**247 N.C. App.—No. 4** **Pages 480-640**

# ADVANCE SHEETS

OF

# CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

## NORTH CAROLINA

*AUGUST 29, 2018*

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

# THE COURT OF APPEALS
# OF
# NORTH CAROLINA

*Chief Judge*

LINDA M. McGEE

*Judges*

WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
DONNA S. STROUD
ROBERT N. HUNTER, JR.
CHRIS DILLON
MARK DAVIS
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
WENDY M. ENOCHS[1]
PHIL BERGER, JR.[2]
HUNTER MURPHY[3]
JOHN S. ARROWOOD[4]

*Emergency Recall Judges*

GERALD ARNOLD
RALPH A. WALKER

*Former Chief Judges*

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

*Former Judges*

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS[5]
J. DOUGLAS McCULLOUGH[6]

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

*Clerk*
DANIEL M. HORNE, JR.

*Assistant Clerk*
Shelley Lucas Edwards

---

OFFICE OF STAFF COUNSEL

*Director*
Leslie Hollowell Davis

---

*Assistant Director*
David Alan Lagos

---

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

---

ADMINISTRATIVE OFFICE OF THE COURTS

*Director*
Marion R. Warren

---

*Assistant Director*
David F. Hoke

---

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

## COURT OF APPEALS

## CASES REPORTED

### Filed 17 May 2016


Blondell v. Ahmed . . . . . . . . . . . . . . . . 480
Blue v. Mountaire Farms, Inc. . . . . . . 489
Butterworth v. City of Asheville . . . . 508
CSX Transp., Inc. v. City of Fayetteville . . . . . . . . . . . . . . . . . 517
In re A.C. . . . . . . . . . . . . . . . . . . . . . . . 528
In re C.A.D. . . . . . . . . . . . . . . . . . . . . 552
In re Cranor . . . . . . . . . . . . . . . . . . . . . 565
Pope v. Pope . . . . . . . . . . . . . . . . . . . . . 587
Rainey v. City of Charlotte . . . . . . . . . 594
State v. Baskins . . . . . . . . . . . . . . . . . . 603
State v. McKiver . . . . . . . . . . . . . . . . . 614
State v. Miller . . . . . . . . . . . . . . . . . . . . 628


## CASES REPORTED WITHOUT PUBLISHED OPINIONS


Centor, Inc. v. Makino, Inc. . . . . . . . . 638
Eltringham v. Rose . . . . . . . . . . . . . . . 638
In re A.E.M. . . . . . . . . . . . . . . . . . . . . 638
In re A.H. . . . . . . . . . . . . . . . . . . . . . . . 638
In re A.T. . . . . . . . . . . . . . . . . . . . . . . . 638
In re C.L. . . . . . . . . . . . . . . . . . . . . . . . 638
In re C.N.H-P. . . . . . . . . . . . . . . . . . . . 638
In re E.B. . . . . . . . . . . . . . . . . . . . . . . . 638
In re K.S. . . . . . . . . . . . . . . . . . . . . . . . 638
In re M.G. . . . . . . . . . . . . . . . . . . . . . . 638
In re K.P. . . . . . . . . . . . . . . . . . . . . . . . 638
In re L.A.S. . . . . . . . . . . . . . . . . . . . . . 638
In re Reeb . . . . . . . . . . . . . . . . . . . . . . . 638
Kirkman v. N.C. Dep't of Commerce . . . . . . . . . . . . . . . . 638
N.C. Dep't of Transp. v. Herman . . . . 639
Rodriguez v. Beckwith . . . . . . . . . . . . 639
Smith v. Young . . . . . . . . . . . . . . . . . . . 639
State v. Alston . . . . . . . . . . . . . . . . . . . 639
State v. Banks . . . . . . . . . . . . . . . . . . . 639
State v. Bruton . . . . . . . . . . . . . . . . . . . 639
State v. Coles . . . . . . . . . . . . . . . . . . . . 639
State v. Darden . . . . . . . . . . . . . . . . . . 639
State v. Fleming . . . . . . . . . . . . . . . . . . 639
State v. Luckadoo . . . . . . . . . . . . . . . . 639
State v. Lyons . . . . . . . . . . . . . . . . . . . . 639
State v. Lytle . . . . . . . . . . . . . . . . . . . . 639
State v. Palmer . . . . . . . . . . . . . . . . . . . 639
State v. Pugh . . . . . . . . . . . . . . . . . . . . 639
State v. Schnebelen . . . . . . . . . . . . . . . 639
State v. Shipman . . . . . . . . . . . . . . . . . 640
State v. Steele . . . . . . . . . . . . . . . . . . . 640
State v. Williams. . . . . . . . . . . . . . . . . . 640
State v. Williams . . . . . . . . . . . . . . . . . 640
Stroud v. Pate Dawson, Inc. . . . . . . . . 640
Town of Cary v. Southerland . . . . . . . 640
Young v. Young . . . . . . . . . . . . . . . . . . 640


## HEADNOTE INDEX

**APPEAL AND ERROR**

**Appeal and Error—appealability—interlocutory orders—denial of summary judgment—Woodson and Pleasant claims—substantial right affected—**The Court of Appeals had jurisdiction over issues in an appeal arising from an industrial accident where the appeal was interlocutory but the issues involved the denial of summary judgment on *Woodson* and *Pleasant* claims. Denials of the dispositive motions involving those claims affected substantial rights and were immediately appealable. **Blue v. Mountaire Farms, Inc., 489.**

**Appeal and Error—jurisdiction on appeal—final order—**Where there were two trial court orders in the case—one in September and one in December—the September order was not final because it was an order awarding attorney fees that did not set the amount. Timely notice of appeal was given from the December order, which did set the amount, and the Court of Appeals had jurisdiction over the appeal. **In re Cranor, 565.**

APPEAL AND ERROR—Continued

**Appeal and Error—notice of appeal—oral and written—**The State's appeal was properly before the Court of Appeals pursuant to Rule 4 of the Rules of Appellate Procedure in a case involving a motion to suppress granted in district court, an appeal to superior court by the State, and the denial of a de novo hearing in superior court. The superior court orally affirmed the district court order, and the State entered oral and written notice of appeal; the written notice was superfluous following the State's oral notice. **State v. Miller, 628.**

## ATTORNEYS

**Attorneys—sanctions—inherent authority of court—**The undisturbed findings of the trial court did not support a sanction against an attorney in the exercise of its inherent authority. **In re Cranor, 565.**

**Attorneys—sanctions—Rule 11—**The superior court erred in imposing Rule 11 sanctions on an attorney where the unchallenged findings and uncontroverted evidence supported a conclusion that the attorney acted in good faith. **In re Cranor, 565.**

## CHILD CUSTODY AND SUPPORT

**Child Custody and Support—infant left in care of aunt—no meaningful interaction or support from mother—behavior inconsistent with status as parent—substantial change in circumstances—best interest of child—**Where respondent-mother had left her infant daughter "April" in the care of April's maternal aunt from May 2012 to December 2014 and made very little effort to have meaningful interaction with April or provide for her financially, the Court of Appeals affirmed the trial court's "Review Order" granting sole legal and physical custody of April to her aunt and scheduling a permanency planning hearing. The trial court did not err by considering facts at issue in light of prior events; by concluding that the mother had acted in a manner inconsistent with her constitutionally protected paramount status as a parent; by concluding that a substantial change of circumstances had occurred to warrant a modification of the earlier permanent custody order when the mother abruptly removed April from the care of her aunt; and by concluding that awarding the sole care, custody, and control of April to her aunt was in the best interest of the child. **In re A.C., 528.**

## CITIES AND TOWNS

**Cities and Towns—land use—fair trial rights—approval of subdivision preliminary plat—street width modification—quasi-judicial—exercise of discretion required—due process—**The trial court erred in a land use case by concluding that the City was not required to afford petitioners all fair trial rights before approving the Developer's subdivision preliminary plat. The approval of the street width modification required the Commission to exercise discretion, and therefore, rendered the Commission's approval process quasi-judicial in nature, depriving petitioners of certain due process rights in the approval process. **Butterworth v. City of Asheville, 508.**

## CIVIL PROCEDURE

**Civil Procedure—Rule 60(b)—domestic violence protection order—not overruling prior order—**The trial court did not abuse its discretion in a domestic violence protection order case by granting defendant wife's Rule 60(b) motion.

Although plaintiff husband contended that the trial court improperly reconsidered another trial court's decision that plaintiff was a victim of domestic violence, a Rule 60(b) order does not overrule a prior order. Consistent with statutory authority, it relieves parties from the effect of an order. **Pope v. Pope, 587.**

**CONSTITUTIONAL LAW**

**Constitutional Law—Confrontation Clause—anonymous 911 call and call back—testimonial hearsay—**The trial court erred in a possession of a firearm by a convicted felon case by denying defendant's motion to exclude evidence of an anonymous 911 call and the dispatcher's call back. Admission of the testimonial hearsay violated his rights under the Sixth Amendment's Confrontation Clause. It was not harmless error, and defendant was entitled to a new trial. **State v. McKiver, 614.**

**DOMESTIC VIOLENCE**

**Domestic Violence—protection order—setting aside—Rule 60(b)(5)—sufficiency of findings of fact—**The trial court did not abuse its discretion by setting aside a domestic violence protection order based on Rule 60(b)(5). The trial court properly made specific findings of fact that plaintiff-husband no longer feared defendant wife. **Pope v. Pope, 587.**

**EVIDENCE**

**Evidence—motion to suppress—appeal from district to superior court—notice of appeal—**The trial court erred in dismissing the State's notice of appeal under N.C.G.S. § 20-38.7(a) as insufficient. Neither the plain language of N.C.G.S. § 20-38.7(a) nor § 15A-1432(b) required the State to set forth the specific findings of fact to which it objected in its notice of appeal from district to superior court. **State v. Miller, 628.**

**FIREARMS AND OTHER WEAPONS**

**Firearms and Other Weapons—possession of firearm by convicted felon—motion to dismiss—sufficiency of evidence—constructive possession—**The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon. The evidence was sufficient to support a reasonable juror in concluding that additional incriminating circumstances existed beyond defendant's mere presence at the scene and proximity to where the firearm was found. Thus, constructive possession of the firearm could be inferred. **State v. McKiver, 614.**

**INDEMNITY**

**Indemnity—contractual agreement—partial summary judgment—**The trial court erred by denying plaintiff CSX's motion for partial summary judgment on its contractual indemnity claim. CenturyLink's equipment would not have been damaged as a result of CSX's crane colliding with PWC's power lines but for, or stemming from, defendant Power Work Commission's exercise of its privilege and license pursuant to the Crossings Agreement. **CSX Transp., Inc. v. City of Fayetteville, 517.**

**Indemnity—contractual agreement—summary judgment—admission of negligence not a bar to recovery—**The trial court erred by granting summary

judgment in favor of defendant Public Works Commission (PWC) on the issue of whether the parties' contractual agreement required PWC to indemnify CSX for its own negligence. The trial court erroneously concluded CSX was barred from recovering because of its admission of negligence. **CSX Transp., Inc. v. City of Fayetteville, 517.**

## JURISDICTION

**Jurisdiction—standing—grandparents in termination of parental rights—** The mother in a termination of parental rights proceeding did not have standing to raise the contention that adoption should not have been the permanent plan because the maternal grandparents offered a safe and loving home. The maternal grandparents did not appeal the trial court's permanency plan, they did not complain of the court's findings of fact or conclusions of law, and they did not complain that they were injuriously affected by the trial court's decision to pursue adoption as the permanency plan. **In re C.A.D., 552.**

## SEARCH AND SEIZURE

**Search and Seizure—suppression order—conclusion of law—specific violation of traffic law—**Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court's order denying his motion to suppress, the Court of Appeals held that the trial court's order contained no adequate conclusion of law concerning the initial stop of defendant's vehicle because it failed to state that the stop was justified based on any specific violation of a traffic law. The case was remanded for additional findings and conclusions. **State v. Baskins, 603.**

**Search and Seizure—suppression order—voluntary statement by defendant—**Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court's order denying his motion to suppress, the Court of Appeals held that defendant's statements concerning the heroin in his vehicle, made after hearing one officer tell another officer that he recovered heroin from a passenger, were voluntary and admissible. **State v. Baskins, 603.**

**Search and Seizure—traffic stop—registration and inspection status—**Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court's findings of fact related to his vehicle's registration and inspection status, the Court of Appeals concluded that the record did not contain substantial evidence that the vehicle was being operated with an expired inspection status. **State v. Baskins, 603.**

## TERMINATION OF PARENTAL RIGHTS

**Termination of Parental Rights—neglected children—consideration of all factors—**The trial court did not abuse its discretion in terminating a mother's parental rights in the best interests of the children. The trial court's written findings showed careful reflection upon all of the N.C.G.S. § 7B-1100(a) factors, the possibility of placing the children with the maternal grandparents, and the history of neglect by the maternal grandparents. **In re C.A.D., 552.**

**Termination of Parental Rights—permanency plan—adoption rather than placement with maternal grandparents—**The trial court did not abuse its discretion in choosing adoption for the permanency plan. **In re C.A.D., 552.**

## VENDOR AND PURCHASER

**Vendor and Purchaser—realtor—action to collect commission—cancellation agreement—**The trial court erred by granting summary judgment for the sellers of a house in an action by a realtor to collect a commission. Although the sellers and the realtor had agreed to cancel the listing, there was a dispute about when the Listing Agreement was actually terminated. Based on the parole evidence rule, an e-mail could not be considered because it contradicted the unambiguous language contained in the termination agreement. The sellers' execution of the Termination Agreement was an offer to terminate the listing agreement, which was not accepted until the termination agreement was executed by realtor. **Blondell v. Ahmed, 480.**

**Vendor and Purchaser—realtor—action to collect commission—sellers' breach of good faith—**In an action by a realtor to collect a commission from the sellers of a house, there was evidence that created a genuine issue of material fact as to whether the sellers breached their duty of good faith and fair dealing and summary judgment should not have been granted for them. Clearly, a jury could determine that the sellers breached their duty of good faith and fair dealing by failing to disclose to the realtor a pending offer when they asked realtor to accept their offer to terminate the listing agreement. **Blondell v. Ahmed, 480.**

## WORKERS' COMPENSATION

**Workers' Compensation—occupational disease—untimely claim—**The Industrial Commission did not err in a workers' compensation case by dismissing plaintiff worker's complaint seeking benefits for an occupational disease. Plaintiff failed to file his claim within the requisite time period of the two-year statute of limitations under N.C.G.S. § 97-58(c). **Rainey v. City of Charlotte, 594.**

**Workers' Compensation—Pleasant claims against individuals—summary judgment for defendants—erroneous—**The trial court erred by denying the individual defendants' motion for summary judgment on plaintiff's *Pleasant* claims arising from an industrial accident. The individual defendants were not aware of the dangers involved; their decisions did not amount to willful, wanton and reckless conduct; and mistakes did not amount to the sort of willful, wanton, and reckless conduct between co-workers that lies at the heart of a *Pleasant* claim. **Blue v. Mountaire Farms, Inc., 489.**

**Workers' Compensation—Woodson claim—safety violations—not determinative—**In a *Woodson* claim arising from an industrial accident, prior violations did not demonstrate egregious conduct by the corporate defendant in allowing a chicken processing plant to operate in noncompliance with applicable safety regulations. OSHA violations are not determinative, but they are a factor in determining whether a *Woodson* claim has been established. **Blue v. Mountaire Farms, Inc., 489.**

**Workers' Compensation—Woodson claim—willful and wanton negligence—not sufficient—**The trial court erred in denying defendant's motion for summary judgment as to plaintiff's *Woodson* claim in an action arising from the release of ammonia at a poultry processing plant during the maintenance of equipment. Willful and wanton negligence alone is not enough to establish a *Woodson* claim. The conduct must be so egregious as to be tantamount to an intentional tort. The mere fact, seen in hindsight, that additional safety measures should have been implemented was not enough to establish that the corporate defendants intentionally engaged in conduct that they knew was substantially certain to cause serious injury or death to their employees. **Blue v. Mountaire Farms, Inc., 489.**

## 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.

[247 N.C. App. 480 (2016)]

COLLEEN BLONDELL, Plaintiff
v.
SHAKIL AHMED, SHABANA AHMED, MICHAEL FEKETE and
SUSAN ELIZABETH FEKETE, individually, Defendants

No. COA15-796

Filed 17 May 2016

**1. Vendor and Purchaser—realtor—action to collect commission—cancellation agreement**

The trial court erred by granting summary judgment for the sellers of a house in an action by a realtor to collect a commission. Although the sellers and the realtor had agreed to cancel the listing, there was a dispute about when the Listing Agreement was actually terminated. Based on the parole evidence rule, an e-mail could not be considered because it contradicted the unambiguous language contained in the termination agreement. The sellers' execution of the Termination Agreement was an offer to terminate the listing agreement, which was not accepted until the termination agreement was executed by realtor.

**2. Vendor and Purchaser—realtor—action to collect commission—sellers' breach of good faith**

In an action by a realtor to collect a commission from the sellers of a house, there was evidence that created a genuine issue of material fact as to whether the sellers breached their duty of good faith and fair dealing and summary judgment should not have been granted for them. Clearly, a jury could determine that the sellers breached their duty of good faith and fair dealing by failing to disclose to the realtor a pending offer when they asked realtor to accept their offer to terminate the listing agreement.

Judge BRYANT dissenting.

Appeal by Plaintiff from order entered 12 January 2015 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 January 2016.

*Martin & Gifford, PLLC, by William H. Gifford, Jr., for the Plaintiff-Appellant.*

*Jordan Price Wall Gray Jones & Carlton, PLLC, by J. Matthew Waters and Joseph E. Propst, for the Defendants-Appellees.*

DILLON, Judge.

Plaintiff Colleen Blondell ("Agent") brought this action to collect a real estate commission she claims is due under a listing agreement ("Listing Agreement") that her real estate firm entered into with Defendants Shakil and Shabana Ahmed ("Sellers") to sell Sellers' home. Agent appeals from the trial court's order granting the Sellers' motion for summary judgment. Because we believe that there is a genuine issue of fact as to whether Sellers breached their duty of good faith and fair dealing when they negotiated for the termination of the Listing Agreement, we reverse and remand for further proceedings consistent with this opinion.

## I. Background

Agent is a real estate broker licensed by the North Carolina Real Estate Commission. She works as an agent with the firm Kiegiel, LLC d/b/a Keystone Properties ("Keystone Properties"). Sellers owned a home in Wake County. A timeline of events necessary for understanding the issues on appeal is as follows:

### A. Parties Enter Into Listing Agreement; Agent Procures Offer

In March 2013, Sellers and Keystone Properties entered into the Listing Agreement. The parties used the "Exclusive Right to Sell Listing Agreement" form produced by the North Carolina Association of REALTORS®, Inc.[1] Pursuant to the Agreement, the listing would be for a period of one year (expiring in March 2014).

On 3 April 2013, Agent showed Sellers' home to Michael and Susan Fekete[2] ("Buyers"). On 6 April 2013, Buyers made an offer which Agent presented to Sellers. Sellers promptly rejected the offer. Over the course of the next few weeks, Agent had a number of communications with both Sellers and Buyers regarding the Sellers' home.

1. This Association is a private organization comprised of licensed real estate brokers. Membership in the Association is not compulsory. The relationship between the Association and its broker members is analogous to the relationship between licensed attorneys and the North Carolina Bar Association.

2. The Feketes were named defendants in this action; however, Agent has since dismissed all claims against the Feketes.

B. Parties Enter Termination Agreement; Sellers Sell Home To Buyers

On 22 April 2013, the Sellers informed Agent that they no longer wished to list their home for sale and of their desire to terminate the Listing Agreement. Accordingly, Agent prepared the Termination Agreement using another form provided by the Association of REALTORS® (entitled "Termination of Agency Agreement and Release," hereinafter "Termination Agreement"). This Termination Agreement essentially provided that the parties would no longer be bound by the Listing Agreement. Further, the Termination Agreement provided that it would become "effective on the date that it has been signed by **both** the Parties." (Emphasis added.)

That same evening (22 April), Agent e-mailed Sellers, attaching the Termination Agreement *unsigned*. The next day (23 April), Sellers executed the Termination Agreement and e-mailed it back to Agent.

Sometime thereafter, but prior to 2 May 2013 – without the knowledge of Agent – Buyers and Sellers met to discuss a possible transaction. On 2 May 2013, Sellers and Buyers tentatively agreed to a purchase price for the home. On 9 May 2013, Buyers presented a written offer to Sellers based on their verbal understanding.

Prior to executing Buyers' offer, Sellers contacted Agent about the status of the Termination Agreement (which Sellers had signed and returned on 23 April). During this communication, Sellers did not disclose to Agent that they had a written offer from Buyers that they intended to sign.

On 10 May 2013, Agent executed the Termination Agreement on behalf of Keystone Properties and e-mailed a copy to Sellers.

On 11 May 2013, Sellers executed the contract to sell their home to Buyers. The transaction closed in late June 2013, unbeknownst to Agent.

Agent commenced this action against Sellers contending that, pursuant to the Listing Agreement, Sellers became obligated to pay Keystone Properties a real estate commission when Sellers sold their home to Buyers.[3] Sellers answered, alleging that no commission was due because the Listing Agreement had been terminated in the Termination

---

3. Keystone Properties assigned to Agent all of their rights – including the right to any commission that may be owed – in the Listing Agreement.

Agreement. After a hearing, the trial court entered summary judgment in favor of Sellers. Agent timely appealed.

II. Analysis

**[1]** The parties agree that the Listing Agreement would entitle Keystone Properties to a real estate commission in the absence of an effective termination agreement. Specifically, the Listing Agreement obligated Sellers to pay a commission if their home sold within the Agreement's one-year term.

The Termination Agreement, however, unambiguously states that Sellers were released from any obligation they may otherwise have under the Listing Agreement. Specifically, the Termination Agreement states:

> 2. **Termination of Agreement.** The Parties agree that all rights and obligations arising on account of the [Listing] Agreement are hereby terminated, and hereby release each other from their respective obligations under the Agreement.
>
> 3. **Release from Liability.** The Parties further release and forever discharge each other and their respective successors in interest from any and all claims, demands, rights and causes of action of whatsoever kind and nature arising from the [Listing] Agreement and the agency relationship existing between them.

Accordingly, if the Termination Agreement is enforceable, Sellers would be entitled to summary judgment in this case.

Agent argues that Sellers should not be allowed to benefit from the Termination Agreement. Specifically, Agent contends that Sellers breached their duty of good faith and fair dealing when Sellers negotiated for the termination of the Listing Agreement without disclosing to Agent or Keystone Properties that Sellers were negotiating directly with Buyers.

It is axiomatic that Sellers owed a duty of good faith and fair dealing to Keystone Properties during the term of the Listing Agreement and during the negotiation of the termination of that Agreement. Indeed, our Supreme Court has recently reiterated the long standing principle that there is implied in every contract a covenant of good faith and fair dealing. *Arnesen v. Rivers Edge Golf Club*, ___ N.C. ___, ___, 781 S.E.2d 1 (2015); *see also Great Am. Ins. Co. v. C.G. Tate Constr. Co.*, 303 N.C. 387, 399, 279 S.E.2d 769, 776 (1981) (recognizing "the common law

principle that implicit in every contract is the obligation of each party to act in good faith"). Also, our Court has consistently held that "[i]t is a basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement." *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C. App. 743, 746, 253 S.E.2d 625, 627 (1979).

The parties dispute when the Listing Agreement was actually terminated. Sellers contend that the Listing Agreement terminated on 23 April when Sellers executed the Termination Agreement. Sellers point to the language in Agent's 22 April e-mail (attaching the Termination Agreement *unsigned*) in which Agent stated:

> Attached you will find the Termination Agreement for the listing of your home. Please sign the form and return it to me at your earliest convenience thereby severing any obligation we have with one another.

Sellers contend that the e-mail constituted an offer that was accepted when they signed the agreement on 23 April. However, based on the Parol Evidence Rule, which has been adopted by our Supreme Court, we cannot consider this e-mail language because it contradicts the unambiguous language contained in the Termination Agreement. *See Root v. Allstate Ins. Co.*, 272 N.C. 580, 587, 158 S.E.2d 829, 835 (1968) (recognizing the general rule that "when a written instrument is introduced into evidence, its terms may not be contradicted by parol or extrinsic evidence, and it is presumed that all prior negotiations are merged into the written instrument") The Termination Agreement unambiguously stated that "[t]his Agreement shall be effective on the date it has been signed by *both the Parties*."

Our Court has recognized that the Parol Evidence Rule is a rule of substantive law which "prohibits the consideration of evidence as to anything which happened prior to or simultaneously with the making of a contract which would vary the terms of the agreement." *Harrell v. First Union Nat. Bank*, 76 N.C. App. 666, 667, 334 S.E.2d 109, 110 (1985). In *Harrell*, the plaintiff signed a "Letter of Consent" with a bank that provided that certain common stock he owned could be used as collateral for advances to his son-in-law in the future. *Id.* At the time of signing, however, the plaintiff told the loan officer (defendant) that he did not want any advances to be made to his son-in-law unless he approved the advances, though the "Letter of Consent" did not require that he approve advances. The loan officer replied, "That's right." *Id.*

Subsequently, several advances were made to the son-in-law secured by the plaintiff's stock without the plaintiff's approval, and the loan officer sold the stock when the loans were not paid. The plaintiff filed an action for the wrongful sale of his stock, and this Court affirmed the trial court's directed verdict in favor of the bank, holding that the Parol Evidence Rule barred the Court from considering the communication made contemporaneously with the signing of the contract. *Id.* at 667, 334 S.E.2d at 110-11.

Here, there is nothing within the four corners of the Termination Agreement that obfuscates or contradicts the term that it would not be effective until signed by *both* parties. Just as this Court did not consider a conversation that the plaintiff had with a loan officer in *Harrell* directly contradicting a term in the contract, we cannot consider the language in Agent's 22 April e-mail. The Termination Agreement is unambiguous. *See Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 709, 567 S.E.2d 184, 188 (2002) ("Generally, the parol evidence rule prohibits the admission of evidence to contradict or add to the terms of a clear and unambiguous contract."). Accordingly, we hold that the Listing Agreement was not terminated nor did the obligations thereunder cease until the Termination Agreement was executed by Agent (on behalf of Keystone Properties) on 10 May. That is, Sellers' execution of the Termination Agreement was an *offer* to terminate the Listing Agreement, which was not accepted until the Termination Agreement was executed by Agent.

**[2]** Having concluded that the Listing Agreement was still in full effect until 10 May, we conclude that there is evidence which creates a genuine issue of material fact whether Sellers breached their duty of good faith and fair dealing under that Agreement. Specifically, prior to 10 May, before Sellers' offer to terminate the Listing Agreement was accepted by Agent and while Sellers still owed a duty of good faith and fair dealing toward Agent under the Listing Agreement: (1) Agent presented an offer from Buyers to Sellers, which would involve the paying of a commission to Agent under the Listing Agreement; (2) Sellers rejected the offer and then informed Agent that they no longer wanted to list their house for sale; (3) Sellers made an offer to Agent to terminate the Listing Agreement; (4) Sellers began negotiating directly with Buyers; (5) Sellers received a written offer in hand from Buyers that they were prepared to sign and which would not involve the paying of any real estate commission; (6) with Buyers' offer in hand, Sellers contacted Agent and asked her to accept their offer to terminate the Listing Agreement; (7) Sellers made the request to Agent without disclosing to Agent that they were

about to accept Buyers' offer; and (8) Sellers signed Buyers' offer almost immediately after receiving the fully executed Termination Agreement from Agent. Clearly, a jury could determine that Sellers breached their duty of good faith and fair dealing by failing to disclose to Agent the pending offer when they asked Agent to accept their offer to terminate the Listing Agreement.

We are persuaded by our Court's decision in *Jaudon v. Swink*, 51 N.C. App. 433, 276 S.E.2d 511 (1981). In *Jaudon*, the real estate agent had a listing agreement with a homeowner/seller which was terminable at the will of either party. During the term of the listing, the agent showed the seller's home to the eventual buyers twice. During the second showing, the buyers made an offer through the agent which the seller promptly rejected. The seller then told the agent that he was terminating their listing agreement. The next day, the buyers went back to the seller's home and entered into a contract to purchase the home directly from the seller. *Id.* at 433-34, 276 S.E.2d at 512. This Court held that the evidence in *Jaudon* was "sufficient to submit to the trier of the facts [to determine] whether defendant terminated the listing agreement in good faith." *Id.* at 436, 276 S.E.2d at 513.

As in *Jaudon*, there is sufficient evidence in the instant case to raise a genuine issue of material fact as to whether the Sellers breached their implied contractual duty of good faith and fair dealing. The questions of whether the Ahmeds breached their duty of good faith and whether Blondell is entitled to her real estate commission are issues of fact for the jury to decide. *Id.*; *Lindsey v. Speight*, 224 N.C. 453, 455, 31 S.E.2d 371, 372 (1944). Accordingly, the trial court erred in granting the Sellers' motion for summary judgment.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

The majority opinion reverses and remands the trial court's order on summary judgment, determining that there existed a genuine issue of material fact regarding whether Sellers breached their duty of good faith and fair dealing when they "negotiated for the termination of the Listing Agreement." Because I do not see evidence in the record to indicate a

genuine issue of material fact, *i.e.*, that Sellers violated their duty of good faith and fair dealing, especially where Agent herself represented that she no longer had an agreement with Sellers, I respectfully dissent.

I disagree with the majority that the facts are at issue. All parties agree on the facts and the basic timeline of the relevant events. Therefore, our obligation on appeal is to review *de novo* whether the trial court erred as a matter of law in granting summary judgment. *See In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

In order to reverse the trial court as the majority would do, there has to be evidence to indicate Sellers intended to deceive or conceal material facts from Agent. *See In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674 (1974) (citations omitted) (holding that in order to obtain relief from a contract on the ground that it was procured by fraud, a party must show false representation of a past or subsisting material fact, made with fraudulent intent and with knowledge of its falsity, which representation was relied upon when the party executed the instrument); *see also Hester v. Hubert Vester Ford, Inc.*, ___ N.C. App. ___, ___, 767 S.E.2d 129, 136 (2015) (holding that where plaintiff presented evidence that defendant intentionally made false representations which induced plaintiff to sign a contract, plaintiff's claim for fraud should survive summary judgment). However, Agent can point to nothing that would indicate such. Rather, Agent, in her deposition and brief, is able to offer only vague equivocations as to Sellers' alleged intent to fraudulently conceal from plaintiff the existence of the 9 May offer which resulted in the contract executed 11 May 2013. In fact, in ruling on summary judgment as to Agent's claims for breach of contract, fraud, or unjust enrichment, the trial court particularly noted that, in addition to the records and arguments of counsel, it reviewed the deposition of "Plaintiff Colleen Blondell," before determining that defendants were entitled to judgment as a matter of law.

Agent's vague allegations in her complaint and in her deposition fail to establish a factual basis for her claims and are insufficient to give rise to an inference of Sellers' intent to deceive plaintiff. Agent's allegations fail especially where Sellers did not initiate contact with Buyers as Sellers did not know the identity of the party who made the previous offer through Agent until Buyers sent their letter dated 25 April 2013. Indeed, the fact that earlier that same day, on 25 April 2013, Agent emailed Buyers stating that she no longer worked with Sellers, cuts decidedly against Agent's argument and the majority opinion, that Agent and Sellers' Listing Agreement was still valid.

In *Jaudon v. Swink*, 51 N.C. App. 433, 276 S.E.2d 511 (1981), upon which the majority opinion relies, this Court found that because the seller of the real estate in question was present when the realtor brought the buyer to the home, it could be inferred that the seller knew the identity of the buyer. *Id.* at 436, 276 S.E.2d at 513.

Here, Sellers first came to know the identity of Buyers as a result of Buyers' 25 April 2013 letter to Sellers; the parties never met in person until 30 April 2013. Despite the fact that both the seller in *Jaudon* and Sellers here executed contracts to sell their respective properties the day after their listing agreements with their realtors terminated (in *Jaudon* the agreement and termination were both oral), *id.* at 433–34, 276 S.E.2d at 512, the facts in the instant case make clear that the termination of the Listing Agreement was instigated by Agent on 22 April 2013, over two weeks before Sellers executed a contract to sell their home with Buyers on 10 May 2013, regardless of when Agent ultimately signed the Termination Agreement. Indeed, Sellers promptly returned the signed Termination Agreement on 23 April 2013, which then remained in Agent's possession, unsigned for seventeen days. The majority characterizes this transaction—Sellers' signing of the Termination Agreement on 23 April 2013—as an *offer* by Sellers to terminate the Listing Agreement, which offer was not accepted until signed by Agent on 10 May 2013. I disagree with this characterization.

Nevertheless, even assuming Agent and Sellers' obligations towards one another were terminated at the latest on 10 May 2013, as Agent cannot point to any evidence in the record that would give rise to an inference of fraud or misrepresentation to survive a motion for summary judgment, I would affirm the trial court's entry of summary judgment in favor of Sellers.

BRIAN BLUE, Plaintiff
v.
MOUNTAIRE FARMS, INC., MOUNTAIRE FARMS OF NORTH CAROLINA CORP., MOUNTAIRE FARMS, LLC, CHARLES BRANTON, DANIEL PATE, JAMES LANIER, ROBERT GARROUTTE, a/k/a ROBERT GARROUTTE, JR., CHRISTOPHER SMITH, HALLEY ONDONA, THOMAS SAUFLEY, DETRA SWAIN, As Executrix of the Estate of Clifton Swain, THE ESTATE OF CLIFTON SWAIN, and BRADFORD SCOTT HANCOX, Public Administrator of Cumberland County, North Carolina, and as Successor or substitute Personal Representative And/ or Administrator And/or Collector of the Estate of Clifton Swain, Defendants

No. COA15-751

Filed 17 May 2016

**1. Appeal and Error—appealability—interlocutory orders—denial of summary judgment—Woodson and Pleasant claims—substantial right affected**

The Court of Appeals had jurisdiction over issues in an appeal arising from an industrial accident where the appeal was interlocutory but the issues involved the denial of summary judgment on *Woodson* and *Pleasant* claims. Denials of the dispositive motions involving those claims affected substantial rights and were immediately appealable.

**2. Workers' Compensation—Woodson claim—willful and wanton negligence—not sufficient**

The trial court erred in denying defendant's motion for summary judgment as to plaintiff's *Woodson* claim in an action arising from the release of ammonia at a poultry processing plant during the maintenance of equipment. Willful and wanton negligence alone is not enough to establish a *Woodson* claim. The conduct must be so egregious as to be tantamount to an intentional tort. The mere fact, seen in hindsight, that additional safety measures should have been implemented was not enough to establish that the corporate defendants intentionally engaged in conduct that they knew was substantially certain to cause serious injury or death to their employees.

**3. Workers' Compensation—Woodson claim—safety violations—not determinative**

In a *Woodson* claim arising from an industrial accident, prior violations did not demonstrate egregious conduct by the corporate defendant in allowing a chicken processing plant to operate in noncompliance with applicable safety regulations. OSHA violations are not determinative, but they are a factor in determining whether a *Woodson* claim has been established.

**4. Workers' Compensation—Pleasant claims against individuals—summary judgment for defendants—erroneous**

The trial court erred by denying the individual defendants' motion for summary judgment on plaintiff's *Pleasant* claims arising from an industrial accident. The individual defendants were not aware of the dangers involved; their decisions did not amount to willful, wanton and reckless conduct; and mistakes did not amount to the sort of willful, wanton, and reckless conduct between co-workers that lies at the heart of a *Pleasant* claim.

Appeal by defendants and cross-appeal by plaintiff from order entered 31 December 2014 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 30 November 2015.

*Smith Moore Leatherwood LLP, by Lisa W. Arthur and Lisa K. Shortt, for defendants.*

*Pinto Coates Kyre & Bowers, PLLC, by Jon Ward, Paul D. Coates, and Adam L. White, A.G. Linett & Associates, P.A., by Adam G. Linett and J. Rodrigo Pocasangre, for plaintiff.*

DAVIS, Judge.

This appeal arises out of a tragic accident involving the release of ammonia at a poultry processing plant in which Brian Blue ("Plaintiff") was severely injured and a co-worker, Clifton Swain ("Swain"), was killed. In his lawsuit, Plaintiff asserted *Woodson*[1] claims against Defendants Mountaire Farms, Inc. ("Mountaire Farms"), Mountaire Farms of North Carolina Corp., and Mountaire Farms, LLC (collectively "the Mountaire Defendants"). Plaintiff also asserted *Pleasant*[2] claims against Charles Branton; Daniel Pate; James Lanier;[3] Robert Garroutte, a/k/a Robert Garroutte, Jr.; Christopher Smith; Halley Ondona; Thomas

---

1. *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

2. *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985).

3. While both Plaintiff's complaint and the caption of the trial court's order from which this appeal arises lists James Lanier as a defendant, the record does not contain any indication that an individual by this name was employed by the Mountaire Defendants at any time relevant to the events giving rise to this appeal. Nor do the parties reference anyone by this name in their briefs to this Court. The record also fails to show that service of process was ever made on this defendant, and no responsive pleading was filed on his behalf.

Saufley; Detra Swain, as executrix of the Estate of Clifton Swain; the Estate of Clifton Swain; and Bradford Scott Hancox, public administrator of Cumberland County, North Carolina, and as successor or substitute personal representative and/or administrator and/or collector of the Estate of Clifton Swain (collectively "the Individual Defendants").

All of the Defendants appeal from the trial court's order denying their motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Plaintiff cross-appeals from the trial court's denial of his motion for summary judgment as to Defendants' affirmative defense of contributory negligence. After careful review, we reverse the trial court's denial of Defendants' motion for summary judgment and remand for entry of summary judgment in favor of Defendants on all claims.

## Factual Background

Mountaire Farms is a poultry processing plant located in Robeson County, North Carolina. As part of its business, Mountaire Farms utilizes anhydrous ammonia refrigeration to maintain the temperature of its poultry. This is accomplished, in part, through the use of machinery called "votators,"[4] which encase the ammonia.

At all times relevant to this appeal, Mountaire Farms' Engineering and Maintenance Department was responsible for overseeing the day-to-day operation and upkeep of the plant. The head of the department was Halley Ondona ("Ondona"). Christopher Smith ("Smith"), the maintenance manager, reported to Ondona. Robert Garroutte ("Garroutte"), the processing maintenance manager, in turn, reported to Smith. Below Garroutte was Jim Laird, the second processing area manager, who supervised several second processing shift superintendents, including Charles Branton ("Branton"). Thomas Saufley ("Saufley") was Mountaire Farms' safety and health manager who was in charge of overseeing its safety program. Daniel Pate ("Pate") was Mountaire Farms' second processing maintenance superintendent, who oversaw the operations of the second processing operation.

The second processing operation was divided into two separate departments — the refrigeration department and the maintenance department. The refrigeration department was comprised of mechanics

4. The manufacturer's manual explains that votators "are scraped surface heat exchangers with jacketed shell pressure vessels. The jacket around the ingredient area of the vessel allows for ammonia cooling of the product medium to the desired temperature prior to packaging."

who dealt with any maintenance tasks at the plant involving ammonia. The maintenance department, in turn, handled non-refrigeration maintenance tasks. When the maintenance department was required to perform maintenance on equipment containing ammonia, the refrigeration department was typically tasked with ensuring the ammonia was evacuated from the equipment prior to the maintenance department beginning its work.

Branton's job was to supervise the plant's maintenance mechanics. He was the direct supervisor of Swain, who was the mechanic in charge of performing maintenance on the plant's votators. Branton also supervised Plaintiff, a maintenance mechanic responsible for repairing and maintaining certain processing equipment at the plant. Both Plaintiff and Swain worked in the maintenance department rather than the refrigeration department.

On 1 April 2009, the United States Department of Agriculture ("the USDA") performed an inspection of the plant. As a result of this inspection, Mountaire Farms was ordered by the USDA to replace the inner sleeve of one of its votators.

In response to the USDA's findings, a new votator sleeve was ordered. Ondona, Smith, and Garroutte held several meetings to discuss whether the new votator sleeve could be installed by Mountaire Farms employees or, alternatively, whether independent contractors needed to be hired for the installation. Ultimately, it was determined that Mountaire Farms employees could perform the installation.[5]

The new votator sleeve arrived at the plant on Tuesday, 16 June 2009. Branton assigned the installation of the votator sleeve to Swain for the following weekend and inputted the corresponding work order on the Mountaire Maintenance Log — a spreadsheet that organized maintenance tasks to be performed and identified the mechanic who was responsible for completing each task. The maintenance log did not list any Mountaire Farms employee other than Swain in connection with the installation of the votator sleeve.

Prior to the installation, Branton provided Swain with selected pages of the manufacturer's operator's manual for the votator, which detailed the procedure for replacing the inner sleeve of a votator. The following warning was contained within these pages of the manual:

5. There is conflicting evidence in the record as to who specifically made the decision to use employees of Mountaire Farms to install the votator sleeve.

> **DANGER: Before removing the heat exchanger tube from the jacket, all refrigerant[6] must be evacuated from the jacket assembly.**

After Swain had reviewed these pages from the manual, Branton asked him "if he'd ever made the repair before . . . if there was gonna be a problem." Swain responded that he "didn't see a problem" with the assignment.

On the morning of Saturday, 20 June 2009, Branton met with the second processing shift mechanics he supervised — including Swain and Plaintiff — before they began work. During this meeting, Branton briefed the mechanics on their assigned tasks for the day based on the assignments previously entered in the maintenance log. Once again, Swain was the only employee mentioned with regard to the votator sleeve replacement.

Swain then began work on the votator sleeve project while Plaintiff performed other unrelated assignments in a separate area of the plant. Sometime later that morning, Swain called over the radio to request Plaintiff's assistance with the replacement of the votator sleeve. Plaintiff then "went over to see what [he] could do for [Swain.]"

As Plaintiff entered the room where Swain was working, Swain was in the process of unscrewing a valve on the votator. Branton was observing Swain's work from a position next to the ladder upon which Swain was standing. As he saw Swain unscrewing the valve, Plaintiff — who was aware of the fact that the votator contained ammonia and of the hazardous nature of ammonia — shouted at Swain: "Stop Cliff, stop." However, his warning was too late as the pressure behind the partially opened votator sleeve forced ammonia out of the votator in an explosive manner, which caused the room to be filled with ammonia almost instantaneously.

Swain died as a result of his exposure to the ammonia, and Plaintiff and Branton were both seriously injured. Plaintiff's injuries left him in a coma for four to five months. He was also required to undergo a double lung transplant as a result of his exposure to the ammonia. Branton required hospitalization and was incapacitated for approximately forty days.

---

6. An internal document prepared by Mountaire Farms and included in the exhibits to the record entitled "Specific Programs within the Written Compliance Plan" explains that "Mountaire Farms . . . utilizes Anhydrous Ammonia as a refrigerant coolant in its processing operation."

A subsequent investigation performed by the North Carolina Department of Environment and Natural Resources Division of Air Quality ("DAQ") found several violations by Mountaire Farms of its risk management and safety guidelines in connection with the accident. As a result, DAQ imposed a civil penalty against Mountaire Farms in the amount of $25,000.00. The North Carolina Occupational Safety and Health Review Commission performed its own investigation after the 20 June 2009 accident and assessed a penalty against Mountaire Farms in the amount of $33,950.00.

On 19 June 2012, Plaintiff filed a lawsuit in Robeson County Superior Court asserting a *Woodson* claim against the Mountaire Defendants as well as a *Pleasant* claim against each of the Individual Defendants. On 20 August 2012, all Defendants except for Garroutte and Ondona filed motions to dismiss Plaintiff's claims pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. Garroutte and Ondona filed their own motions to dismiss on 31 August 2012 and 12 September 2012, respectively.

On 5 November 2012, Defendants' motions to dismiss were heard before the Honorable Mary Ann L. Tally. Judge Tally entered an order on 28 November 2012 denying the motions. Defendants filed an answer to the complaint on that same date.

On 23 June 2014, Plaintiff filed a motion for summary judgment as to the defense of contributory negligence, which was listed as an affirmative defense in Defendants' answer. Defendants filed a motion for summary judgment as to all claims contained in Plaintiff's complaint on 25 August 2014. Plaintiff voluntarily dismissed his claims against Mountaire Farms, LLC and Pate on 25 September 2014.

On 1 December 2014, the parties' summary judgment motions were heard before the Honorable James Gregory Bell. The trial court entered an order on 31 December 2014 denying both motions. On 12 January 2015, Defendants filed a notice of appeal, and on 15 January 2015, Plaintiff cross-appealed.

## Analysis

### I. Appellate Jurisdiction

**[1]** As an initial matter, we note that Defendants' appeal is interlocutory. "[W]hether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation, quotation marks, and brackets omitted). "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." *Id.* (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

Generally, there is no right of immediate appeal from an interlocutory order. *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013). The prohibition against appeals from interlocutory orders "prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

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

*N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

This Court has held that a defendant's interlocutory appeal from the denial of a dispositive motion involving a *Woodson* claim affects a substantial right and is therefore immediately appealable. *See Edwards v. GE Lighting Systems, Inc.*, 193 N.C. App. 578, 581, 668 S.E.2d 114, 116 (2008) (holding that employer's appeal from denial of motion for summary judgment on *Woodson* claim was proper because denial of motion affected employer's substantial right of immunity from liability based on North Carolina Workers' Compensation Act).

This same principle applies equally to *Pleasant* claims as such claims are also an exception to the exclusivity of the Workers' Compensation Act. *See Bruno v. Concept Fabrics, Inc.*, 140 N.C. App. 81, 85, 535 S.E.2d 408, 411 (2000) ("Normally, the Workers' Compensation Act provides an exclusive remedy for an employee injured as a result of

an on-the-job accident. Our Supreme Court held in Pleasant, however, that the Workers' Compensation Act does not shield a co-employee from liability for injury to another employee caused by willful, wanton and reckless negligence." (internal citations omitted)). Therefore, this Court possesses jurisdiction over both of the issues raised in Defendants' appeal.[7]

## II. *Woodson* Claim

**[2]** On appeal, the Mountaire Defendants argue that the trial court erred in denying their motion for summary judgment as to Plaintiff's *Woodson* claim. We agree.

> The standard of review relating to the granting or denial of a summary judgment motion is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. In ruling on the motion, the court must consider the evidence in the light most favorable to the nonmovant, who is entitled to the benefit of all favorable inferences which may reasonably be drawn from the facts proffered. Summary judgment may be properly shown by proving that an essential element of the plaintiff's case is non-existent.

*JPMorgan Chase Bank, Nat'l Ass'n v. Browning*, 230 N.C. App. 537, 540-41, 750 S.E.2d 555, 559 (2013) (internal citations and quotation marks omitted). "When the denial of a summary judgment motion is properly before this Court . . . the standard of review is *de novo*." *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008).

As a general proposition, the North Carolina Workers' Compensation Act ("the Workers' Compensation Act") provides the exclusive remedy available to employees seeking relief for work-related injuries resulting from the acts or omissions of their employers. *See Wake Cty. Hosp. System, Inc. v. Safety Nat. Cas. Corp.*, 127 N.C. App. 33, 40, 487 S.E.2d 789, 793 ("[T]he exclusivity provision of the Act precludes a claim for

---

7. Because we hold that Defendants' motion for summary judgment was improperly denied by the trial court, Plaintiff's cross-appeal is rendered moot and, therefore, we need not determine whether we possess jurisdiction to consider the cross-appeal. *See Sellers v. FMC Corp.*, 216 N.C. App. 134, 143, 716 S.E.2d 661, 667 (2011) ("Due to our above decision on plaintiff's appeal, we must dismiss defendant's issues on cross-appeal as moot . . . ."), *disc. review denied*, 366 N.C. 250, 731 S.E.2d 429 (2012). Defendants' motion to dismiss the cross-appeal is also denied as moot.

ordinary negligence, even when the employer's conduct constitutes willful or wanton negligence."), *disc. review denied*, 347 N.C. 410, 494 S.E.2d 600 (1997). We explained the rationale underlying this exclusive remedy in *Edwards*.

> The North Carolina Workers' Compensation Act grants employers who fall under the purview of the act immunity from suit for civil negligence actions. In exchange for this immunity, the Act imposes liability, including medical expenses and lost income, on employers for work-related injuries without the worker having to prove employer negligence or face affirmative defenses such as contributory negligence and the fellow servant rule.

*Edwards*, 193 N.C. App. at 582, 668 S.E.2d at 117 (internal citations, quotation marks, and brackets omitted).

In *Woodson*, our Supreme Court adopted a narrow exception to the exclusivity of the Workers' Compensation Act as a remedy for injuries in the workplace. The employer in *Woodson* was a construction company that specialized in trench excavation. *Woodson*, 329 N.C. at 334, 407 S.E.2d at 225. Acting in disregard of applicable safety regulations and the obvious danger of a potential cave-in, the company's president ordered his employees to work in a trench that had sheer, unstable walls and lacked proper shoring without the use of a trench box (despite the fact that one was available). *Id.* at 345-46, 407 S.E.2d at 231. One of the company's employees was killed when the trench in which he was working collapsed. *Id.* at 336, 407 S.E.2d at 226. The record revealed that the company had been cited at least four times in the preceding six and a half years for violations of trenching safety regulations. *Id.* at 345, 407 S.E.2d at 231.

Based on these facts, our Supreme Court ruled that there was sufficient evidence from which "a reasonable juror could determine that upon placing a man in this trench serious injury or death as a result of a cave-in was a substantial certainty rather than an unforeseeable event, mere possibility, or even substantial probability." *Id.* The Court proceeded to hold that

> when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is

> tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the [Workers' Compensation] Act.

*Id.* at 340-41, 407 S.E.2d at 228.

The elements of a *Woodson* claim are: "(1) misconduct by the employer; (2) intentionally engaged in; (3) with the knowledge that the misconduct is substantially certain to cause serious injury or death to an employee; and (4) that employee is injured as a consequence of the misconduct." *Hamby v. Profile Products, LLC*, 197 N.C. App. 99, 106, 676 S.E.2d 594, 599 (2009) (citation and quotation marks omitted).

The Supreme Court has cautioned, however, that "[t]he *Woodson* exception represents a narrow holding in a fact-specific case, and its guidelines stand by themselves. This exception applies only in the most egregious cases of employer misconduct. Such circumstances exist where there is uncontroverted evidence of the employer's intentional misconduct and where such misconduct is substantially certain to lead to the employee's serious injury or death." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 557, 597 S.E.2d 665, 668 (2003). This Court has held that "*[w]illful and wanton negligence alone is not enough to establish a Woodson claim*; a higher degree of negligence is required. The conduct must be so egregious as to be tantamount to an intentional tort." *Shaw v. Goodyear Tire & Rubber Co.*, 225 N.C. App. 90, 101, 737 S.E.2d 168, 176 (citation omitted), *disc. review denied*, 367 N.C. 204, 748 S.E.2d 323 (2013).

In the present case, we conclude that the Mountaire Defendants were entitled to summary judgment on Plaintiff's *Woodson* claim for several reasons. First, and most basically, it is undisputed that Plaintiff was not assigned to perform any work at all regarding the votator sleeve installation. As the record makes clear, *Swain* was the sole employee who was assigned this task. At no point was Plaintiff ever ordered by a supervisor to assist Swain with the project, and Plaintiff never actually performed any work on the installation. Instead, Plaintiff merely entered the room where Swain was working and "[t]he accident happened before [Plaintiff] could get to him." Thus, Plaintiff's injury occurred only after he voluntarily chose to enter the room in which Swain was working in response to a request for assistance from Swain, who did not occupy a supervisory position over Plaintiff. Moreover, Plaintiff's deposition testimony makes clear that he did not inform his supervisor of his intent to assist Swain.

> Q. So you went there in response to Mr. Swain's request; is that right?
>
> A. Yes, ma'am.
>
> Q. You never spoke to Mr. Branton about going in to help Mr. Swain?
>
> A. No, ma'am.

Consequently, the Mountaire Defendants did not place *Plaintiff* in danger in connection with the votator sleeve installation and, therefore, Plaintiff cannot establish a valid *Woodson* claim. In several prior cases, this Court has reached a similar conclusion where an employee engaged in a dangerous activity or placed himself in a dangerous area without first being instructed to do so by his employer. For example, in *Hamby*, the plaintiff was a truck-dump operator at a mulch company. On his own initiative, he decided to clear accumulated woodchips in an auger pit at his employer's plant that was used for grinding mulch. While doing so, he slipped and entangled his left leg in the augers, causing him to suffer serious injuries that ultimately required the amputation of his left leg above the knee. *Hamby*, 197 N.C. App. at 101, 676 S.E.2d at 596. The pit was found to be in violation of OSHA standards due to the fact that no protective guard rail surrounded it. The emergency deactivation switch for the auger pit was also inoperable at the time of the plaintiff's accident such that the augers could not be immediately shut down. *Id.*

The plaintiff brought a *Woodson* claim against his employer, and the trial court granted the employer's motion for summary judgment. *Id.* at 105, 676 S.E.2d at 598. On appeal, we affirmed the trial court's entry of summary judgment in favor of the employer, holding as follows:

> Plaintiffs' forecast of evidence here shows that Hamby was injured by Terra-Mulch's inadequately guarded machinery — the rotating augers — in violation of OSHA standards. Our Supreme Court, however, [has] found this circumstance insufficient to establish a *Woodson* claim, even when coupled with an allegation that supervisors specifically directed the employee to work in the face of the hazard. *Plaintiffs' allegations and forecast of evidence in this case did not demonstrate that Hamby was specifically instructed to descend from the truck-dump operator platform in the manner that exposed him to the hazardous augers*, or that Terra-Mulch was otherwise substantially certain he would be seriously

> injured. Accordingly, we agree with the trial court that Plaintiffs' forecast of evidence at summary judgment was insufficient to establish their *Woodson* claim against Terra-Mulch.

*Id.* at 108, 676 S.E.2d at 600 (internal citations and quotation marks omitted and emphasis added).

In *Edwards*, an employee worked at his employer's plant, which manufactured industrial lighting through a process that "require[d] metal parts to be baked in annealing ovens in an oxygen-free gas which contains a high concentration of carbon monoxide." *Edwards*, 193 N.C. App. at 580, 668 S.E.2d at 115. The employee, an annealing oven operator, was working overtime and decided to take a break, choosing to do so behind one of the annealing ovens. However, due to a leak emanating from the rear of the annealing oven, he was exposed to fatal levels of carbon monoxide, ultimately causing his death. *Id.*

The employee's estate brought a *Woodson* claim against the employer. The employer filed a motion for summary judgment, which was denied by the trial court. *Id.* at 580, 668 S.E.2d at 115-16. On appeal, this Court held that because the employee had acted on his own initiative, the elements of a *Woodson* claim were lacking. We reasoned that

> in contrast to *Woodson*, where the employer intentionally ordered the decedent to work in a known dangerous condition, in the instant case, decedent volunteered to work extra hours after his shift, and chose to take a break behind the annealing ovens, where the carbon monoxide concentration was very high. Although plaintiff contends that [the employer] could have done more to ensure its workers' safety, the evidence does not show that the employer engaged in misconduct *knowing* it was substantially certain to cause death or serious injury.

*Id.* at 584-85, 668 S.E.2d at 118 (citation, quotation marks, and brackets omitted).

The second primary reason why Plaintiff's *Woodson* claim fails as a matter of law is his inability to show knowledge on the part of the Mountaire Defendants that the attempt to replace the votator sleeve was substantially certain to cause serious injury or death. The evidence of record shows that Swain led his supervisor to believe that the installation of the votator sleeve could safely be performed. Swain informed Branton after examining the excerpt from the operator's manual that

he "didn't see a problem" with him performing the installation. This evidence belies the notion that Branton was on notice that Swain's installation of the votator sleeve was substantially certain to result in serious injury or death.

Plaintiff points to his own deposition testimony in which he stated that he had a conversation with Swain prior to the accident in which Plaintiff expressed his belief that Swain could not perform the installation himself and that mechanics from Mountaire Farms' refrigeration department needed to be involved. According to Plaintiff, Swain responded that he felt like he had no choice other than to perform the installation in order to keep his job. However, Plaintiff has failed to offer evidence that Plaintiff, Swain, or anyone else expressed concerns to management personnel at Mountaire Farms about Swain's alleged inability to safely perform the installation.

Branton testified that he was unaware of the dangers posed by the installation in terms of the potential for the release of ammonia from the votator. His lack of awareness of this danger was aptly demonstrated by the fact that he stood next to Swain while Swain was performing the installation. Indeed, Branton testified that he did not know that there was any risk at all of ammonia being released during the replacement of the votator sleeve and, therefore, his testimony shows that he lacked any basis for believing that the refrigeration department needed to be brought in to assist with the project.

> Q. If you had noted that this involved exposure -- this involved an actual Ammonia exposure situation would you have signed [sic] this to Clifton Swain?
>
> A. No.
>
> Q. What would you have done?
>
> A. Well, it would have -- I would have gotten touch [sic] with refrigeration if it was -- yeah. It would have been a -- refrigeration would have been responsible to drain the Ammonia.
>
> Q. Was refrigeration available that Saturday?
>
> A. Yes.
>
> . . . .
>
> Q. Have you ever assigned a task to your mechanics that you did not think they were qualified to do?

> A. No.
>
> Q. At any time did Brian Blue or Clifton Swain express to you any concerns about doing this project?
>
> A. No, no.
>
> . . . .
>
> Q. Would you have -- you actually went into the room where Brian Blue was [sic] Clifton Swain were in there. Would you have gone into that room and exposed yourself to potential ---
>
> A. No.
>
> Q. --- bodily injury or death if you thought ---
>
> A. No.
>
> Q. --- there was exposure?
>
> A. No.

Nor has Plaintiff shown that Mountaire Farms' managerial personnel had any basis for believing that any attempt by its mechanics to replace the votator sleeve was substantially certain to result in serious injury or death. While there was an internal discussion as to whether Mountaire Farms should hire an independent contractor to perform the installation, the mere fact that such a discussion took place, without more, falls short of meeting the "substantial certainty" element of *Woodson*.

Notably, the only evidence on this issue established that this was the first time Mountaire Farms had been required to address the need for repair of a votator. Ondona testified on this issue as follows:

> Q. Okay. When the votators were installed, how many votators were there?
>
> A. I think three.
>
> . . . .
>
> Q. Okay. During the time that you were engineering and maintenance manager for Mountaire Farms, was there a process or a procedure for performing major repairs on votators?
>
> A. We haven't [sic] done any repairs yet, so I could not recall initiating repair. And that's my recollection.

When asked why the possibility of using independent contractors for the project had been discussed, Ondona responded that this was "[b]ecause it was never done before by the plant, and it's the first time that we are going to undertake that kind of job. . . ."

Therefore, there were no past experiences upon which the Mountaire Defendants could have drawn in determining how to handle the installation of the new votator sleeve. Moreover, the evidence suggests that the votator sleeve *could*, in fact, have been safely installed by Mountaire Farms' employees had the ammonia been drained from the votator — presumably by a mechanic with the refrigeration department — prior to Swain beginning the installation.

However, there is no evidence that at any time after being assigned the project Swain requested assistance from the refrigeration department in draining the ammonia from the votator. Nor did he or Plaintiff ask Branton or any other supervisor to arrange for such assistance. Plaintiff also did not alert any of the refrigeration mechanics about his belief that they needed to assist Swain on this project. Plaintiff testified as follows regarding the issue of whether refrigeration mechanics could have provided assistance:

> Q. Could Mr. Swain that morning have had refrigeration drain the system?
>
> MR. LINETT: Objection to form.
>
> A. That was the supervisor's call. We don't have the authority to tell no supervisor what to do.
>
> Q. But refrigeration personnel were there at the plant that day?
>
> A. Yes, ma'am.
>
> Q. And they could have drained the system?
>
> A. Yes, ma'am.
>
> MR. LINETT: Objection to form.
>
> A. Excuse me.
>
> Q. Could Mr. Swain have asked his supervisor to have refrigeration drain the system?
>
> MR. LINETT: Objection to form.
>
> A. I guess he could have, yes.

Q. And could he have talked to his supervisor about this task?

MR. LINETT: Objection to form.

A. Yes.

To the extent that Mountaire Farms' manner of handling and staffing the project can be characterized as negligent, this Court — as noted above — has made clear that "*[w]illful and wanton negligence alone is not enough to establish a Woodson claim*; a higher degree of negligence is required. The conduct must be so egregious as to be tantamount to an intentional tort." *Shaw*, 225 N.C. App. at 101, 737 S.E.2d at 176 (citation omitted). Similarly, the mere fact that additional safety measures should — in hindsight — have been implemented is not enough to establish that the Mountaire Defendants intentionally engaged in conduct that they knew was substantially certain to cause serious injury or death to their employees. *See Edwards*, 193 N.C. App. at 585, 668 S.E.2d at 118 ("Although plaintiff contends that [the employer] could have done more to ensure its workers' safety, the evidence does not show that the employer engaged in misconduct *knowing* it was substantially certain to cause death or serious injury." (citation, quotation marks, and brackets omitted)).

**[3]** We likewise reject Plaintiff's contention that the existence of prior DAQ and OSHA violations demonstrates egregious conduct by Mountaire Farms in terms of allowing the plant to operate in a state of noncompliance with applicable safety regulations. "While OSHA violations are not determinative, they are a factor in determining whether a *Woodson* claim has been established." *Kelly v. Parkdale Mills, Inc.*, 121 N.C. App. 758, 761, 468 S.E.2d 458, 460 (1996) (internal citation omitted). In the present case, prior to the 20 June 2009 accident, Mountaire Farms had been cited a total of three times — twice by OSHA and once by the DAQ. Notably, none of these violations related to the storage or release of ammonia.

On a number of occasions, North Carolina courts have rejected *Woodson* claims despite the presence of evidence in the record demonstrating that the workplace at issue was unsafe at the time of the accident. *See Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 238, 424 S.E.2d 391, 394 (1993) (employer "knew that certain dangerous parts of . . . machine were unguarded, in violation of OSHA regulations and industry standards"); *Hamby*, 197 N.C. App. at 108, 676 S.E.2d at 600 ("Plaintiffs' forecast of evidence here shows that Hamby was injured by [the employer's] inadequately guarded machinery — the rotating augers

— in violation of OSHA standards."); *Edwards*, 193 N.C. App. at 584, 668 S.E.2d at 118 ("[A]lthough the evidence tended to show that [the employer] did not adequately maintain its equipment, even a knowing failure to provide adequate safety equipment in violation of OSHA regulations does not give rise to liability under *Woodson*." (citation, quotation marks, brackets, and ellipses omitted)); *Regan v. Amerimark Bldg. Products, Inc.*, 127 N.C. App. 225, 226, 489 S.E.2d 421, 423 (1997) (three months before plaintiff's accident, employer was issued citations for "several serious violations of the Occupational Safety and Health Act"), *aff'd per curiam*, 347 N.C. 665, 496 S.E.2d 378 (1998).

For all of these reasons, we hold that Plaintiff has failed to show the existence of a genuine issue of material fact as to his *Woodson* claim and that the Mountaire Farms Defendants were entitled to judgment as a matter of law. The trial court therefore erred in denying the Mountaire Defendants' motion for summary judgment as to this claim.

## III. *Pleasant* Claims

**[4]** The Individual Defendants argue that the trial court also erred in denying their motion for summary judgment as to Plaintiff's *Pleasant* claims. Once again, we agree.

In *Pleasant*, the plaintiff and his co-worker were both employees of a construction company. One afternoon, the plaintiff was walking back from lunch to the construction site. The co-worker, who was driving his truck at the time, saw the plaintiff walking and decided to "scare [him] by blowing the horn and by operating the truck close to him." He drove too close to the plaintiff, hitting him with the truck and seriously injuring his right knee. *Pleasant*, 312 N.C. at 711, 325 S.E.2d at 246.

The plaintiff filed a personal injury action against the co-worker, who argued that the suit was barred by the exclusivity provision of the Workers' Compensation Act. *Id.* The trial court entered a directed verdict in favor of the co-worker, and a divided panel of this Court affirmed. *Pleasant v. Johnson*, 69 N.C. App. 538, 317 S.E.2d 104 (1984), *rev'd*, 312 N.C. 710, 325 S.E.2d 244 (1985).

Our Supreme Court reversed, holding that "[t]he pivotal issue in this case is whether the North Carolina Workers' Compensation Act provides the exclusive remedy when an employee is injured in the course of his employment by the willful, wanton and reckless conduct of a co-employee. We hold that it does not and that an employee may bring an action against the co-employee for injuries received as a result of such conduct." *Pleasant*, 312 N.C. at 710-11, 325 S.E.2d at 246.

In applying *Pleasant*, we have held that

> [e]ngaging in willful, wanton, and reckless behavior is akin to the commission of an intentional tort, and, as such, the employee must form the constructive intent to injure. Such intent exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified. Alternatively, when an employee is injured by the ordinary negligence of a co-employee, the Act is the exclusive remedy.

*Pender v. Lambert*, 225 N.C. App. 390, 395, 737 S.E.2d 778, 782 (internal citations and quotation marks omitted), *disc. review denied*, 366 N.C. 591, 743 S.E.2d 197 (2013); *see also Trivette v. Yount*, 366 N.C. 303, 312, 735 S.E.2d 306, 312 (2012) ("[E]ven unquestionably negligent behavior rarely meets the high standard of 'willful, wanton and reckless' negligence established in *Pleasant*.").

The caselaw from this Court and the Supreme Court applying *Pleasant* illustrates the high bar that a plaintiff must meet in order to survive summary judgment on a *Pleasant* claim. *See*, *e.g.*, *Jones v. Willamette Indus.*, *Inc.*, 120 N.C. App. 591, 596, 463 S.E.2d 294, 297-98 (1995) (holding *Pleasant* claim not established where employee died while cleaning residue from boiler system at employer's plant in unsafe manner in accordance with co-workers' instructions because "although supervisory personnel at [employer] should have ensured that adequate and appropriate safety measures were in place, and being used . . . this does not support an inference that they intended for [the decedent] to be injured, nor does it support an inference that they were manifestly indifferent to the consequences"), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 714 (1996); *Dunleavy v. Yates Const. Co.*, *Inc.*, 106 N.C. App. 146, 156, 416 S.E.2d 193, 199 (*Pleasant* claim not established where co-worker supervising inexperienced employee left employee unsupervised for brief period of time during which employee died as a result of trench collapse because "evidence show[ed] that [the co-worker's] conduct, although arguably negligent, was not willful, wanton, and reckless"), *disc. review denied*, 332 N.C. 343, 421 S.E.2d 146 (1992).

We first address Plaintiff's *Pleasant* claim against Branton, the supervisor at Mountaire Farms most directly involved in the assignment of the votator sleeve project. As discussed above in our analysis of Plaintiff's *Woodson* claim, the record is devoid of evidence that Branton was aware of the dangers involved with the installation of the votator

sleeve. Indeed, Branton's lack of knowledge on this subject was most fundamentally demonstrated by the fact that he stood close enough to the votator during the attempted installation so that when the ammonia was released he — like Plaintiff — was seriously injured. It logically follows that he could not have formed the constructive intent to expose Plaintiff to a hazardous situation as would be necessary in order for a viable *Pleasant* claim to exist on these facts. Moreover, as discussed earlier, Branton was not responsible for Plaintiff's presence in the room where the installation was being performed.

Plaintiff's *Pleasant* claims against Garroutte, Ondona, and Smith are premised on his assertion that in their roles as managerial employees of Mountaire Farms they failed to recognize that the votator sleeve needed to be installed by an independent contractor as opposed to a Mountaire Farms' employee. However, as discussed above, the record fails to support Plaintiff's argument that Mountaire Farms employees were clearly incapable of replacing the votator sleeve. Moreover, even assuming *arguendo* that these Defendants were mistaken in their belief that the project could be safely performed by their own employees, there is no indication in the record that the need to utilize independent contractors was so obvious that a contrary decision amounted to the sort of willful, wanton, and reckless conduct required to support a *Pleasant* claim.

Plaintiff also alleges that Ondona failed to keep Mountaire Farms' risk management plan up to date and that Saufley should be held liable because he possessed "responsibility for general employee safety." However, such assertions — without more — are insufficient to establish a valid *Pleasant* claim. *See Jones*, 120 N.C. App. at 596, 463 S.E.2d at 297-98 ("[A]lthough supervisory personnel . . . should have ensured that adequate and appropriate safety measures were in place, and being used . . . this does not support an inference that they intended for [the decedent] to be injured, nor does it support an inference that they were manifestly indifferent to the consequences.").

Finally, summary judgment is also proper as to Plaintiff's *Pleasant* claim against Swain. Swain's lack of understanding that the ammonia had to be drained from the votator prior to the installation of the new votator sleeve and his failure to take the necessary safety precautions were mistakes on his part that tragically ended up costing him his life. Such errors simply do not amount to the sort of willful, wanton, and reckless conduct between co-workers that lies at the heart of a *Pleasant* claim.

Thus, we hold that Plaintiff failed to forecast sufficient evidence in support of his *Pleasant* claims to defeat the Individual Defendants'

motion for summary judgment. Therefore, the trial court erred in denying their motion.

**Conclusion**

For the reasons stated above, the trial court's denial of Defendants' motion for summary judgment is reversed. We remand this case to the trial court with instructions to enter summary judgment in favor of Defendants on all claims asserted by Plaintiff in this action. Plaintiff's cross-appeal is dismissed as moot.

REVERSED AND REMANDED IN PART; DISMISSED IN PART

Chief Judge McGEE and Judge DILLON concur.

---

HOPE C. BUTTERWORTH AND HUSBAND, LUKE T. BUTTERWORTH; MICHAEL D. SKRZYNSKI; SUZANNE A. FULLAR; KERRY BRIGHT AND WIFE, STEPHANIE LeGRAND; LAURENCE H. VICKERS AND WIFE, KAREN T. VICKERS; H. PETER LOEWER AND WIFE, JEAN LOEWER, PETITIONERS
v.
THE CITY OF ASHEVILLE AND FARMBOUND HOLDINGS, LLC, RESPONDENTS

No. COA15-919

Filed 17 May 2016

**Cities and Towns—land use—fair trial rights—approval of subdivision preliminary plat—street width modification—quasi-judicial—exercise of discretion required—due process**

The trial court erred in a land use case by concluding that the City was not required to afford petitioners all fair trial rights before approving the Developer's subdivision preliminary plat. The approval of the street width modification required the Commission to exercise discretion, and therefore, rendered the Commission's approval process quasi-judicial in nature, depriving petitioners of certain due process rights in the approval process.

Appeal by Petitioners from order entered 24 April 2015 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 9 February 2016.

*Roberts & Stevens, P.A., by F. Lachicotte Zemp, Jr., and Eric P. Edgerton, for Petitioners.*

*City of Asheville City Attorney's Office, by City Attorney Robin T. Currin and Assistant City Attorney Catherine A. Hofmann, and McGuire Wood & Bissette, P.A., by Joseph P. McGuire, for Respondents.*

DILLON, Judge.

The subject matter of this appeal is a proposed residential subdivision being developed by Farmbound Holdings, LLC (the "Developer"), which was approved by the City of Asheville's Planning and Zoning Commission (the "Commission"). Petitioners are individuals who reside near the proposed development. Petitioners (the "Neighbors") appeal from the trial court's order dismissing their action against the City of Asheville ("the City") and the Developer. For the following reasons, we reverse the order of the trial court and remand the matter to the trial court for remand to the Commission for further proceedings.

## I. Background

In May of 2014, the Developer submitted an application to the City to develop a major residential subdivision known as the Brynn Subdivision. In its application, the Developer requested that the subdivision be approved *with a modification* which would allow for the city streets within the proposed subdivision to be narrower in width than otherwise required by City regulations.

In October of 2014, the Commission convened a public meeting and heard a presentation by the City urban planner explaining the proposed project as well as the report of the City's Technical Review Committee recommending that the subdivision be approved with the modification. The Commission also allowed for public comment from concerned citizens who opposed approval, including the Neighbors. Ultimately, though, the Commission voted to approve the Brynn Subdivision preliminary plat, five to one (5-1), *with* the requested street-width modification.

In December of 2014, the Neighbors filed a petition for *certiorari* in Buncombe County Superior Court, seeking review of the Commission's decision. Respondents each filed an answer and moved for dismissal.

On 24 April 2015, after a hearing on the matter, the trial court entered its written order granting Respondents' motions to dismiss. The Neighbors timely filed written notice of appeal to our Court from the trial court's dismissal.

## II. Analysis

In their sole argument on appeal, the Neighbors contend that the trial court erred in concluding that the City was *not* required to afford them all fair trial rights before approving the Developer's subdivision preliminary plat. Specifically, the Neighbors contend that the approval of the street-width modification required the Commission to exercise discretion and, therefore, rendered the Commission's approval process quasi-judicial in nature, and *not* ministerial/administrative in nature. We hold that the Commission's approval of the plat in this case was, in fact, quasi-judicial in nature and that, therefore, the Neighbors[1] were deprived of certain due process rights in the approval process. Accordingly, we reverse the order of the trial court for remand to the Commission for further proceedings consistent with this opinion.

### A. The Commission is Authorized to Approve Subdivision Applications

Our General Assembly has empowered municipalities to regulate the subdivisions within their territorial jurisdiction. *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 107, 388 S.E.2d 538, 542 (1990). Specifically, N.C. Gen. Stat. § 160A-373 allows a municipality to exercise its power to approve subdivisions through either "(1) [t]he city council, (2) [t]he city council on recommendation of a designated body, or (3) [a] designated planning board, technical review committee, or other designated body or staff person." N.C. Gen. Stat. § 160A-373 (2014).

With regard to a proposed subdivision requiring the extension of public and private streets, Asheville has elected the third option provided under our General Statutes. Specifically, Asheville's City Code of Ordinances delegates the power to approve a proposed subdivision which requires the extension of a public or private street to the Commission.[2] Asheville City Code of Ordinances § 7-5-8(a)(3)(d)(1) (2014).

---

1. Neither party argues the Neighbors' standing in this matter.

2. A proposed subdivision which involves the extension of public or private streets is deemed a "major" subdivision under Asheville's Code. Asheville City Code of Ordinances § 7-5-8(a)(1) (2014). "Minor" subdivisions are dealt with separately in the Code and need only be approved by City staff, *see id.* § 7-5-8(b)(4), as they "do not require the extension of public streets or private streets built to City of Asheville standards," *see id.* § 7-5-8(b)(1).

B. The Due Process Required in the Commission's Decision Process Depends upon Whether its Decision was Quasi-judicial or Administrative in Nature

Our Supreme Court has observed that the decision by a local government to approve or deny a particular land use is typically characterized as being one of four types – legislative, advisory, quasi-judicial, or administrative. *See County of Lancaster v. Mecklenburg*, 334 N.C. 496, 507, 434 S.E.2d 604, 612 (1993). As in *County of Lancaster*, the question in the present case is whether the Commission's approval of the subdivision plat is "properly characterized as a quasi-judicial decision or as an administrative [] decision." *Id.*

The level of due process required to be afforded by the Commission in deciding a land use request depends upon whether its decision process is quasi-judicial or administrative in nature. *See*, *e.g.*, *Sanco of Wilmington Serv. Corp. v. New Hanover County*, 166 N.C. App. 471, 475, 601 S.E.2d 889, 892-93 (2004) (comparing administrative and quasi-judicial land use decisions). Specifically, our Supreme Court has recognized, "[d]ue process requirements mandate that certain *quasi-judicial* [land use] decisions comply with all fair trial standards when they are made." *County of Lancaster*, 334 N.C. at 506, 434 S.E.2d at 611 (emphasis added). The Supreme Court has described these "fair trial standards" as embracing "an evidentiary hearing with the right of the parties to offer evidence; cross-examine adverse witnesses; inspect documents; have sworn testimony; and have written findings of fact supported by competent, substantial, and material evidence." *Id.* at 507-08, 434 S.E.2d at 612. In contrast, an *administrative* land use decision does not require this level of due process and may be made "without a hearing at all[.]" *Id.* at 508, 434 S.E.2d at 612.

Our Supreme Court has differentiated between *quasi-judicial* decisions and administrative decisions as follows: In making quasi-judicial decisions, the decision-maker must "exercise discretion of a judicial nature"; and in the land use context, "these quasi-judicial decisions involve the application of zoning policies to individual situations, such as variances, special and conditional use permits, and appeals of administrative determinations." *Id.* at 507, 434 S.E.2d at 612. In sum, the Court has stated that such quasi-judicial decisions "involve two key elements: the finding of facts regarding the specific proposal and the exercise of some discretion in applying the standards of the ordinance." *Id.* Further, as explained by the Court, such quasi-judicial decisions may *not* be delegated to an individual administrator, *see id.* at 509, 434 S.E.2d at 613, but rather must be made by the municipality's governing council, board

of adjustment or – as in the case of Asheville – a designated planning board, *see* N.C. Gen. Stat. § 160A-373.

By contrast, *administrative* decisions are "routine" and "nondiscretionary," and may be delegated to a single individual. *County of Lancaster*, 334 N.C. at 507, 434 S.E.2d at 612. Moreover, while the decision-maker "may well engage in some fact finding [in making an administrative decision] . . . this involves determining objective facts that do not involve an element of discretion." *Id.* (internal marks and citation omitted).

This is not to say that *every* decision to allow a modification in a subdivision proposal is quasi-judicial in nature. That is, the decision to allow a modification may be administrative in nature if the decision process does not involve the exercise of discretion but rather involves the application of specific, neutral, and objective criteria as set out in the municipality's governing code. *See id.* at 510, 434 S.E.2d at 614 (explaining that a decision which requires the application of objective standards is administrative). However, where the decision requires the exercise of discretion in applying generally stated standards, the decision is of a quasi-judicial nature. As our General Assembly has provided,

> an ordinance s**hall be deemed to authorize a quasi-judicial decision** if the city council or planning board is authorized to decide whether to approve or deny the plat based not only upon whether the application complies with the specific requirements set forth in the ordinance, but also on **whether the application complies with one or more generally stated standards requiring a discretionary decision** to be made by the city council or planning board.

N.C. Gen. Stat. § 160A-377(c) (2014) (emphasis added).

C. The Commission Viewed its Decision as Ministerial/ Administrative in Nature and *Not* Quasi-judicial in Nature

Asheville's Code grants the Commission the authority to allow modifications to the minimum subdivision standards required under the Code. Asheville City Code of Ordinances § 7-5-8(c)(1) (2014). Specifically, the Code states that such modifications may be allowed in cases of "physical hardship," defining cases of physical hardship as

> those cases where because of the topography of the tract to be subdivided, the condition or nature of adjoining areas, or the existence of other unusual physical characteristics, strict compliance with the provisions of [the]

> chapter would cause unusual and unnecessary hardship on the subdivision of the property by [the] property owner or developer.

*Id.* § 7-5-8(c)(2). In the event of a case of substantial hardship and the grant of a modification, the Code empowers the Commission to impose such conditions on the property owner or developer "as will ensure the purposes of the standards or requirements waived." *Id.* § 7-5-8(c)(3).

Asheville's Code, however, also provides that the Commission's process in deciding whether to approve a preliminary plat "shall be ministerial in nature," without making any separate provision for those cases which involve approving a modification due to a physical hardship. *Id.* § 7-5-8(a)(3)(d)(1). Instead, the Code simply states that the Commission must schedule a public hearing to receive comments regarding a proposed project upon receipt of a major subdivision preliminary plat from the Technical Review Committee,[3] and that, in the event the preliminary plat as submitted is denied, the Commission must "set forth in writing the reasons for denying approval of the plat." *Id.*

In the present case, the record of the proceedings before the Commission reveals that the Commission acted in a ministerial/administrative capacity, believing that it did not have the authority to reject the plat with the modification where City staff had already recommended approval. That is, it appears that the Commission was under the impression that modifications pursuant to § 7-5-8(c) of the City Code were administrative rather than quasi-judicial in nature, as the text of § 7-5-8(a)(3)(d)(1) of the City Code would seem to dictate. Specifically, the record of the Commission's hearing demonstrates as follows: Existing City standards required a minimum forty-five (45) foot right-of-way for certain new streets, but the proposed subdivision's streets had only a twenty-five (25) foot right-of-way. Nevertheless, the Commission was under the impression that the requested modification was part of the Technical Review Committee's initial review; that there had been compliance with the process in place for an applicant to request such a modification; that City staff had recommended approval of the modification or alternately had already approved the modification; and that the matter had, therefore, already been resolved prior to the Commission's approval of the plat, which was merely ministerial, as required by the Code.

---

3. The Technical Review Committee is tasked with the initial stage of review of new major subdivision applications and their compliance with applicable regulations. Asheville City Code of Ordinances § 7-5-8(a)(3)(d) (2014).

### D. The Commission's Decision to Approve the Developer's Proposed Subdivision with the Modification was, in fact, Quasi-judicial in Nature

Notwithstanding the provisions of the Asheville Code suggesting otherwise, the decision regarding the Developer's proposed modification required a determination of whether the Developer would suffer "physical hardship" if the modification was not allowed. *See id.* § 7-5-8(c)(2). We hold that this determination required an exercise of discretion in the application of this generally stated standard, rendering the Commission's decision quasi-judicial in nature. *See* N.C. Gen. Stat. § 160A-377(c) (2014). Our conclusion is in spite of the language in Asheville's Code stating that review before the Commission "shall be ministerial." *See* Asheville City Code of Ordinances § 7-5-8(a)(3)(d)(1) (2014). Indeed, our General Assembly has provided that "an ordinance shall be deemed to authorize a quasi-judicial decision if the . . . planning board is authorized to decide whether to approve or deny the plat based . . . on whether the application complies with one or more generally stated standards." N.C. Gen. Stat. § 160A-377(c) (2014).

Here, determining the presence of "physical hardship" as defined in § 7-5-8(c)(2) of Asheville's Code required the exercise of judgment and discretion in applying the relevant "generally stated standard[][.]" *See id.* That is, the decision did not require the mere application of specific, neutral, and objective criteria, which would render the decision administrative in nature. Therefore, we hold that the Commission's approval of the Developer's plat with the street-width modification was a quasi-judicial decision. In approving the plat, the Commission was required to determine whether the Developer would suffer "physical hardship" without the modification, a decision which required the exercise of judgment and discretion in applying this general standard.[4]

---

4. Generally speaking, the weighing by a local government board of various burdens of a proposed use of land not strictly complying with local regulations to determine whether certain of the associated burdens constitute an undue hardship on a particular party requires application of a general standard – undue hardship – to a set of individualized circumstances, and the exercise of judgment and discretion. *See Harrison v. City of Batesville*, 73 So.3d 1145, 1152-56 (2011) (Mississippi Supreme Court reviewing quasi-judicial application of such a standard); *Matthew v. Smith*, 707 S.W.2d 411, 414-18 (1986) (Missouri Supreme Court: same); *Oklahoma City v. Harris*, 126 P.2d 988, 991-92 (1941) (Oklahoma Supreme Court: same); *Brandon v. Bd. of Comm'rs of Town of Montclair*, 124 N.J.L. 135, 139-41 (1940) (New Jersey Supreme Court: same).

E. The Trial Court Erred in Dismissing the Petition for *Certiorari*, and Remand to the Commission is Necessary

Having found that the Commission's decision to approve the proposed subdivision was quasi-judicial in nature, we hold that the trial court erred in dismissing the Neighbor's petition for *certiorari*, and remand the matter to the trial court for further remand to the Commission so that a hearing with "fair trial standards" can be had.

While review of quasi-judicial decisions by local land use authorities is first to superior court and in the nature of *certiorari*, *see id.* § 153A-336(a); *id.* § 160A-377(a); *id.* § 153A-349(a); *id.* §§ 160A-393(a), (b)(3), our Court reviews the decisions of trial courts in such cases to determine whether (1) the trial court's review was within the appropriate scope of review and (2) whether the review was correct, *see Fehrenbacher v. City of Durham*, ___ N.C. App. ___, ___, 768 S.E.2d 186, 191 (2015). Moreover, the nature of the decision by the local authority, not the label assigned to it, controls. *Guilford Fin. Servs., LLC v. City of Brevard*, 150 N.C. App. 1, 6, 563 S.E.2d 27, 31 (2002), *rev'd on other grounds*, 356 N.C. 655, 576 S.E.2d 325 (2003) (per curiam).

Our Supreme Court has held that the appropriate scope of review on a petition for *certiorari* from a decision by a local governmental authority regarding otherwise non-compliant land use includes the following issues where the local authority is acting in a quasi-judicial capacity:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

*Coastal Ready-Mix Concrete Co., Inc. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980).

Under the whole record test, which our Court has held is one of the standards of review applicable to these decisions, if the petitioner is alleging that the decision by the local authority was arbitrary and

capricious, its findings of fact are binding on appeal if they are supported by substantial, competent evidence, provided such evidence was presented to the local authority before the decision was made. *Blue Ridge Co., L.L.C. v. Town of Pineville*, 188 N.C. App. 466, 469, 655 S.E.2d 843, 846 (2008). However, where the petitioner is alleging that the decision was based on legal error, *de novo* review, the other relevant standard, is applicable. *Id.* at 469, 655 S.E.2d at 845-46. Our Court has held that "[t]he superior court may apply both standards of review if required, but the standards should be applied separately to discrete issues." *Id.* at 469-70, 655 S.E.2d at 846.

In the present case, the Neighbors alleged in their petition for *certiorari*, which they labeled in the alternative as a complaint seeking a declaratory judgment and injunctive relief, that the Commission failed to comply with the due process requirements for quasi-judicial proceedings, alleging additionally that in doing so the Commission acted arbitrarily and capriciously. Therefore, under *Blue Ridge Co.*, the allegations in the Neighbors' petition required the trial court to review the Commission's decision under both the *de novo* and whole record standards. *Id.* at 469-70, 655 S.E.2d at 845-46. The trial court, however, did neither, apparently simply agreeing with the Respondents' position in their answers and motions to dismiss, ordering that the Neighbors' petition be dismissed without addressing any of the relevant issues set out by our Supreme Court in *Coastal Ready-Mix Concrete*, or making any findings or conclusions indicating its rationale for so ruling.

In any event, we hold that the trial court on remand shall remand the case to the Commission to conduct further proceedings which provide the Neighbors with the level of due process required for quasi-judicial proceedings before that Commission.[5] *See Humble Oil & Ref. Co. v. Bd. of Aldermen of Town of Chapel Hill*, 248 N.C. 458, 470, 202 S.E.2d 129, 137 (1974).

---

5. Our holding is not to be construed to deem *all* allowances of modifications, variances, or special uses, whether under Asheville's Code or any other local land use regulation, as quasi-judicial decisions. Instead, our holding here is confined to the modification authorized by § 7-5-8(c) of the Asheville City Code, where a modification is required for approval of an otherwise non-compliant preliminary plat. For example, although § 7-7-8(c)(6) of the City Code, applicable to conditional use zoning, authorizes the City planning and development director to allow "minor modifications" to approved conditional use zoning ordinances, such modifications are prescribed by specific, neutral, and objective criteria, such as the limitation of a deviation not in excess of "up to ten percent or 24 inches . . . from the approved setback," or a reduction of no more than "25 percent in the number of

## III. Conclusion

For the reasons stated herein, we reverse the order of the trial court and remand the matter for further proceedings.

REVERSED AND REMANDED.

Judges BRYANT and ZACHARY concur.

---

CSX TRANSPORTATION, INC., PLAINTIFF
v.
CITY OF FAYETTEVILLE AND PUBLIC WORKS COMMISSION OF THE CITY OF FAYETTEVILLE, A/K/A FAYETTEVILLE PUBLIC WORKS COMMISSION, DEFENDANTS

---

CITY OF FAYETTEVILLE, THIRD-PARTY PLAINTIFF
v.
TIME WARNER CABLE SOUTHEAST, LLC, THIRD-PARTY DEFENDANT

No. COA15-1286

Filed 17 May 2016

**1. Indemnity—contractual agreement—summary judgment—admission of negligence not a bar to recovery**

The trial court erred by granting summary judgment in favor of defendant Public Works Commission (PWC) on the issue of whether the parties' contractual agreement required PWC to indemnify CSX for its own negligence. The trial court erroneously concluded CSX was barred from recovering because of its admission of negligence.

**2. Indemnity—contractual agreement—partial summary judgment**

The trial court erred by denying plaintiff CSX's motion for partial summary judgment on its contractual indemnity claim. CenturyLink's equipment would not have been damaged as a result

---

parking spaces required[.]" *See* Asheville City Code of Ordinances § 7-7-8(c)(6) (2014). Whereas § 7-5-8(c) of the City Code authorizes a modification requiring application of the physical hardship standard without any other guiding standards, minor modifications under § 7-7-8(c)(6) are guided by clear standards. *See id.* Therefore, our review of a minor modification under § 7-7-8(c)(6), unlike a more general modification under § 7-5-8(c), would, like the legislative action empowering the planning and development director to authorize it, be deferential, presuming its validity. *See County of Lancaster v. Mecklenburg*, 334 N.C. 496, 510 n. 7, 434 S.E.2d 604, 614 n. 7 (1993).

of CSX's crane colliding with PWC's power lines but for, or stemming from, defendant Power Work Commission's exercise of its privilege and license pursuant to the Crossings Agreement.

Appeal by plaintiff from order entered 28 May 2015 by Judge Tanya T. Wallace and order entered 8 June 2015 by Judge Beecher R. Gray in Cumberland County Superior Court. Heard in the Court of Appeals 27 April 2016.

*Millberg Gordon Stewart PLLC, by Frank J. Gordon and B. Tyler Brooks, for plaintiff-appellant.*

*Hutchens Law Firm, by J. Scott Flowers and Natasha M. Barone, for defendants-appellees.*

TYSON, Judge.

CSX Transportation, Inc. ("CSX") appeals from order granting summary judgment in favor of defendants City of Fayetteville and the Public Works Commission ("PWC") on whether the parties' contractual agreement required PWC to indemnify CSX for its own negligence, and denying CSX's motion for partial summary judgment on its contractual indemnity claim. CSX also appeals from order granting summary judgment in favor of PWC on CSX's claim for indemnification. We reverse the trial court's order granting summary judgment in favor of PWC, grant CSX's motion for partial summary judgment on its contractual indemnity claim, and remand.

## I. Factual Background

In 1951, PWC entered into a contract ("the Crossings Agreement") with Atlantic Coast Line, CSX's predecessor-in-interest, which allowed PWC, as licensee, to install aerial power lines over a section of railroad tracks. The Crossings Agreement includes an indemnification provision, which states:

> The Licensee will indemnify and save harmless the Railroad Company, its successors and assigns, from and against all loss, cost, damage and expense, and from and against any and all claims or demands therefor, on account of injury to person or property, which may be incurred by the Railroad Company by reason of the construction, maintenance, use or operation of the said conductors, wires or supports,

> or by reason of the exercise of any of the privileges conferred by this license or agreement.

It is not disputed that CSX, as successor-in-interest to the Atlantic Coast Line, has the right to enforce the 1951 agreement.

The Crossings Agreement requires all power lines installed by PWC to be maintained at an elevation of at least twenty-seven or twenty-eight feet above the top of the railroad tracks, depending on the line's voltage. Pursuant to the Crossings Agreement, PWC installed utility poles on both sides of the railroad tracks running adjacent to 3024 Clinton Road, in Fayetteville, North Carolina, and connected two aerial lines between these poles.

On 14 March 2011, CSX employee Donald Herring ("Mr. Herring") was operating a crane on the railroad tracks and struck one or more of the power lines crossing over the tracks. By the time Mr. Herring realized his crane would not pass under the power lines, it was too late for him to stop.

The parties' briefs present conflicting evidence of whether the height of PWC's lines complied with the elevation requirements contained in the Crossings Agreement. A CSX investigation concluded PWC's lines were hanging lower than required by the Crossings Agreement. CSX alleged in its complaint the power lines were hung no higher than eighteen feet, seven inches.

Conversely, PWC's engineer measured one of the power lines as twenty-seven feet, seven inches above the tracks. PWC also hired an independent electrical engineer who opined that the height of the power lines was in compliance with the Crossings Agreement.

The collision caused a power surge of electrical current into equipment owned by a third party, CenturyLink, through a "common ground" which connected PWC's and CenturyLink's lines. The power surge caused extensive damage to CenturyLink's equipment, including underground wiring and an above-ground utility pedestal. CenturyLink repaired its property and issued demands on CSX to pay for damages to CenturyLink's property purportedly caused by the power surge. CSX settled the CenturyLink claim by paying $118,000.00 in March 2013.

After CSX compensated CenturyLink, it sought indemnification from PWC pursuant to the indemnification provision within the Crossings Agreement. PWC denied CSX's claim for indemnification. On 11 March 2014, CSX filed a complaint against PWC, and alleged claims for: (1) breach of contract/contractual indemnity; (2) negligence/

gross negligence; (3) common law indemnity; (4) trespass; (5) private nuisance; and, (6) contribution. PWC responded by filing an answer, a counterclaim, and a third-party complaint against Time Warner Cable Southeast, LLC ("Time Warner").

In April 2015, PWC and Time Warner filed motions for summary judgment, and CSX filed a motion for partial summary judgment. The parties' motions were heard on 7 May and 12 May 2015 before the Honorable Tanya T. Wallace. The trial court granted Time Warner's motion for summary judgment and dismissed it from the case. No party appealed from this ruling and order. The parties stipulate Time Warner is not a party to this appeal.

On 28 May 2015, Judge Wallace entered a written order granting in part and denying in part CSX's motion for partial summary judgment. Judge Wallace concluded a genuine issue of material fact existed with regard to CSX's claim for indemnification, and denied CSX's motion for summary judgment on this issue. Judge Wallace granted CSX's motion for summary judgment on PWC's counterclaim, and dismissed the counterclaim with prejudice.

That same day, Judge Wallace also entered a written order, which granted in part and denied in part PWC's motion for summary judgment. Judge Wallace ruled as follows:

> 1. [PWC's] Motion for Summary Judgment as to [CSX's] first claim for relief, Count One: Indemnification, is denied.
>
> 2. The Crossing[s] Agreement does not require [PWC] to indemnify [CSX] for the negligence of [CSX] or its employees. This issue is resolved as a matter of law.
>
> 3. [PWC's] Motion for Summary Judgment as to all of [CSX's] remaining claims for relief is granted. [CSX's] claims for relief designated as Count Two: Negligence/Gross Negligence; Count Three: Common Law Indemnity; Count Four: Trespass; Count Five: Private Nuisance; and Count Six: Contribution are hereby dismissed with prejudice.

Judge Wallace denied PWC's motion for summary judgment on CSX's claim for indemnification after she determined a genuine issue of material fact existed with regard to CSX's negligence.

On 18 May 2015, the day trial was scheduled to begin before the Honorable Beecher Gray, CSX filed an admission of negligence. In light of CSX's admission of negligence, PWC orally renewed its motion for summary judgment on CSX's claim for indemnification that same day.

Judge Gray granted PWC's renewed motion for summary judgment based upon Judge Wallace's prior order, which had concluded as a matter of law PWC was not required to indemnify CSX for CSX's own negligence. This order was entered on 8 June 2015. CSX gave timely notice of appeal to this Court.

## II. Issue

CSX argues the trial court erred by granting summary judgment in favor of PWC. CSX contends the trial court incorrectly concluded that North Carolina law does not allow a party to be indemnified for its own negligence.

## III. Standard of Review

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

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

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

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

## IV. Analysis

### A. Indemnification

**[1]** Both parties stipulated during oral argument that North Carolina law permits a party to be indemnified for its own negligence, but disagree on the application of this principle to the facts here.

CSX argues: (1) that portion of Judge Wallace's 28 May 2015 order, which granted summary judgment in favor of PWC as a matter of law on the issue of whether the Crossings Agreement required PWC to indemnify CSX for its own negligence; and, (2) Judge Gray's subsequent order, which granted summary judgment in favor of PWC on CSX's claim for indemnification are based upon a misapprehension of North Carolina indemnity law. We agree.

In its 28 May 2015 order, the trial court stated:

> The Court further finds that, with regard to the issue of whether the indemnification agreement contained in the subject contract between the Parties . . . requires [PWC] to indemnify [CSX] for the negligence of [CSX] or [CSX]'s employees, there is no genuine issue of material fact and [PWC is] entitled to judgment as a matter of law.
>
> . . . .
>
> 2. The Crossing[s] Agreement does not require [PWC] to indemnify [CSX] for the negligence of [CSX] or its employees. This issue is resolved as a matter of law.

North Carolina courts have long upheld the validity and enforcement of indemnification provisions in contracts, whereby one party is required to reimburse another for claims paid to a third party. Our Supreme Court explained the purpose of indemnity provisions, and our courts' role in interpreting these provisions, as follows:

> An indemnity contract obligates the indemnitor to reimburse his indemnitee for loss suffered or to save him harmless from liability. Our primary purpose in construing a contract of indemnity is to ascertain and give effect

> to the intention of the parties, and the ordinary rules of construction apply. The court must construe the contract as a whole and an indemnity provision must be appraised in relation to all other provisions.

*Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008) (citations and internal quotation marks omitted).

Our Supreme Court has expressly recognized the right of a party to contractually provide for indemnification against its own negligence. *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965). The Court emphasized "[f]reedom of contract is a fundamental basic right" and held an indemnity clause which would allow defendant-company to be indemnified for its own negligence was valid and enforceable. The Court reasoned "[i]f the indemnity clause does not provide defendant indemnity against claims of the character of plaintiff's claim, it has no meaning or purpose. The indemnity applies to claims based on defendant's negligence for there is no other class of claims for which defendant would be responsible to [third-party's] employees[.]" *Id.* at 466, 144 S.E.2d at 399 (distinguishing exculpatory contracts, "whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts, and contracts of indemnity against liability imposed for the consequences of his negligent acts[]").

This Court also unequivocally recognized the right of contracting parties to provide for indemnification for one's own negligence. *Cooper v. H.B. Owsley & Son, Inc.*, 43 N.C. App. 261, 266-67, 258 S.E.2d 842, 846 (1979) (holding general contractor was required to indemnify crane owner for crane owner's own negligence pursuant to indemnification provision in contract); *Beachboard v. S. Ry. Co.*, 16 N.C. App. 671, 679, 193 S.E.2d 577, 582-83 (1972) (holding language of indemnity provision in contract obligated paper company to indemnify railroad where both railroad and paper company were found to have been negligent), *cert. denied*, 283 N.C. 106, 194 S.E.2d 633 (1973).

In *Beachboard*, a railroad employee was injured while working in a paper company's rail yard and sued his employer, the railroad, for his on-the-job injury. The railroad sought indemnification from the paper company pursuant to a contractual indemnification provision. The paper company contended the indemnification provision in its contract with the railroad was solely limited to instances in which the paper company was negligent, and because the railroad had "also been found guilty of negligence in this case, [the paper company] ha[d] no obligation to

indemnify it." *Id.* at 679, 193 S.E.2d at 582. We expressly rejected the paper company's argument because "[t]o adopt [the paper company's] interpretation effectively robs the indemnity clause of nearly all meaning." *Id.*

In *Cooper*, this Court analogized indemnification provisions to liability insurance policies, which "have long been enforced by the courts." *Cooper*, 43 N.C. App. at 266, 258 S.E.2d at 846. Rejecting the defendant's argument that it would be against public policy to permit the plaintiff to be indemnified against its own negligence, we noted "it is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence[.]" *Id.* at 267, 258 S.E.2d at 846 ("[Defendant] contends that it is against public policy to permit [plaintiff] to be indemnified against its own negligence or against that of its employee for which it is responsible. We perceive, however, no sound reason why this must be so.").

More recently, this Court, citing *Cooper*, explicitly rejected the notion that North Carolina does not permit the contractual indemnification of a party for its own negligent acts. *Malone v. Barnette*, __ N.C. App. __, __, 772 S.E.2d 256, 260-61 (2015). In *Malone*, this Court observed:

> This Court has expressly held that North Carolina public policy is not violated by an indemnity contract that provides for the indemnification of a party against the consequences of its own negligent conduct, particularly when the agreement is made "at arms [sic] length and without the exercise of superior bargaining power." *Cooper v. H.B. Owsley & Son, Inc.*, 43 N.C. App. 261, 267, 258 S.E.2d 842, 846 (1979). We further noted that the enforcement of such provisions "would have no greater tendency to promote carelessness on the part of the indemnitee than would enforcement against the insurer of a policy of liability insurance" and recognized that "the occasion for the indemnitee seeking indemnity would not arise unless it had itself been guilty of some fault, for otherwise no judgment could be recovered against it." *Id.* at 266-68, 258 S.E.2d at 846 (citation and brackets omitted).

*Malone*, __ N.C. App. at __, 772 S.E.2d at 260 (footnote omitted); *see also Kirkpatrick & Assocs., Inc. v. Wickes Corp.*, 53 N.C. App. 306, 310, 280 S.E.2d 632, 635 (1981) (citation omitted) (holding plaintiff's admission of negligence did not bar its claim for recovery based upon indemnity clause because "[d]efendant's ultimate liability to plaintiff is in contract,

not in tort[]"); *Hargrove v. Plumbing and Heating Serv. of Greensboro, Inc.*, 31 N.C. App. 1, 7, 228 S.E.2d 461, 465 (holding that indemnification provision provided for full indemnity for all negligence, including any negligence on the part of the indemnitee), *disc. review denied*, 291 N.C. 448, 230 S.E.2d 765 (1976).

Here, the trial court granted summary judgment in favor of PWC on the grounds that CSX had admitted its negligence in causing or contributing to the incident, which gave rise to CenturyLink's claim, and this admission barred CSX from receiving indemnification from PWC as a matter of law. As discussed supra, this conclusion is contrary to well-established North Carolina law. The trial court's conclusion of law was incorrect and summary judgment entered upon this erroneous conclusion was improper. The trial court's 8 June 2015 order, which granted summary judgment in favor of PWC as a result of CSX's admitted negligence, is reversed.

B. Enforceability of the Indemnity Provision

**[2]** Both parties also stipulated at oral argument that the language of the indemnity provision in the Crossings Agreement is not ambiguous and should be interpreted by this Court as a matter of law. CSX contends the second phrase in the indemnification provision, which requires indemnification where the injury is "by reason of the exercise of any of the privileges conferred by this license or agreement[,]" mandates indemnification for the situation at bar. CSX reasons the only "privilege[] conferred" by the agreement was to allow PWC to place power lines over the railroad tracks. CSX argues if not for, or "but for," the presence of the power lines above the railroad tracks, which exist only as a result of PWC's exercise of its privilege under the license granted, CSX's crane would not have hit PWC's power lines and damaged CenturyLink's equipment.

"A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law." *Schenkel & Shultz*, 362 N.C. at 273, 658 S.E.2d at 921.

> As in the construction of any contract, the court's primary purpose in construing a contract of indemnity is to ascertain and give effect to the intention of the parties, and the ordinary rules of construction apply. It will be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties, but it cannot be extended to cover any losses which are neither expressly within its terms

> nor of such character that it can reasonably be inferred that they were intended to be within the contract.

*Dixie Container Corp. v. Dale*, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968) (citations and internal quotation marks omitted).

The language in the Crossings Agreement provides for indemnification for damage "which may be incurred by the Railroad Company *by reason of* the construction, maintenance, use or operation of the said conductors, wires or supports, or *by reason of* the exercise of any of the privileges conferred by this license or agreement." (emphasis supplied).

PWC forcefully argues "by reason of" does not mean "but for," and is more akin to a proximate causation requirement. PWC asserts it is only required to indemnify CSX for injuries incurred "by reason of," or caused by, the construction, maintenance, use, or operation of PWC's equipment. We disagree with this narrow interpretation. *See One Beacon Ins. Co. v. United Mech. Corp.*, 207 N.C. App. 483, 488, 700 S.E.2d 121, 124-25 (2010) (interpreting "arising from or relating to, and by reason of" language in indemnity provision as synonymous with "stemm[ing] from"). If this Court were to accept PWC's interpretation of the indemnification provision, it would "effectively rob[] the indemnity clause of nearly all meaning." *Beachboard*, 16 N.C. App. at 679, 193 S.E.2d at 582.

Moreover, there is a want of authority to support PWC's assertion that "by reason of" is synonymous with "caused by" or "proximately caused by." Although "by reason of" has never expressly been defined by North Carolina's appellate courts, the United States Court of Appeals for the First Circuit interpreted the phrase "by reason of" in an indemnification provision and held: "[W]e consider the language unambiguous: 'by reason of' means 'because of,' and thus necessitates an analysis at least approximating a 'but-for' causation test." *Pac. Ins. Co., Ltd. v. Eaton Vance Mgmt.*, 369 F.3d 584, 589 (1st Cir. 2004) (citing Black's Law Dictionary 201 (6th ed. 1990); *see also* Webster's Third New Int'l Dictionary 307 (1993) (defining "by virtue of" to mean "by reason of").

The Crossings Agreement was an arm's length, bargained-for exchange between two equally sophisticated parties. The language in the indemnification provision, which both parties concede is unambiguous, was granted as consideration for, and as a result of, PWC's power lines being installed and maintained over CSX's railroad tracks. This provision allows CSX to be indemnified for damages paid to CenturyLink, because the damage was "by reason of," or "by virtue of," PWC's exercise of its privilege, *i.e.* hanging power lines above the railroad tracks.

In other words, but-for, or "stemm[ing] from," PWC's exercise of its privilege and license pursuant to the Crossings Agreement, CenturyLink's equipment would not have been damaged as a result of CSX's crane colliding with PWC's power lines. *See One Beacon Ins. Co.*, 207 N.C. App. at 488, 700 S.E.2d at 124-25. Under the agreement, CSX is entitled to indemnification from PWC, even though damages resulted from CSX's own negligence. On *de novo* review, CSX's motion for partial summary judgment on its claim for contractual indemnity is granted.

## V. Conclusion

The trial court erroneously concluded CSX was barred from recovering indemnification from PWC because of CSX's admission of negligence in the harm caused to CenturyLink.

That portion of Judge Wallace's order entered 28 May 2015, which: (1) granted summary judgment in favor of PWC on whether the Crossings Agreement required PWC to indemnify CSX for its own negligence as a matter of law; and, (2) denied CSX's motion for partial summary judgment on its contractual indemnity claim is reversed. Upon *de novo* review, CSX's motion for partial summary judgment on its contractual indemnity claim is granted.

Judge Gray's order entered 8 June 2015, following CSX's admission of negligence, which granted summary judgment in favor of PWC as to CSX's claim for indemnification is reversed. This cause is remanded to the trial court for further proceedings and entry of judgment consistent with this opinion.

REVERSED AND REMANDED.

Judges CALABRIA and HUNTER, JR. concur.

[247 N.C. App. 528 (2016)]

IN THE MATTER OF A.C.

No. COA15-1114

Filed 17 May 2016

**Child Custody and Support—infant left in care of aunt—no meaningful interaction or support from mother—behavior inconsistent with status as parent—substantial change in circumstances—best interest of child**

Where respondent-mother had left her infant daughter "April" in the care of April's maternal aunt from May 2012 to December 2014 and made very little effort to have meaningful interaction with April or provide for her financially, the Court of Appeals affirmed the trial court's "Review Order" granting sole legal and physical custody of April to her aunt and scheduling a permanency planning hearing. The trial court did not err by considering facts at issue in light of prior events; by concluding that the mother had acted in a manner inconsistent with her constitutionally protected paramount status as a parent; by concluding that a substantial change of circumstances had occurred to warrant a modification of the earlier permanent custody order when the mother abruptly removed April from the care of her aunt; and by concluding that awarding the sole care, custody, and control of April to her aunt was in the best interest of the child.

Appeal by respondent-mother from order entered on or about 15 July 2015 by Judge Andrea F. Dray in District Court, Buncombe County. Heard in the Court of Appeals 18 April 2016.

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

*Sydney Batch, for respondent-appellant.*

*Leake & Stokes, by Jamie A. Stokes, for intervenor-appellee.*

*Amanda Armstrong, for guardian ad litem.*

STROUD, Judge.

Respondent-mother appeals from a "Review Order" granting sole legal and physical custody of her daughter "April"[1] to April's maternal aunt ("intervenor") and scheduling a permanency planning hearing in accordance with N.C. Gen. Stat. § 7B-906.1(a) (2015). We affirm.

April was born out of wedlock to respondent-mother and respondent-father in November 2011. Respondent-father has a history of involvement with Buncombe County Department of Social Services ("DSS") stemming from his substance abuse and reports of sexual abuse involving his three older daughters, who are April's half-sisters. Respondent-father's three daughters had been adjudicated neglected in 2003 and were in the custody of their paternal grandmother at the time of April's birth.

On 2 May 2012, DSS received a child protective services ("CPS") report regarding April and her half-sisters. An investigation revealed that respondent-father, respondent-mother, and April had moved into the home of the paternal grandmother in violation of a court order prohibiting unsupervised contact between respondent-father and his three older daughters.

Rather than obtain a separate residence from respondent-father, respondent-mother agreed to place five-month-old April in kinship care with intervenor on 4 May 2012. DSS did not seek nonsecure custody of the child but filed a petition alleging she was a neglected juvenile on 24 August 2012. The petition summarized respondent-father's CPS history and alleged that the paternal grandmother had revealed respondent-father was bathing with April "all the time" in her home. The paternal grandmother also acknowledged that two of April's half-sisters had previously disclosed sexual abuse by respondent-father after bathing with him.

Respondent-mother gave birth to April's sister "Megan"[2] in October 2012. Megan immediately joined her sister in a kinship placement with intervenor.

The trial court adjudicated April a neglected juvenile in March 2013. At disposition, the court found that respondent-father was incarcerated for violating probation and had "abused drugs while living in the home with respondent mother." The court maintained respondents' legal custody of April but concluded that she should remain in her placement

---

1. The parties stipulate to the use of this pseudonym to protect the juvenile's identity.

2. We use this pseudonym to protect the juvenile's identity.

with intervenor. The court concluded that respondent-mother "is capable of providing proper care and supervision for [April] in a safe home when the respondent father is not in the home." It ordered that respondent-mother have one hour per week of supervised visitation with April and authorized additional supervised or unsupervised visitation for respondent-mother at the discretion of the Child and Family Team "so long as respondent father is not in the home." The court subsequently established a permanent plan for April of "prevention of out of home placement."

At a review hearing on 6 November 2013, and by written order entered 24 January 2014, the trial court granted sole legal and physical custody of April to respondent-mother. Though noting that respondent-mother "has not taken advantage of [her] opportunity to visit with [April,]" the court found she was residing with April's maternal grandfather, had full-time employment, and was scheduled to begin parenting classes. Respondent-mother had also obtained a domestic violence protective order against respondent-father. Because "[t]he conditions that led to the involvement of [DSS] have been addressed[,]" the court concluded that "the respondent mother is willing and able to provide adequate care [of April] in a safe environment[.]" Respondent-mother was ordered to complete a parenting class and "engage in mental health counseling with [April] and follow all treatment recommendations." The court granted respondent-father one hour of visitation per week at the Family Visitation Center. The court waived further review hearings and relieved DSS of its responsibilities in the case but retained jurisdiction pursuant to N.C. Gen. Stat. § 7B-201 (2013).

Despite receiving sole legal and physical custody of April in November 2013, respondent-mother left the child in intervenor's care. On 29 October 2014, respondent-father filed a motion in the cause to enforce his visitation rights as established by the 24 January 2014 review order. The trial court entered an order on 11 December 2014, reopening the case and setting respondent-father's motion for hearing the week of 9 February 2015.

On 19 December 2014, respondent-mother and her boyfriend ("Mr. C.") drove to April's daycare, presented a copy of the 24 January 2014 review order, and removed April. The daycare staff contacted intervenor, who asked respondent-mother to bring April home. Respondent-mother refused and informed intervenor that she also intended to take custody of Megan. Intervenor agreed to meet respondent-mother at the Madison County Sheriff's Department the following day to surrender Megan.

When intervenor arrived at the sheriff's office with Megan, respondent-mother had been jailed on an outstanding warrant for nonpayment of child support owed to intervenor. Respondent-mother refused to allow April and Megan to return to intervenor's care and directed that they be given to their maternal grandmother. Respondent-mother was released from jail later that day when Mr. C. paid her outstanding child support balance of $2,675.55.

On 22 December 2014, intervenor filed a complaint in the District Court in Madison County seeking immediate, temporary, and permanent custody of April and Megan. The court entered an *ex parte* order granting immediate custody to intervenor on 22 December 2014. At a hearing on 2 January 2015, however, the court determined that it lacked jurisdiction over April in light of the pending proceedings in Buncombe County. The court granted intervenor temporary legal and physical custody of Megan, finding that respondent-mother and respondent-father had "abandoned" Megan. April was restored to respondent-mother's physical custody on 2 January 2015.

On or about 6 January 2015, intervenor filed a "Motion to Reopen, Motion to Intervene, and Motion in the Cause for Child Custody" in the juvenile proceeding in Buncombe County. (Original in all caps.) The motion alleged "a substantial change in circumstances" since the 24 January 2014 order granted respondent-mother sole custody of April. Intervenor claimed respondent-mother and respondent-father had "abrogated their constitutionally protected paramount status as the parents of [April]" and were each unfit to care for her.

On 7 January 2015, the trial court entered an *ex parte* order granting intervenor immediate custody of April but later struck its order and returned April to respondent-mother after a hearing on 21 January 2015. The court subsequently allowed intervenor's motion to intervene as April's caretaker under N.C. Gen. Stat. § 7B-401.1(e) (2015), but maintained April in respondent-mother's custody pending a hearing on intervenor's motion in the cause. On 11 March 2015, the District Court in Madison County granted respondent-mother eight hours per week of supervised visitation with Megan but maintained Megan in intervenor's legal and physical custody.

The District Court in Buncombe County heard twelve days of evidence and argument between 26 March and 27 May 2015 on the intervenor's motion to modify custody of April. On 24 April 2015, the trial court entered an interim order granting intervenor weekend visitation with April. On or about 15 July 2015, the trial court entered a "Review Order"

granting intervenor "the sole legal and physical custody of [April]" and scheduling a permanency planning hearing for the 2 November 2015 term. Based on detailed findings of fact spanning fourteen pages and seventy-four numbered paragraphs, the court concluded that (1) since being awarded sole legal and physical custody of April on 6 November 2013, respondent-mother "has acted in a manner inconsistent with her constitutionally protected paramount status as a parent of [April;]" (2) "[t]here has been a substantial change in circumstances affecting the general welfare and best interest of [April]" since the Review Order [rendered] at the [6 November] 2013 hearing[;]" (3) respondent-mother is "unfit at this time to exercise the primary physical custody of [April;]" and (4) "it is in the best interest of [April] that her sole care, custody and control should be awarded to the intervenor . . . subject to visitation with the respondent parents[.]" Respondent-mother filed timely notice of appeal pursuant to N.C. Gen. Stat. § 7B-1001(a)(4) (2015).

## I. <u>Standards of Review</u>

When the trial court awarded respondent-mother sole legal and physical custody of April on 24 January 2014, it did not enter a civil custody order pursuant to N.C. Gen. Stat. § 7B-911 (2013), but retained juvenile court jurisdiction pursuant to N.C. Gen. Stat. § 7B-201 (2013). By allowing April's caretaker to intervene and seek custody of April from respondent-mother, the court was obliged to resolve a custody dispute between a parent and a nonparent in the context of a proceeding under Chapter 7B. *See*, *e.g.*, *In re B.G.*, 197 N.C. App. 570, 571-75, 677 S.E.2d 549, 550-53 (2009). Our review of the 15 July 2015 "Review Order" thus requires recourse to legal principles typically applied in custody proceedings under N.C. Gen. Stat. Chapter 50, in addition to those governing abuse, neglect, and dependency proceedings under Chapter 7B.

The following standard of review applies to a trial court's order entered after a review hearing under N.C. Gen. Stat. § 7B-906.1:

> Our review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. The trial court's findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings. In choosing an appropriate permanent plan under N.C. Gen. Stat. § 7B-906.1 (2013), the juvenile's best interests are paramount. We review a trial court's determination as to the best interest of the child for an

> abuse of discretion. Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.

*In re J.H.*, ___ N.C. App. ___, ___, 780 S.E.2d 228, 238 (2015) (citations and quotation marks omitted). Unchallenged findings of fact are deemed to be supported by the evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Moreover, erroneous findings that are unnecessary to support the trial court's conclusions of law may be disregarded as harmless. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240-41 (2006).

The U.S. Constitution's Due Process Clause protects a "parent's paramount constitutional right to custody and control of his or her children." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001). This protection ensures that "the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody . . . or where the parent's conduct is inconsistent with his or her constitutionally protected status[.]" *Id.* (citations omitted). "While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011).

The Due Process Clause further requires that "a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence."[3] *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (citing *Santosky v. Kramer*, 455 U.S. 745, 747-48, 71 L. Ed. 2d 599, 603 (1982)). "The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721, 693 S.E.2d 640, 643 (2009) (citations and quotation marks omitted), *cert. denied*, 563 U.S. 988, 179 L. Ed. 2d 1211 (2011). Our inquiry as a reviewing court is " 'whether the evidence presented is such that a [fact-finder] applying that evidentiary standard could reasonably find' " the fact in question. *Id.*, 693 S.E.2d at 644 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986)).

---

3. We note the trial court made all of its findings of fact by the requisite "clear, cogent and convincing evidence" standard. (Original in bold and all caps.) *Cf. David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 754 (2005) ("remand[ing] for findings of fact consistent with this standard").

## II. Evidence of Prior Events

Respondent-mother first claims that the trial court erred in relying on "irrelevant evidence" to support its conclusions of law that she acted inconsistently with her constitutionally protected status as a parent, that she was unfit to have custody of April, and that there had been a substantial change in circumstances since the 24 January 2014 review order. (Original in all caps.) She contends that the court wrongly considered evidence of events occurring prior to 6 November 2013—the date on which she obtained sole legal and physical custody of April—in reaching its conclusions of law. Because the court had already accounted for these prior events in its 24 January 2014 review order, respondent-mother argues that the same evidence could not then be used to modify custody. Therefore, according to respondent-mother, "the relevant time frame in this case is 6 November 2013 to [6] January 2015"—the approximate date intervenor filed her motion in the cause.

The "substantial change in circumstances" standard applies to a motion to modify a civil custody order under N.C. Gen. Stat. § 50-13.7(a) (2015), which requires "a showing of changed circumstances by either party or anyone interested." *See Andrews v. Andrews*, 217 N.C. App. 154, 157, 719 S.E.2d 128, 130 (2011) ("Our case law has interpreted this standard to require a showing of a substantial change in circumstances affecting the welfare of the child." (citation and quotation marks omitted)), *disc. review denied*, 365 N.C. 561, 722 S.E.2d 595 (2012). The controlling statute here, N.C. Gen. Stat. § 7B-1000(a) (2015), provides in pertinent part:

> Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances *or the needs of the juvenile.*

(Emphasis added.) In construing substantively identical language in former N.C. Gen. Stat. § 7A-664(a), we held that the statute authorized the court to modify a custody order upon a change in circumstances or "upon a showing that the needs of the juvenile had changed such that it was in her best interest that the order be modified[.]" *In re Botsford*, 75 N.C. App. 72, 75, 330 S.E.2d 23, 25 (1985).

Nonetheless, we agree with respondent-mother that the burden fell upon intervenor to demonstrate "changes" warranting a modification of the custody arrangement established by the 24 January 2014 review

order. *See* N.C. Gen. Stat. § 7B-1000(a). By definition, such changes must have either occurred or come to light subsequent to the establishment of the *status quo* which intervenor sought to modify. *See Hensley v. Hensley*, 21 N.C. App. 306, 307, 204 S.E.2d 228, 229 (1974) (requiring a "showing that circumstances have changed between the time of the [custody] order and the time of the hearing on [the] motion [to modify]"); *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979) (allowing court to consider "facts pertinent to the custody issue [which] were not disclosed to the court at the time the original custody decree was rendered"). Here, the trial court awarded respondent-mother legal and physical custody of April at the 6 November 2013 review hearing, and entered the attendant review order on 24 January 2014.

However, in assessing whether a change had occurred, the trial court was free to consider the historical facts of the case in assessing what occurred after respondent-mother was awarded custody of April. While a court may not rely on prior events to find changed circumstances, it may certainly consider facts at issue in light of prior events. *Cf. Cantrell v. Wishon*, 141 N.C. App. 340, 344, 540 S.E.2d 804, 806-07 (2000) ("[T]he trial court erroneously placed *no* emphasis on the mother's past behavior, however inconsistent with her rights and responsibilities as a parent[;] . . . . failed to consider the long-term relationship between the mother and her children; . . . and failed to make findings on the mother's role in building the relationship between her children and the [nonparent custodians].").

Insofar as respondent-mother faults the trial court for considering evidence and making findings about events that occurred prior to 6 November 2013, we find her objection without merit. Respondent-mother's blanket exception to "[f]indings of fact 16-19, 31-32, parts of 33, and parts of 40" is overruled. *Cf. In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001) (holding that a "broadside exception that the trial court's conclusion of law is not supported by the evidence, does not present for review the sufficiency of the evidence to support the entire body of the findings of fact").

### III. Respondent-Mother's Constitutionally Protected Status

Respondent-mother next challenges the trial court's conclusions that she "has acted in a manner inconsistent with her constitutionally protected paramount status as a parent" and that she was unfit to have primary physical custody of April. We review these conclusions of law *de novo*. *See Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010).

"[P]arents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child." *Cantrell*, 141 N.C. App. at 342, 540 S.E.2d at 806. "So long as a parent has this paramount interest in the custody of his or her children," the parent's interest prevails in any custody dispute with a nonparent, regardless of the best interests of the child. *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503; *accord Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). However, "[a] parent loses this paramount interest if he or she is found to be unfit or acts inconsistently with his or her constitutionally protected status." *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503 (citation and quotation marks omitted); *see also Cantrell*, 141 N.C. App. at 342, 540 S.E.2d at 806 ("[A] parent may lose the constitutionally protected paramount right to child custody if the parent's conduct is inconsistent with this presumption or if the parent fails to shoulder the responsibilities that are attendant to rearing a child."). Once a parent cedes his or her protected status, custody issues must be resolved based on the best interests of the child. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534-35 (1997).

### A. <u>Action Inconsistent with Constitutionally Protected Status</u>

"[T]here is no bright line beyond which a parent's conduct" amounts to action inconsistent with the parent's constitutionally protected paramount status. *Boseman*, 364 N.C. at 549, 704 S.E.2d at 503. Our Supreme Court has emphasized the "fact-sensitive" nature of the inquiry, as well as the need to examine each parent's circumstances on a "case-by-case basis[.]" *See id.* at 550, 704 S.E.2d at 503 ("[D]etermining whether the trial court erred is a fact-sensitive inquiry[.]"); *Price*, 346 N.C. at 79, 484 S.E.2d at 534-35 ("Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents."). The court must consider "both the legal parent's conduct and his or her intentions" *vis-à-vis* the child. *Estroff v. Chatterjee*, 190 N.C. App. 61, 70, 660 S.E.2d 73, 78-79 (2008).

#### 1. <u>Respondent-mother's conduct</u>

In *Price v. Howard*, the court articulated the following principle that guides our determination of whether respondent-mother's actions were inconsistent with her constitutionally protected status:

> [T]he legal right of a parent to custody may yield to the interests of the child where the "parent has voluntarily permitted the child to remain continuously in the custody

> of others in their home, and has taken little interest in [the child], thereby substituting such others in his own place, so that they stand *in loco parentis* to the child, and continuing this condition of affairs for so long a time that the love and affection of the child and the foster parents have become mutually engaged, to the extent that a severance of this relationship would tear the heart of the child[] and mar his happiness[.]"

*Price*, 346 N.C. at 75, 484 S.E.2d at 532 (quoting *In re Gibbons*, 247 N.C. 273, 280, 101 S.E.2d 16, 21-22 (1957)). Likewise, in *Boseman v. Jarrell*, the court held that "if a parent cedes paramount decision-making authority, then, so long as he or she creates no expectation that the arrangement is for only a temporary period, that parent has acted inconsistently with his or her paramount parental status." *Boseman*, 364 N.C. at 552, 704 S.E.2d at 504. The *Price* Court recognized, however, "there are circumstances where the responsibility of a parent to act in the best interest of his or her child would require a temporary relinquishment of custody, such as under a foster-parent agreement or during a period of service in the military, a period of poor health, or a search for employment." *Price*, 346 N.C. at 83, 484 S.E.2d at 537. When this kind of temporary arrangement is necessary, the parent nonetheless bears some responsibility for preserving his or her constitutionally protected status:

> [T]he parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary, and the parent should avoid conduct inconsistent with the protected parental interests. Such conduct would, of course, need to be viewed on a case-by-case basis, but may include failure to maintain personal contact with the child or failure to resume custody when able.

*Id.* at 83-84, 484 S.E.2d at 537.

The trial court made the following findings of fact[4] regarding respondent-mother's conduct after being awarded custody of April in November 2013:

---

4. Throughout her second argument in her appellant's brief, respondent-mother objects generally to many of the trial court's enumerated findings of fact, to wit: "[F[inding[s] of fact 61-65[;] . . . . "finding[s] of fact 22-24 [and] 43[;] . . . . [f]inding of fact 64[;]" . . . . [f]inding of fact 21[;] . . . . findings 25-28[;] . . . [f]indings of fact 37-38[; and] . . . . [f]indings of fact 30-34, and 36[.]" Each of these numbered findings consist of multiple evidentiary facts in paragraphs of varying length. Finding of Fact 61, for example, consists of twenty-one lines of single-spaced text. The great majority of respondent-mother's

6. The intervener became the caretaker for the juvenile [April] on May 4, 2012, pursuant to a kinship placement. . . . [April] was five months old at the time of placement with the intervener.

. . . .

9. At the time of the filing of the Juvenile Petition, in August 2012, the respondent mother was pregnant with [Megan]. Upon her birth, [Megan] was immediately placed with the intervener by [DSS] with the consent of the respondent parents.

. . . .

13. Pursuant to a Review Order entered at the November 6, 2013[] term of Buncombe County Juvenile Court (hereafter "the Review Order"), sole legal and physical custody of [April] was returned to the respondent mother . . . . The juvenile court retained jurisdiction over [April]. The respondent mother was ordered to engage in and complete a parenting class; engage in mental health counseling with the minor child and follow all treatment recommendations; and continue family counseling with the minor child.

14. The respondent mother did complete the . . . parenting course on December 2, 2013. She initiated counseling with Ilene Procida . . . on November 18, 2013, but according to Ms. Procida's records, she only attended one session in person in 2013. Ms. Procida's records noted a phone call from the respondent mother in December 2013, along with a note at that time that services were being discontinued. . . . There is no evidence that the respondent mother engaged in any counseling services from the time of that call through the end of 2014.

. . . .

---

objections amount to the claim that the trial court should have credited her testimony, rather than the testimony of intervenor and other witnesses. Issues of credibility and the weight to be given to witness testimony "must be resolved by the trial court and are not a basis for overturning a finding of fact." *Elliott v. Muehlbach*, 173 N.C. App. 709, 714, 620 S.E.2d 266, 270 (2005). Absent a more particularized argument as to particular facts, we decline to review the findings alluded to in respondent-mother's broadside exceptions. *Cf. Beasley*, 147 N.C. App. at 405, 555 S.E.2d at 647.

16. The respondent mother's family, and specifically the intervener and both of her parents, . . . significantly supported the respondent mother in 2013 and made it possible for [her] to meet all criteria necessary to regain legal custody of [April]. The intervener provided the respondent mother with a job at the Turkey Creek Café, which the intervener co-owned. [Her father] provided the respondent mother with free housing. All three relatives supervised the respondent mother's visits with [April] under the juvenile court's orders. Because the respondent mother had no transportation during 2013, all three relatives provided the respondent mother transportation to therapy sessions, parenting classes, visitations, work, and essentially anywhere else [she] needed to go.

. . . .

21. On November 6, 2013, the respondent mother did not make any effort to pick up [April] or otherwise take physical custody of her; did not articulate a plan to the intervener regarding how to transition custody back to her; and did not provide the intervener with any date or other anticipated length of time after which she intended to assume physical custody of the juvenile. Despite the intention of the respondent mother to leave the juvenile with the intervener and not assume custody, she did not provide the intervener with any legal mechanism to provide medical or educational care for the child, such as a power of attorney.

22. Following the entry of the Review Order, [April] remained in the physical custody of the intervener for more than thirteen (13) additional months, until December 19, 2014. During this time period, the respondent mother did not spend any overnights with the juvenile that were not supervised by one of her family members, in the home of a family member.[5]

5. Respondent-mother objects to the trial court's use of the word "supervised" in this finding of fact. But the trial court did not suggest that respondent-mother's visits were pursuant to supervised visitation and properly recognized that respondent-mother had been awarded custody at the 6 November 2013 hearing. The trial court used the word "supervised" to indicate that respondent-mother did not spend an overnight visit with the juvenile alone or remove her from the family member's home during these overnight visits.

23. From November 6, 2013, until December 19, 2014, the respondent mother only sporadically visited with [April] and did not adhere to any set visitation schedule. She would on occasion interact with [April] and [Megan] during her work hours at the Turkey Creek Café until her employment there ended in January of 2014. When her employment there ended, the respondent mother would occasionally text the intervener in an effort to schedule a visit with little notice . . . . The respondent mother rarely visited the juvenile for more than a half hour to an hour per week during this time period, and at times would go weeks without visiting with her. The respondent mother and her boyfriend [Mr. C.] took [April] and [Megan] away from a family member's home for unsupervised time for a few hours on only two occasions during this period.

24. From November 6, 2013, until December 19, 2014, the respondent mother did not regularly call the intervener to speak to [April] or [Megan]. She would sporadically text the intervener to ask "How's my girls?", but such texts were not on a regular basis.

25. From November 6, 2013, until December 19, 2014, the respondent mother did not provide any financial assistance to either the intervener or her parents for the benefit of [April]. On a few rare occasions, she brought clothes or diapers to the intervener for [April]. She was not regularly paying child support, as is evidenced by an order for arrest issued for the respondent mother for outstanding child support in the amount of $2,675.55 in Madison County file number 13 CVD 198. When [she was] arrested on that order on December 20, 2014, [Mr. C.] was able to . . . pay the amount of child support arrears in full on that same date.

26. From November 6, 2013, until approximately July 2014, the respondent mother was living rent-free with family members and friends and had no vehicle and thus no transportation costs. She was sporadically employed during this period of time. When asked by her father . . . around December of 2013 to assist with the increased utility costs after she moved into his home, the respondent mother refused, stating that she needed to help [Mr. C.] make his truck payment. The respondent mother and [Mr. C.]

spent at least two weekends in a hotel in Pigeon Forge, Tennessee, in late 2013 or early 2014, and the respondent mother paid for both [Mr. C.'s] and his friend's hotel room and restaurant meals during one of those weekends[.] . . . The respondent mother has maintained gainful employment . . . from June 2014 through this hearing.

27. From November 6, 2013, until December 19, 2014, the respondent mother was able-bodied, capable of maintaining gainful employment, and owed a duty of support to [April].

28. From November 6, 2013, until December 19, 2014, the intervener provided for all of [April's] needs, as well as [Megan's] needs, with assistance from [April's] maternal grandparents during her working hours. The intervener fed, clothed, and cared for the daily needs of [April] during this time. The intervener enrolled the juvenile in day care[,] . . . enrolled the juvenile in a dance class, and nurtured the juvenile's love of horses by purchasing her a horse and regularly attending horse shows with [April] and [Megan]. Either the intervener or one of her parents handled all medical appointments for [April] during this time.

. . . .

62. The respondent mother voluntarily allowed custody of [April] to remain with the intervener for an indefinite period of time following the return of legal custody to her on November 6, 2013, with no notice to the intervener that such relinquishment of custody would only be temporary. She failed to advise the intervener of an end date to the intervener's period of custody, failed to establish a transitional plan with the intervener regarding her resumption of custody, and failed to notify the intervener in a clear and definite manner that she intended to resume custody of [April]. The respondent mother induced the intervener, [April], and [Megan] to flourish as a family unit in a relationship of love and duty with no expectation that it would be terminated.

63. The intervener and the respondent mother never agreed that the surrender of [April's] custody to the intervener would be temporary.

> 64. The respondent mother was legally and physically able to resume custody of [April] on November 6, 2013, and she induced the court to believe the same by accepting the award of custody from the court on that date. By failing to resume custody when she was able on November 6, 2013, the respondent mother acted in a manner inconsistent with her constitutionally protected paramount status as a parent.

The order's conclusions of law repeat the court's determination that respondent-mother "has acted in a manner inconsistent with her constitutionally protected paramount status as a parent of the minor child [April]."

As in *Price*, this case involves a voluntary act of the parent resulting in a "relatively lengthy period of nonparent custody[.]" *Price*, 346 N.C. at 82, 484 S.E.2d at 536 (citing *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976)). Respondent-mother's conduct since obtaining sole legal and physical custody of April on 6 November 2013 represents an abdication of her parental role.

Respondent-mother contends she was not prepared to assume physical custody of April on 6 November 2013, notwithstanding her representations to the trial court at the time. The 24 January 2014 review order includes explicit findings that respondent-mother "is willing and able to provide adequate care in a safe environment" for April and that she "has adequate resources" to do so. Respondent-mother is estopped to re-litigate the issue of her circumstances as of 6 November 2013 at a subsequent hearing on intervenor's motion to modify custody in 2015. *See Newsome*, 42 N.C. App. at 425, 256 S.E.2d at 854. By her own account, respondent-mother was "completely honest with the Court" about her housing situation when she testified at the 6 November 2013 review hearing. She cannot now claim her housing "was not big enough" for April. *See id.* ("[A] prior decree is not res judicata as to those facts *not before the court*." (emphasis added)).

Respondent-mother challenges the trial court's findings that she visited April and asked intervenor about her only "sporadically" between 6 November 2013 and 19 December 2014. These findings are amply supported by intervenor's testimony and the testimonies of April's maternal grandmother and grandfather, who kept April for intervenor on alternate weekends.[6] Respondent-mother's assertion that she maintained

---

6. The grandmother and grandfather are separated.

"extensive and consistent" contact with April is flatly contradicted by the accounts of these witnesses. (Original in italics.) The trial court was entitled to weigh this competing evidence and determine the credibility of each witness. *In re Hughes*, 74 N.C. App. 751, 759, 330 S.E.2d 213, 218 (1985). The court was further entitled to view respondent-mother's lack of engagement with April as conduct inconsistent with her constitutionally protected status as parent. *See McRoy v. Hodges*, 160 N.C. App. 381, 387, 585 S.E.2d 441, 445 (2003).

Respondent-mother also objects to the findings regarding her failure to provide intervenor with financial support for April's care. She notes that "April's needs were appropriately met" at all times after respondent-mother obtained sole custody of the child on 6 November 2013. (Original in italics.) Regardless of intervenor's performance in caring for April, respondent-mother's failure to provide financial support for her child was properly considered in determining whether she had acted inconsistently with her constitutionally protected status. *See Price*, 346 N.C. at 77, 484 S.E.2d at 533 (discussing *Lehr v. Robertson*, 463 U.S. 248, 262, 77 L. Ed. 2d 614, 627 (1983)). Respondent-mother's assertion that she provided assistance to intervenor "[w]hen financially able to do so" is contradicted by the testimony of both intervenor and April's grandfather. The court was entitled to credit the version of events provided by these witnesses. Its findings are also corroborated by respondent-mother's arrest for non-payment of child support in December 2014.

We find unavailing respondent-mother's reliance on our decision in *Grindstaff v. Byers*, 152 N.C. App. 288, 567 S.E.2d 429 (2002). The father in *Grindstaff*—who "was working two jobs and did not have adequate room for the children"—signed a formal custody agreement placing the children in the care of their maternal grandmother. *Id.* at 290, 567 S.E.2d at 430. The agreement did not specify a duration but was understood by all parties to be temporary. *Id.* at 296, 567 S.E.2d at 434. Nine months later, when respondent-father refused to return the children to the grandmother after a visitation, she filed an action for custody. *Id.* at 290-91, 567 S.E.2d at 430-31. Reversing an order granting custody to the grandmother, we found "no evidence in the record[] that the [father] acted inconsistent[ly] with his constitutionally protected status." *Id.* at 298, 567 S.E.2d at 435. We noted that the father "maintained or attempted to maintain contact and support for his children, and that he resumed custody when his circumstances permitted." *Id.* at 297, 567 S.E.2d at 434. The "overwhelming evidence" showed that the father "supported the children financially," kept in contact through regular visitation and phone calls, attended the children's medical appointments, provided

their health insurance, and paid for their daycare. *Id.* at 297-98, 567 S.E.2d at 434-35.

As recounted in the trial court's findings, respondent-mother's actions stand in stark contrast to the conduct of the father in *Grindstaff*. Respondent-mother placed April with intervenor in May 2012, rather than live apart from her then-boyfriend. She allowed April's newborn sister Megan to join April in intervenor's home in October 2012. Rather than reclaim April on 6 November 2013, respondent-mother left her and her younger sister in intervenor's uninterrupted care until 19 December 2014. During this period, respondent-mother had little meaningful interaction with April and made no effort to provide for her financially. Respondent-mother thus "not only created the family unit that [intervenor] and the child have established, but also induced them to allow that family unit to flourish . . . with no expectations that it would be terminated." *Price*, 346 N.C. at 83, 484 S.E.2d at 537.

### 2. <u>Respondent-mother's intentions</u>

Respondent-mother insists that she intended April's placement with intervenor to be temporary and that intervenor was aware of her intentions. *See id.* ("[I]f defendant and plaintiff agreed that plaintiff would have custody of the child only for a temporary period of time and defendant sought custody at the end of that period, she would still enjoy a constitutionally protected status absent other conduct inconsistent with that status."). Respondent-mother points to the trial court's findings that she "refused to consent to a change in plan to guardianship at the November 6, 2013 hearing" and that she "gloated [to intervenor] that she had 'won' custody of [April]" as they drove back to Turkey Creek Café following the hearing. As the court further found, however,

> [o]n November 6, 2013, the respondent mother did not make any effort to pick up the juvenile or otherwise take physical custody of her; did not articulate a plan to the intervener regarding how to transition custody back to her; and did not provide the intervener with any date or other anticipated length of time after which she intended to assume physical custody of the juvenile. Despite the intention of the respondent mother to leave the juvenile with the intervener and not assume custody, she did not provide the intervener with any legal mechanism to provide medical or educational care for the child, such as a power of attorney.

In light of her subsequent conduct, respondent-mother's mere refusal to authorize intervenor's appointment as April's guardian does not evince an intention to assume her responsibilities as a parent.

Respondent-mother further claims she informed intervenor during a car ride in March 2014 that "she wanted to get her life together so she could have her girls" with her. She testified that intervenor responded by threatening her with a handgun and promising a "blood bath" if she attempted to take April away from intervenor. According to respondent-mother, she did not broach the subject again "due to the fear that her sister and father would cause physical harm to her[.]"

The trial court explicitly found not credible "the respondent-mother's claims that she did not assume custody of [April] until December 19, 2014, due to her fear that the [intervenor] might cause bodily harm to her." The court's findings cite respondent-mother's history of relying on intervenor "for all of her needs" including "comfort and support" as well as respondent-mother's acknowledgement that intervenor "has never assaulted her as an adult and . . . has never been charged with any crime[.]" The court noted that intervenor "begrudgingly but voluntarily relinquished custody of [Megan]" to respondent-mother in December 2014 and "followed the proper legal channels" in attempting to regain custody of both children. The court found that respondent-mother thus "had no reasonable basis to believe that she could not exercise her custodial rights to [April] due to any risk of harm posed by the [intervenor]."

Respondent-mother described her intentions toward April as follows:

> [Respondent-mother:] (Inaudible). I knew that one day I was going to get my children, as soon as I possibly could and could overcome my fear.
>
> [Intervenor's counsel:] But you never articulated to [intervenor] any specific plan, a time-line or other specific plan of, "These are the steps I'm going to take to get them back by this day["?]
>
> [Respondent-mother:] Not by a certain day. No, ma'am.
>
> [Intervenor's counsel:] It was a very general vague, "I want to get my life together and get them back one day["?]
>
> [Respondent-mother:] Yes.

Intervenor offered the following account of respondent-mother's stated intentions toward April:

> [Guardian *ad litem's* counsel:] . . . When [respondent-mother] regained custody in November of 2013, when she left court that day, was there some kind of conversation? Did she come to you and say, "I have custody now. Let's talk about how I'm going to get the kids."[?] Did that ever happen?
>
> [Intervenor:] She—no. She rode back to Turkey Creek Café with me. And it was pretty much like this, "I won custody. You didn't. Game over," and just went on with her life like, you know, nothing had changed. . . .
>
> But she never attempted—it was never a conversation of, "Okay. Well, I've got my kids. You know, what's our next step?" That was never, ever brought up.

Regarding the March 2014 car ride, intervenor testified that she asked respondent-mother "what her intentions were[,]" and that respondent-mother replied "that she would like to let the girls come stay with her and [Mr. C.] at some point, but that was about . . . the extent of that conversation." Intervenor did not recall threatening a "blood bath" to prevent respondent-mother from taking physical custody of the children.

It is true the trial court must consider "both the legal parent's conduct and his or her intentions" in determining whether the parent acted inconsistently with her constitutionally protected status. *See Estroff*, 190 N.C. App. at 70, 660 S.E.2d at 78-79. As revealed by her testimony, however, respondent-mother's intentions were vague, inchoate, and conveyed to intervenor on just two occasions—immediately after the 6 November 2013 review hearing, and during a car ride in March 2014. Her professed intentions were also completely at odds with her behavior toward April throughout this period. As the trial court found,

> [t]he respondent mother voluntarily allowed custody of the juvenile to remain with the intervener for an indefinite period of time following the return of legal custody to her on November 6, 2013, with no notice to the intervener that such relinquishment of custody would only be temporary. She failed to advise the intervener of an end date to the intervener's period of custody, failed to establish a transitional plan with the intervener regarding her resumption of custody, and failed to notify the intervener in a clear and definite manner that she intended to resume custody of the juvenile.

These findings are entirely consistent with both respondent-mother's and intervenor's testimony.

It is axiomatic that a party's "[i]ntent is a mental attitude seldom provable by direct evidence" and "must ordinarily be proved by circumstances from which it may be inferred." *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015) (citation omitted). Where "different inference[s] may be drawn from the evidence, [the trial court] alone determines which inferences to draw and which to reject." *In re Hughes*, 74 N.C. App. at 759, 330 S.E.2d at 218. Here, the trial court found that respondent-mother "induced the [intervenor], [April], and [Megan] to flourish as a family unit in a relationship of love and duty with no expectation that it would be terminated." Inasmuch as "an individual is presumed to intend the natural consequences of the individual's actions[,]" it was reasonable for the trial court to infer that respondent-mother had no meaningful intention that intervenor's custody of April be temporary. *In re J.L.B.M.*, 176 N.C. App. 613, 627-28, 627 S.E.2d 239, 248 (2006) (citing *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000)).

We hold that clear, cogent, and convincing evidence supports the trial court's findings of fact, which in turn support the trial court's conclusion of law that respondent-mother "acted in a manner inconsistent with her constitutionally protected paramount status" as April's parent.

### B. Unfitness

Respondent-mother also challenges the trial court's determination that she is "unfit at this time to exercise the primary physical custody" of April. She contends the court's findings mischaracterize her as "easily agitated, aggressive, and violent" based on a single instance when she allegedly slapped April in the face in May 2014 and accounts of respondent-mother's cruelty to animals and other "childhood behavior" unrelated to her present parenting abilities. Respondent-mother notes that she and Mr. C. have custody of their infant son and care for him appropriately.

Because we have upheld the trial court's conclusion that respondent-mother acted inconsistently with her constitutionally protected status as April's parent, we need not also review the court's determination of her unfitness. As our Supreme Court has explained,

> a natural parent may lose his [or her] constitutionally protected right to the control of his [or her] children *in one of two ways*: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is

> inconsistent with his or her constitutionally protected status. Therefore, . . . the trial court's finding of [a parent's] fitness . . . [does] not preclude it from granting joint or paramount custody to [a nonparent], based upon its finding that [the parent's] conduct was inconsistent with his [or her] constitutionally protected status.

*David N.*, 359 N.C. at 307, 608 S.E.2d at 753 (emphasis added). Once the court concluded that respondent-mother had acted inconsistently with her status as a parent, it was required to apply the "best interest of the child" standard when ruling on intervenor's motion for custody. *See Price*, 346 N.C. at 79, 484 S.E.2d at 534-35; *see also* N.C. Gen. Stat. §§ 7B-903(a), -906.1(i) (2015) (prescribing a "best interests of the juvenile" standard for dispositions and review hearings). Accordingly, we decline to address respondent-mother's argument regarding the trial court's second basis for applying the "best interest of the child" test. *Cf. In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) (If one of the trial court's grounds for termination of parental rights is valid, "it is unnecessary to address the remaining grounds."), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

## IV. Substantial Change in Circumstances

Respondent mother next argues that the "trial court erred when it concluded as a matter of law that a substantial change of circumstances had occurred" as required "to warrant a modification of the permanent custody order from the 6 November 2013 [review] hearing."[7] (Portion of original in all caps.) She claims the court impermissibly considered evidence of April's mental health and behavioral changes that postdated intervenor's filing of her motion to modify child custody on or about 6 January 2015. Respondent-mother further contends that the evidence fails to establish "that a 'nexus' exists between the changed circumstances and the welfare of the child[.]" (Quoting *Shipman v. Shipman*, 357 N.C. 471, 478, 586 S.E.2d 250, 255-56 (2003)).

"[O]nce the custody of a minor child is judicially determined, that order of the court cannot be modified until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of

---

7. Unlike N.C. Gen. Stat. § 50-13.7(a), the Juvenile Code allows the court to modify custody in an abuse, neglect, or dependency proceeding "in light of changes in circumstances *or the needs of the juvenile*." N.C. Gen. Stat. § 7B-1000(a) (emphasis added); *see also Botsford*, 75 N.C. App. at 75, 330 S.E.2d at 25. Because this distinction between the juvenile court and civil court standards does not affect our analysis, we adopt the parties' framing of the issue.

the child; and (2) a change in custody is in the best interest of the child." *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443 (2011) (citation and ellipsis omitted). "[T]he evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection." *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255. However, "[w]here the 'effects of the substantial changes in circumstances on the minor child are self-evident,' there is no need for evidence directly linking the change to the effect on the child." *Lang v. Lang*, 197 N.C. App. 746, 750, 678 S.E.2d 395, 398 (2009) (ellipsis omitted) (quoting *Shipman*, 357 N.C. at 479, 586 S.E.2d at 256).

The evidence and the trial court's findings amply support its conclusion that "[t]here has been a substantial change in circumstances affecting the general welfare and best interest of [April] since the Review Order entered [after] the November 6, 2013 hearing." The findings reflect respondent-mother's abdication of her parental role since 6 November 2013, as well as her perpetuation of intervenor, April, and Megan "as a family unit in a relationship of love and duty with no expectation that it would be terminated." This substantial change in circumstances was compounded by respondent-mother's decision on 19 December 2014 to wrest April from the only home and caretaker she had known since May 2012, without any notice or transition plan. After regaining custody of April on 21 January 2015, respondent-mother "did not allow the [intervenor] any contact with [April] for six weeks" until the District Court in Madison County granted respondent-mother supervised visitation with Megan. Respondent-mother did not return April to her daycare and "refused to allow [April] any contact with [her] extended family members," other than her grandmother, until the court ordered her to do so on 16 April 2015.

The evidence and the trial court's findings also make plain the adverse effect of the change in circumstances on April. After obtaining emergency custody from the District Court in Madison County on 21 December 2014, intervenor observed behavioral changes in April that included "clinginess to the [intervenor,]" aggression toward Megan, a refusal to nap, and "multiple episodes of aggression toward other children" at daycare. Since returning to respondent-mother's custody in January 2015, April has experienced "extreme difficulty" and distress during transfers back to respondent-mother after visits with intervenor.

The trial court's findings also include the observations of two therapists who worked with April in early 2015. Kristie Sluder performed an

intake assessment of April at intervenor's request on 11 January 2015. Ms. Sluder described April as "clingy[,]" physically possessive of intervenor, and "needing constant reassurance from [intervenor]" in a manner "out of the scale of normal development" for a child of April's age. Noting the importance of "stability" and "[s]ecure attachments" to early childhood development, Ms. Sluder diagnosed April with adjustment disorder and attributed her maladaptive behaviors "to the changes in custody that had occurred in" December 2014 and January 2015. Ms. Sluder described respondent-mother's sudden, unannounced reclamation of April on 19 December 2014 as "disturbing and entirely negligent toward" April.

Respondent-mother engaged Ilene Procida in February 2015 to replace Ms. Sluder as April's therapist. Ms. Procida testified that April "was very emotionally attached" to intervenor and did not display a similar bond with respondent-mother.[8] Having observed April as recently as the day before her testimony on 26 March 2015, Ms. Procida described April as "very cautious and tentative around [her] mom" and "very relaxed" with intervenor. Ms. Procida saw signs that respondent-mother was coaching April, noting that April "constantly looks to her biological mother for approval and for—or what to say next" and will "say one thing to [Ms. Procida] if she's alone and then something different if Mom is in the room." April had confided to Ms. Procida "on multiple occasions that she wishes to be with her aunt." Ms. Procida opined that it would be "very upsetting, especially for a toddler[,]" to be suddenly removed from her home and primary caretaker and described respondent-mother's abrupt reclamation of April on 19 December 2014 as "very traumatic" for April. Ms. Procida characterized April and Megan's relationship as "hugely important" to both girls and believed it would be "wrong" to separate the sisters.

We find no merit to respondent-mother's argument that the trial court erred in considering evidence of April's mental health and behavior after 6 January 2015, the approximate date intervenor filed her motion in the cause. "The party seeking to have the custody order vacated has the burden of showing that circumstances have changed between the time of the order *and the time of the hearing on his motion.*" *Hensley*, 21 N.C. App. at 307, 204 S.E.2d at 229 (emphasis added);

8. Although respondent-mother casts Ms. Procida's testimony as "unreliable" in light of her difficulty "recalling dates and pertinent information about April's case[,]" the trial court's credibility determinations are not a viable basis for relief on appeal. *See Elliott*, 173 N.C. App. at 714, 620 S.E.2d at 270.

*accord Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967) (discussing rule in child support context). Section 7B-906.1 likewise allows the juvenile court at a review hearing to consider "any evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C. Gen. Stat. § 7B-906.1(c).

In *Lang*, this Court held the effects of changed circumstances on the child to be self-evident based on the trial court's findings that "(1) the child needed ADHD medication and [the father] was willing to provide it; (2) [the father] was 'very attentive to the child's progress and behavior in school,' while the mother was less attentive; and (3) '[the father] had been more consistent in treating the child's various recurring medical conditions.' " *Lang*, 197 N.C. App. at 751, 678 S.E.2d at 399 (brackets omitted). We further found "the trial court's consideration of the effect of the changes in circumstances on the child [to be] implicit in these three findings in the context of the whole order[.]" *Id.* at 751-52, 678 S.E.2d at 399.

In this case, the direct connection between the substantial change in circumstances and April's well-being is both self-evident and explained in the trial court's order, as follows:

> In making the decision to assume custody of [April] on December 19, 2014, the respondent mother did not consider the trauma that [April] was likely to suffer in being removed from the only caregiver she knew, as well as her sister to whom she was extremely bonded; being denied access to that caregiver and all her extended family to whom she was extremely close; and being removed from her day care environment, all without advance notice to the child or any opportunity for her to physically or emotionally prepare for such a drastic change.

Respondent-mother's argument is overruled.

### V. <u>Best Interest of the Child</u>

In addition to finding a substantial change in circumstances affecting April's welfare, the trial court was required to determine that "a change in custody is in the best interest of the child." *Hibshman*, 212 N.C. App. at 121, 710 S.E.2d at 443 (citation omitted). We review a trial court's best interest determination for an abuse of discretion. *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset

only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Respondent-mother does not directly contest the trial court's assessment of April's best interest. She instead contends that "the trial court is barred from considering the child's best interest without clear and cogent evidence that a substantial change has occurred affecting April's welfare." Because we have rejected respondent-mother's premise that no actionable change in circumstances occurred, her argument as to April's best interest also fails. Moreover, we discern no abuse of discretion in the trial court's conclusion of law that "it is in the best interest of the juvenile [April] that her sole care, custody, and control should be awarded to the [intervenor], subject to visitation with the respondent parents[.]" We affirm the trial court's order.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

---

IN THE MATTER OF C.A.D. AND B.E.R. (MINOR JUVENILES)

No. COA15-1195

Filed 17 May 2016

**1. Jurisdiction—standing—grandparents in termination of parental rights**

The mother in a termination of parental rights proceeding did not have standing to raise the contention that adoption should not have been the permanent plan because the maternal grandparents offered a safe and loving home. The maternal grandparents did not appeal the trial court's permanency plan, they did not complain of the court's findings of fact or conclusions of law, and they did not complain that they were injuriously affected by the trial court's decision to pursue adoption as the permanency plan.

**2. Termination of Parental Rights—permanency plan—adoption rather than placement with maternal grandparents**

The trial court did not abuse its discretion in choosing adoption for the permanency plan.

**3. Termination of Parental Rights—neglected children—consideration of all factors**

The trial court did not abuse its discretion in terminating a mother's parental rights in the best interests of the children. The trial court's written findings showed careful reflection upon all of the N.C.G.S. § 7B-1100(a) factors, the possibility of placing the children with the maternal grandparents, and the history of neglect by the maternal grandparents.

Appeal by Respondent-Mother from a permanency planning order entered 20 March 2014, and an order terminating her parental rights entered 9 July 2015 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 13 April 2016.

*Staff Attorney Elizabeth Kennedy-Gurnee for Cumberland County Department of Social Services.*

*Mary McCullers Reece for Respondent-Mother.*

*Matthew D. Wunsche for Guardian ad Litem.*

HUNTER, JR., Robert N., Judge.

Respondent-Mother Tabitha Nicole Rogers ("Respondent") appeals following an order terminating her parental rights to her minor children "Beth" and "Charlie."[1] We hold the trial court did not abuse its discretion in terminating Respondent's parental rights to serve Beth's and Charlie's best interests.

## I. Factual and Procedural Background

Since 2002, the Cumberland County Department of Social Services ("DSS") visited Respondent's home over nine times for child protective service referrals. She is the biological mother of four children, "Richard," Beth, "Oliver" (now deceased), and Charlie.[2] Samuel Nolan is Beth's legal father. Brian Phillip "Tank" Davis is Respondent's boyfriend

1. Pseudonyms have been used to protect the minor children. N.C. App. Rule 3.1(b). In an effort to highlight the conduct of the adults in this case, the Court has not used pseudonyms to protect the adults because they were not "under the age of eighteen at the time of the proceedings in the trial division . . . ." *See Id.*

2. Richard, the eldest, was born in 2002. Beth was born in 2005. Oliver was born in 2007. Charlie was born in 2008.

and Charlie's putative father. Cory Bavousett is Richard's father and Christopher Morrison is Richard's putative father. Oliver's biological father is unidentified in the record.

Respondent lives in a two-bedroom single-wide trailer with her three children Oliver, Beth, and Richard, her parents Marjorie Rogers and Graham Rogers, Jr. ( the "maternal grandparents"), her boyfriend Brian Phillip "Tank" Davis, and her brother Graham Rogers III. She is unemployed. Charlie had not yet been born into this environment. On 18 March 2008, social worker Yvette Jordan (Cumberland County DSS) visited the home to investigate a referral, which came from a 911 call from a member of this household.

Ms. Jordan walked into "clutter, disarray and squalor" that engulfed the residents. Oliver, Richard's and Beth's ten-month-old baby brother, lain dead, his body decomposing "for an undetermined period of time." Bruises distorted his face, chest, arms, and legs. A sore left the flesh of his arm open and exposed. His skin was purple and lifeless, "slippage indicat[ed] he had been dead for a period of time." When asked about Oliver's death, Tabitha Rogers, Graham Rogers III, Marjorie Rogers, Graham Rogers Jr., and Brian Phillip "Tank" Davis, could not, or would not, give an explanation. The trial court heard allegations Brian Phillip "Tank" Davis had harmed Oliver. After an autopsy on Oliver's body, the examiner determined "there were total inconsistencies between the adults' statements and the time [of Oliver's death."]

The home was "infested with roaches, had dirty diapers on the floor . . . piles of dirty clothes . . . one baby's bottle containing a dark liquid substance . . . [and] [t]he home smelled of urine and had a strong animal smell as well." "There was very little food in the home, [and] there was no food or formula for [Oliver] in the home."

Beth, then three years old, was "covered in dirt and she had a strong urine smell on her body." Scratches painted her legs, feet, and face. She was dressed unfit for the March weather. When taken to the hospital for her injuries, Beth "had to be bathed before the doctor could examine her."

Her five-year-old brother, Richard, wore disturbing injuries. Richard "had a rash under his left arm and a healing gash on top o[f] his head." When asked about the gash, Richard "replied that he could not talk about it." Like Beth, doctors had to bathe him before he could be examined.

The record discloses no criminal charges filed in this matter.

On the day after Ms. Jordan's visitation, DSS filed a verified juvenile petition alleging Beth and Richard were abused, neglected, and

dependent. Cumberland County District Court Judge Edward A. Pone immediately ordered non-secure custody of the juveniles and placed them into foster care and therapy. While in foster care, the children evidenced "significant [] developmental delays."

On 5 August 2008, Judge Pone adjudicated Beth and Richard as "neglected" and dismissed the allegations of abuse and dependency. Judge Pone found "[r]eturn of the juveniles to the Respondent[] would be contrary to the welfare and best interest of the juveniles in as much as additional services are needed." Judge Pone found Beth's and Richard's home "an injurious environment," and the family "has a long history of involvement with Child Protective Services," and it was "imperative" for the children to reside in a clean and safe environment.

To achieve this end, Judge Pone ordered Respondent to enroll in parenting classes, and put the children in continued therapy and foster care. The record shows Respondent "by and through her counsel, admitted and stipulated that the juveniles were neglected." The record does not disclose what party, if any, recommended the children be reunified with Respondent and/or the maternal grandparents. Notwithstanding this lack, Judge Pone statutorily set the permanent plan as reunification with Respondent. *See In re L.M.T.*, *A.M.T.*, 367 N.C. 165, 167, 752 S.E.2d 453, 455 (2013) (citing N.C. Gen. Stat. § 7B-507(b) (2011)). DSS devised "a plan of structure for the family" which included intensive in-home services.

In September 2008, Respondent gave birth to her fourth child, Charlie. On 21 November 2008, Judge Pone ordered Beth and Richard to be transitioned back into the home with Respondent and the maternal grandparents. The record does not disclose what party advocated for this transition. Judge Pone ordered the family to participate in intensive in-home services and therapy, and set the following boundaries recommended by Richard's therapist:

> a. [Richard] should have his own bed and space and preferably his own bedroom;
>
> b. [Richard] should sleep by himself in his own bed;
>
> c. [Richard] should not sleep with "Mr. and Mrs. Rogers."
>
> d. The caregivers should not possess or access pornography in the home or on the property where [Richard] resides.
>
> e. The caregivers should maintain personal boundaries when in the presence of [Richard] by always being fully clothed i.e. underwear, pants, bra and shirts.

> f. [Richard] should not be responsible for the care giving or disciplining of any children including his siblings i.e. diaper changing, carrying, etc. . . .
>
> h. [Richard] should have no contact with [Brian Phillip "Tank" Davis] by phone, in person, by written correspondence, or by seeing pictures. . . .
>
> o. Ms. Tabitha Rogers should receive psychoeducation . . . .
>
> q. Graham and Marjorie Rogers should receive psychoeducation . . . .

On 18 August 2009, Judge Pone gave Respondent and the maternal grandparents joint legal and physical custody of Beth and Richard, with Respondent having primary custody. Judge Pone found, "it would be inappropriate to enter any type of visitation order as to Samuel Nolan or Brian 'Tank' Davis. In fact, the Court specifically finds that any visitation with the Respondent Brian "Tank" Davis would be contrary to the welfare and best interest of the juveniles." Accordingly, Judge Pone ordered, "[t]here shall be absolutely no contact allowed with [Brian Phillip "Tank" Davis] and either of the juveniles, most specifically [Richard]. That a violation of this [no contact] shall be considered as direct contempt of the Court and will be punishable by incarceration for the maximum period allowed by law."

On 3 February 2011, DSS visited Respondent's home after receiving another child protective service referral. Social worker, Lakendrick Smith, visited the home, where DSS had found Oliver's dead body decomposing some three years prior.

During his investigation, Mr. Smith found bugs and dirty dishes throughout the trailer. Mr. Smith learned Brian Phillip "Tank" Davis had violated the trial court's no-contact order and lived at the trailer, where he fought pit bulls in front of Beth, Richard, and Charlie. Beth, now five years old, was mature enough to describe the adult conduct in her home environment. She told DSS the following:

> 8. [Mommy and Brian Phillip "Tank" Davis] make their own cigarettes and those cigarettes smell funny. [] [T]hey call it weed. That weed looks brown and they get it out of a clear plastic bag. [They] smoke weed. . . .
>
> 10. [Richard] touched [me] in [my] private area. [He] sits on [my] face when [I'm] in the bed and he doesn't have any clothes on.

> 11. [Richard] touches [my] private area between [my] legs when [I] ha[ve] [my] clothes on and [I] always tell[] on him and [] [Mommy] says "go back to bed."
>
> 12. [My] daddy (Brian "Tank" Davis) has dogs (pit bulls), and the dogs hurt each other sometimes. [T]he dogs, Macy and Hooch got in a fight and Macy has a lot of stitches.
>
> 13. [] "[M]ommy gets hurt because daddy [Brian Phillip "Tank" Davis] hits [M]ommy" and [I] see[] [it]. [I] "beat[] daddy [Brian Phillip "Tank" Davis] up when he hits [] [M]ommy and he just throws [me] down on the bed."

Respondent denied she and Brian Phillip "Tank" Davis engaged in any domestic violence. Respondent denied using marijuana, though she "stated she couldn't pass a drug test and she had last used marijuana about fifteen days [prior]." Graham Rogers, Jr. and Marjorie Rogers still lived at the home while this was happening.

On 4 February 2011, DSS obtained non-secured custody of Beth, Richard, and Charlie, and filed a verified juvenile petition alleging the children were neglected and dependent. DSS alleged the home environment was injurious to the children and that all of the adults had violated the trial court's order.

On 7 February 2011, DSS filed a motion for show cause and contempt to have the trial court hold Respondent in contempt for violating the no-contact order. On 13 December 2011, DSS voluntarily dismissed the motion for contempt in exchange for the following stipulations from Respondent and the maternal grandparents:

> The parties agree to the following stipulation:
>
> Neglect Based on: improper supervision and injurious environment[;]
>
> Dependency Based on: inability to care for the juveniles and lack of an appropriate alternative child care plan.
>
> As a factual basis for the above stipulation, the parties agree and consent to the following . . . .
>
> 3. The parties admit that Brian "Tank" Davis was allowed contact with the juveniles in violation of the Court's previous order(s).
>
> 4. That Tabitha Rogers admits to having a continuing relationship with Brian "Tank" Davis between approximately

> August 3, 2009, and approximately February 4, 2011, wherein she allowed her children [Beth, Richard, and Charlie] to be around him on a regular and continuing basis.
>
> 5. That Graham and Marjorie Rogers were aware of Tabitha Rogers' continued relationship with Brian "Tank" Davis and that the juveniles . . . were around him on a regular and continuing basis.
>
> 6. The juvenile [Beth] has reported that her "mommy gets hurt because daddy hits mommy" and she sees this. She reports that she "beats her daddy up when he hits her mommy and he just throws her down on the bed."
>
> 7. [The home] was found to be in a disarray and in an unsafe condition for the juveniles to live in . . . .
>
> 9. That disclosures from the juveniles have indicated that sexually inappropriate behavior occurred.
>
> 10. That Tabitha Rogers admits to the regular use of marijuana between August 3, 2009, and February 4, 2011.
>
> 11. That [Richard] was prescribed various necessary medications . . . [and he] was out of his prescribed medications and Tabitha Rogers had not consistently followed through with his necessary mental health treatment.

Judge Pone held hearings for the adjudication and disposition of Beth, Charlie, and Richard on 13 and 15 December 2011. The parties stipulated that the children were neglected and the home environment was "injurious to their welfare." Judge Pone adjudicated the children as neglected and dependent and placed them into foster care. Judge Pone set the matter for permanency planning review on 1 February 2012.

The court system and DSS made "extraordinary efforts" to reunify the children with Respondent and the maternal grandparents, but they did not utilize the resources and opportunities given to them. Judge Pone set the permanent plan as reunification with Respondent and the maternal grandparents and ordered Respondent to complete a psychological evaluation and parenting assessment. Judge Pone ordered DSS to continue providing foster care for the children.

While her children were in foster care, Respondent moved from her parents' trailer into Brian Phillip "Tank" Davis' motel room. At a 7 March 2013 hearing, Respondent told the trial court she wanted the maternal grandparents to have legal and physical custody of the children, as well

as guardianship. The guardian *ad litem* "highly opposed" this. Judge Pone noted the history of court intervention in the case and stated, "once [DSS's] and the [trial] Court's involvement ceased, the same issues resurfaced." Judge Pone found it was contrary to the children's best interests to return them to Respondent or the maternal grandparents and ordered DSS to take legal and physical custody of the children. Judge Pone changed the permanent plan to custody with court approved caretakers concurrent with adoption. The maternal grandparents did not appeal this permanency plan.

On 30 June 2014, DSS filed a petition to terminate Respondent's parental rights, and the rights of the uninvolved fathers. Due to the trial court's scheduling conflicts, Richard was dismissed from the termination of parental rights petition on 11 March 2015, and his case was set for resolution on a future date.

While the termination of parental rights matter was pending, North Carolina Child Protective Services opened an adverse investigation into Beth's and Charlie's temporary foster parents who were probable adoptive parents. The result of this investigation left Beth and Charlie with no proposed adoptive parent at the termination of parental rights hearing.

The parties were heard on the termination of parental rights petition 23–27 February 2015 and 27 March 2015. Judge Pone found the following *inter alia*:

> THE COURT, AFTER REVIEWING THE EVIDENCE, RECORD, SWORN TESTIMONY AND ARGUMENTS PRESENTED, MAKES THE FOLLOWING FINDING, BY CLEAR, COGENT, AND CONVINCING EVIDENCE:
>
> 66. [T]his was, and has always been, much more than a case of a dirty house. This time, there was domestic violence witnessed by [Beth] between the Respondents and she was able to describe substance abuse and drug and alcohol use by the Respondents. The Respondent Mother admitted regular drug use between August 3, 2009 and February 4, 2011. . . .
>
> 93. Clearly, the Respondents neglected the juveniles—both in 2008 and again in 2011. There has not been any substantial change in circumstances. The likelihood of neglect recurring is great. The juveniles were neglected and brought into care in 2008; they were returned home and in 2011 they returned neglected. It is clear that there

is a substantial likelihood of the repetition of the neglect should the juveniles be returned home.

94. The Respondents have significant instability. Today, they say they have been stable in the current [address] for twelve (12) months. Yet, sheriff's deputies tried to locate the Respondent Mother at this address on two (2) separate occasions without success in the child support matter. . . .

101. The Respondent Mother has been less than candid with this Court at various time[s] throughout these proceedings . . . .

105. At [the] time [of the 18 March 2008 DSS petition], the juvenile [Oliver] had died in the home, and the home was in a deplorable and toxic condition. There were considerable questions surrounding the death of the juvenile; questions that still linger today. The Court, however, moved forward; over a period of time, and by August 3, 2009, the juveniles had been returned to the Respondent Mother and the maternal grandparents to what was believed to be a safe and nurturing environment. . . .

108. Each of the Respondents has acted in a manner that is inconsistent with the constitutionally protected status as a parent, and none of the Respondents is a fit or proper person for the care, custody, and control of the juveniles. Each of these Respondents have abdicated their requirements as parents. . . .

117. Moreover, this Court is not satisfied that there has been any fundamental change in the family culture which led to two (2) adjudications of neglect, and the death of one juvenile since 2008.

118. This Court does not have a crystal ball; no one can predict every detail in the future. However, the history in this case clearly indicates the likelihood of neglect being repeated should the juveniles be returned. The risk of such neglect is extraordinarily high.

119. The Court took a chance in 2009. Services were provided and the plan of reunification was implemented, only to have the juveniles returned in approximately eighteen (18) months. The fact is, the conditions are likely to have

reverted much sooner than that. [Brian Phillip "Tank" Davis] had resumed his contact in, by his own testimony, a couple of months and the environment returned to being injurious and hazardous.

120. The Respondents . . . have demonstrated a pattern of failing to provide appropriate care and supervision for the juveniles; it is highly probable that such neglect would be repeated if custody of the juveniles were returned to any of the Respondents. . . .

128. To this date, none of the adults charged with caring for these children, including the Respondents, have offered any plausible explanation as to how—with at least four adults in the home—the juvenile [Oliver] died and had started to decompose without any of them knowing it. It is beyond this Court's comprehension.

DISPOSITIONAL FINDINGS

3. The juveniles are of tender years. [Beth] . . . is currently ten (10) years old, and [Charlie] . . . is currently six (6) years old.

4. The likelihood of adoption for the juveniles is good. . . . The testimony provided is that the juveniles behaviorally are very good. . . .

5. That a termination of parental rights will assist in the accomplishment of the permanent plan; the permanent plan has been set to adoption and terminating the parental rights of the Respondents will be necessary in achieving that plan. . . .

6. There is a minimal bond between [Charlie] and the Respondents. [He] was removed from the home of the Respondents at an early age, and has been in foster care since that time. [Beth] remains very bonded to the Respondent Mother, and loves the Respondent Mother dearly. . . .

7. That at this time, there is not a proposed adoptive parent. The previous placement providers now have an open CPS investigation; this was a tragic turn of events. Those circumstances were unforeseeable. The Court has received this information for the first time on this date.

> 8. The juveniles are in a very tragic situation. That it is clear the juveniles were seriously neglected by the Respondents; the juvenile [Beth] on two occasions now. The Respondents woefully failed these juveniles. The conditions which led to removal were not alleviated.
>
> 9. These juveniles, tragically, have now been failed again, by a system wherein things are not perfect. Just as the Court was unable to foresee the reinstitution of neglect following the 2009 reunification with the Respondents, no one was able to foresee the current situation with the former placement providers. . . .
>
> 12. Even absent a current approved adoptive parent, these juveniles deserve an opportunity to move forward as best they can, and it is therefore in the juveniles' best interests that the parental rights of the Respondents be terminated.

Judge Pone found it was in Beth's and Charlie's best interests to terminate Respondent's parental rights and awarded DSS custody of the children for placement in foster care. Respondent timely filed her notice of appeal 10 July 2015.

## II. Standard of Review

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). " 'An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.' " *In re N.G.*, 186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008).

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law. We then consider, based on the grounds found for termination, whether the trial court abused its discretion in finding termination to be in the best interest of the child." *In re Shepard*, 162 N.C. App. 215, 221-22, 591 S.E.2d 1, 6 (citation and quotation marks omitted), *disc. review denied sub nom. See also In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004).

## III. Analysis

First, Respondent contends the trial court erred in ceasing reunification efforts in its 20 March 2013 permanency plan because the children should have been placed with the maternal grandparents. Second, Respondent contends the trial court abused its discretion in terminating her parental rights because the findings do not support the conclusions of law. We disagree.

**[1]** When a trial court orders DSS to take non-secure custody of a juvenile as part of a permanency plan, the trial court must make findings that: (1) the juvenile's continuation or return to the home is contrary to their health and safety; (2) the county DSS office has made reasonable efforts to prevent the need for placement of the juvenile; and (3) shall specify that the juvenile's placement and care is DSS's responsibility and that DSS shall provide or arrange for foster care or other placement, unless the court orders a specific placement. N.C. Gen. Stat. § 7B-507(a) (2015).

Respondent does not contend the trial court failed to make these findings or abused its discretion in making adoption the permanency plan. Rather, Respondent contends the "maternal grandparents offered a safe, loving home, [and] the trial court's permanent plan of adoption or placement with a non-relative was error."

"Only a 'party aggrieved' may appeal from an order or judgment of the trial division." *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (quoting N.C. Gen. Stat. § 1-271) (citations omitted). "An aggrieved party is one whose rights have been directly and injuriously affected by the action of the court." *Culton*, 327 N.C. at 625–26, 398 S.E.2d at 324–25 (citations omitted). Here, the maternal grandparents have not appealed the trial court's permanency plan. They do not complain of the court's findings of fact or conclusions of law, and they do not complain they were injuriously affected by the trial court's decision to pursue adoption. Respondent cannot claim an injury on their behalf. Therefore, she has no standing to raise her first claim.

**[2]** Presuming that Respondent could assert standing, the clear, cogent, and convincing evidence shows Beth's and Charlie's health and safety were endangered by Respondent, the maternal grandparents, and the home they lived in together. We hold the trial court made findings based upon credible evidence and the findings support the trial court's conclusions. We hold the trial court did not abuse its discretion in choosing adoption for the permanency plan.

**[3]** Second, we review the termination of Respondent's parental rights. After a trial court finds that one or more grounds for terminating parental rights exists, the court must determine if terminating parental rights is in the juvenile's best interest. N.C. Gen. Stat. § 7B-1110(a) (2015). To determine the best interests of the child, the court must consider the following criteria:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

*Id.* While the trial court must consider all of these factors, it is only required to make written findings regarding the relevant factors. *See In re D.H.*, 232 N.C. App. 217, 221–22, 753 S.E.2d 732, 735 (2014).

Respondent contends the trial court should have awarded the maternal grandparents custody of Beth and Charlie in an effort to keep the family together. Our Court has held, "[a] trial court may, but is not required to, consider the availability of a relative during the dispositional phase of a hearing to terminate parental rights." *In re M.M.*, 200 N.C. App. 248, 684 S.E.2d 463 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 401 (2010) (citation omitted). Therefore, Respondent's contention is not determinative of this matter.

It is well settled that the child's best interests are paramount to the parent's interests when the two are in conflict. N.C. Gen. Stat. § 7B-1100(3) (2015); *see also In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) ("As we stated in *Wilson v. Wilson*, 269 N.C. 676, 678, 153 S.E.2d 349, 351 (1967), "[t]he welfare or best interest of the child is always to be treated as the paramount consideration to which even parental love must yield . . . .").

Here, the trial court considered all six of the section 7B-1100(a) factors and the possibility of placing Beth and Charlie with the maternal grandparents. The trial court's written findings show careful reflection upon all of these factors, and the history of neglect that Beth and Charlie

faced in the home with Respondent and the maternal grandparents. Despite Respondent's contentions, Beth's and Charlie's best interests have not been served by their maternal grandparents. Like Respondent, the maternal grandparents repeatedly failed to meet Beth's, Charlie's, and Richard's needs, and created a home environment where a child, Oliver, died and decomposed for some time, without any explanation from the four adults living in the home. The record also shows Respondent stipulated to Beth's and Charlie's neglect multiple times, and admitted violating court orders.

Accordingly, we hold the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and the findings support the conclusions of law. We hold the trial court did not abuse its discretion in terminating Respondent's parental rights to serve the best interests of Beth and Charlie. We observe this just result took almost seven years to achieve since the death of Oliver, a tragic delay.

## IV. Conclusion

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

Judge CALABRIA and TYSON concur.

---

IN THE MATTER OF CAROLE WINIFRED CRANOR, RESPONDENT

No. COA15-541

Filed 17 May 2016

**1. Appeal and Error—jurisdiction on appeal—final order**

Where there were two trial court orders in the case—one in September and one in December—the September order was not final because it was an order awarding attorney fees that did not set the amount. Timely notice of appeal was given from the December order, which did set the amount, and the Court of Appeals had jurisdiction over the appeal.

**2. Attorneys—sanctions—Rule 11**

The superior court erred in imposing Rule 11 sanctions on an attorney where the unchallenged findings and uncontroverted evidence supported a conclusion that the attorney acted in good faith.

**3. Attorneys—sanctions—inherent authority of court**

The undisturbed findings of the trial court did not support a sanction against an attorney in the exercise of its inherent authority.

Judge HUNTER, JR., concurring in part and dissenting in part.

Appeal by Appellant Lynn Andrews from orders entered 12 September 2014 and 17 December 2014 by Judge George B. Collins, Jr., in Durham County Superior Court. Heard in the Court of Appeals 4 November 2015.

*Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for the Appellant Lynn Andrews.*

*West Law Offices, P.C., by James P. West, for the Petitioner-Appellee Frank Taylor Cranor.*

DILLON, Judge.

Lynn Andrews ("Attorney Andrews") – who was retained by Carole Cranor in this incompetency proceeding – appeals from an order entered 12 September 2014 (the "September Order") in which the trial court imposed judicial discipline on her, pursuant to Rule 11 and its inherent authority, and ordered her to pay attorneys' fees to the Petitioner Frank Cranor and *his* attorney ("Attorney West"). Attorney Andrews also appeals two subsequent orders entered 17 December 2014 (the "December Orders") in which the trial court set *the amount* of the attorneys' fee award and denied Attorney Andrews' Rule 60 motion for relief from the September Order.

I. Background

This matter involves an incompetency proceeding commenced by Frank Cranor to have his sister Carole Cranor declared incompetent and to have him appointed as her general guardian. Carole Cranor is a retired pharmacist residing in Durham who was diagnosed with early onset dementia. At the time of her diagnosis, Carole and her brother Frank Cranor were not close. There is evidence that they had a contentious relationship due to a past disagreement concerning the care of their mother and that they had very little contact with each other.

Carole Cranor consulted her long-time, close attorney-friend, Harriet Hopkins ("Ms. Hopkins"), for help in choosing a long-term care facility and in getting her legal and financial affairs in order. Carole

Cranor also appointed Ms. Hopkins as her attorney-in-fact via a durable power of attorney ("DPOA") that Ms. Hopkins drafted. The DPOA that Ms. Hopkins drafted contained a gifting provision which allowed Ms. Hopkins to make gifts to herself from Carole Cranor's estate. However, there is no evidence that Ms. Hopkins ever made any such gifts, and the DPOA was subsequently replaced by another DPOA drafted by an independent attorney.

Frank Cranor, who resides in Arkansas, learned of his sister's deteriorating condition and became aware that Ms. Hopkins was acting as Carole's attorney-in-fact. On 3 June 2013, Frank Cranor filed the petition to have his sister Carole adjudicated incompetent and requested that he be appointed as her general guardian, citing a concern that his sister was being taken advantage of by Ms. Hopkins.

On 8 June 2013, Carole Cranor hired Attorney Andrews to represent her in the incompetency proceeding.[1]

After a period of litigation, which included discovery and a series of motions, Attorney Andrews was successful in obtaining a Rule 12(b)(6) dismissal of Frank Cranor's incompetency petition. This appeal, however, is unrelated to the dismissal or the issue of Carole Cranor's competency. Rather, this appeal arises from orders entered *after the dismissal* of the incompetency petition.

Following the dismissal, Attorney Andrews filed motions seeking attorneys' fees, costs, and sanctions against Frank Cranor and Attorney West. In these motions, Attorney Andrews alleged that Frank Cranor's incompetency petition did not contain justiciable issues of fact or law, and thus was non-justiciable. In response, Frank Cranor and Attorney West filed motions for attorneys' fees, costs, and Rule 11 sanctions against Attorney Andrews, contending that Attorney Andrews' motions for fees, costs, and sanctions were filed in violation of Rule 11 because they were not well grounded in fact and were filed for the purpose of harassing Frank Cranor and Attorney West.

The clerk denied all motions. Specifically, the clerk determined that Frank Cranor's incompetency petition *was* justiciable and that Attorney

---

1. The clerk had appointed Attorney Andrews to serve as Carole Cranor's guardian ad litem on 3 June, the day Frank Cranor filed his petition. However, Attorney Andrews promptly withdrew, citing a conflict of interest, based on a previous discussion she had had with Ms. Hopkins regarding Carole Cranor's situation. When Attorney Andrews was hired by Carole Cranor directly, Frank Cranor petitioned to have her disqualified; however, his motion was denied.

Andrews had acted in good faith in seeking fees, costs, and sanctions.[2] All parties appealed to superior court.

Following a hearing on the matter, the superior court entered its September Order denying Attorney Andrews' motions *but allowing* Attorney West's motion for sanctions against Attorney Andrews. Specifically, in allowing Attorney West's motions, the court ordered that (1) Attorney Andrews be prohibited from accepting any fees or expenses from Carole Cranor; (2) Attorney Andrews be removed as attorney for Carole Cranor and be barred from representing her in any action or proceeding in any court in the State of North Carolina; and (3) Attorney Andrews pay the attorneys' fees and costs of Frank Cranor and Attorney West incurred in defending against Attorney Andrews' motions for fees, costs and sanctions, with the amount of the award to be determined in a future hearing.[3]

In December 2014, the superior court entered its December Orders in which it denied Attorney Andrews' Rule 60(b) motion for relief from the September Order and set *the amount* of attorneys' fees and costs awarded in the September Order at $122,987.72. In January 2015, Attorney Andrews filed her notice of appeal to this Court from the September Order and from both December Orders.

## II. Jurisdiction

**[1]** As a preliminary matter, we address Frank Cranor's contention that this Court lacks jurisdiction to consider Attorney Andrews' arguments concerning the September Order. Specifically, Frank Cranor contends that the September Order was a final order (notwithstanding the later December Orders) and that Attorney Andrews failed to file her notice of appeal from that order within the thirty (30) day period prescribed by Rule 3 of the North Carolina Rules of Civil Procedure. *See* N.C. R. App. P. 3(c)(1); N.C. R. Civ. P. 58. We disagree, and hold that we have jurisdiction to consider Ms. Andrews' arguments regarding the September Order.

Frank Cranor's argument turns on whether the September Order was a "final" order, notwithstanding the subsequent December Orders. Our Supreme Court has held that "[a]n order that completely decides

---

2. The Clerk did order Frank Cranor to pay the costs of a multidisciplinary evaluation of Carole Cranor ordered by the court that he sought as part of the incompetency proceeding.

3. The trial court also requested that the State Bar open an investigation into Attorney Andrews' conduct in its September Order.

the merits of an action [] constitutes a final judgment for purposes of appeal even when the trial court reserves for later determination collateral issues such as attorney's fees and costs." *Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013).

The gist of Frank Cranor's argument is that the December Orders dealt only with collateral matters and, therefore, did not affect the status of the September Order as being a "final" order. However, we note that the September Order, itself, did not decide any substantive issue concerning Carole Cranor's competency, but rather only dealt with "collateral issues," including an award of attorneys' fees. *See Bryson v. Sullivan*, 330 N.C. 644, 653, 412 S.E.2d 327, 331 (1992) (noting that sanctions are collateral issues that "require consideration after the action has been terminated"). Where an order imposes judicial discipline, an appeal from such order is interlocutory if the order involves the imposition of attorneys' fees and if the *amount* of the fee award was not set in the order. *See, e.g.*, *Sanders v. State Pers. Comm'n*, ___ N.C. App. ___, ___, 762 S.E.2d 850, 854 (2014) (stating that "an appeal of the [] issue of attorney fees, itself, is interlocutory if the trial court has not set the amount to be awarded").

Because the September Order was an order for attorneys' fees which did not set *the amount* of the fee award, instead leaving the issue for later determination, it was not a final order. Rather, the December Order, which *did set the amount* of the attorneys' fees, was the final order. Thus, since Attorney Andrews noticed her appeal from the December Orders within the time allowed by our Rules, we reject Frank Cranor's argument concerning our jurisdiction and address the merits of Attorney Andrews' appeal.

## III. Analysis

### A. Rule 11 Sanctions

**[2]** We first review the superior court's award based on Rule 11. N.C. Gen. Stat. § 1A-1, Rule 11 (2014). Our Supreme Court has held that a trial court's decision to impose sanctions under Rule 11 "is reviewable *de novo* as a legal issue." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). That is not to say that the reviewing court reweighs the evidence and makes new factual findings. Rather, the Supreme Court instructs that "[i]n the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact

are supported by a sufficiency of the evidence." *Id.* The Supreme Court further instructs that if the appellate court makes these determinations in the affirmative, "it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under [Rule 11]." *Id.* The trial court's decision concerning the *type* of sanction(s) to impose, however, is reviewed for an abuse of discretion. *Id.*

Based on our review, we hold that Rule 11 sanctions against Attorney Andrews were not warranted in this case.

First, many of the superior court's findings are not supported by the evidence. For instance, the court found that Attorney Andrews "has repeatedly argued to [the superior court] that because [Frank Cranor] refused to consent to a limited guardianship with Harriet Hopkins as the guardian, that he was seeking to take away all of [Carole Cranor's] rights. This argument is a misrepresentation of the facts and the law." However, in his petition, Frank Cranor specifically stated that he was seeking to be named his sister's general guardian, which would legally allow him great control over Carole's life. Such relief, if granted, would have deprived Carole of her authority to choose Ms. Hopkins as her guardian or attorney-in-fact. Throughout the litigation, the record shows that Mr. Cranor persisted in objecting to Ms. Hopkins acting as Carole's attorney-in-fact. Therefore, we hold that this finding is without evidentiary support.

The superior court also found that Attorney Andrews *admitted* that her client Carole Cranor was incompetent, which would tend to show that Attorney Andrews recognized the justiciability of Frank Cranor's petition. However, the record clearly shows that Attorney Andrews conceded only that her client had limited capacity related to "early stage dementia," maintaining that Carole was otherwise competent to make decisions concerning her own affairs, including the decision to name her attorney-in-fact.[4] Therefore, we hold that this finding is also without evidentiary support.

Further, the superior court found that Attorney Andrews continued to insist during the proceeding that there was no evidence of wrongdoing by Carole's attorney-in-fact, Ms. Hopkins. It is true that Ms. Hopkins' drafting of a DPOA, which contained a gifting provision in her favor, may have constituted unethical conduct. However, the record does not disclose that Attorney Andrews ever contested this point or made any

---

4. Although not central to our analysis, we note that the evidence produced during discovery clearly suggested that Carole did have substantial capacity and was not totally incompetent.

misrepresentation concerning this point. Rather, Attorney Andrews' statements on this issue are supported by another finding by the superior court – which *is* supported by the evidence – that although Ms. Hopkins had violated the Professional Rules of Conduct in drafting the gifting provision in her favor, "[t]here is no evidence that Ms. Hopkins ever received anything of value or otherwise benefitted from the DPOA."

The superior court's concern seemingly was that Attorney Andrews was acting for the benefit of Ms. Hopkins and not for the benefit of her client, Carole Cranor. It is true that Attorney Andrews' advocacy in this matter had the potential of benefiting Ms. Hopkins by allowing her to continue serving as Carole's attorney-in-fact and/or as a limited guardian appointed by the court. However, Attorney Andrews' advocacy benefited her client as well, in that she was acting in accordance to Carole's wishes: that Ms. Hopkins, in whom she had great trust, remain in charge of her affairs during her decline and that her brother, with whom she had a strained relationship, would have no authority over the running of her affairs.

We hold that the evidence in the record and the superior court's findings which *are* supported by the evidence support a conclusion that Rule 11 sanctions are not warranted in this case, as found by the clerk in the initial hearing on the matter. We agree with the determination by the clerk that the petition filed by Frank Cranor was justiciable and that Attorney Andrews' motions were properly denied. However, we also conclude that Attorney Andrews acted in good faith and in the interest of zealously advocating for her client. We therefore agree with the clerk that "remarks and pleadings made and filed by [Attorney Andrews] in this matter were made in apparent good faith and do not rise to a level of culpability sufficient to justify imposition of sanctions pursuant to [Rule 11] nor to trigger payment of costs."

Specifically, Attorney Andrews could reasonably have inferred from Frank Cranor's original and amended petitions for adjudication of Carole Cranor's incompetence that Frank Cranor was attempting to gain control over his sister's assets by having her declared incompetent and having himself named as her general guardian, and that the petitions were filed without a proper basis in fact. The petition was eventually dismissed for failure to state a claim.[5] Frank Cranor represented in his

5. We note that while the grant of a 12(b)(6) motion is not sufficient to *establish* the absence of a justiciable issue, it *can serve as evidence* of the absence of a justiciable issue. *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 259, 400 S.E.2d 435, 439 (1991).

petition that he had first-hand knowledge of Carole's condition though there is evidence that he had no first-hand knowledge of her condition, in that he had had very little contact with her for many years.

Further, Attorney Andrews could reasonably have inferred that Frank Cranor was not proceeding in good faith, based in part on his attempt to have Carole evaluated by his chosen psychiatrist without notifying Attorney Andrews. Specifically, on the morning of 8 June 2013, Attorney Andrews e-mailed Attorney West that she had been retained by Carole and that she objected to any evaluation of her client that day by Frank Cranor's chosen psychiatrist. However, whether Attorney West was aware of Attorney Andrews' e-mail or not, Attorney West appeared at Carole's residential care facility later that same day along with the psychiatrist for the purpose of performing an exam on Carole.

Finally, based on overwhelming evidence that Carole Cranor still retained significant capacity, Attorney Andrews could have reasonably concluded that Frank Cranor pursued his appeal of the clerk's dismissal of his amended petition after a point where he should reasonably have become aware that the pleading no longer contained a justiciable issue. *Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438; *see also Bryson v. Sullivan*, 330 N.C. 644, 658, 412 S.E.2d 327, 334 (1992) ("[O]nce the case has become meritless, failure to dismiss or further prosecution of the action may result in sanctions [under Rule 11] or pursuant to the inherent power of the court."). Thus, we do not believe that the trial court's finding that "the record . . . clearly establishes the justiciability of the issues presented by the petition" supports the trial court's conclusion of law that "no reasonably competent attorney could conclude that the issues brought by [Frank Cranor] are non-justiciable in this proceeding."

Again, we do not take a position regarding Attorney Andrews' beliefs about the motivation of Frank Cranor and Attorney West in filing the petition or in prosecuting this matter. Indeed, Carole was suffering from dementia, and there was a concern regarding the initial DPOA which contained the self-gifting provision in favor of Ms. Hopkins. We simply conclude that the unchallenged findings and uncontroverted evidence in the record supports a conclusion that Attorney Andrews acted in good faith in filing the Rule 11 motion and the motion for attorneys' fees. Accordingly, we hold that the superior court erred in imposing sanctions on Attorney Andrews in response to both motions.

### B. Sanctions Imposed in the Trial Court's Inherent Authority

**[3]** In addition to the imposition of sanctions pursuant to Rule 11, the superior court imposed sanctions against Attorney Andrews in

the exercise of its inherent authority. These sanctions included (1) prohibiting Attorney Andrews from collecting any fees or expenses from Carole Cranor, and (2) removing Attorney Andrews as Carole Cranor's attorney. The proper standard of review for acts by the trial court in the exercise of its inherent authority is abuse of discretion. *In re Key*, 182 N.C. App. 714, 721, 643 S.E.2d 452, 457 (2007).

The superior court prohibited Attorney Andrews from collecting fees or expenses from Carole Cranor pursuant to the provisions of Indigent Defense Services ("IDS") Rule 1.9(e), which governs the appointment of counsel to indigent clients and also applies to guardian ad litem appointments in certain situations. This was improper and constitutes an abuse of discretion. IDS Rule 1.9(e) addresses a situation where an attorney is appointed as **counsel** for an indigent client, *withdraws*, and then becomes *privately retained* as counsel for the same client. *See* Commentary to IDS Rule 1.9(e) (2014). That situation is markedly different from the facts of this case, where Ms. Andrews was appointed as Ms. Cranor's guardian ad litem and where the record clearly shows that Ms. Cranor was not indigent. IDS Rule 1.9(e) clearly does *not* apply in the present situation.

Additionally, we do not believe the record supports the trial court's removal of Attorney Andrews as counsel for Carole Cranor in this matter, or its order preventing Carole Cranor from retaining Attorney Andrews in any future matter.[6] As previously discussed, many of the findings used by the trial court to support its conclusions were not supported by the evidence in the record. We do not believe that the undisturbed findings of the trial court support this sanction.

## IV. Conclusion

In conclusion, we reverse the September Order and December Orders to the extent that they impose sanctions on Attorney Andrews pursuant to Rule 11 *and* the trial court's inherent authority, including the imposition of attorneys' fees and costs. Furthermore, we reverse the September Order to the extent that it orders that the cost of the multidisciplinary evaluation of Carole Cranor be borne by the Department of Health and Human Services and reinstate the order of the clerk requiring that Frank Cranor bear the cost. *See* N.C. Gen. Stat. § 35A-1116(b)(3) (requiring that when a respondent is not adjudicated incompetent, the

6. It is not within the trial court's inherent authority to place a limitation on a lawyer's right to practice law for an *indefinite* period of time. *See Matter of Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977).

cost of a multidisciplinary evaluation may be taxed against either party in the court's discretion).[7] These Orders are otherwise affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

Judge ZACHARY concurs.

Judge HUNTER, JR., concurs in part and dissents in part by separate opinion.

HUNTER, JR., Robert N., Judge, concurring in part and dissenting in part.

I agree with the majority that this Court has jurisdiction to hear Appellant's appeal. However, I must respectfully dissent from the majority's analysis in favor of affirming the trial court.

"The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a)." *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). Second, "in reviewing the appropriateness of the particular sanction imposed, an 'abuse of discretion' standard is proper because '[t]he rule's provision that the court "shall impose" sanctions for motions abuses . . . concentrates [the court's] discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions.' " *Id.* (quoting *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1174 (D.C. Cir. 1985)).

---

7. Whether to tax the cost of the evaluation to Frank Cranor pursuant to N.C. Gen. Stat. § 35A-1116(b)(3) was within the discretion of the clerk. Here, since the superior court did not reverse the dismissal of the incompetency petition, the superior court's review of the clerk's order taxing costs of the evaluation was for an abuse of discretion. There is nothing in the record which would support a conclusion that the clerk abused its discretion in taxing the costs of the evaluation to Frank Cranor.

The majority contends "many of the superior court's findings are not supported by the evidence." A full review of the record shows the following, in addition to the facts set forth by the majority.

Dementia runs in Frank Cranor's ("Petitioner") family. His mother and maternal aunt struggled with the disease, and he is aware that he and his sister, Carole Cranor ("Respondent"), face an increased likelihood of suffering from the disease. In 2000, Respondent began complaining of memory issues to Petitioner. In 2006, Respondent and Petitioner were emotionally strained when their mother's health deteriorated. Respondent was tasked with managing her mother's affairs, but her declining capacity failed her as a caretaker, and Petitioner took over as his mother's caretaker, which caused some turmoil.

According to Petitioner, he and Respondent reconciled in 2009. Sometime in 2010–2011, Respondent told Petitioner she had quit her job and collected disability due to her memory problems. Petitioner visited Respondent in 2011, and he discovered she had hygiene issues because she did not remember to shower. He grew concerned for her, but had confidence that Respondent's ex-husband was caring for her.

Respondent's memory became significantly worse in 2012–2013. In April 2013, Respondent's ex-husband called Petitioner and told him that Respondent had fallen and her friend and attorney, Harriet Hopkins ("Hopkins"), had taken her to the hospital. Then, Respondent learned that Hopkins "had taken control of [Respondent's personal affairs and [] estate" by drafting a durable power of attorney document that gave Hopkins "the unilateral right to gift to herself any or all of [Respondent's] property without any duty to provide an accounting to anyone." This shocked Petitioner and made him feel that Respondent's "personal and financial well-being were in too much jeopardy to continue to refrain from taking action to protect her from herself and others, particularly [] Hopkins."[1]

Respondent was discharged from the hospital and admitted to an assisted living facility. After some time, Petitioner called a nursing assistant to check on Respondent and she said Respondent's condition was "poor."

1. There is no record evidence that Hopkins represented Respondent as a client beyond this durable power of attorney document. There is also no evidence that Hopkins self-gifted any of Respondent's property.

On 3 June 2013, Petitioner filed a petition[2] to have Respondent adjudicated incompetent and have a general guardian appointed to protect her. Petitioner nominated himself to be Respondent's general guardian but he also contacted guardian *ad litem* ("GAL") Kelly Black-Oliver, and "adamantly [expressed to her] that he did not necessarily wish to be [Respondent's general] guardian, just that [he wanted] one [] appointed so that there was some accountability."

When the petition was filed, attorney Lynn Andrews ("Appellant"), was appointed to serve as Respondent's GAL. She immediately withdrew from the case as GAL and stated she had a conflict of interest because she is a friend of Hopkins' and discussed the case with her. Thereafter, Ms. Black-Oliver was appointed as GAL.

Several days later, Petitioner's counsel asked Ms. Black-Oliver if she would agree to have a forensic psychiatrist from Duke University examine Respondent. Ms. Black-Oliver agreed "that was a prudent thing to do," and the parties scheduled the examination on a Saturday. Appellant sent an email to Petitioner's counsel Saturday morning and stated, "I'm representing [Respondent], and I'm not going to allow this evaluation." The parties went to Respondent's assisted living facility so Ms. Black-Oliver could interview Respondent and the forensic psychiatrist could examine Respondent, but Appellant intervened "to try to delay or prevent Ms. Black-Oliver from speaking to [Respondent]."

On 13 June 2013, Appellant stated in a written motion that Respondent retained her as counsel. Appellant moved to stay the multidisciplinary evaluation ("MDE"). She obtained an *ex parte* order staying the MDE. The parties were heard on the matter on 14 June 2013. At the hearing, Appellant debated the proper procedure to schedule a MDE and stated the following:

> And we've already said that we will admit that [Respondent] has limited capacity. We're not alleging she's incompetent. If [Petitioner's counsel] says this is a contested case on incompetency, he's wrong. We will concede that the Respondent has early stage dementia or Alzheimer's. That's the reason she's in an assisted living facility. . . .
>
> And, again, I don't blame Ms. Black-Oliver. I think [Petitioner's counsel] has been pushing and bullying and

2. Petitioner filed a Standard Form AOC-SP-200. It states, *inter alia*, "Respondent has suffered significant cognitive decline and memory loss, apparently due to dementia, as well as physical problems such as dehydration, extreme fatigue, and bad falls."

> trying to do everything as fast as he can in this case, but there's just nothing there. A [MDE] is appropriate in a case where incompetency is at question or contested. We'd advised him we're not contesting that [Respondent] has limited capacity. . . . And we will admit that [Respondent] has a diagnosis of early onset, early stage dementia. She's very forgetful. . . . Apparently [Petitioner's counsel] is trying to have [Respondent] declared completely incompetent with a full guardianship stripping her of every right she can possibly have.

Thereafter, the parties questioned Ms. Black-Oliver. Petitioner's counsel questioned Ms. Black-Oliver as follows:

> [PETITIONER'S COUNSEL]: Did [Appellant] threaten to have you disqualified [as guardian *ad litem*]?
>
> [MS. BLACK-OLIVER]: I believe she stated that it was her intention to do so yesterday, but she has not done so yes—yet.
>
> [PETITIONER'S COUNSEL]: And did she go to the Public Defender who is the person that appoints the guardian *ad litems* to complain that you had acted inappropriately and/or colluded and/or threatened to kidnap [Respondent] to your knowledge?
>
> [MS. BLACK-OLIVER]: That is summarily my understanding.

Ms. Black-Oliver also testified that Petitioner is "independently wealthy himself" and "[r]eceived the same split of inheritance that [Respondent] received." She stated, "[A]ny potential concerns I would have of [Petitioner's] interest in the proceedings being financial and having control of [Respondent's] assets was [sic] quelled . . . ."

At the conclusion of the hearing Petitioner's counsel asked the trial court to dissolve the MDE stay, and to disqualify Appellant as Respondent's counsel. The trial court stayed the MDE and denied Petitioner's motion to disqualify.

One week later, on 21 June 2013, Appellant filed a Rule 12(b)(6) motion to dismiss the petition. She alleged, "The Petition fails to state any facts tending to support a finding that the Respondent is an 'Incompetent Adult' as defined by NCGS 35A-1101(7). The Petition

contains no factual allegations tending to show that the Respondent lacks sufficient capacity to manage her own affairs . . . ."

Petitioner filed a verified amended petition on 10 July 2013 and Appellant filed a response in which she admitted the following:

> The Respondent admits that when she was living alone, her memory problems and inability to drive adversely impacted her ability to prepare adequate meals for herself, which led to her being hospitalized after a fall due to dehydration. . . . Respondent admits that during the time when she was living alone, she might have been vulnerable to being taken advantage of by unscrupulous persons offering to perform services on her home. Since the Respondent wisely decided to move into a facility where she no longer has the responsibility of keeping up a house and where there are other people around to look after her, this is no longer an issue.

The parties were heard on the motion to dismiss on 3 July 2013, and the Clerk of Durham County Superior Court concluded the Standard Form AOC-SP-200 petition was not specific enough. The Clerk dismissed the case without prejudice, allowing Petitioner to re-file or appeal to Superior Court "for trial de novo" and told Petitioner's counsel to "keep intact all the work you've done . . . ."

Afterwards, Appellant prepared a draft order for dismissal *with* prejudice and emailed it to the Clerk without first allowing Petitioner's counsel to review it. The Clerk signed the order and backdated it six days without consent of the parties. Petitioner's counsel emailed the Clerk and told him the order should be without prejudice and asked him to correct it. The Clerk declined to do so and told Petitioner's counsel that changes would only be made if Appellant consented to them. Consequently, Petitioner appealed to Superior Court.

In Superior Court, Appellant sought to limit the scope of the appeal to only the issue of dismissal. The Superior Court issued an order stating, "[Petitioner] is entitled to a *de novo* hearing . . . in accordance with G.S. 35A-1115 . . . [and the appeal is not] limited to the record before the Clerk of Court." The Superior Court signed a MDE order to have Respondent evaluated and allowed Petitioner to amend his petition. The Superior Court scheduled the case for an evidentiary hearing.

Appellant appealed the Superior Court's order and argued Petitioner had no right to appeal from a Clerk of Court's dismissal. She argued the

Clerk's dismissal should have been without prejudice, and the trial court remanded the case to the Clerk to allow him to amend the order, which the Clerk did on 2 October 2013. Once the Clerk amended the order to reflect the dismissal was without prejudice, the Superior Court entered an order dismissing Petitioner's appeal for lack of standing.

On 28 October 2013, Appellant filed a motion for attorneys fees pursuant to N.C. Gen. Stat. § 6-21.5, and alleged Petitioner and his counsel filed a nonjusticiable case when they petitioned to have Respondent declared incompetent. Appellant alleged the following, *inter alia*:

> 6. After the dismissal of [the original] Petition and Amended Petition and [the] appeal to Superior Court, Petitioner continued to file numerous pleadings that had no relevance to the issues pertinent to his pending appeal in a last-ditch effort to unearth some evidentiary support for his unsubstantiated claim that the Respondent is incompetent. . . .
>
> 9. [After a MDE stating Respondent has the capacity to manager her affairs] Petitioner continued to pursue this litigation, seeking additional discovery and further continuances, long after the time limit for a hearing prescribed by G.S. 35A-1108 had passed, and in the face of overwhelming evidence that Respondent is not incompetent and does not need a guardian. . . .
>
> 14. Petitioner did not have reasonable grounds to bring this proceeding, as shown by: the complete lack of any allegation or evidence tending to show that Respondent is incompetent; the complete lack of any medical evidence for such alleged incompetence; and the complete lack of any valid reason why an adjudication of incompetence was sought . . . .
>
> 16. The pleadings filed in this special proceeding reveal a complete absence of any justiciable issue of either law or fact . . . .
>
> 17. Petitioner did not advance any claim supported by a good faith argument for an extension, modification, or reversal of law in this proceeding.

Appellant filed a second motion on 28 October 2013 against Petitioner and Petitioner's counsel for Rule 11 sanctions. Appellant alleged the following, *inter alia*:

> 1. . . . [The 22 May 2013] Petition did not contain any statements or allegations made upon information and belief. . . .
>
> 3. The Petition and other pleadings filed for Petitioner by his Attorney were presented for an improper purpose, such as intimidation or harassment of Respondent, [Appellant], [Hopkins], and other witnesses, and to cause unnecessary delay or needlessly increase the cost of litigation, in that:
>
> a. The affidavit and other pleadings . . . strongly suggest that the reason Petitioner initiated this proceeding is because Petitioner does not like [Hopkins], rather out of than [sic] any genuine concern for Respondent's welfare . . . .
>
> i. After the Clerk dismissed his Petition and Amended Petition and Petitioner elected to appeal said dismissal rather than initiate a new proceeding, Petitioner filed a barrage of voluminous and frivolous motions, requests, notices, and memoranda that had no relevance to the issues pertaining to Petitioner's appeal and said appeal was ultimately dismissed by the Superior Court for lack of standing . . .
>
> [5.] e. Attorney for the Petitioner had ample time to investigate this matter, both before and after the filing of his Petition and, long past the timeframe prescribed by G.S. 35A-1108 for holding a hearing on his Petition for Adjudication of Incompetency, still had no evidentiary support for Petitioner's claim that Respondent is incompetent and would be unlikely to find any evidentiary support for such a claim.

On 21 December 2013, Petitioner and Petitioner's counsel moved for Rule 11 sanctions against Appellant. They alleged Appellant's motions for sanctions, attorneys fees, and costs violated Rule 11. On 17 December 2013, they filed a thirty-four page brief in response to Appellant's motions and included seventeen exhibits that included deposition and hearing transcripts, affidavits, email messages, and other pertinent information.

The parties were heard on the Rule 11 motions in Superior Court on 8 September 2014 through 10 September 2014. The trial court reviewed the entire record, heard arguments of counsel, and read counsel's briefs. In a 12 September 2014 order, the trial court made the following findings of fact and conclusions of law:

Findings of Fact

1. Petitioner in this case, Respondent's brother, had been concerned about Respondent's health and well-being for several years preceding the filing of the petition in this case. These concerns were vastly increased when he received an email from Harriet Hopkins dated May 2, 2013 in which she informed him that his sister had really declined over the last month and expressed concerns about her worsening memory and physical issues, including bad falls and dehydration which she described as symptoms of dementia. She told him it was pretty clear that it was a safety risk for her to live alone.

2. The original petition was filed in this case on June 3, 2013, with the Durham County Clerk of Court, using Form AOC-SP-200. It alleged that Respondent lacked sufficient capacity to manage her own affairs, etc., and supported those allegations with facts that basically repeated what Hopkins told him in the email. It was signed and verified by Petitioner. There is not a place on Form AOC-SP-200 for Petitioner's attorney to sign. . . .

11. [Appellant] has repeatedly argued to this Court and to others in this case that because Petitioner refused to consent to a limited guardianship with Harriet Hopkins as the guardian, that he was seeking to take away all of Respondent's rights. That argument is a misrepresentation of the facts and the law.

11. [sic] The Clerk of Court, after he dismissed the petition is this case on Rule 12 (b) (8) grounds, advised [Petitioner's counsel] that he could appeal for a trial *de novo* before a Superior Court judge and that he could have a jury trial. (Emphasis added).

12. Superior Court Judge Paul Ridgeway also ordered the case set for a hearing on the merits in Superior Court in his August 8, 2013 Order, based on his understanding at that time that the Clerk's dismissal was with prejudice.

13. Based on the advice of the Clerk, Judge Ridgeway's Order and [Petitioner's Counsel's] interpretation of the law, [Petitioner's Counsel] began to prepare for trial in Superior Court. That preparation included signing and

filing the pleadings complained of by Respondent in her Rule 11 motions. . . .

15. The record in this proceeding, including but not limited to the May 2, 2013, email of Harriet Hopkins, the durable power of attorney of Respondent that was drafted by Ms. Hopkins, and the admissions of [Appellant] and [Ms. Black-Oliver] as to the incompetence of the Respondent, clearly establishes the justiciability of the issues presented by the petition in this proceeding. . . .

17. [Appellant], who has the burden of proof to support her motions for sanctions, fails to identify any legal authority or provide any basis for a good faith argument for the extension, modification, or reversal of existing law as a basis to impose sanctions on the Petitioner and [his counsel] under Rule 11 of the North Carolina Rules of Civil Procedure and instead appears to rely solely on her personal opinion of what she believes the law in North Carolina should be.

18. [Appellant's] conduct in this proceeding, which includes numerous and repeated misrepresentations of fact and law that are clearly intentional, is egregious, and such conduct alone provides a sufficient basis for sanctioning [Appellant] under the inherent authority of the Court.

Conclusions of Law

1. No reasonably competent attorney could conclude that the issues brought by Petitioner are non-justiciable in this proceeding. [Appellant's] amended motion for attorney's fees pursuant to G.S. 6-21.5 is thus neither well-grounded in fact after reasonable inquiry nor warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. It was also interposed to harass, delay and drive up the costs of litigation, all of which are improper purposes. This motion is frivolous as a matter of law and should be denied. Filing this frivolous motion is in violation of Rule 11 and requires the imposition of sanctions against [Appellant].

2. In contrast, the Petitioner's initial Petition, Amendment to the Petition, and Second Amended Petition were clearly

> well-grounded in fact based upon reasonable inquiry and were warranted by Chapter 35A of the North Carolina General Statutes. None of them violate Rule 11.
>
> 3. As to Respondent's Amended Motion for Sanctions Against Petitioner, the Court finds that it is unwarranted by law and was interposed for an improper purpose, to wit: harassing Petitioner and causing needless increase in the cost of litigation. Therefore, it violates Rule 11 and requires that [Appellant] be sanctioned.
>
> 4. As to Respondent's Amended Motion for Sanctions Against Petitioner's Attorney, Respondent has failed to meet her burden of proving by the greater weight of the evidence that Petitioner's attorney signed any pleading that was not well grounded in fact, not warranted by existing law or was interposed for any improper purpose. . . .
>
> 8. The evident purpose of the totality of [Appellant's] actions in the case was to protect the interests of Harriet Hopkins to the detriment of Respondent. This purpose may be inferred from the objective behavior of [Appellant], including but not limited to: alleging that this case is non-justicable, filing Rule 11 motions against Petitioner, accepting employment in this case after having been appointed GAL and then withdrawing as GAL because of a conflict arising out of her friendship with Harriet Hopkins, objecting to a multidisciplinary evaluation of Respondent and then acting to have it stayed after the Clerk ordered it, accusing [Ms. Black-Oliver] of threatening to kidnap Respondent, and making repeated claims that Harriet Hopkins had done nothing wrong. This evident purpose goes beyond the scope of Rule 11 in its severity and its potential adverse effect on the administration of justice. The Court is justified in such situations to look beyond the sanctions of Rule 11 and invoke its inherent authority.

The trial court allowed Petitioner's Rule 11 motion, prohibited Appellant from accepting any fees from her representation of Respondent, ordered Appellant to pay Petitioner's attorneys fees, removed Appellant as Respondent's attorney, ordered the Clerk to deliver a copy of the order to the Executive Director of the North Carolina State Bar, and requested the State Bar open an investigation into Appellant's behavior.

The trial court set a second hearing date to determine the amount of attorneys fees and costs. On 2 October 2014, Petitioner's counsel filed a petition for attorneys fees and costs and included a log of the billable time they spent defending Petitioner and themselves against Appellant's Rule 11 motion. Appellant filed a response on 13 October 2014, and objected to the attorneys fees and costs. She also filed a Rule 60(b) motion seeking relief from the 12 September 2014 order awarding Rule 11 sanctions against her. The parties were heard on their motions on 12 December 2014.

At the hearing, the trial court stated the following:

> I've read [Appellant's] Rule 60 motion, and even though it[] cites provisions of law that weren't necessarily brought up in the hearing back in September, I don't' see anything in here that I didn't' take into consideration in entering my order. I mean, for instance, I specifically read everything in Michael Crowell's materials concerning judicial discipline. I don't consider what I did in that September 12th order to be discipline. . . . I specifically wasn't disciplining [Appellant] in my mind, and that's why I referred it to the State Bar. . . . All right. Well, just [] for the record and so everybody understands, I took this case as seriously as any case I have ever heard. I did independent research. I didn't rely on the filings done by either side because, frankly, I wanted to go outside those. I labored over what the right thing to do in this case was and what the right procedure was. I thought about it a lot.

The trial court denied Appellant's Rule 60 motion. Additionally, the trial court scrutinized the affidavits of billable hours submitted by Petitioner's counsel and found that their hourly rates of $250.00 and $285.00 per hour were "more than reasonable."

Thereafter, the trial court issued an order on 17 December 2014. In the order, the trial court ordered Appellant to pay Petitioner $122,987.72 in attorneys fees and costs. Appellant filed her notice of appeal on 13 January 2015.

## Analysis

Rule 11 of the North Carolina Rules of Civil Procedure sets out the following:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one

> attorney of record . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2015). A Rule 11 motion signed in violation of this rule subjects an attorney to sanctions.

Further, "the central purpose of Rule 11 is to deter baseless filings and to streamline the administration and procedure of our courts." *Adams v. Bank United of Texas FSB*, 167 N.C. App. 395, 399, 606 S.E.2d 149, 153 (2004) (citation omitted). Rule 11 was enumerated to "prevent abuse of the legal system, [and] our General Assembly never intend[ed] to constrain or discourage counsel from the appropriate, well-reasoned pursuit of a just result for their client." *Grover v. Norris*, 137 N.C. App. 487, 495, 529 S.E.2d 231, 235 (2000).

"Under Rule 11, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose." *Johns v. Johns*, 195 N.C. App. 201, 212, 672 S.E.2d 34, 42 (2009) (citation omitted). An "improper purpose" is "any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Persis Nova Const. Inc. v. Edwards*, 195 N.C. App. 55, 63, 671 S.E.2d 23, 28 (2009) (citation omitted). For example, an improper purpose may be inferred from the following:

> [F]rom "the service or filing of excessive, successive, or repetitive [papers] ...," from "filing successive lawsuits despite the res judicata bar of earlier judgments," from "failing to serve the adversary with contested motions," from filing numerous dispositive motions when trial is

> imminent, from "the filing of meritless papers by counsel who have extensive experience in the pertinent area of law," from "filing suit with no factual basis for the purpose of 'fishing' for some evidence of liability," from "continuing to press an obviously meritless claim after being specifically advised of its meritlessness by a judge or magistrate," or from "filing papers containing 'scandalous, libellous, and impertinent matters' for the purpose of harassing a party or counsel."

*Id.* (quoting *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992) (quoting Gregory P. Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 13(C) (Supp. 1992))).

After considering the context of Appellant's Rule 11 motion, and carefully reviewing the record *de novo*, it is clear Appellant violated Rule 11 when she signed and filed her Rule 11 motion against Petitioner and Petitioner's counsel. At the outset of litigation, Appellant conceded this is "[not a] contested case" of incompetency. She admitted Respondent has dementia and/or Alzheimer's. The other GAL, Ms. Black-Oliver, conceded Respondent is incompetent and worked to have Respondent evaluated by a forensic psychiatrist. The record clearly shows Respondent has endured a downward trajectory of mental competency for many years. The evidence to support that contention comes from nurses, caregivers, Respondent's ex-husband, Hopkins, and others, not just Petitioner. Appellant alleges there is "a complete lack of [] evidence," and no "good faith" reason for Petitioner to bring this action. Her allegations are not supported by the record. The record shows Respondent failed to feed herself, suffered dehydrated, and sustained a serious fall, all due to her lack of mental capacity. Moreover, there is no substantive evidence to suggest Petitioner is trying to completely control Respondent, for financial incentive or otherwise, as Appellant alleges. Rather, the record shows Petitioner is financially well-off and has concern for his sister, due to his conversations with her ex-husband, friends, and caregivers, and after reviewing the durable power of attorney she executed that exposed her assets to Hopkins' potential self-gifting. Therefore, Petitioner and Petitioner's counsel carried their burden in proving Appellant's Rule 11 motion was filed for an objectively improper purpose.

First, I would hold the trial court's conclusions of law support its imposition of sanctions; the trial court's conclusions of law are supported by its findings of fact; and the findings of fact are supported by a sufficiency of the evidence. Therefore, the trial court's "decision to

impose" Rule 11 sanctions is binding on this court. *Turner*, 352 N.C. at 165, 381 S.E.2d at 714.

Second, I would hold the trial court did not abuse its discretion in selecting the specific sanctions at issue. The trial court assigned the excess cost of litigation to Appellant, and prevented her from further representation in a case that she originally claimed presented a conflict of interest. Further, the trial court referred the matter to the State Bar, and in doing so, it did not abuse its discretion.

For the foregoing reasons, I respectfully dissent in favor of affirming the trial court.

---

MACK DEVAUGHN POPE, Plaintiff
v.
DAWN WRENCH POPE, Defendant

No. COA15-1062

Filed 17 May 2016

**1. Civil Procedure—Rule 60(b)—domestic violence protection order—not overruling prior order**

The trial court did not abuse its discretion in a domestic violence protection order case by granting defendant wife's Rule 60(b) motion. Although plaintiff husband contended that the trial court improperly reconsidered another trial court's decision that plaintiff was a victim of domestic violence, a Rule 60(b) order does not overrule a prior order. Consistent with statutory authority, it relieves parties from the effect of an order.

**2. Domestic Violence—protection order—setting aside—Rule 60(b)(5)—sufficiency of findings of fact**

The trial court did not abuse its discretion by setting aside a domestic violence protection order based on Rule 60(b)(5). The trial court properly made specific findings of fact that plaintiff-husband no longer feared defendant wife.

Appeal by plaintiff from order entered 8 April 2015 by Judge R. Dale Stubbs in Harnett County District Court. Heard in the Court of Appeals 9 February 2016.

*Daughtry, Woodard, Lawrence & Starling, by Kelly K. Daughtry, for plaintiff-appellant.*

*The Armstrong Law Firm, P.A., by Eason Armstrong Keeney, L. Lamar Armstrong, III, and Marcia H. Armstrong, for defendant-appellee.*

BRYANT, Judge.

Where a trial judge has authority to grant Rule 60(b) relief without offending the rule that precludes one trial judge from overruling the judgment of another, we affirm the order of the trial court.

Mack Devaughn Pope, plaintiff-husband, and Dawn Wrench Pope, defendant-wife, were married on 25 October 2000. Two children born of the marriage currently reside with defendant-wife.

The parties separated on 12 May 2014. On 12 August 2014, plaintiff-husband filed a Complaint seeking a Domestic Violence Protective Order ("DVPO") against defendant-wife. On 14 August 2014, defendant-wife filed a DVPO Complaint against plaintiff-husband. Both parties obtained *ex parte* DVPOs, and a hearing for both DVPOs was set for 30 September 2014.

Defendant-wife did not appear for the 30 September 2014 DVPO hearings scheduled on both DVPO Complaints and the Honorable Jimmy L. Love, Jr., Judge presiding, dismissed defendant-wife's DVPO Complaint.[1] Judge Love proceeded with the hearing on plaintiff-husband's DVPO Complaint. Judge Love found that defendant-wife had committed acts of domestic violence by harassing, following, and yelling at plaintiff-husband, and that the DVPO was warranted for a period of one year in order to alleviate plaintiff-husband's fear of imminent serious bodily injury and continued harassment. Defendant-wife was served with the DVPO that same day, on 30 September 2014.

Plaintiff-husband continued to contact defendant-wife after his DVPO was entered against her. Plaintiff-husband showed up at defendant-wife's house, both when the children were present and when they were not. He also required defendant-wife to meet him at gas stations

---

1. Defendant-wife later testified that plaintiff-husband told her he was not going to the hearing and was going to have his DVPO complaint dropped. Defendant-wife claims she relied on plaintiff-husband's assurances and believed him because in a prior matter, plaintiff-husband dropped criminal assault charges against her after promising to do so.

to fill her truck up with gas rather than giving her the funds to do so. According to defendant-wife, plaintiff-husband continued to call her "quite often" and also "yell" and "cuss" at her.

On 2 December 2014, defendant-wife filed a second DVPO Complaint, alleging that plaintiff-husband was repeatedly coming by her residence and threatening to force her to leave the residence. Defendant-wife obtained an *ex parte* DVPO and the matter was set to be heard on 9 December 2014. Meanwhile, on 4 December 2014, plaintiff-husband filed a motion to correct the DVPO entered 30 September 2014 based on a clerical error: Judge Love set the effective date through 30 September *2014* rather than 30 September *2015*. The hearing on 9 December 2014 was held before the Honorable Robert W. Bryant, Jr., who concluded that the "evidence does not support or provide grounds for [defendant-wife's] DVPO."

Three months later, on 13 March 2015, defendant-wife filed a Rule 60 Motion for relief from the 30 September 2014 order granting plaintiff-husband's DVPO and from the 9 December 2014 order denying her DVPO, alleging (1) that she did not appear at the hearing before Judge Love because plaintiff fraudulently told her he was dismissing the DVPO Complaint; and (2) that incidents occurring since entry of the DVPO showed plaintiff-husband was not afraid of defendant-wife. A hearing was held on 7 April 2015 before the Honorable R. Dale Stubbs, Judge presiding. After hearing evidence from both parties and argument from counsel, Judge Stubbs set aside Judge Love's 30 September 2014[2] DVPO based on his conclusion that it was "no longer equitable that the [DVPO] should have future application" and that there was "good reason justifying relief from the [DVPO]" because "the harassment has been on both sides" and plaintiff-husband was not afraid of defendant-wife. Plaintiff-husband filed his notice of appeal of Judge Stubbs's order on 8 April 2015.

---

On appeal, plaintiff-husband argues that (I) the trial court could not properly reconsider another trial court's decision that plaintiff-husband was a victim of domestic violence; (II) the trial court abused its discretion in setting aside the DVPO based on Rule 60(b)(5); and (III) there is otherwise no basis for this Court to affirm the set-aside order.

---

2. Judge Stubbs's order referred to "a DVPO entered against [defendant-wife] and amended on 12-9-14." As the order entered 30 September 2014 was the only DVPO "amended" to correct a clerical error, it is clear this is the order to which Judge Stubbs refers.

*I*

**[1]** Plaintiff-husband first argues that Judge Stubbs could not properly revisit the findings supporting Judge Love's decision that plaintiff-husband was a victim of domestic violence absent grounds to do so under Rule 60(b) of the North Carolina Rules of Civil Procedure. Specifically, plaintiff-husband argues that, in granting defendant-wife's 60(b) motion, Judge Stubbs improperly reviewed or reconsidered Judge Love's original decision granting the DVPO. We disagree.

A motion for relief from a final order made pursuant to Rule 60(b) is within the sound discretion of the trial court, and the trial court's decision will not be disturbed absent: (1) an abuse of discretion; and/or (2) a trial court's "misapprehension of the appropriate legal standard" for ruling on a Rule 60(b) motion. *Anuforo v. Dennie*, 119 N.C. App. 359, 361, 458 S.E.2d 523, 525 (1995) (citations omitted). As to the former, "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's discretion] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (internal citation omitted). Further, findings of fact made by the trial court upon a Rule 60(b) motion are binding on appeal if supported by any competent evidence. *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 132, 180 S.E.2d 407, 410 (1971) (citations omitted).

Rule 60(b) states, in pertinent part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for one of the following reasons:
>
> . . .
>
> (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment. . . .

N.C. Gen. Stat. § 1A-1, Rule 60(b)(5), (6) (2015).

Plaintiff-husband argues that Judge Stubbs could not properly revisit Judge Love's findings—namely that plaintiff-husband feared he would be physically injured by defendant-wife and that plaintiff-husband was significantly distressed by the prospect of relentless torment—because it is "[t]he well established rule in North Carolina . . . that no appeal lies from one judge to another; . . . and that ordinarily one judge may not modify, overrule, or change the judgment of another . . . judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citations omitted). As such, " '[a] judge of the District Court cannot modify a judgment or order of another judge of the District Court' absent a showing of mistake, inadvertence, fraud, newly discovered evidence, satisfaction, or that the judgment is void." *Duplin Cnty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 481, 751 S.E.2d 621, 623 (2013) (quoting *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117 (1981)). For the reasons stated below, plaintiff-husband's argument is misguided.

Rule 60(b) does not offend the rule which states that "one [trial] judge may not ordinarily . . . overrule . . . the judgment or order of another [trial] judge . . . ." *Id.* (quoting *In re Royster*, 361 N.C. 560, 563, 648 S.E.2d 837, 840 (2007)). Indeed, "[a] 60(b) order does not *overrule* a prior order but, consistent with statutory authority, relieves parties from the *effect* of an order." *Van Engen v. Que Scientific, Inc.*, 151 N.C. App. 683, 690, 567 S.E.2d 179, 184 (2002) (emphasis added) (quoting *Charns v. Brown*, 129 N.C. App. 635, 639, 502 S.E.2d 7, 10 (1998)). Thus, "a [trial] [c]ourt judge[3] may grant relief from the decision of another judge on a Rule 60(b) motion." *Trent v. River Place, LLC*, 179 N.C. App. 72, 79, 632 S.E.2d 529, 534 (2006) (citation omitted); *Hieb v. Lowery*, 121 N.C. App. 33, 38, 464 S.E.2d 308, 311–12 (1995) ("[A] [trial] court judge has authority to grant relief under a [Rule 60](b) motion without offending the rule that precludes one [trial] court judge from reviewing the decision of another." (citation omitted)); *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 904 (1978) (vacating and remanding where a judge erroneously believed he lacked the power to grant the relief requested in a 60(b) motion because he believed he did " 'not have authority to pass upon or reconsider' " another judge's order).

---

3. Many cases refer to "Superior Court" judges in this context as most 60(b) appeals are from Superior Court. However, as "District Court" judges are able to hear 60(b) motions, cases analyzing the trial court's ability to grant relief under 60(b) should be equally applicable to a District Court judge's ability to do the same. *Cf. Duplin Cnty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 481, 751 S.E.2d 621, 623 (2013) (reviewing appeal from district court's 60(b) order and noting that a district court's setting aside an order based on one of the grounds in Rule 60(b) does not "overrule" a prior order).

Furthermore, a trial judge commits reversible error by denying a Rule 60(b) motion because the judge believes it should be heard by the judge who entered the order from which relief is sought. *Trent*, 179 N.C. App. at 78–79, 632 S.E.2d at 534; *Hoglen*, 38 N.C. App. at 731, 248 S.E.2d at 904. As such, "[w]here a judge refuses to entertain such a motion because he labors under the erroneous belief that he is without power to grant it, then he has failed to exercise the discretion conferred on him by law." *Trent*, 179 N.C. App. at 79, 632 S.E.2d at 534 (internal quotation marks and citation omitted).

Rule 60(b) is the proper vehicle by which a trial court may grant relief from DVPOs. When defendant-wife filed her Rule 60 motion to set aside the DVPO on 13 March 2015, Judge Stubbs was required to hear the motion—which he did on 7 April 2015—and exercise the "discretion conferred on him by law" by either granting or denying the motion. When Judge Stubbs granted defendant-wife's motion to set aside the DVPO concluding that it was "no longer equitable," his order was made using the form provided by the Administrative Office of the Courts ("AOC") specifically for orders setting aside DVPOs. The form is titled "Order Setting Aside Domestic Violence Protective Order," with the supporting statute listed under the title as "G.S. 1A-1: Rule 60(b)." Accordingly, Judge Stubbs was not re-litigating the issue, but rather was acting lawfully by hearing and granting the motion. Therefore, plaintiff-husband's argument is overruled.

*II*

**[2]** Plaintiff-husband next argues that the trial court abused its discretion in setting aside the DVPO. Specifically, plaintiff-husband contends the trial court abused its discretion in granting defendant-wife's Rule 60(b) Motion, *sua sponte*, under Rule 60(b)(5), where defendant-wife moved for relief under Rule 60(b)(6). We disagree.

"The purpose of Rule 60(b) is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments." *Carter v. Clowers*, 102 N.C. App. 247, 254, 401 S.E.2d 662, 666 (1991) (citing 9 C. Wright & A. Miller, Federal Practice and Procedure § 2851 (1971)). "Rule 60(b) is an unusual rule, having been described as 'a grand reservoir of equitable power.' " *Id.* at 253, 401 S.E.2d at 665 (quoting *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 712, 222 S.E.2d 706, 708 (1976)). As such, while "the usual method for seeking relief under Rule 60(b) is by filing a motion. . . . other means may be sufficient." *Id.* For instance, a trial court may even act *sua sponte* to grant relief under Rule 60(b), even where a party has not moved for relief under that rule.

*Id.* ("[N]omenclature is unimportant, moving papers that are mislabeled in other ways may be treated as motions under Rule 60(b) when relief would be proper under that rule." (citation omitted)); *see also Hieb*, 121 N.C. App. at 38, 464 S.E.2d at 311.

Further, a Rule 60(b) movant need not specify under which subpart of Rule 60(b) relief is sought. *Sides v. Reid*, 35 N.C. App. 235, 237, 241 S.E.2d 110, 111 (1978) ("If a movant is uncertain whether to proceed under clause (1) or (6) of Rule 60(b), he need not specify if his motion is timely and the reason justifies relief." (citation omitted)). Likewise, the trial court need not set aside a final judgment under the subpart specified by the movant. *Id.* It follows, then, that if a trial court may set aside a DVPO *sua sponte*, absent a party's motion under Rule 60(b) entirely, and a Rule 60(b) movant need not specify under which subsection it seeks relief, a trial court may set aside a DVPO pursuant to Rule 60(b)(5), even where a party moved for relief pursuant to Rule 60(b)(6) or another subsection.

Plaintiff-husband argues that there is no case which specifically supports granting relief from a DVPO under Rule 60(b)(5). However, "[o]n motion *and upon such terms as are just*, a court may relieve a party from a *judgment* if, among other reasons, it is no longer equitable that the judgment have prospective application." *Buie v. Johnston*, 313 N.C. 586, 589, 330 S.E.2d 197, 199 (1985) (citing N.C.G.S. § 1A-1, Rule 60(b)(5)). Rule 60(b)(5) allows relief from a judgment when "it is no longer equitable that the judgment should have prospective application . . . ." N.C.G.S. § 1A-1, Rule 60(b)(5). That is exactly what the trial court determined.

Here, the trial court relied on competent evidence to support its conclusion that plaintiff-husband was no longer afraid of defendant-wife. After the DVPO was entered in September 2014, plaintiff-husband continued to call defendant-wife, show up at her house "almost every day," and require defendant-wife to meet him at gas stations to fill up her truck with gas rather than provide her with the funds to do so independently. Judge Stubbs properly made specific findings of fact that plaintiff-husband no longer feared defendant-wife.

Accordingly, the decision to set aside the DVPO under Rule 60(b)(5) was supported by findings of fact and was proper. Plaintiff-husband's argument is overruled.

Furthermore, as we have already held there was no error in setting aside the DVPO, and plaintiff-husband's third and final argument on

appeal is essentially an alternative one, namely that there is otherwise no basis for this Court to affirm the set-aside order, we need not address it. The order of the trial court setting aside the 30 November 2014 DVPO is

AFFIRMED.

Judges DILLON and ZACHARY concur.

---

ERVIN RAINEY, Employee, Plaintiff
v.
CITY OF CHARLOTTE, Employer, and SELF-INSURED, Carrier, Defendants

No. COA15-953

Filed 17 May 2016

**Workers' Compensation—occupational disease—untimely claim**

The Industrial Commission did not err in a workers' compensation case by dismissing plaintiff' worker's complaint seeking benefits for an occupational disease. Plaintiff failed to file his claim within the requisite time period of the two-year statute of limitations under N.C.G.S. § 97-58(c).

Appeal by plaintiff from opinion and award filed 9 June 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 January 2016.

*The Sumwalt Law Firm, by Vernon Sumwalt, for plaintiff-employee.*

*Jones, Hewson & Woolard, by Lawrence J. Goldman, for defendant-employer.*

ELMORE, Judge.

The North Carolina Industrial Commission dismissed plaintiff's claim for benefits for an occupational disease, concluding that plaintiff failed to timely file his claim pursuant to N.C. Gen. Stat. § 97-59(c). We affirm.

## I. Background

Ervin Rainey (plaintiff) worked as an automotive mechanic assistant for the City of Charlotte (defendant) for eighteen years, which required frequent strenuous use of his arms and shoulders. On 9 May 2000, plaintiff presented to Dr. H. Yates Dunaway, an orthopedic surgeon, for an evaluation of his right shoulder and knee. According to his medical report, plaintiff told Dr. Dunaway that his job requires heavy use of his shoulders to break down tires. The report also included Dr. Dunaway's diagnosis, "severe osteoarthritis right shoulder," and the following statement: "I have talked with [plaintiff] extensively about the likelihood of total shoulder arthroplasty in the near future. He will need to consider modifying his work."

Plaintiff declined surgical intervention and continued to work in his same position as an automotive mechanic assistant for defendant. His shoulder problems persisted, however, and at times plaintiff had to request assistance from co-workers. On 1 December 2009, he retired due to pain in his left shoulder, which had rendered him incapable of performing his normal job functions.

On 1 October 2012, plaintiff presented to Dr. Roy Majors with a history of left shoulder pain, which dated back twelve years and had become worse in recent months. Dr. Majors diagnosed plaintiff with end-stage arthritis in his left shoulder and referred him to Dr. Nady Hamid for surgery. Dr. Hamid performed a left total shoulder arthroplasty on 5 November 2012 and wrote plaintiff completely out of work after the surgery.

Plaintiff filed a workers' compensation claim on 29 November 2012, alleging an occupational disease in his left shoulder. The deputy commissioner, and later the Full Commission, concluded that plaintiff had failed to file his claim within the requisite time period and dismissed for lack of jurisdiction. Plaintiff appeals.

## II. Discussion

The sole issue on appeal is whether plaintiff filed his claim before the expiration of the two-year statute of limitations. "Whether the claim for an occupational disease was filed timely is an issue of jurisdiction for the commission." *Terrell v. Terminix Servs., Inc.*, 142 N.C. App. 305, 307, 542 S.E.2d 332, 334 (2001). Our North Carolina Supreme Court has articulated the standard of review in cases involving challenges to the jurisdiction of the Industrial Commission:

> Except as to questions of jurisdiction, findings of fact by the Industrial Commission are conclusive on appeal when supported by competent evidence even though there is evidence to support contrary findings. G.S. 97-86; *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981). Findings of jurisdictional fact by the Industrial Commission, however, are not conclusive upon appeal even though supported by evidence in the record. *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E.2d 645 (1965). A challenge to jurisdiction may be made at any time. *Id.* When a defendant employer challenges the jurisdiction of the Industrial Commission, any reviewing court, including the Supreme Court, has the duty to make its own independent findings of jurisdictional facts from its consideration of the entire record. *Lucas v. Stores*, 289 N.C. 212, 221 S.E.2d 257 (1976).

*Dowdy v. Fieldcrest Mills, Inc.*, 308 N.C. 701, 705, 304 S.E.2d 215, 218 (1983).

N.C. Gen. Stat. § 97-58 (2015) establishes the time limit to file a claim for compensation for an occupational disease. Pursuant to subsection (c), the claim must be filed "within two years after death, disability, or disablement as the case may be." N.C. Gen. Stat. § 97-58(c) (2015). Subsection (b) further provides that "[t]he time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has [the] same." N.C. Gen. Stat. § 97-58(b) (2015). Our Supreme Court has construed these two subsections (b) and (c) *in pari materia* to "establish the factors which commence the running of the two year period within which claims must be filed . . . ." *Dowdy*, 308 N.C. at 706, 304 S.E.2d at 218. The two-year period begins to run

> when [1] an employee has suffered injury from an occupational disease which renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by such injury, and [2] the employee is informed by competent medical authority of the nature and work related cause of the disease. The two year period for filing claims for an occupational disease does not begin to run until all of these factors exist.

*Id.* at 308, 304 S.E.2d at 218–19 (citing *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980)).

A. Informed by Competent Medical Authority

First, we must determine when plaintiff was informed by competent medical authority of the nature and work-related cause of his left shoulder condition. The Full Commission concluded that plaintiff had been adequately informed during his 9 May 2000 evaluation with Dr. Dunaway. Plaintiff maintains, however, that his appointment with Dr. Dunaway was for his right shoulder only, and it was not until his visit with Dr. Majors on 1 October 2012 that plaintiff was informed of the occupational disease in his left shoulder.

During his deposition, Dr. Dunaway confirmed that it was his diagnosis of arthritis that would have led to a total shoulder arthroplasty. He also acknowledged that the nature of plaintiff's work, as referenced in his report, would require use of both shoulders. When asked about certain statements in his report concerning his plan for treatment, Dr. Dunaway testified as follows:

> Q. You reference in the following sentence that "[plaintiff] will need to consider modifying his work," correct?
>
> A. Correct.
>
> Q. And what was the basis for writing that [plaintiff] would need to modify his work?
>
> A. Recognizing he had this arthritis in his shoulder, we know that the heavier you use the joint, the more likely that arthritis is to be a problem and be symptomatic.
>
> Q. And would that be the case for either of [plaintiff]'s shoulders?
>
> A. I would think so.

Dr. Dunaway admitted that he had no independent recollection of the examination apart from his report, though he believed he told plaintiff to consider modifying his work:

> A. . . . usually when I make a sentence like that, then I discuss that with the patient.
>
> Q. Any reason to doubt you discussed with [plaintiff] that he needed to modify his employment?
>
> A. No reason that I'm aware of.

> Q. Okay. And would you have discussed with [plaintiff] the reason that you felt he needed to modify his employment, in light of the employment activities he did?
>
> A. Yeah. I'm assuming. Obviously, I don't remember this. But as is usually my practice, we talk about the diagnosis, what the potential outcomes might be, and how you might modify that, to alter that outcome.

As to his conversations with plaintiff regarding the cause of his shoulder problems, Dr. Dunaway offered the following testimony:

> Q. Okay. In your medical opinion, was the occasional heavy use, breaking down tires, aggravating the arthritis in his shoulders?
>
> A. That would have been my opinion, I think.
>
> . . . .
>
> Q. And you discussed with him that his occasional heavy use, breaking down tires, could be contributing to that pain that he was having in his shoulders—
>
> A. Correct.
>
> Q. —and was contributing to the symptoms from his arthritis in his shoulders?
>
> A. Correct.

While we are cautious to rely solely on statements that Dr. Dunaway "assumed" to have made or details that he "would think" to be true, see *Lawson v. Cone Mills Corp.*, 68 N.C. App. 402, 410, 315 S.E.2d 103, 108 (1984) ("[I]t is not enough for the medical authority to 'assume' he told a worker his disease 'may have been' work related."), plaintiff's own testimony tends to corroborate Dr. Dunaway's recollection of the examination.[1] According to plaintiff, Dr. Dunaway evaluated and made recommendations pertaining to both the right and left shoulders:

---

1. We do not treat plaintiff's own adverse testimony as a "judicial admission," as argued by defendant, but as an "evidentiary admission." The difference being that under the latter approach, the testimony is "admissible in evidence against such party, but . . . may be rebutted, denied, or explained away and is in no sense conclusive." *Woods v. Smith*, 297 N.C. 363, 373–74, 255 S.E.2d 174, 181 (1979); *cf. Cogdill v. Scates*, 290 N.C. 31, 44, 224 S.E.2d 604, 611 (1976) ("If at the close of the evidence, a plaintiff's own testimony has *unequivocally* repudiated the material allegations of his complaint and his testimony has shown no additional grounds for recovery, . . . the defendant's motion for directed verdict should be allowed." (emphasis added)).

> Q. If we were to represent to you that Dr. Dunaway recommended a total shoulder replacement—
>
> A. Yeah, both—he said both.
>
> Q. —in 2000—
>
> A. Uh-huh.
>
> Q. —do you remember that conversation with the doctor?
>
> A. Yes, I remember that, yeah.
>
> . . . .
>
> Q. Tell us about the conversation you had with Dr. Dunaway about you'll eventually need a total shoulder replacement.
>
> A. Well, when I went there and after he put me in this machine and—you know, and checked me out, then he told me—he said, "Well, you might as well get ready to retire from the City, because you're going to have—both of your shoulders going [sic] to have to be replaced."

On cross-examination, plaintiff again stated that Dr. Dunaway had recommended replacement surgery for both shoulders:

> Q. And the—you indicated that you saw Dr. Dunaway, and I think we've got his medical record, and I think Mr. Sumwalt indicated that was in the year 2000.
>
> . . . .
>
> Q. The—he was recommending you need shoulder replacement surgery to your right shoulder, wasn't he?
>
> A. No, he didn't speculate—he said both shoulders.

Plaintiff further testified that Dr. Dunaway told him that his job was causing his shoulder problems:

> Q. Just so that I'm clear—
>
> THE WITNESS: Okay.
>
> Q. —when you and I were talking earlier—
>
> A. Uh-huh.
>
> Q. —you mentioned a doctor, sometime while you were employed by the City, who basically told you your job duties were hurting both your shoulders.

A. He might have did, but I had to keep on working. I couldn't stop.

Q. And I don't want to know "he might of did"—did he?

A. Yeah, he did.

. . . .

Q. And did—did Dr. Dunaway indicate that if you kept doing your job, you're going to need shoulder replacement surgery?

A. Yes.

Q. And that would indicate to you that your job is—is going to cause shoulder replacement—

A. Yes.

Q. —shoulder surgery? So when Dr. Dunaway told you that, was that not an indication to you that your job was the cause of your shoulder problems?

A. Oh, yeah. He—yeah, he said, yeah.

Q. So it wasn't—it wasn't just Dr. Hamid. It was—

A. Yeah.

Q. —Dr. Dunaway—

A. Yeah.

Q. —years before?

A. Yeah, but I couldn't—I couldn't stop, though. I had to work.

Q. Understood. I just want to make sure that I—

A. Yes.

Q. —understand it was not just Dr. Hamid—

A. Oh, okay.

Q. —it was Dr. Dunaway, too.

A. Okay.

Q. Agreed?

A. Yes, right.

Based on the foregoing, we conclude that plaintiff was informed by Dr. Dunaway on 9 May 2000 of the nature and work-related cause of his left shoulder injury.

B. Time of Disability

Next, we must determine when plaintiff became "disabled"—that is, when "an employee has suffered injury from an occupational disease which *renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by such injury.*" *Dowdy*, 308 N.C. at 706, 304 S.E.2d at 218 (emphasis added) (citation omitted). The Full Commission concluded that plaintiff was disabled on 1 December 2009, the date of his retirement. While neither party disputes that plaintiff has had no meaningful employment since he retired, plaintiff asserts that "retirement is irrelevant to any analysis of disability," and that he could not have been disabled before 5 November 2012—the date that Dr. Hamid imposed medical restrictions on plaintiff's ability to work.

We reject plaintiff's argument that medical restrictions are the only competent evidence of disability, or as he states, "when there are no medical restrictions 'because of' a compensable injury or disease, 'disability' does not exist as a matter of law." On the contrary, "[t]his Court has previously held that an employee's own testimony as to pain and ability to work is competent evidence as to the employee's ability to work." *Byrd v. Ecofibers, Inc.*, 182 N.C. App. 728, 731, 645 S.E.2d 80, 82 (2007) (citing *Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 499, 560 S.E.2d 809, 813 (2002); *Matthews v. Petroleum Tank Serv., Inc.*, 108 N.C. App. 259, 265, 423 S.E.2d 532, 536 (1992); *Niple v. Seawell Realty & Indus. Co.*, 88 N.C. App. 136, 139, 362 S.E.2d 572, 574 (1987), *disc. review denied*, 321 N.C. 744, 365 S.E.2d 903 (1988)).

Moreover, unlike those cases cited by plaintiff, in which retirement was wholly unrelated to the occupational disease, *e.g.*, *Stroud v. Caswell Ctr.*, 124 N.C. App. 653, 654–55, 478 S.E.2d 234, 235 (1996), here plaintiff testified repeatedly that he stopped working for defendant *because of the pain in his left shoulder*:

> Q. Okay. What went into your decision to retire from the City?
>
> A. Well, I was up under the truck—most of the time, after I got through changing tires, I used to go up under the fire truck and I had to put a bottle jack under there and jack

> it up—you know, crawl up under there, and when I laid on my shoulder, you know—I mean, it hurt so bad, I said, "Look, I got to quit." That's why I retired. I said, "Man, I got to get out of here. I cannot make it," you know. I had to crawl back from under the truck, and that's why I retired.
>
> Q. And why, specifically, did that bother you—what about that activity?
>
> A. When I—when I turned on this side (indicating), this shoulder right here (indicating), I couldn't—you know, I couldn't hardly—I couldn't use this shoulder, even when—
>
> Q. And you're pointing to your left shoulder?
>
> A. Yeah, my left shoulder right here.

We agree with the Full Commission, therefore, that on 1 December 2009, plaintiff was disabled within the meaning of the Worker's Compensation Act.

## III. Conclusion

We conclude that, as of 1 December 2009, plaintiff had suffered injury from an occupational disease which rendered him incapable of earning the wages he was receiving at the time of his incapacity, and had been informed by competent medical authority of the nature and work-related cause of the disease. Because he did not file his worker's compensation claim until 5 November 2012, plaintiff's claim was barred by the two-year statute of limitations under N.C. Gen. Stat. § 97-58(c). We affirm the Full Commission's dismissal for lack of jurisdiction.

AFFIRMED.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
SANDY KEITH BASKINS

No. COA15-1088

Filed 17 May 2016

**1. Search and Seizure—traffic stop—registration and inspection status**

Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court's findings of fact related to his vehicle's registration and inspection status, the Court of Appeals concluded that the record did not contain substantial evidence that the vehicle was being operated with an expired inspection status.

**2. Search and Seizure—suppression order—conclusion of law—specific violation of traffic law**

Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court's order denying his motion to suppress, the Court of Appeals held that the trial court's order contained no adequate conclusion of law concerning the initial stop of defendant's vehicle because it failed to state that the stop was justified based on any specific violation of a traffic law. The case was remanded for additional findings and conclusions.

**3. Search and Seizure—suppression order—voluntary statement by defendant**

Where defendant was convicted of drug trafficking charges and challenged on appeal the trial court's order denying his motion to suppress, the Court of Appeals held that defendant's statements concerning the heroin in his vehicle, made after hearing one officer tell another officer that he recovered heroin from a passenger, were voluntary and admissible.

Appeal by Defendant from order entered 10 July 2015 and judgment entered 14 July 2015 by Judge Susan E. Bray in Superior Court, Guilford County. Heard in the Court of Appeals 11 April 2016.

*Attorney General Roy Cooper, by Assistant Attorney General Thomas O. Lawton III, for the State.*

*Marilyn G. Ozer for Defendant.*

McGEE, Chief Judge.

Greensboro Police Department Detective M.R. McPhatter ("Detective McPhatter") was working in a drug interdiction capacity on the morning of Monday, 6 October 2014 when he positioned himself near a Shell gas station with a convenience store ("the store") drop-off point for the China Bus Line. This line ran between Greensboro and New York City and, in the past, Greensboro police had made arrests of people who had transported illegal narcotics on that bus line. Detective McPhatter was wearing plain clothes and waiting in an unmarked car when the bus arrived at the store between 6:00 a.m. and 6:30 a.m. on 6 October 2014. Detective McPhatter observed Gregory Charles Baskins ("Gregory") and Tomekia Bone ("Bone") exit the bus. At that time, Detective McPhatter was not familiar with either Gregory or Bone. Both Gregory and Bone were carrying "smaller bags. Just for like a weekend-type trip, change of clothes." Detective McPhatter watched Gregory and Bone enter the store, and then saw Gregory exit the store a couple of minutes later. After leaving the store, Detective McPhatter observed Gregory walking "backwards" in his direction, approach to about four parking spaces distance, and "gave a look inside my car as to see if he knew me or he was trying to . . . see who I was inside the vehicle. And then he kind of gave me a shoo-off type thing and then kind of walked back inside the store." At approximately the same time, Detective McPhatter observed a burgundy Buick ("the Buick") pull into the parking lot of the store. The driver of the Buick was later determined to be Gregory's brother, Sandy Keith Baskins ("Defendant"). Gregory got into the front passenger side of the Buick and Bone got into the rear right seat. The Buick then left the store's parking lot with Gregory and Bone inside.

Detective McPhatter had taken down the license plate number for the Buick, and he input that information into his mobile terminal, which accessed the Department of Motor Vehicles ("DMV") data associated with that license plate number. According to Detective McPhatter's testimony, the Buick's "registration had . . . expired -- it had expired and it had an inspection violation also." Detective McPhatter relayed that information to other officers in the area because he wanted to stop the Buick in order to investigate possible drug trafficking activity. The information relating to the license plate of the Buick was obtained from DMV. Detective McPhatter did not want to stop the Buick himself because he did not want Gregory to recognize his vehicle as the same vehicle that had been waiting in the parking lot of the store.

Greensboro Police Department Detective M. P. O'Hal ("Detective O'Hal") was the officer who actually stopped the Buick on the morning of 6 October 2014. Detective O'Hal, who was part of the same drug interdiction squad as Detective McPhatter, had been alerted by Detective McPhatter concerning Gregory's actions at the store. Detective McPhatter had read the Buick's license plate number over the radio, so Detective O'Hal was able to type that information into his mobile service computer and obtain information concerning the license plate from DMV. A printout of the DMV screen information relied upon by Detective O'Hal was provided to Detective O'Hal during his testimony:

> [THE STATE:] Want to show you what I've marked as State's 1 and 2, couple of communications printouts, and just ask you about the information in each of these documents. You say when you initially ran the information through the Department of Motor Vehicles, it reflected that the license itself was expired.
>
> [DET. O'HAL:] Yeah. The inspection was expired on it.
>
> [THE STATE:] Okay. And I want to ask about each of these. Let me begin with what I've marked as State's Exhibit Number 1. If I may approach, Your Honor.
>
> THE COURT: Yes.
>
> [THE STATE:] Can you explain what this first document reflects?
>
> [DET. O'HAL:] This is what I saw on my -- I call it a visual MCT or my computer, which was with me that day of the stop. And it shows that the customer I.D.'s name or driver's license number, the name of the person that the vehicle is registered to, and it says "plate status expired." And it says that it was issued on 9-26-2013 and showed a status of being expired.
>
> . . . .
>
> [THE STATE:] And so in layman's terms . . . State's Exhibit Number 1 . . . reflect[s] the status of the plate and the inspection on the date in which it was stopped in State's 1.
>
> [DET. O'HAL:] Correct.
>
> . . . .

> [THE STATE:] Okay. And that information reflected in State's 1 . . . is the same information that was available to you on that particular day.
>
> [DET. O'HAL:] Yes.

The communications printout, State's Exhibit 1, which was the same information Detective O'Hal relied upon to justify the stop of the Buick, contained the following two lines of information relevant to this appeal:

> PLT STATUS: EXPIRED
>
> ISSUE DT: 09262013 VALID THRU: 10152014

This DMV registration request response printout contained *no* information indicating the status of the Buick's inspection. As indicated in the information provided by DMV, the Buick's registration, though technically expired, was still valid on 6 October 2014, and would remain valid through 15 October 2014. This was because, according to N.C. Gen. Stat. § 20-66(g),

> [t]he registration of a vehicle that is renewed by means of a registration renewal sticker expires at midnight on the last day of the month designated on the sticker. It is lawful, however, to operate the vehicle on a highway until midnight on the fifteenth day of the month following the month in which the sticker expired.

N.C. Gen. Stat. § 20-66(g) (2015).

Detective O'Hal successfully initiated the stop, and approached Defendant, who was the driver of the Buick. Detective O'Hal informed Defendant that he had been stopped due to an expired registration and an inspection violation, and asked Defendant to produce his driver's license and registration. Defendant informed Detective O'Hal that his license had been revoked. According to Detective O'Hal's testimony, while he was talking to Defendant, he noticed Gregory acting very nervous and sweating profusely. Detective O'Hal then noticed Gregory glance at Bone nervously, and Detective O'Hal noticed that Bone was also acting nervous. Detective O'Hal then asked if there were any weapons in the Buick, and Defendant responded that there were not. Detective O'Hal asked Defendant if he would consent to a search of the Buick, and Defendant gave consent. Defendant, Gregory, and Bone all exited the Buick, and Detective O'Hal conducted a sniff search with his drug-trained canine ("K-9"). The K-9 alerted in both the front and rear right side passenger seats, indicating the possible recent presence of illegal

narcotics. Based upon the alert of the K-9, and the behavior of Gregory and Bone, they, along with Defendant, were searched. Approximately six ounces of what was later determined to be heroin was recovered from inside Bone's pants, and the suspects were arrested.

Defendant was indicted on 1 December 2014 for conspiracy to traffic in heroin, trafficking by possession of 28 grams or more of heroin, and trafficking by transportation of 28 grams or more of heroin. Defendant filed a motion to suppress on 27 April 2015. The suppression hearing was conducted on 6 July 2015, and Defendant's motion to suppress was denied by order entered 10 July 2015. Defendant was tried, found not guilty of the conspiracy charge, and found guilty of the two trafficking charges. Judgment was entered on 14 July 2015, and Defendant received an active sentence of 225 to 282 months. Defendant specifically preserved his right to appeal the denial of his motion to suppress.

I.

**[1]** Defendant challenges two of the trial court's findings of fact relating to Detective O'Hal's initial stop of the Buick, findings fourteen and eighteen. The relevant portions of the contested findings are as follows: "Detective McPhatter could see the license plate on the Buick, so he ran the number through DMV and learned the registration had expired, as had the inspection (last inspected 8-31-13). He relayed that information to the team members." "[Detective] O'Hal, who had also confirmed the DMV information about the registration and inspection . . . activated his lights to stop the Buick."

We first address the evidence concerning the Buick's registration. N.C. Gen. Stat. § 20-66(g) states:

> When Renewal Sticker Expires. – The registration of a vehicle that is renewed by means of a registration renewal sticker expires at midnight on the last day of the month designated on the sticker. It is lawful, however, to operate the vehicle on a highway until midnight on the fifteenth day of the month following the month in which the sticker expired.

N.C. Gen. Stat. § 20-66(g). The Buick's license plate had a sticker on it indicating that the plate was valid until 30 September 2014. By operation of N.C. Gen. Stat. § 20-66(g), it was lawful to operate the Buick until midnight of 15 October 2014. *Id.* In accord with N.C. Gen. Stat. § 20-66(g), the communications printout, which was "the same information that was available to" Detective O'Hal prior to the stop, clearly stated that

the plate registration was: "VALID THRU: 10152014[,]" or 15 October 2014. Detective O'Hal stopped the Buick on 6 October 2014.

As far as the registration was concerned, Defendant was operating the Buick lawfully, and Detective O'Hal was provided confirmation of this fact in the information he requested and received from DMV. While it might be technically true that the registration was expired, the trial court's findings of fact fail to indicate that the registration was still valid on 6 October 2014, and this information was necessary for determination of the legitimacy of the stop based upon an alleged registration violation. Those portions of findings of fact fourteen and eighteen indicating that the Buick's registration had expired are supported by substantial record evidence, but they do not, on these facts, establish that the Buick was being operated in an unlawful manner.

II.

Next, we address the findings related to the inspection status of the Buick. It constitutes an infraction when a person "[o]perates a motor vehicle that is subject to inspection under this Part on a highway or public vehicular area in the State when the vehicle has not been inspected in accordance with this Part, as evidenced by the vehicle's lack of a current electronic inspection authorization or otherwise." N.C. Gen. Stat. § 20-183.8(a)(1) (2015). "A law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation." N.C. Gen. Stat. § 15A-1113(b) (2015).

However, as the State concedes, "the inspection violation itself does not appear on the computer screens that the officers were looking at when they ran the [ ] Buick's license number." The State argues, however, that "the record contains plain and direct testimony from both Officer McPhatter and Officer O'Hal that they ran the tags on the Buick, learned that the registration had expired, and that there was an inspection violation, because the Buick had last been inspected 31 August 2013[.]" It is true that Detective O'Hal testified that the information he received from DMV indicated that the Buick's inspection was not current. However, Detective O'Hal also testified that State's Exhibit 1, a printout of a DMV request for the Buick, was identical to the information he received on 6 October 2014. Though it is possible Detective O'Hal had access to additional information concerning the inspection status of the Buick, Detective O'Hal testified that he based his stop solely on the information included in State's Exhibit 1. If that testimony was correct, then Detective O'Hal could not have known that the Buick's inspection was not current.

The only non-testimonial evidence admitted at the hearing that included information about the inspection status was a copy of the registration card for the Buick, which stated: "INSPECTION DUE 09/30/2014." This evidence cannot have served as the basis for Detective O'Hal's testimony that the inspection was out-of-date for two reasons. First, Detective O'Hal did not have this card before he initiated the stop. In fact, he apparently did not obtain the card at any time during the stop. Second, the registration card cannot provide up-to-date information concerning whether the Buick had already been inspected for the purposes of registration renewal. According to N.C. Gen. Stat. § 20-183.4C(a):

> (6) A vehicle that has been [previously] inspected in accordance with this Part must be inspected by the last day of the month in which the registration on the vehicle expires.
>
> (7) A vehicle that is required to be inspected in accordance with this Part may be inspected 90 days prior to midnight of the last day of the month as designated by the vehicle registration sticker.

N.C. Gen. Stat. § 20-183.4C(a) (2015). The owner of a vehicle has ninety days prior to the expiration of the inspection within which to have the vehicle inspected.[1] There is no record evidence indicating that Detective O'Hal was provided information indicating that the Buick had not been properly inspected prior to the 6 October 2014 stop. Again, we recognize that the record may not contain all the relevant evidence available to Detective O'Hal on 6 October 2014, but our review is limited to the record evidence in this regard. This record does not contain substantial evidence that the Buick was being operated with an expired inspection status and, therefore, those portions of findings of fact fourteen and eighteen stating otherwise are overruled.

III.

**[2]** When ruling on a motion to suppress following a hearing, "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2015). In the present case, the trial court's order denying Defendant's motion to suppress contains no adequate conclusion of law concerning its ruling regarding the initial stop of the

---

1. Even if the Buick had been inspected after 30 September 2014, but before the stop on 6 October 2014, it would still have been being operating legally as far as its inspection status was concerned.

Buick by Detective O'Hal. As our Supreme Court has confirmed, it is the trial court that must make the required legal rulings in the first instance. *State v. Salinas*, 366 N.C. 119, 123-24, 729 S.E.2d 63, 66-67 (2012). When the trial court has not made all the required determinations:

> Remand is necessary because it is the trial court that "is entrusted with the 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."

*Id.* at 124, 729 S.E.2d at 67 (citation omitted); *see also State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 630-31 (2000) ("In examining the case before us, our review is limited. It is the trial judge's responsibility to make findings of fact that are supported by the evidence, and then to derive conclusions of law based on those findings of fact.") (citation omitted).

In the present case, the trial court entered the following conclusion of law as its sole conclusion regarding the validity of the initial stop of the Buick:

> The temporary detention of a motorist upon probable cause to believe he has violated a traffic law (such as operating a vehicle with expired registration and inspection) is not inconsistent with the Fourth Amendment's prohibition against unreasonable searches and seizures, even if a reasonable officer would not have stopped the motorist for the violation. [citation omitted] [Detective] O'Hal was justified in stopping Defendant[s'] vehicle.

This conclusion consists of a statement of law, followed by the conclusion that Detective O'Hal was "justified" in initiating the stop. This conclusion does not specifically state that the stop was justified based upon any specific violation of a traffic law. This conclusion intimates that Detective O'Hal was justified in initiating the stop based upon either the alleged registration violation or the alleged inspection violation, but it does not actually make any such conclusion. This Court has reviewed a similar occurrence in *State v. McFarland*, 234 N.C. App. 274, 758 S.E.2d 457 (2014):

> The "conclusions of law" in the written order were simply statements of law[.]
>
> Generally, a conclusion of law requires "the exercise of judgment" in making a determination, "or the application

> of legal principles" to the facts found. Not one of the "conclusions" here applied the law to the facts of this case. Although we can imagine how the facts as found by the trial court would likely fit into the legal standards recited in the section of the order which is identified as "conclusions of law," based upon the trial court's denial of the motion, it is still the trial court's responsibility to make the conclusions of law. The mandatory language of N.C. Gen. Stat. § 15A–977(f) ("The judge must set forth in the record his findings of facts *and conclusions of law*." (emphasis added)) forces us to conclude that the trial court's failure to make any conclusions of law in the record was error.
>
> "Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial."

*Id.* at 283-84, 758 S.E.2d at 464-65 (citations omitted). We remand for further action consistent with this opinion, including making additional findings of fact and conclusions of law as necessary. The trial court may, in its discretion, take additional evidence in order to comply with this holding. *See State v. Gabriel*, 192 N.C. App. 517, 523, 665 S.E.2d 581, 586 (2008). If the trial court again denies Defendant's motion to suppress, Defendant's convictions stand subject to appellate review. If the trial court grants Defendant's motion to suppress, the trial court shall vacate the 14 July 2015 judgment and convictions and Defendant shall be granted a new trial on the charges of trafficking heroin by possession and trafficking heroin by transportation.

IV.

In the event the trial court again denies Defendant's motion to suppress, based upon Defendant's argument that Detective O'Hal improperly initiated the stop of the Buick due to registration or inspection issues, we address Defendant's additional arguments.

A.

Defendant argues that "the [trial] court erred by concluding reasonable suspicion [that Defendant was involved in trafficking] existed to stop the [Buick.]" We do not address the merits of this argument because the trial court made no such conclusion.

Though the order included findings of fact that could have been relevant to a reasonable suspicion analysis on that issue, there is no discussion in the trial court's order concerning reasonable suspicion that Defendant was engaged in criminal activity; and there is no conclusion, based upon any reasonable suspicion that Defendant was trafficking illegal drugs or engaged in any other type of criminal activity, that the stop of the Buick was proper. The only discussion in the order about the basis for the stop concerned the issues related to registration and inspection status. If, upon remand, the trial court again upholds the stop of the Buick as proper, that ruling must be based upon a conclusion that there was reasonable suspicion for Officer O'Hal to believe the Buick was being operated in violation of registration or inspection statutes.

B.

**[3]** Defendant next argues that "the [trial] court erred by denying Defendant's motion to suppress his statements made after the unconstitutional seizure." We disagree.

Subsequent to the K-9 alerting for the possible presence of drugs, and Defendant and Gregory having been searched, a female officer approached Bone to search her. Bone then voluntarily produced the heroin she had hidden in her pants. Detective O'Hal, who was standing near Defendant, was informed that suspected heroin had been recovered from Bone. Defendant, who apparently overheard this exchange, then stated that "[t]he dope wasn't his, it was a guy named Maurice Antonio Nichols [('Nichols')] out of High Point and they were just making a drop for him." Following Defendant's statement, Defendant and Gregory were handcuffed and placed under arrest.

The sole conclusion of law related to this issue states: "Defendant['s] statement about [ ] Nichols and the drop for him was voluntary. There was no interrogation or functional equivalent of interrogation. [(Citations omitted).]" The relevant findings of fact in support of the trial court's conclusion were the following:

> 36. One of the detectives came back to the area where [Defendant] and [Gregory] were and said they had found narcotics on Bone.
>
> 37. Defendant . . . dropped his head, looked over at his brother Gregory and told Officer O'Hal that dope wasn't his that it was for a guy named Maurice Antonio Nichols out of High Point, and that they were making a drop for him.

We hold these findings are supported by substantial evidence, and are sufficient to support the trial court's conclusion that Defendant's statement was voluntary and not the result of any custodial interrogation. Detective O'Hal testified that neither he, nor any other officer, asked or said anything to Defendant to elicit Defendant's statement. The evidence supports that Defendant volunteered this statement in response to an officer informing Detective O'Hal that suspected heroin had been recovered from Bone. "Spontaneous statements made by an individual while in custody are admissible despite the absence of *Miranda* warnings." *State v. Stover*, 200 N.C. App. 506, 515, 685 S.E.2d 127, 134 (2009) (citation and quotation marks omitted).

Defendant further argues that Detective O'Hal, shortly after initiating the stop of the Buick, improperly questioned him concerning "where he was going [that day]." However, during the suppression hearing Defendant did not argue that this statement should be suppressed. Presumably for that reason, the trial court's order contains no conclusion of law regarding that statement. Defendant has waived appellate review of this argument. *State v. Golphin*, 352 N.C. 364, 392-93, 533 S.E.2d 168, 191 (2000) (citations omitted) ("Generally, '[t]his Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal.' "). Assuming *arguendo* Defendant had preserved this argument for appellate review, we hold that Defendant's argument fails.

C.

In Defendant's final argument, he contends that the trial court committed plain error in failing to *sua sponte* exclude certain testimony of Defendant's witness, Mercedes Washington ("Washington"). Assuming *arguendo* the challenged testimony of Washington constituted error, we have thoroughly reviewed the record, and hold that Defendant fails to demonstrate "that, absent the error, the jury probably would have returned a different verdict." *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012). This argument is without merit.

NO ERROR IN PART; REVERSED AND REMANDED IN PART.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER ALLEN McKIVER

No. COA15-1070

Filed 17 May 2016

**1. Firearms and Other Weapons—possession of firearm by convicted felon—motion to dismiss—sufficiency of evidence—constructive possession**

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon. The evidence was sufficient to support a reasonable juror in concluding that additional incriminating circumstances existed beyond defendant's mere presence at the scene and proximity to where the firearm was found. Thus, constructive possession of the firearm could be inferred.

**2. Constitutional Law—Confrontation Clause—anonymous 911 call and call back—testimonial hearsay**

The trial court erred in a possession of a firearm by a convicted felon case by denying defendant's motion to exclude evidence of an anonymous 911 call and the dispatcher's call back. Admission of the testimonial hearsay violated his rights under the Sixth Amendment's Confrontation Clause. It was not harmless error, and defendant was entitled to a new trial.

Appeal by Defendant from judgment entered 29 April 2015 by Judge Benjamin G. Alford in New Hanover County Superior Court. Heard in the Court of Appeals 11 February 2016.

*Attorney General Roy Cooper, by Special Deputy Attorney General Joseph E. Herrin, for the State.*

*Kimberly P. Hoppin for Defendant.*

STEPHENS, Judge.

Defendant Christopher Allen McKiver appeals from the judgment entered upon his conviction for one count of possessing a firearm as a convicted felon following a jury trial in New Hanover County Superior Court. McKiver argues that the trial court committed reversible error, in

violation of his rights under the Sixth Amendment to the United States Constitution to confront the witnesses against him, when it denied his motion *in limine* to exclude evidence of an anonymous 911 call and the subsequent 911 dispatcher's call back. McKiver also contends that the trial court erred in denying his motion to dismiss. We hold that although the trial court did not err in denying his motion to dismiss, McKiver is entitled to a new trial because the erroneous admission of testimonial statements violated his Sixth Amendment rights and was not harmless.

*Factual Background*

At 9:37 p.m. on 12 April 2014, Wilmington Police Department ("WPD") Officer Scott Bramley was dispatched to Penn Street in the Long Leaf Park subdivision in response to an anonymous 911 caller's report that there was a possible dispute and a black man with a gun standing outside. Bramley activated his patrol car's blue lights and siren on his way to the scene, stopped a few blocks away to retrieve his patrol rifle from the vehicle's trunk, then proceeded to Penn Street and parked on the left side of the roadway. As he exited his vehicle, Bramley noticed two individuals standing near a black Mercedes that was parked beside a vacant lot. The Mercedes was still running, and Bramley could hear music "blaring" from its radio as he approached the two individuals, one of whom was a black male wearing a red and white plaid shirt, jeans, and a hat, who began to walk toward Bramley. Although Bramley had not yet received any description of the suspect, he "confronted [the man in the plaid shirt] about possibly having [a firearm], at which point he lifted his shirt to show [Bramley] he did not have a gun." After performing a pat-down to confirm that the man was unarmed, Bramley let him go and continued his investigation.

By this time, several other WPD officers had arrived on the scene, which Bramley would later describe as "very dark" due to the "very sporadic" street lighting in the area. Bramley observed there were a number of other individuals watching from nearby residences and walking around near the vacant lot, perhaps 100 yards away from the Mercedes. After a few moments, Bramley asked the New Hanover County 911 dispatcher for a better description of the suspect, was informed that the anonymous 911 caller had already disconnected, and requested the dispatcher to initiate a call back. After reconnecting with the anonymous 911 caller, the dispatcher reported to Bramley that "[s]he said it was in a field in a black car," and that "[s]omeone said he might have thrown the gun." Several WPD officers searched for the gun in the vacant lot and eventually discovered a Sig Sauer P320 .45 caliber handgun located approximately 10 feet away from the Mercedes. Meanwhile, after Bramley told

the dispatcher he had located a black Mercedes and asked whether the caller had provided a description of the suspect, the dispatcher replied, "Black male, light plaid shirt. He was last seen by the car with a gun in his hand and the [caller] went inside." Bramley later testified that upon receiving this information, he "immediately knew [the suspect] was the first gentleman that I had come into contact with because no one else in that area was wearing anything remotely similar to that clothing description." Bramley returned to his patrol car to see if he could pull a photograph off his vehicle's dashboard camera of the man he had patted down upon first arriving in order to relay it to officers *en route* to the scene, but was unable to do so. Shortly thereafter, McKiver approached the WPD officers who were searching the Mercedes and asked what they were doing to his car. Upon seeing the red plaid shirt McKiver was wearing, Bramley recognized him as the same black male he had patted down upon his arrival, concluded he met the description provided in the call back to the anonymous 911 caller, and placed McKiver under arrest.

WPD officers subsequently determined that the Mercedes was registered to McKiver's brother in Elizabethtown and found a red bag in the vehicle's trunk containing cash and medications prescribed to McKiver. Although they found no fingerprints or DNA evidence on the firearm they found in the vacant lot, the officers traced its serial number to one that had been reported stolen from an individual in Elizabethtown.

*Procedural History*

On 22 September 2014, McKiver was indicted by a New Hanover County grand jury on one count of possession of a firearm by a felon and one count of possession of a stolen firearm. These matters came on for a jury trial in New Hanover County Superior Court on 27 April 2015, the Honorable Benjamin G. Alford, Judge presiding.

Prior to jury selection, the trial court held a hearing on McKiver's motion *in limine* to exclude evidence of the anonymous 911 call and the dispatcher's call back. After noting the lack of any fingerprints or DNA found on the firearm and the lack of any eyewitness testimony that he had ever possessed it, McKiver contended that both calls amounted to testimonial hearsay and that their admission in evidence would violate his Sixth Amendment right to confront the witnesses against him. In response, the State argued that the calls were nontestimonial, and therefore properly admissible, because the statements they contained were made to enable police assistance to meet an ongoing emergency. The trial court denied McKiver's motion but granted his request for a continuing objection to the admission of this evidence in order to preserve the issue for appellate review.

At trial, the State presented testimony from Bramley about the investigation he conducted in response to the initial 911 call and, over McKiver's timely objection, how he relied on the description provided during the dispatcher's call back of the suspect's shirt to identify and arrest McKiver. In addition to Bramley's testimony, the State introduced evidence of McKiver's prior felony conviction for possession with intent to sell or distribute marijuana; played a recording of the initial 911 call for the jury and admitted the 911 call logs into evidence; and also presented testimony from New Hanover County 911 communications manager Deborah Cottle, who explained how the 911 dispatch system works. WPD crime scene technician Max Cowart also testified and explained the procedures he followed for photographing and collecting evidence from the crime scene, and Elizabethtown resident Hunter Norris testified that the firearm recovered from the scene had belonged to his father before it was stolen.

At the close of the State's evidence, McKiver moved to dismiss both charges for insufficient evidence but the trial court denied this motion. McKiver declined to put on any evidence and renewed his motion to dismiss, which the court again denied before providing jury instructions on both actual and constructive possession. The case was submitted to the jury on 29 April 2015. That same day, the jurors returned verdicts convicting McKiver on the charge of possessing a firearm as a convicted felon but acquitting him on the charge of possessing a stolen firearm. The court sentenced McKiver to 14 to 26 months imprisonment, suspended for 36 months of supervised probation after completion of a six-month active term. After sentencing, McKiver gave notice of appeal to this Court.

*Analysis*

*Motion to dismiss*

**[1]** We first address McKiver's argument that the trial court erred in denying his motion to dismiss the charge of possession of a firearm by a convicted felon. Specifically, McKiver argues that the court should have dismissed the charges against him because there was insufficient evidence of additional incriminating circumstances to support a jury verdict that he constructively possessed the firearm. We disagree.

As this Court's prior decisions make clear, "[w]hen ruling on a defendant's motion to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citations

omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925 (citations omitted), *affirmed*, 301 N.C. 374, 271 S.E.2d 277 (1980). "[A]ll evidence admitted, whether competent or incompetent, must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence and resolving in its favor any contradictions in the evidence." *State v. Worsley*, 336 N.C. 268, 274, 443 S.E.2d 68, 70-71 (1994) (citation omitted). Thus, a defendant's motion to dismiss "is properly denied if the evidence, when viewed in the above light, is such that a rational trier of fact could find beyond a reasonable doubt the existence of each element of the crime charged." *Id.* at 274, 443 S.E.2d at 71 (citation omitted). This Court reviews the trial court's denial of a motion to dismiss *de novo*. *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33.

Section 14-415.1 of our General Statutes provides that "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]" N.C. Gen. Stat. § 14-415.1(a) (2015). "[T]he State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) [the] defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Perry*, 222 N.C. App. 813, 818, 731 S.E.2d 714, 718 (2012) (citation omitted), *disc. review denied*, 366 N.C. 431, 736 S.E.2d 188 (2013). Possession of the firearm "may be actual or constructive. Actual possession requires that a party have physical or personal custody of the [firearm]. A person has constructive possession of [a firearm] when the [firearm] is not in his physical custody, but he nonetheless has the power and intent to control its disposition." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted), *superseded in part on other grounds by statute as stated in State v. Gaither*, 161 N.C. App. 96, 587 S.E.2d 505 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). However, where a defendant does not have "exclusive control of the location where the [firearm] is found, constructive possession of the [firearm] may not be inferred without other incriminating circumstances." *State v. Clark*, 159 N.C. App. 520, 525, 583 S.E.2d 680, 683 (2003) (citation and internal quotation marks omitted).

In the present case, the evidence introduced at trial tended to show that McKiver had previously been convicted of a felony; that an anonymous 911 caller saw a man wearing a plaid shirt and holding a gun near a black car beside a field; that someone saw that man drop the gun;

that upon his arrival at the scene, Bramley saw McKiver standing near a black Mercedes wearing a plaid shirt; that Bramley saw multiple individuals watching from nearby residences and walking near the vacant lot; that McKiver later returned to the scene and said the car was his; that although the car was registered to McKiver's brother in Elizabethtown, WPD officers found medication prescribed to McKiver himself in the trunk; and that the WPD officers found a firearm that had been reported stolen from Elizabethtown in the vacant lot approximately 10 feet away from the Mercedes.

McKiver contends that because the firearm was found not in his possession but instead in a vacant lot that he did not maintain control over, the State failed to introduce sufficient evidence of incriminating circumstances from which it could be inferred that he constructively possessed the gun. However, this argument ignores the fact that the State also presented evidence that when Bramley arrived, McKiver was standing near the black Mercedes wearing a shirt similar to the one the anonymous caller described the man with the gun wearing before someone saw him drop it. Although McKiver takes issue with the admissibility of the initial 911 call and subsequent dispatcher's call back, our standard of review requires consideration of "all of the evidence actually admitted, whether competent or incompetent." *State v. Jones*, 208 N.C. App. 734, 737, 703 S.E.2d 772, 775 (2010) (holding that even though evidence was erroneously admitted in violation of the defendant's rights under the Confrontation Clause, it nevertheless "provid[ed] substantial evidence, for the purpose of [the] defendant's motion" to dismiss), *vacated on other grounds*, 365 N.C. 467, 722 S.E.2d 509 (2012); *see also State v. Jones*, 342 N.C. 523, 540, 467 S.E.2d 12, 23 (1996) ("[T]he fact that some of the evidence was erroneously admitted by the trial court is not a sufficient basis for granting a motion to dismiss."); *State v. Littlejohn*, 264 N.C. 571, 574, 142 S.E.2d 132, 134 (1965) ("Though the court below, in denying [the defendants'] motion for nonsuit, acted upon evidence which we now hold to be incompetent, yet if this evidence had not been admitted, the State might have followed a different course and produced competent evidence tending to establish [each element of the offense]."). Thus, even assuming *arguendo* that the trial court erred in admitting this evidence, it remains relevant to our analysis for purposes of this issue.[1] Because this evidence was sufficient to

---

1. Given our conclusion *infra* that McKiver is entitled to a new trial due to the violation of his Sixth Amendment rights, we note here that this evidence would clearly be inadmissible against McKiver at any subsequent trial, and thus would not be proper for the trial court to consider should the same inquiry arise again.

support a reasonable juror in concluding that additional incriminating circumstances existed—beyond McKiver's mere presence at the scene and proximity to where the firearm was found—and, thus, to infer that McKiver constructively possessed the firearm, we conclude the trial court did not err in denying McKiver's motion to dismiss.

*Confrontation Clause*

**[2]** McKiver argues that the trial court erred in denying his motion to exclude evidence of the anonymous 911 call and the dispatcher's call back because admission of the testimonial hearsay they contained violated his rights under the Sixth Amendment's Confrontation Clause. We agree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted), *appeal dismissed*, 363 N.C. 857, 694 S.E.2d 766 (2010). Once error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2015).

The Sixth Amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. In *Crawford v. Washington*, the United States Supreme Court held that the Confrontation Clause forbids "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. 36, 53-54, 158 L. Ed. 2d 177, 194 (2004). Although it did not provide a specific definition in *Crawford* of what makes a statement "testimonial," the Court offered clarification on this issue in its opinion consolidating two cases, *Davis v. Washington* and *Hammon v. Indiana*. *See Davis v. Washington*, 547 U.S. 813, 822, 165 L. Ed. 2d 224, 237 (2006).

The statements at issue in *Davis* were made by the victim to a 911 operator as the defendant, her ex-boyfriend, attacked her and then fled the scene as soon as she identified him by name to the 911 operator. *Id.* at 818, 165 L. Ed. 2d at 234. Although the victim did not testify at trial, the recording of the 911 call was admitted into evidence, and the defendant was convicted of violating a domestic no-contact order. *See id.* at 819, 165 L. Ed. 2d at 235. The statements at issue in *Hammon* were made after police responded to a reported domestic disturbance at a residence to find the victim "alone on the front porch, appearing somewhat frightened." *Id.* (internal quotation marks omitted). When asked, however,

the victim told the officers “nothing was the matter,” and granted them permission to enter the home, wherein they found the defendant, her husband, in the kitchen. *See id.* While one officer remained with him, another questioned the victim in another room, where she gave a verbal description of what had happened and completed a form battery affidavit. *See id.* at 820, 165 L. Ed. 2d at 235. Although the victim did not testify at trial, the defendant was convicted after the trial court admitted her affidavit into evidence and also allowed the officer who interviewed her to testify about what she told him. *Id.* at 820-21, 165 L. Ed. 2d at 236.

As the Court explained in *Davis*,

> [s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* at 822, 165 L. Ed. 2d at 237. The Court identified several factors relevant to the determination of whether a statement is testimonial, including: (1) whether the victim “was speaking about events *as they were actually happening*, rather than describing past events”; (2) whether a “reasonable listener” would recognize that the victim “was facing an ongoing emergency” and her “call was plainly a call for help against a *bona fide* physical threat”; (3) whether the questions asked and statements elicited by law enforcement “were necessary to be able to *resolve* the present emergency, rather than simply to learn . . . what had happened in the past”; and (4) the contextual formality (or lack thereof) in which the victim’s statements were made. *Id.* at 827, 165 L. Ed. 2d at 240 (citations and internal quotation marks omitted; emphasis in original).

Based on this analytic framework, the Court held that the victim’s statements to the 911 dispatcher in *Davis* were nontestimonial, and properly admissible, because they described events as they were happening, were made in the face of an ongoing emergency in a frantic environment that was neither tranquil nor safe, and provided information necessary to resolve the present emergency. *Id.* at 828-29, 165 L. Ed. 2d at 240-41. In so holding, the Court nevertheless cautioned that what begins as a conversation to elicit information needed to render emergency assistance could become testimonial and therefore inadmissible.

*See id.* at 828, 165 L. Ed. 2d at 241 ("This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, . . . , evolve into testimonial statements, . . . , once that purpose has been achieved.") (citations and internal quotation marks omitted). Such was the case in *Hammon*, the Court concluded, reasoning that the victim's statements were testimonial, and therefore inadmissible, because they were made "some time after the events described were over" and thus were part of an investigation into past conduct and were not necessary for police to resolve any ongoing emergency. *Id.* at 830, 165 L. Ed. 2d at 242. As the Court explained in a footnote:

> Police investigations themselves are, of course, in no way impugned by our characterization of their fruits as testimonial. Investigations of past crimes prevent future harms and lead to necessary arrests. While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so. The Confrontation Clause in no way governs police conduct, because it is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are.

*Id.* at 832 n.6, 165 L. Ed. 2d at 243 n.6 (emphasis in original).

The North Carolina Supreme Court first applied the approach established in *Davis* in *State v. Lewis*, 361 N.C. 541, 648 S.E.2d 824 (2007). There, a police officer responded to the victim's call concerning a robbery at her apartment and took her statement, which included a description of the perpetrator, who the victim alleged had also assaulted her during the robbery, which had occurred several hours earlier. *Id.* at 543-44, 648 S.E.2d at 826. The victim was taken to the hospital to treat her injuries and later that evening, she selected the defendant's photograph from a photographic line-up that another officer had assembled based in part on her statement. *See id.* The victim died prior to trial, but the trial court allowed both officers to testify about what the victim told them, and the defendant was convicted of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and misdemeanor breaking and entering. *See id.*

On appeal, the defendant argued that the officers' testimony violated her rights under the Confrontation Clause. After applying the

framework outlined in *Davis*, our Supreme Court determined that at the time of her first statement, the victim "faced no immediate threat to her person"; that the officer "was seeking to determine what happened rather than what is happening"; that "the interrogation bore the requisite degree of formality"; that the victim's statement "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"; and that the interrogation occurred "some time after the events described were over." *Id.* at 548, 648 S.E.2d at 829 (internal quotation marks omitted). The Court also observed that "[a]lthough [the] defendant's location was unknown at the time of the interrogation, *Davis* clearly indicates that this fact does not in and of itself create an ongoing emergency." *Id.* at 549, 648 S.E.2d at 829 (citation omitted). Consequently, the Court held that the statements were testimonial, and thus inadmissible under the Confrontation Clause, because the circumstances surrounding them objectively indicated that no ongoing emergency existed and that "the primary purpose of the interrogation was to establish or prove past events potentially relevant to a later criminal prosecution." *Id.* The Court ultimately concluded the defendant was entitled to a new trial because "we cannot say beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" and also because "we cannot say beyond a reasonable doubt that the total evidence against [the] defendant was so overwhelming that the error was harmless[,]" given that the identification of the defendant as the perpetrator of the crimes alleged depended almost entirely on the victim's statements. *Id.* at 549, 648 S.E.2d at 830 (citations and internal quotation marks omitted).

In the present case, the record before us does not include any recording or transcript of the initial anonymous 911 call or the dispatcher's call back. However, McKiver's counsel cross-examined Bramley extensively about these calls, and we find particularly relevant the following excerpt from the trial transcript in which Bramley testified about the statements made in the initial 911 call, as well as the actions he took in response to it and his observations upon arriving at the scene:

> Q. . . . When you arrived on the scene, there was just the [Mercedes] and two guys up by the car; is that right?
>
> A. Yes, sir, off to the left.
>
> Q. Now, the original caller from 911 informed the dispatch and you that there was a black guy outside with a gun. Is that your understanding?

A. Yes, sir. We were informed that there was an individual with a firearm and a possible dispute.

Q. Possible dispute.

A. Yes, sir.

Q. You were also told [by the dispatcher] that the caller didn't know if the person was pointing [the gun] at anybody.

A. We weren't advised whether or not they were pointing it, sir, we just know that they—there was someone with a firearm on-scene, as well as a possible dispute outside. I don't recall hearing whether or not they were pointing it.

Q. Well, you listened to the 911 call, correct?

A. I have listened to it as of today, yes, sir.

Q. In fact, you're the way that the State introduced that into this trial; isn't that correct?

A. Yes, sir.

Q. Okay. Do you recall then that dispatch asked, "Okay. Is he pointing it at anyone?"

A. That's correct.

Q. And the response was, "I don't know."

A. That's correct.

Q. "I got away from the window." Then there's a question. Do you recall this? "Did you happen to see what he's wearing?" Do you recall that question?

A. Yes, sir.

Q. And her answer was, "No, I don't know what he's wearing." Do you recall that?

A. I do.

Q. And in addition to describ[ing] the scene, this caller describing the scene, "Do you hear anything right now? No, I just know they're out there." Do you recall that?

A. Yes, sir.

Q. "Okay," dispatcher says, "How many people were out there?" And do you recall that she answered, "It was people. I mean, it was just people outside. But he's—he's—I don't know what he's doing" ?

A. Yes, sir.

Q. "Okay, I mean, was he, like, around people or anything? He's walking around." Do you recall that?

A. Yes, sir.

Q. "Did you know what kind of gun? I don't know, I just saw a gun in his hand. It's dark outside." You didn't hear anything about waving the gun or brandishing the gun, it was "I just saw a gun in his hand." Isn't that correct as being your recollection?

A. That's correct.

Q. And she agreed with you, as you have described it yourself, that it was dark outside.

A. That's correct.

Q. Further question that was played here in the court in the trial from dispatch, "Do you hear anything else going on? Do you hear any arguments outside or anything?" "Uh-uh" was her answer. Do you recall that?

A. That's correct.

Q. And she concludes, pretty close to the conclusion [of the call], the dispatcher asks, "Do you want me to stay on the line 'til they get there?" talking about the police units. And the caller's response was, "No, I'll be fine."

A. That's correct.

Q. And when you arrived, those events appeared to have already happened, is that correct?

A. Yes, sir.

Q. Because there was no black man with a gun standing there in the street.

A. That's correct.

Q. There was—there were no people standing in a crowd around listening to music at that point; is that correct?

A. That's correct.

Q. It appeared that what [the caller] was describing had already happened; is that correct?

A. Yes, sir.

Q. She did not describe anything more about the person she was observing, the clothing.

A. At that time, you're correct. Yes, sir.

Q. When you arrived, it would appear that everything was pretty quiet, pretty calm; is that correct?

A. Yes, sir.

Our review of the record demonstrates that the circumstances surrounding both the initial 911 call and the dispatcher's subsequent call back objectively indicate that no ongoing emergency existed. Indeed, even before Bramley and other WPD officers arrived on the scene, the anonymous caller's statements during her initial 911 call—that she did not know whether the man with the gun was pointing his weapon at or even arguing with anyone; that she was inside and had moved away from the window to a position of relative safety; and that she did not feel the need to remain on the line with authorities until help could arrive—make clear that she was not facing any *bona fide* physical threat. Moreover, Bramley's testimony on cross-examination demonstrates that when he arrived at Penn Street, the scene was "pretty quiet" and "pretty calm." Although it was dark, Bramley and the other WPD officers had several moments to survey their surroundings, during which time Bramley encountered McKiver and determined that he was unarmed. While the identity and location of the man with the gun were not yet known to the officers when Bramley requested the dispatcher to initiate a call back, our Supreme Court has made clear that "this fact alone does not in and of itself create an ongoing emergency," *Lewis*, 361 N.C. at 549, 648 S.E.2d at 829 (citation omitted), and there is no other evidence in the record of circumstances suggesting that an ongoing emergency existed at that time. We therefore conclude the statements made during the initial 911 call were testimonial in nature.

We reach the same conclusion regarding the statements elicited by the dispatcher's call back concerning what kind of shirt the caller saw

the man with the gun wearing and the fact that someone saw the man drop the gun. Because these statements described past events rather than what was happening at the time and were not made under circumstances objectively indicating an ongoing emergency, we conclude that they were testimonial and therefore inadmissible. In our view, this case presents the same scenario the *Davis* Court cautioned against, insofar as what began "as an interrogation to determine the need for emergency assistance . . . evolve[d] into testimonial statements, . . . , once that purpose ha[d] been achieved." 547 U.S. at 828, 165 L. Ed. 2d at 241. We emphasize that our conclusion here should by no means be read as a condemnation of Bramley or the other WPD officers, who reacted professionally and selflessly to a potentially dangerous situation. Nevertheless, as Justice Scalia explained in *Davis*, the harm the Confrontation Clause aims to prevent is the *use* of testimonial hearsay at trial, rather than its *collection* by law enforcement, and our inquiry on this issue is an objective one, rather than a determination from an officer's perspective. *See id.* at 832 n.6, 165 L. Ed. 2d at 243 n.6 ("While prosecutors may hope that inculpatory "nontestimonial" evidence is gathered, this is essentially beyond police control. Their saying that an emergency exists cannot make it be so."). Consequently, we hold that the trial court erred by denying McKiver's motion *in limine* to exclude the testimonial statements from the initial 911 call and the dispatcher's subsequent call back.

The State contends this error was harmless but provides no specific arguments or citations to authority to support such a conclusion. At trial, the identification of McKiver as the man who held and then dropped the gun depended almost entirely on the testimonial statements elicited during the initial 911 call and the dispatcher's call back, and we cannot say beyond a reasonable doubt that the erroneous admission of this evidence did not contribute to the jury's verdict convicting McKiver of possessing a firearm as a convicted felon, or that the remaining evidence against McKiver, considered collectively, was "so overwhelming that the error was harmless." *See Lewis*, 361 N.C. at 549, 648 S.E.2d at 830 (citation omitted). Accordingly, we hold that McKiver is entitled to a

NEW TRIAL.

Judges HUNTER, JR., and INMAN concur.

STATE OF NORTH CAROLINA
v.
BRENT TYLER MILLER

No. COA14-1310-2

Filed 17 May 2016

**1. Appeal and Error—notice of appeal—oral and written**

The State's appeal was properly before the Court of Appeals pursuant to Rule 4 of the Rules of Appellate Procedure in a case involving a motion to suppress granted in district court, an appeal to superior court by the State, and the denial of a de novo hearing in superior court. The superior court orally affirmed the district court order, and the State entered oral and written notice of appeal; the written notice was superfluous following the State's oral notice.

**2. Evidence—motion to suppress—appeal from district to superior court—notice of appeal**

The trial court erred in dismissing the State's notice of appeal under N.C.G.S. § 20-38.7(a) as insufficient. Neither the plain language of N.C.G.S. § 20-38.7(a) nor § 15A-1432(b) required the State to set forth the specific findings of fact to which it objected in its notice of appeal from district to superior court.

Appeal by the State from order entered 2 June 2014 by Judge Linwood Foust in Mecklenburg County Superior Court. The case was originally heard before this Court on 22 April 2015. *State v. Miller*, __ N.C. App. __, 773 S.E.2d 574 (2015). Upon remand from the Supreme Court of North Carolina, *State v. Miller*, __N.C. __, __ S.E.2d __ (2016).

*Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.*

*Tin, Fulton, Walker, & Owen, PLLC, by Noell P. Tin, for defendant.*

PER CURIAM.

Upon remand from the Supreme Court of North Carolina to address the remaining issues, *State v. Miller*, __ N.C. __, __ S.E.2d __ (2016). The State appeals from the superior court's order, which denied the State a hearing *de novo* under N.C. Gen. Stat. § 20-38.7(a) from the district court's "preliminary determination" that Defendant's motion to suppress should be granted.

## I. Background

The procedural history of this case is set forth in this Court's prior opinion. *State v. Miller*, __ N.C. App. __, 773 S.E.2d 574, 2015 N.C. App. LEXIS 398 (unpublished).

This Court filed a unanimous, unpublished opinion on 19 May 2015, which dismissed the State's appeal for lack of appellate jurisdiction. We also did not have jurisdiction to review the State's issue on appeal by writ of certiorari. The record on appeal before us at that time failed to show the court's order the State had purportedly appealed from was "entered" pursuant to N.C. Gen. Stat. § 15A-1432(e) (2015) ("If the superior court finds that the order of the district court was correct, it must *enter an order* affirming the judgment of the district court. The State may appeal the order of the superior court to the appellate division upon certificate by the district attorney to the judge who affirmed the judgment that the appeal is not taken for the purpose of delay." (emphasis supplied)).

This Court's filed opinion, upon which the mandate issued on 8 June 2015, dismissed the State's appeal for lack of jurisdiction. *See* N.C. R. App. P. 32(b). The State failed to meet its burden, as appellant, to show in the record on appeal that the order appealed from had been "entered."

> *Entering* a judgment or an order is a ministerial act which consists in spreading it upon the record. . . . [A] judgment or an order is entered under [Rule 4(a)] when the clerk of court records or files the judge's decision regarding the judgment or order.

*State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) (citation and quotation marks omitted) (emphasis in original).

The record before this Court, when the appeal was heard, failed to meet the State's jurisdictional burden to show the order the State purportedly appealed from had been "entered" in accordance with the N.C. Gen. Stat. § 15A-1432(e) and rule set forth in *Oates*. The Supreme Court entered an order allowing an amendment of the record to add the minutes of the relevant superior court session, to allow the appellant to show the Clerk of Superior Court of Mecklenburg County had, in fact, "entered" the order appealed from by recording or filing the judge's decision in accordance with the statute and *Oates*. *See* Order Amending Record on Appeal 17 Mar. 2016; *Miller*, __ N.C. at __, __ S.E.2d at __; *Oates*, 366 N.C. at 266, 732 S.E.2d at 573.

After amending the record on appeal to reflect the clerk's entry of the court's order, the Supreme Court determined the order appealed

from had been properly "entered" to provide jurisdiction in the Appellate Division, and remanded to this Court for consideration of the remaining issues asserted in the State's appeal.

"It is well established that the appellant bears the burden of showing to this Court that the appeal is proper." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *affirmed*, 360 N.C. 53, 619 S.E.2d 502 (2005). Appellant's failure to initially demonstrate and establish appellate jurisdiction in this Court unnecessarily expended scarce appellate judicial resources. " 'It is . . . not the duty of this Court to construct arguments for or find support for appellant's right to appeal.' " *Id.* (quoting *Thompson v. Norfolk & Southern Ry.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000)).

II. State's Notice of Appeal to the North Carolina Court of Appeals

**[1]** Defendant argues the State's appeal should be dismissed because the State's notice of appeal to this Court is insufficient to confer jurisdiction. This separate argument for dismissal of the State's appeal has not been addressed by either this Court or by the Supreme Court. Prior to the original hearing date of this case, the State also filed a petition for writ of certiorari, to seek review of the superior court's 15 November 2013 order, in the event this Court determines the State had failed to file a proper notice of appeal to this Court.

In a case involving an implied consent offense, "[t]he State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss." N.C. Gen. Stat. § 20-38.7(a) (2015). After it considers the State's appeal from the district court's "preliminary determination", the superior court must "then enter an order remanding the matter to the district court with instructions to finally grant or deny the defendant's pretrial motion." *State v. Fowler*, 197 N.C. App. 1, 11, 676 S.E.2d 523, 535 (2009), *disc. review denied*, 364 N.C. 129, 696 S.E.2d 695 (2010).

The State does not have any right to directly appeal to the appellate division from the district court's final order granting a defendant's pretrial motion to suppress evidence. *Id.* at 29, 676 S.E.2d at 546. The State must again appeal "to the superior court from [the] district court's final *dismissal* of criminal charges against [the] defendant." *Id.* (emphasis in original). Only then may the State appeal to the appellate division from the superior court's entered order, affirming the district court's final order of dismissal under N.C. Gen. Stat. § 15A-1432(e). *Id.* at 7, 676 S.E.2d at 532 ("[N.C. Gen. Stat.] § 15A-1432(a)(1) gives the State a statutory right of appeal to superior court from a district court's order

dismissing criminal charges against a defendant, and [N.C. Gen. Stat.] § 15A-1432(e) gives the State a statutory right of appeal to this Court from a superior court's order affirming a district court's dismissal.").

Here, the State appealed to the superior court from the district court's preliminary determination granting Defendant's motion to suppress. N.C. Gen. Stat. § 20-38.7(a). By order entered 15 November 2013, the superior court determined the State's general notice of appeal, without more, was insufficient and declined to grant the State a *de novo* hearing.

The superior court remanded the case to the district court for entry of a final order. The superior court entered an oral order "affirming" the final order of the district court on 2 June 2014, which provided a statutory avenue for the State's appeal to this Court under N.C. Gen. Stat. § 15A-1432(e). The State's "notice of appeal" to this Court states as follows:

> NOW COMES the State of North Carolina, by and through the undersigned Assistant District Attorney, pursuant to N.C.G.S. § 15A-1445(a)(1), and gives notice of appeal from the Superior Court of Mecklenburg County to the North Carolina Court of Appeals from the Order of the Honorable Linwood O. Foust, Superior Court Judge presiding, issued June 2, 2014, in which the Court granted the defendant's motion to suppress pursuant to N.C.G.S. § 15A-954(a)(1) and N.C.G.S. § 15A-954(a)(8).

In its sole argument on appeal, the State argues the superior court erred by denying the State a *de novo* evidentiary hearing from the district court's order granting Defendant's motion to suppress. The order to which the State assigns error was issued by the superior court on 15 November 2013, and which dismissed the State's appeal and denied the State's request for a *de novo* hearing. This order is not mentioned nor addressed in the State's notice of appeal to this Court.

Defendant argues this Court is without jurisdiction to address the State's appeal, because the State has appealed from the incorrect order. Defendant asserts the express language of the State's notice of appeal shows the State has appealed from the superior court's order issued on 2 June 2014, which was entered at the State's request to affirm the district court's final order granting Defendant's motion to suppress.

"As a general rule an appeal will not lie until there is a final determination of the whole case." *State v. Newman*, 186 N.C. App. 382, 384, 651 S.E.2d 584, 586 (2007), *disc. review denied*, 362 N.C. 478, 667 S.E.2d 234

(2008) (citation omitted). The 15 November 2013 order of the superior court was not a final order and is interlocutory under the current statutory scheme. For the State to appeal from the 15 November 2013 order, the case was required to be remanded to the district court for entry of a final order of its "preliminary determination" to suppress and subsequently be appealed to the superior court to enter an order affirming the district court's final order. *Fowler*, 197 N.C. App. at 11, 676 S.E.2d at 535; N.C. Gen. Stat. § 15A-1432(a) and (e).

The district court's final order, affirmed by the superior court on 2 June 2014, stated the superior court's denial of a hearing *de novo* was the basis for entry of the order. Here, notice of appeal from the superior court's order entered 2 June 2014, constituted notice of appeal to the previous proceedings. The State's failure to cite to the 15 November 2013 order does not divest this Court of jurisdiction to hear the issues raised by the State's appeal.

Defendant also argues the State's notice of appeal to this Court cites an incorrect statute to support its contention that the State has a right to seek review in the appellate division. The statute cited in the State's notice of appeal to this Court, N.C. Gen. Stat. § 15A-1445(a)(1), provides the State may appeal from the superior court to the appellate division "[w]hen there has been a decision or judgment dismissing criminal charges as to one or more counts." N.C. Gen. Stat. §15A-1445(a)(1) (2015). Defendant contends N.C. Gen. Stat. § 15A-1445(a)(1) is inapplicable to his appeal. *See State v. Bryan*, 230 N.C. App. 324, 327, 749 S.E.2d 900, 903 (2013) ("In contrast [to N.C. Gen. Stat. § 15A-1432(e)], the legislative history of [N.C. Gen. Stat.] § 15A-1445(a)(1) indicates that this statute is applicable to final orders issued by a superior court acting in its *original jurisdiction*. . . . This statutory application is supported by our case law, as the State receives an automatic appeal as of right only from decisions by a superior court acting in its normal capacity." (emphasis supplied) (internal citations omitted)), *disc. review denied*, 367 N.C. 330, 755 S.E.2d 615 (2014).

While we agree that N.C. Gen. Stat. § 15A-1432(e), and not § 15A-1445(a)(1), is the statute that confers jurisdiction upon this Court to hear the issue raised by the State's appeal, Defendant's motion to dismiss does not address the State's oral notice of appeal. The State entered both an oral and written notice of appeal. Pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure, "*any party* entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by . . . giving oral notice of appeal at trial." N.C. R. App. P. 4 (a)(1) (emphasis supplied).

In *Oates*, the Supreme Court stated Appellate Rule 4(a) "permits oral notice of appeal, but only if given at the time of trial or, as here, *of the pretrial hearing*." 366 N.C. at 268, 732 S.E.2d at 574 (emphasis supplied). Here, the superior court orally affirmed the final order of the district court pursuant to the State's request. The prosecutor orally entered notice of appeal to this Court immediately thereafter.

Following the State's oral notice of appeal, the written notice was superfluous. The State's appeal is properly before this Court pursuant to Rule 4. It is unnecessary to rule upon the State's petition for writ of certiorari. That petition is dismissed as moot.

## III. Denial of a Hearing *De Novo*

**[2]** The State argues the superior court erred by denying the State a hearing *de novo* from the district court's "preliminary determination" that Defendant's motion to suppress should be granted.

Pursuant to N.C. Gen. Stat. § 20-38.7,

> [t]he State may appeal to superior court any district court preliminary determination granting a motion to suppress or dismiss. *If there is a dispute about the findings of fact*, the superior court shall not be bound by the findings of the district court but shall determine the matter de novo. Any further appeal shall be governed by Article 90 of Chapter 15A of the General Statutes.

N.C. Gen. Stat. § 20-38.7(a) (emphasis supplied). The plain language of the statute requires the superior court to determine the matter "*de novo*" only "if there is a dispute about the findings of fact." *Id.*

Here, the district court judge made six findings of fact based upon the officer's testimony, and pertaining to the officer's stop of Defendant's vehicle. The State's notice of appeal to the superior court states as follows:

> NOW COMES the undersigned Assistant District Attorney for the Twenty-Sixth Prosecutorial District and respectfully enters notice of appeal pursuant to N.C.G.S. §§ 20-38.7 in the above captioned case and shows the Court the following:
>
> 1. On June 3, 2013, Defendant through his attorney made a pre-trial motion to suppress alleging a lack of reasonable suspicion to stop the Defendant.

> 2. The Honorable Kim Best-Staton, District Court Judge presiding, indicated in open court on June 3, 2013 that she would take the matter under advisement after hearing arguments from defense counsel and the State.
>
> 3. On June 7, 2013, the Honorable Kim Best-Staton granted Defendant's motion to suppress for lack of reasonable suspicion to stop the Defendant.
>
> 4. On July 12, 2013, the Honorable Kim Best-Staton made the required written findings and signed her Findings of Fact and Conclusions of Law.
>
> 5. The State respectfully contends that the District Court's decision to grant the Defendant's motion to suppress was contrary to the law.
>
> 6. The State disputes the District Court Judge's Findings of Fact and respectfully requests a hearing *de novo* in Superior Court.
>
> THEREFORE, based on the foregoing, the State of North Carolina respectfully enters notice of appeal and requests a hearing *de novo* in superior court.

The superior court dismissed the State's appeal and denied the State a hearing *de novo*, because "the State could not articulate in the written Notice of Appeal which specific FINDINGS OF FACT or CONCLUSIONS OF LAW the State objected." The court did review, and affirmed, the district court's decision.

Statutes granting the State a right to appeal are strictly construed. *State v. Murrell*, 54 N.C. App. 342, 343, 283 S.E.2d 173, 173, *disc. review denied*, 304 N.C. 731, 288 S.E.2d 804 (1982). The statute is silent in the manner in which the State is required to give notice of appeal from the district court's "preliminary determination" that it intends to grant a defendant's pretrial motion to suppress or dismiss. N.C. Gen. Stat. § 20-38.7(a).

The key inquiry becomes whether N.C. Gen. Stat. § 20-38.7(a) requires more than a general objection by the State to the district court judge's findings of fact or an assertion of new facts or evidence in order to demonstrate a "dispute about the findings of fact." N.C. Gen. Stat. § 20-38.7(a).

In *State v. Palmer*, 197 N.C. App. 201, 676 S.E.2d 559, *disc. review denied*, 363 N.C. 810, 692 S.E.2d 394 (2010), this Court addressed the

defendant's notice of appeal to superior court from the district court's "preliminary determination." This Court looked to the procedures set forth in N.C. Gen. Stat. § 15A-1432(b) to guide whether the State had properly appealed to the superior court under N.C. Gen. Stat. § 20-38.7(a). *Id.* at 205-06, 676 S.E.2d at 562.

This Court reasoned that N.C. Gen. Stat. § 15A-1432 was enacted to "create[] a simplified motion practice for the State's appeal," "regulates the appeals by the State to superior court from a district's court's final order dismissing criminal charges against a defendant," and "is analogous to [N.C. Gen. Stat.] § 20-38.7(a)." *Id.* at 205, 676 S.E.2d at 562.

N.C. Gen. Stat. § 15A-1432, entitled "Appeals by State from district court judge," provides, in part:

> (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the district court judge to the superior court:
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> . . . .
>
> (b) When the State appeals pursuant to subsection (a) the appeal is by written motion *specifying the basis of the appeal* made within 10 days after the entry of the judgment in the district court. The motion must be filed with the clerk and a copy served upon the defendant.

N.C. Gen. Stat. § 15A-1432(a)(1), (b) (2015) (emphasis supplied). Here, Defendant contends the State failed to sufficiently "specify[] the basis of the appeal." *Id.*

The State's written notice of appeal in *Palmer* included the defendant's name and address, and file number. *Id.* at 206, 676 S.E.2d at 562. The document stated the State " 'appeals to superior court the district court preliminary determination granting a motion to suppress or dismiss.' " *Id.* at 206, 676 S.E.2d at 562-63. The document "also enumerated the issues raised in defendant's . . . pretrial motion to suppress, and recited almost verbatim all of the district court's findings of fact from its . . . preliminary determination." *Id.* at 206, 676 S.E.2d at 563.

The State's notice of appeal in *Palmer* did not specify the date of the district court's preliminary determination from which it was appealing. The superior court concluded it had no basis to determine whether the

notice of appeal was timely and was without jurisdiction to hear the State's appeal. *Id.* at 206-07, 676 S.E.2d at 563.

This Court held in *Palmer*:

> [W]e have declined to infer that the General Assembly intended to engraft upon N.C. Gen. Stat. § 20-38.7(a) the ten-day time limit for making an appeal specified in N.C. Gen. Stat. § 15A-1432(b). Accordingly, in light of the information that was included in the State's written motion, we hold the State's appeal sufficiently comported with the *remaining* requirements of N.C.G.S. § 15A-1432(b), and that the superior court erred by concluding that it was "unable to determine that it ha[d] jurisdiction to hear the State's 'appeal[,'] as the proper basis for this 'appeal' and the [superior c]ourt's jurisdiction to hear an appeal of this matter [wa]s not properly alleged in the State's sole filing in this matter."

*Id.* at 207, 676 S.E.2d at 563 (emphasis supplied).

In *Palmer*, this Court upheld the validity of the State's written notice of appeal, despite the State's failure to note the specific findings of fact in dispute. Here, the State's notice of appeal reads the "State disputes the District Court Judge's Findings of Fact."

We are bound by *Palmer* and hold the trial court erred in dismissing the State's notice of appeal under N.C. Gen. Stat. § 20-38.7(a) as insufficient. Neither the plain language of N.C. Gen. Stat. § 20-38.7(a) nor § 15A-1432(b) requires the State to set forth the specific findings of fact to which it objects in its notice of appeal to superior court. We decline to extend the language of the statute to require this.

The record states on 30 May 2014, after the State filed its notice of appeal to superior court, the Senior Resident Superior Court Judge of the 26th Judicial District entered an Administrative Order, as follows:

> ADMINISTRATIVE ORDER CONCERNING APPEALS BY THE STATE UNDER NCGS SEC. 20-38.7
>
> Pursuant to the inherent authority of the Court and for the purpose of promoting the efficient disposition of appeals made by the State of North Carolina from the District Court of Mecklenburg County to the Superior Court of Mecklenburg under the provisions of NCGS Sec. 20-38.7,

IT IS ORDERED:

1. Whenever the State appeals from a district court preliminary determination granting a motion to suppress or dismiss as permitted by NCGS 20-38.7, the State shall specify with particularity in its written notice of appeal those findings of fact made by the district court, or portions thereof, which the State disputes in good faith; a broadside exception to the district court's findings of fact is not permitted.

2. Prior to the hearing of the State's appeal, counsel for the defendant and the assistant district attorney prosecuting the appeal shall confer and make a good faith effort to stipulate to any facts that are not in dispute. The stipulations, if any, shall be reduced to writing, signed by the attorneys for the State and defendant, and filed with the Clerk of Superior Court.

3. This Order shall apply to all appeals made by the State under the provisions of NCGS Sec. 20-38.7 on and after June 9, 2014.

The Senior Resident Superior Court Judge has the authority to enter local rules and administrative orders governing practices and procedures within that Judicial District. *See* N.C. Gen. Stat. § 7A-41.1(c) (2015). The entered administrative order provides guidance on the local practice and procedure concerning "dispute(s) about the findings of fact." N.C. Gen. Stat. § 20-38.7(a).

The State has not appealed from this order and it is not before us on this appeal. The State's notice of appeal to superior court was entered prior to the filing of this administrative order, and it is not applicable to this case on remand.

## IV. Conclusion

We remand this matter to the superior court to review the district court's 12 June 2013 "preliminary determination" on Defendant's motion to suppress according to the statutory standard of review set forth in N.C. Gen. Stat. § 20-38.7(a). The trial court should address the State's challenges to the district court's findings of fact at a hearing pursuant to N.C. Gen. Stat. § 20-38.7(a) and N.C. Gen. Stat. §15A-1432.

REMANDED.

Panel Consisting of: Calabria, Stroud, Tyson, JJ.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 MAY 2016)

| | | |
|---|---|---|
| CENTOR, INC. v. MAKINO, INC.<br>No. 15-863 | Mecklenburg<br>(14CVS10733) | Remanded |
| ELTRINGHAM v. ROSE<br>No. 15-662 | New Hanover<br>(08CVD2561) | Dismissed |
| IN RE A.E.M.<br>No. 15-1022 | Guilford<br>(08JT1)<br>(08JT724) | Affirmed |
| IN RE A.H.<br>No. 15-1177 | Forsyth<br>(14JA77-79) | Remanded |
| IN RE A.T.<br>No. 15-931 | Martin<br>(04JT76)<br>(04JT77)<br>(12JT9) | Affirmed |
| IN RE C.L.<br>No. 15-1176 | Alamance<br>(06JB87) | Affirmed |
| IN RE C.N.H-P<br>No. 15-1199 | Wake<br>(13JT86-88)<br>(14JT53) | Affirmed |
| IN RE E.B.<br>No. 15-1087 | Wake<br>(15SPC0155) | Reversed |
| IN RE K.S.<br>No. 15-1165 | Randolph<br>(13JT148) | Affirmed |
| IN RE M.G.<br>No. 15-1355 | Mecklenburg<br>(12JA661-663) | Affirmed in part,<br>reversed and<br>remanded in part |
| IN RE K.P.<br>No. 15-1319 | Cumberland<br>(10JT666) | Affirmed |
| IN RE L.A.S.<br>No. 15-1224 | Columbus<br>(13JT45) | Affirmed |
| IN RE REEB<br>No. 15-927 | Union<br>(14SP158) | Dismissed |
| KIRKMAN v. N.C. DEP'T<br>OF COMMERCE<br>No. 15-1332 | Jackson<br>(15CVS306) | Dismissed |

| | | |
|---|---|---|
| N.C. DEP'T OF TRANSP. v. HERMAN<br>No. 15-1032 | Ashe<br>(12CVS430) | Modified and Affirmed |
| RODRIGUEZ v. BECKWITH<br>No. 15-1021 | Swain<br>(14CVD140) | Reversed and Remanded |
| SMITH v. YOUNG<br>No. 15-1147 | N.C. Industrial Commission<br>(PH-3197)<br>(Y16313) | Dismissed |
| STATE v. ALSTON<br>No. 15-966 | Halifax<br>(13CRS53859) | No Error |
| STATE v. BANKS<br>No. 15-828 | Cabarrus<br>(12CRS50987-89) | Affirmed |
| STATE v. BRUTON<br>No. 15-942 | Stokes<br>(14CRS456)<br>(14CRS51128) | Reversed |
| STATE v. COLES<br>No. 15-899 | Forsyth<br>(12CRS60562) | No Error |
| STATE v. DARDEN<br>No. 15-1134 | Wayne<br>(12CRS50294)<br>(14CRS3139) | Reversed and Remanded |
| STATE v. FLEMING<br>No. 16-43 | Union<br>(13CRS52352)<br>(14CRS797) | No Error |
| STATE v. LUCKADOO<br>No. 15-775 | Martin<br>(12CRS51372)<br>(13CRS126) | AFFIRMED IN PART; REMANDED FOR NEW SENTENCING HEARING. |
| STATE v. LYONS<br>No. 15-964 | Pitt<br>(13CRS56785) | No Error |
| STATE v. LYTLE<br>No. 15-1215 | Mecklenburg<br>(11CRS257261) | Dismissed |
| STATE v. PALMER<br>No. 15-1112 | Rowan<br>(12CRS55410) | No Error |
| STATE v. PUGH<br>No. 15-1133 | Wake<br>(13CRS214277) | Dismissed |
| STATE v. SCHNEBELEN<br>No. 15-974 | Burke<br>(14CRS50888) | Affirmed |

| | | |
|---|---|---|
| STATE v. SHIPMAN<br>No. 15-1146 | Mecklenburg<br>(13CRS229395) | No error at trial; vacated and remanded as to restitution |
| STATE v. STEELE<br>No. 15-827 | Mecklenburg<br>(09CRS65417-20) | NO ERROR IN PART; REVERSED AND REMANDED IN PART. |
| STATE v. WILLIAMS<br>No. 15-1212 | Edgecombe<br>(13CRS52685)<br>(13CRS52689) | No Plain Error In Part; No Error in Part |
| STATE v. WILLIAMS<br>No. 15-1076 | Alamance<br>(13CRS4268)<br>(13CRS54632) | Remanded for resentencing |
| STROUD v. PATE DAWSON, INC.<br>No. 15-1066 | Iredell<br>(15CVS1383) | Dismissed |
| TOWN OF CARY v. SOUTHERLAND<br>No. 15-740 | Wake<br>(13CVS4896) | Dismissed |
| YOUNG v. YOUNG<br>No. 15-1121 | Iredell<br>(13CVD585) | Dismissed |

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS