248 N.C. App.—No. 2 Pages 124-304

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 10, 2018

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

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OF
NORTH CAROLINA

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[1]Appointed 1 August 2016 [2]Sworn in 1 January 2017 [3]Sworn in 1 January 2017 [4]Appointed 24 April 2017
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COURT OF APPEALS

CASES REPORTED

FILED 5 JULY 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

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.

ALLEN INDUSTRIES, INC., PLAINTIFF
v.
JODY P. KLUTTZ, DEFENDANT

No. COA15-521

Filed 5 July 2016

Injunctions—preliminary—voluntary dismissal—damages

Defendant's motion for damages arising from a preliminary injunction entered against her in an employment matter was correctly denied where plaintiff voluntarily dismissed the action after the non-competition clause expired. Defendant relied solely on the argument that the voluntary dismissal by plaintiff per se entitled her to recover the bond; however, the trial court determined that the injunction was not wrongly issued since defendant's actions were in violation of the covenant not to compete. The facts of the specific case must be considered in determining whether the trial court properly concluded that defendant had not been wrongfully enjoined.

Appeal by defendant from order entered 15 October 2014 by Judge Lindsay R. Davis, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 21 October 2015.

Tuggle Duggins P.A., by Denis E. Jacobson and Brandy L. Mills, for plaintiff-appellee.

Ferguson, Scarbrough, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order denying her motion for damages on a preliminary injunction bond. Because the trial court correctly determined, in light of the facts and legal arguments presented by the parties, that the preliminary injunction was not wrongfully entered at the inception of the lawsuit, we affirm the trial court's order denying defendant's motion for damages.

I. Background

Plaintiff is in the business of making commercial signs and awnings, and defendant used to be plaintiff's employee who managed "daily relationship[s] with customers" for plaintiff. On 9 May 2013, plaintiff

filed a complaint against defendant alleging that defendant had begun working for a "direct competitor" and had breached her employment contract by using customer information she had gained from plaintiff. Plaintiff sought both an injunction and monetary relief. Plaintiff also filed a separate motion for a preliminary injunction.

On 28 June 2013, the trial court granted plaintiff's motion for a preliminary injunction based on "the non-competition clause" of the employment contract. The order enjoined defendant from working for Atlas Sign Industries of NC, LLC, plaintiff's competitor, through 14 March 2014. The order also required a $20,000 bond from plaintiff. On 3 June 2013, defendant appealed the preliminary injunction order. In May of 2014, in an unpublished opinion, this Court dismissed defendant's appeal as moot and declined to address the merits of the case because the time period of the covenant not to compete had already expired. *See Allen Industries, Inc. v. Kluttz*, ___ N.C. App. ___, 759 S.E.2d 711 (2014) (unpublished).

After the case was remanded to the trial court, in July of 2014, plaintiff voluntarily dismissed the case. The following month, defendant made a "MOTION IN THE CAUSE FOR DAMAGES ON PRELIMINARY INJUNCTION BOND" ("motion for damages") requesting payment to her of the $20,000 bond for the preliminary injunction she contended was wrongfully entered. On 15 October 2014, the trial court denied defendant's motion for damages based on its interpretation of the employment contract. Defendant appeals the denial of her motion for damages.

II. Preliminary Injunction Bond

Defendant argues that "[t]he trial court erred in finding that [defendant] is not entitled to recover damages on the preliminary injunction bond." (Original in all caps.) Defendant contends based upon *Industries Innovators, Inc.* that "[a] voluntary dismissal of a complaint is equivalent to a finding that the defendant was wrongfully enjoined." 99 N.C. App. 42, 51, 392 S.E.2d 425, 431, *disc. rev. denied*, 327 N.C. 483, 397 S.E.2d 219 (citations and quotation marks omitted) (1990). We consider whether the trial court's findings of fact and conclusions of law are sufficient to support the judgment. *See generally id.* at 42, 49, 392 S.E.2d at 430.

In order to recover the preliminary injunction bond, defendant needed to demonstrate that she was "wrongfully enjoined[.]" N.C. Gen. Stat. § 1A-1, Rule 65(c) (2013); *see generally Indus. Innovators, Inc.*, 99 N.C. App. at 49, 392 S.E.2d at 430. But *Industries Innovators, Inc.* explains "three possibilities" for concluding whether a party has

been wrongfully enjoined, not all of which require a final determination on the merits. 99 N.C. App. at 49-51, 392 S.E.2d at 430-31. However, *Industries Innovators, Inc.* acknowledges that there is no hard and fast rule for determining whether an individual has been wrongfully enjoined:

> North Carolina case law presents a somewhat confusing picture of the standard for determining liability under an injunction bond.
>
> Any standard for determining whether the defendant was wrongfully enjoined should be consistent with the very purpose of the bond which is to require that the plaintiff assume the risks of paying damages he causes as the price he must pay to have the extraordinary privilege of provisional relief. Consistent with that purpose, and we believe consistent with present North Carolina case law, Professor Dobbs observed:
>
> > The fact that the plaintiff's position seemed sound when it was presented on the *ex parte* or preliminary hearing is no basis for relieving him of liability, since the very risk that requires a bond is the risk of error because such hearings are attenuated and inadequate. To say that proof of the inadequate hearing, against which the bond is intended to protect, relieves of liability on the bond is merely to subvert the bond's purpose. Thus the few cases that seem to deal with this situation seem correct in assessing liability to the plaintiff who loses on the ultimate merits, even when his proof warranted preliminary relief at the time it was awarded.
>
> Accordingly, a defendant is entitled to damages on an injunction bond only when there has been a final adjudication substantially favorable to the defendant on the merits of the plaintiff's claim. Such an adjudication is equivalent to a determination that the defendant has been wrongfully enjoined. A final judgment for the defendant which does not address the merits of the claim, i.e., dismissal for lack of jurisdiction, gives rise to damages on the injunction bond only if the trial court determines that defendant was actually prohibited by the injunction from doing what he was legally entitled to do.

99 N.C. App. at 50, 392 S.E.2d at 431 (citations and quotation marks omitted).

Furthermore, specifically as to the consideration of wrongful enjoinment after a voluntary dismissal, our Supreme Court determined, in *Blatt Co. v. Southwell*, that despite a voluntary dismissal by the plaintiff, the trial court must consider the reasons for the dismissal in determining whether the defendant was entitled to recovery:

> In an action in which the plaintiff has obtained a temporary restraining order or injunction by giving bond such as that required by G.S. 1-496, (t)he voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought.
>
> When, however, the dismissal of the action is by an amicable and voluntary agreement of the parties, the same is not a confession by the plaintiff that he had no right to the injunction granted, and does not operate as a judgment to that effect. As stated in *American Gas Mach. Co. v. Voorhees*, *supra*: A judgment of voluntary dismissal by agreement of the parties of an action in which a restraining order has been issued is not an adjudication that the restraining order was improvidently or erroneously issued.

259 N.C. 468, 472, 130 S.E.2d 859, 862 (1963) (citations and quotation marks omitted).

This case presents a voluntary dismissal by plaintiff, but the dismissal was taken only after there was no longer any need to maintain the case because the covenant not to compete had expired by its own terms. As neither party has cited North Carolina case law on this precise issue of mootness, we also look to general principles of law on this issue which have been established in other jurisdictions:

> [T[here is no reason for the court to presume that an interlocutory injunction deprived the defendant of any right. Courts have consistently concluded that a final judgment that a claim has been mooted does not mandate recovery by the defendant; they have held that they must probe the merits of the original claim to determine whether the plaintiff is liable for damages resulting from the injunction. In examining the merits of the mooted claims, however, some courts have held that the defendant can be

> denied recovery if the plaintiff made a claim in good faith or a claim that presented serious questions. These courts may have deprived defendants of compensation for damages resulting from being unjustly deprived of a right. The defendant's entitlement standard would eliminate the possibility of that injustice, for it would require the court to address the merits before absolving the plaintiff of liability or allowing recovery.

Harvard Law Review Association, Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c), 99 Harv. L. Rev. 828, 839-40 (1986) (quotation marks and footnotes omitted). Thus, other courts have also determined that no precise factors, rules, or specific circumstances will be controlling; rather, we must consider the facts of this specific case in determining whether the trial court properly concluded that defendant had not been wrongfully enjoined. *See generally id.* This treatment of mootness is also consistent with *Industries Innovators, Inc.*, as the trial court must "determine[] that defendant was actually prohibited by the injunction from doing what he was legally entitled to do." 99 N.C. App. at 50, 392 S.E.2d at 431.

Turning to the specifics of this case, based primarily upon the employment contract, the trial court determined that the injunction was not wrongfully issued since defendant's actions were in violation of the covenant not to compete in spite of defendant's arguments that the language of the covenant was overbroad:

> The undisputed record in this case establishes that the defendant was employed in a sales-related position by the plaintiff, in the course of which she was privy to and used confidential and proprietary information, about the plaintiff's products and services relating to sales and service. The plaintiff established a legitimate business interest in the protection of that information from a direct competitor, and considered with the fact that defendant left her employment with the plaintiff and took essentially the same position with a direct competitor, the language of the covenant is no broader than necessary to protect that interest.

On appeal, defendant has not challenged any of the findings of fact or conclusions of law but has relied solely upon her argument that the voluntary dismissal by plaintiff *alone* per se entitles her to recover the bond. As defendant misapprehends the law, we reject this argument and conclude that the trial court properly determined that defendant

was not "wrongfully enjoined" based upon the employment contract as applied to the facts of this case. Defendant's argument is overruled.

III. Conclusion

The trial court properly denied defendant's motion for recovery of the bond. For the foregoing reasons, we affirm.

AFFIRMED.

Judges STEPHENS and DAVIS concur.

CARON ASSOCIATES, INC., PLAINTIFF
v.
SOUTHSIDE MANUFACTURING CORP. AND CROWN FINANCIAL, LLC, DEFENDANTS

No. COA15-1376

Filed: 5 July 2016

Assignments—accounts receivable—failure to deliver under terms of original contract

Where Caron Associates contracted with Southside Manufacturing to buy cabinetry for a construction project and Southside subsequently assigned all of its accounts receivable to Crown Financial, the trial court did not err by granting summary judgment in favor of Caron on Crown's claims against Caron. Payment on the contract was due within 30 days of delivery of the cabinetry, and Southside failed to deliver the cabinetry.

Appeal by Defendant from an order entered 3 September 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 11 May 2016.

StephensonLaw, LLP, by Philip T. Gray, for Plaintiff-Appellee.

Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Crown Financial, LLC ("Crown"), appeals following an order awarding Caron Associates, Inc. ("Purchaser") summary judgment. On appeal

Crown contends the trial court erred in awarding Purchaser summary judgment because Purchaser owes Crown money pursuant to an assignment. After careful review of the record, we affirm the trial court.

I. Factual and Procedural Background

On 4 October 2013, Purchaser entered into a contract with Southside Manufacturing Corp. ("Cabinet Maker") to buy cabinetry for a construction project at Bertie County High School. Purchaser agreed to pay Cabinet Maker $103,500.00 for the cabinetry provided that Cabinet Maker deliver the cabinetry in "late November 2013." The parties agreed payment was due "within 30 days after delivery." After the parties executed the contract, "[Cabinet Maker] notified [Purchaser] the November 2013[] delivery date needed to be extended to December 18, 2013," and Purchaser agreed to the 18 December 2013 delivery date.

On 9 December 2013, Cabinet Maker sent Purchaser a "progress billing" invoice for incomplete cabinetry that it did not deliver. The next day, Purchaser told Cabinet Maker it would not accept invoices. Purchaser stated, "invoices are not sent until product is actually delivered. [Cabinet Maker] was to deliver . . . on December 18, 2013 and the [c]ontract terms called for [Purchaser] to make payment within 30 days after the delivery."

On 9 December 2013, Cabinet Maker assigned all of its accounts receivable to Crown. Crown is in the business of factoring, the business of buying accounts receivable at a discounted rate. Crown ran a credit check on Purchaser and agreed to purchase all of Cabinet Maker's accounts receivable for $33,750.00. The record does not disclose whether Crown failed to review the Purchaser-Cabinet Maker contract, which states Purchaser's obligation to pay $103,500.00 is contingent upon Cabinet's Maker's timely delivery.

On 9 December 2013, Crown sent Purchaser an "Assignment of Receivables Letter." In the letter, Crown informed Purchaser that it is the assignee of Cabinet Maker's accounts receivable. The letter states the following in relevant part:

> This will inform you that [Cabinet Maker] has assigned all rights, title, and interest in its accounts receivable to Crown Financial, LLC ("Crown") effective today's date. All present and future payments due to [Cabinet Maker] need to be remitted to:

> [Cabinet Maker] Manufacturing Corp.
> c/o Crown Financial, LLC
> P.O. Box 219330
> Houston, Texas 77218
>
> Please confirm by signing below that these remittance instructions will not be changed without written instructions from both [Cabinet Maker] and "Crown." Also attached is Exhibit "A" which is a list of invoice(s) totaling $45,000.00 that we will be advancing on initially. Please confirm by signing below that these invoice(s) are in line for payment and the payment obligation of [Purchaser] is not subject to any offsets, back charges, or disputes of any kind or nature.
>
> In the future, we will be faxing additional Exhibit "A's" for your confirmation pursuant to these same terms and conditions.

On 11 December 2013, Purchaser signed the assignment letter underneath the language, "Accepted and acknowledged this 9th day of December 2013 by: Caron Associates" and returned the letter to Crown. The record shows Cabinet Maker signed a copy of the letter separately and returned it to Crown.

Cabinet Maker bounced several checks and failed to deliver the cabinetry to Purchaser. On 8 January 2014, Crown emailed Purchaser and asked, "[J]ust following up to make sure that Cabinet Maker has delivered the finished product to the Bertie County High School and that there are no problems?" Purchaser responded to Crown and stated the following:

> Are you kidding me? [Cabinet Maker] is the biggest joke I have ever seen in my life. Not only did they not deliver but we have been given the run around for 3 weeks and found out today that the owner . . . has some previous legal issues, [Cabinet Maker] has been bouncing employee and vendor pay checks and all employees have been laid off. Not a good day.

Crown replied, "Thank you for the info. I was afraid that would be your answer. . . ."

On 12 February 2014, Crown sent Purchaser a demand letter for $45,000.00. Crown claimed Purchaser owed it $45,000.00 under the terms of the assignment letter.

On 27 March 2014, Purchaser filed a complaint against Cabinet Maker and Crown. Purchaser raised claims for breach of contract, negligent misrepresentation, and sought a declaratory judgment that it did not owe Crown $45,000.00. Purchaser filed an amended complaint on 28 April 2014 and raised the same claims.

On 28 May 2014, Crown filed an answer generally denying the allegations and raised counterclaims against Purchaser for breach of contract and detrimental reliance. Crown also raised a crossclaim against Cabinet Maker for $45,000.00.

On 23 June 2014, Purchaser moved for entry of default against Cabinet Maker. The Clerk of Wake County Superior Court entered default against Cabinet Maker on 24 June 2014. On 30 July 2014, Purchaser filed a response to Crown's counterclaims.

Discovery began on 4 February 2015 and Crown sent requests for admission to Purchaser. Purchaser responded to the requests on 10 June 2015.

On 11 August 2015, Purchaser moved for summary judgment pursuant to Rule 56. Purchaser attached an affidavit from its vice president, Peter Huffey, to its motion, along with other email exhibits. On the same day, Purchaser filed a motion for default judgment against Cabinet Maker.

On 21 August 2015, Crown moved for summary judgment pursuant to Rule 56. Crown attached an affidavit from its officer, Philip R. Tribe, to its motion, along with its assignment letter and Cabinet Maker's progress billing invoice for $45,000.00. Crown did not provide any evidence disputing the terms of the Purchaser-Cabinet Maker contract, or Cabinet Maker's failure to deliver. On 1 September 2015, the trial court entered default judgment against Cabinet Maker.

The trial court heard the parties on their motions for summary judgment on 1 September 2015. At the hearing, Purchaser stated the following:

> [T]he original delivery date was pushed back at the request of [Cabinet Maker], and that was no problem. . . . [A]nd right before the delivery date I guess [Cabinet Maker] was in financial straits and so independently [Cabinet Maker] contracted with [Crown] to factor basically interest it looks like their entire book of business. . . . And on an aside, the principals of [Cabinet Maker] are now sitting in federal prison for raiding the corporation. [Cabinet Maker]

> is defunct and there's been a whole lot of mess and a lot of other companies been [sic] injured . . . .

Crown's counsel conceded there was no genuine issue of material fact and stated, "Well I don't think there are any issues of fact because the affidavit in the file . . . ."

On 4 September 2015, the trial court granted Purchaser's motion for summary judgment, declared Purchaser had no duty or obligation to Crown, and denied Crown's motion for summary judgment. On 30 September 2015, Crown gave its notice of appeal. Thereafter, the parties settled the record on appeal and filed their appellate briefs.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Analysis

Crown contends the trial court erred in granting Purchaser summary judgment because Purchaser waived its defenses by signing the assignment letter. Further, Crown contends Purchaser is an account debtor under N.C. Gen. Stat. § 25-9-403 (2015). We disagree.

North Carolina law allows for an "[a]greement not to assert defenses against [an] assignee" under N.C. Gen. Stat. § 25-9-403 (2015). Section 25-9-403 sets out the following:

> [A]n agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment:
>
> (1) For value;
>
> (2) In good faith;
>
> (3) Without notice of a claim of a property or possessory right to the property assigned; and
>
> (4) Without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under [N.C. Gen. Stat. §] 25-3-305(a).

Id. An account debtor is a "person obligated on an account, chattel paper, or general intangible." N.C. Gen. Stat. § 25-9-102(a)(3) (2015).

After careful review of the record, it appears there is no genuine issue of material fact surrounding the Purchaser-Cabinet Maker contract. The contract does not appear in the record but Purchaser's affidavit in support of its motion for summary judgment shows that payment for the cabinets was due within thirty days of delivery. Therefore, Cabinet Maker's duty to deliver is a condition precedent to Purchaser's duty to pay the contract price. "A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance. The event may be largely within the control of the obligor or the obligee." *Powell v. City of Newton*, 364 N.C. 562, 566, 703 S.E.2d 723, 727 (2010) (citation omitted). The parties "are bound when the condition [precedent] is satisfied." *Id.* (citation omitted).

Crown does not dispute the terms of the Purchaser-Cabinet Maker contract. Crown does not dispute Cabinet Maker's failure to deliver the cabinets. Therefore, under these facts, Purchaser cannot be a "person *obligated*" because there is no evidence to suggest the condition precedent, Cabinet Maker's delivery, was satisfied. *See* N.C. Gen. Stat. § 25-9-102(a)(3) (2015) (emphasis added).

Further, the plain language of the assignment letter does not obligate Purchaser. It merely informs Purchaser that all present or future payments due to Cabinet Maker are due to Crown as Cabinet Maker's assignee. The letter references Cabinet Maker's premature invoice for $45,000.00, and states "[Crown] will be advancing on [the $45,000.00] initially." The letter states, "the payment obligation . . . is not subject to any offsets, back charges, or disputes of any kind or nature." This Court observes there is no record evidence that Crown gave Purchaser any consideration in exchange for Purchaser's signature on the assignment letter. Therefore, the assignment letter in itself cannot be a contract.

As our Supreme Court has held, "it is well-settled principle" that when an assignee buys a chose in action "for value, in good faith, and before maturity," the assignee takes the action "subject to all defenses which the debtor may have had against the assignor based on facts existing at the time of the assignment or on facts arising thereafter but prior to the debtor's knowledge of the assignment." *William Iselin & Co. v. Saunders*, 231 N.C. 642, 646–47, 58 S.E.2d 614, 617 (1950) (citations omitted). Therefore, under these facts, Purchaser never incurred a duty to pay Cabinet Maker because Cabinet Maker failed to deliver. Without delivery, Crown is unable to compel Purchaser's payment.

Lastly, we review Crown's claim that it detrimentally relied on Purchaser's representations in the assignment letter. A "party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party." *Whiteacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004) (citations omitted). The doctrine of equitable estoppel prevents such a party from "taking inconsistent positions in the same or different judicial proceedings . . . to protect the integrity of the courts and the judicial process." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007) (internal quotation marks and citations omitted). To proceed on an equitable estoppel claim, the claimant must provide a forecast of evidence showing "(1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially." *Hawkins v. M & J Fin. Corp.*, 238 N.C. 174, 177–78, 77 S.E.2d 669, 672 (1953) (citations omitted). Here, Crown failed to provide a forecast of evidence showing that it lacked the knowledge and means to review the Purchaser-Cabinet Maker contract. In doing so, Crown failed to raise a genuine issue of material fact concerning its counterclaim for detrimental reliance.[1]

After careful *de novo* review of the record, we hold there is no genuine issue of material fact.

IV. Conclusion

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

Judges CALABRIA and TYSON concurs.

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1. When "only one inference can reasonably be drawn from undisputed facts, the question of estoppel is one of law for the court to determine." *Hawkins*, 238 N.C. at 185, 77 S.E.2d at 677 (citations omitted). When the evidence "raises a permissible inference that the elements of equitable estoppel are present, but . . . other inferences may be drawn from contrary evidence, estoppel is a question of fact for the jury . . . ." *Creech v. Melnik*, 347 N.C. 520, 528, 495 S.E.2d 907, 913 (1998) (citation omitted).

EISENBERG v. HAMMOND

[248 N.C. App. 136 (2016)]

MARCIA T. EISENBERG, PLAINTIFF
v.
PATRICK J. HAMMOND, DEFENDANT

No. COA15-287

Filed 5 July 2016

Arbitration and Mediation—testimony outside presence of parties—failure to object in accordance with arbitration agreement

Where the trial court vacated two arbitration awards because the arbitrator had taken testimony from a witness outside the presence of the parties, the Court of Appeals reversed the order of the trial court because defendant waived his right to challenge the arbitrator's alleged error under the terms of the arbitration agreement, which required objections to be written and timely filed with the arbitrator.

Appeal by plaintiff from order entered 12 November 2014 by Judge Anna Worley in District Court, Wake County. Heard in the Court of Appeals 7 October 2015.

Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell and Vitale Family Law, by Lorion M. Vitale, for plaintiff-appellant.

Raleigh Family Law, PLLC, by Imogen Baxter and Sonya Dubree and Gammon, Howard & Zeszotarski, PLLC, by Joseph E. Zeszotarski, Jr., for defendant-appellee.

STROUD, Judge.

Plaintiff appeals the trial court's order vacating two arbitration awards. Because defendant waived his right to challenge the alleged error of the arbitrator under the terms of the arbitration agreement, the trial court erred by vacating the arbitration awards based upon that alleged error, so we reverse and remand.

I. Background

In 1986 the parties were married and in 1992 they had a daughter, Sue.[1] In 2009 the parties separated. In March of 2010, plaintiff filed a

1. A pseudonym will be used to protect the daughter's identity.

complaint against defendant requesting equitable distribution. On 20 April 2010, defendant answered plaintiff's complaint and counterclaimed for equitable distribution, post-separation support and alimony, and attorney's fees. On 16 November 2010, the trial court entered an order awarding post-separation support to defendant; this order is not at issue on appeal.

On 15 June 2011, the parties entered into a consent order to arbitrate their remaining claims. The consent order set out the "conditions and provisions" for the arbitration. Prior to arbitration, in August of 2011, Sue's psychologist requested that defendant not be present when Sue, then 19 years old, testified, due to mental health concerns for Sue. Defendant refused to consent to Sue's psychologist's request. Plaintiff's attorney then requested that Sue's testimony be taken outside of the presence of all of the parties. The arbitrator granted the request and took Sue's testimony outside of the presence of both parties, although counsel for both parties were present. Defendant's counsel did a direct examination and a re-direct examination of Sue. On or about 30 August 2011, the arbitrator entered two decisions regarding (1) alimony and attorney's fees and (2) equitable distribution; the substance of these decisions is not challenged on appeal.

On 23 September 2011, defendant filed a motion to vacate the arbitration awards because the arbitrator had taken testimony from Sue outside the presence of the parties in contravention of the terms set forth in the consent order which required (1) compliance with the Rules of Civil Procedure and Evidence which mandate witness testimony to be taken in open court and (2) that all parties shall be present during witness testimony. In November of 2011, plaintiff moved to confirm the arbitration awards. On 12 November 2014, the trial court vacated the arbitration decisions, thus effectively allowing defendant's motion to vacate the arbitration decisions and denying plaintiff's motion to confirm the arbitration awards.[2] The trial court reasoned that pursuant to North Carolina General Statute § 50-54 the arbitrator had "exceeded his powers under the Consent Order" and "committed an error of law" by excluding defendant from Sue's testimony. Plaintiff appeals the trial court order vacating the arbitration decisions.

II. Arbitration

Plaintiff argues that "the trial court erred by vacating the arbitration awards because . . . [defendant] waived his right to be present during

2. The record does not reveal why the defendant's motion was not heard until nearly three years after it was filed.

the testimony of . . . [Sue] and his right to seek vacation of the award." (Original in all caps.) "The standard of review of the trial court's vacatur of the arbitration award is the same as for any other order in that we accept findings of fact that are not clearly erroneous and review conclusions of law *de novo*." *Carpenter v. Brooks*, 139 N.C. App. 745, 750, 534 S.E.2d 641, 645 (citations and quotation marks omitted), *disc. review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000). North Carolina General Statute § 50-54 provides that

> [u]pon a party's application, the court shall vacate an award for any of the following reasons:
>
> . . . .
>
> (3) The arbitrators exceeded their powers;
>
> . . . .
>
> (8) If the parties contract in an arbitration agreement for judicial review of errors of law in the award, the court shall vacate the award if the arbitrators have committed an error of law prejudicing a party's rights.

N.C. Gen. Stat. § 50-54(a)(3), (8) (2011). In the consent order, the parties specifically agreed that the trial court could conduct review of errors of law pursuant to North Carolina General Statute § 50-54(a)(8).

Defendant contended in his motion to vacate the award that the taking of testimony from Sue without his presence was beyond the power of the arbitrator under both the consent order and applicable law and that the taking of testimony without his presence was an error of law prejudicing his rights. "An arbitrator's ability to act is both created and limited by the authority conferred on him by the parties' private arbitration agreement." *Faison & Gillespie v. Lorant*, 187 N.C. App. 567, 573, 654 S.E.2d 47, 51 (2007). Both parties agree that the current dispute is controlled by the consent order which governs the parties' arbitration. Paragraph 15(c) of the consent order provides that the parties will abide by the Rules of Civil Procedure and Evidence; as a general rule, these rules require testimony be taken in open court in the presence of the parties. *See* N.C. Gen. Stat. § 1A-1, Rule 43(a); *see also* § 8C-1, Rules 615, 616 (2011). Defendant argues that the very next sentence of the consent order in paragraph 15(d) states, "Evidence shall be taken in the presence of the arbitrator and all parties[.]" Yet defendant ignores the last half of the sentence; paragraph 15(d) in its entirety reads: "Evidence shall be taken in the presence of the arbitrator and all parties, *except*

where a party is absent in default or *has waived the right to be present*." (Emphasis added.) Paragraph 20 of the consent order then explains how a party may waive a right:

> A party who proceeds with the arbitration after knowledge that a provision or requirement of this consent order has not been complied with and *who fails to object in writing shall be deemed to have waived the right to object. An objection must be timely filed with the arbitrator with a copy sent to the other party.*

(Emphasis added.)

The evidence establishes that by 10 August 2011 defendant had "knowledge" of Sue's psychologist's request that Sue be allowed to present testimony out of the presence of the parties because his attorney emailed plaintiff's attorney on this day that defendant "feels that [Sue] can testify in front of h[im] and [plaintiff,] and won't consent to lawyers only." Defendant's attorney's email was in writing, but it was not filed with the arbitrator, so it cannot qualify as a written objection under paragraph 20 of the consent order. Defendant was also aware that plaintiff intended to move *in limine* that Sue be allowed to testify outside the presence of the parties, as her attorney emailed defendant's attorney the day before the arbitration: "I plan to make a pretrial motion on this matter to exclude the parties for the mental health of their child. You are certainly entitled to put on your defense." In addition, on 11 August 2011, after defendant had knowledge of the request regarding Sue's testimony, the parties entered into a "FINAL PRETRIAL ORDER" by agreement. The final pretrial order identified Sue as one of the witnesses defendant intended to call to testify but does not note any issue regarding the circumstances of her testimony.

Defendant's first written "objection," other than the email to plaintiff's attorney, regarding the conditions of Sue's testimony occurs on 23 September 2011 in his motion to vacate the arbitration award, but defendant's 23 September 2011 "writing" was not "filed with the arbitrator" but rather with the trial court and came only after the arbitration was complete. Defendant never made any written request or objection which was filed with the arbitrator about Sue's testimony prior to or during the arbitration. In fact, the arbitration began on 11 August and did not resume until 17 August, but defendant still failed to file any written objection during that time or when the arbitration resumed. We also note that defendant had a right under the consent order to have the arbitration proceedings recorded, but he did not elect to do so and we have

no record of the discussion, if any, which occurred at arbitration regarding defendant's objection to the manner of Sue's testimony, the arbitrator's response, or Sue's testimony.[3]

The trial court found that defendant had raised an oral objection to Sue's testimony outside of his presence at the arbitration hearing, and that no written objection was required:

> The Defendant did not halt the proceeding or file a written objection as required by Paragraph 20 of the Consent Order to Arbitrate. It was not necessary for the Defendant to halt the proceeding or file a written objection. His oral objection was enough to satisfy this requirement because the Plaintiffs motion in limine was made orally just prior to the commencement of the hearing.

This appeal raises a question of law, since it depends upon interpretation of the consent order, which we review *de novo*. *See Carpenter v. Brooks*, 139 N.C. App. at 750, 534 S.E.2d at 645. We conclude that the trial court erred by disregarding the plain terms of paragraph 20 in its conclusion that an oral objection was sufficient. We conclude further that defendant waived his right to be present for Sue's testimony by his failure to timely file a written objection with the arbitrator pursuant to paragraph 20. Having concluded that defendant did waive his right to raise an objection as to how Sue's testimony was taken, we turn to defendant's brief which focuses on a series of related arguments as to why the trial court order should be affirmed. We address each in turn.

A. Paragraph 11 of the Consent Order

Defendant argues that the arbitrator did not have the power to exclude him as a party, from the testimony of a witness, based upon paragraph 11 of the consent order which provides, "The arbitrator shall have the power to require exclusion of any witness, other than a party, his or her lawyer or other essential person, during any other witness's testimony." We agree with defendant that both paragraphs 11 and 15 give

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3. Paragraph 13(a) of the consent order provides, "The hearing will be recorded by tape recording if elected by a party. The hearing will be opened by recording the date, time and place of the hearing; and the presence of the arbitrator, the parties, and their counsel." Both parties acknowledge in their briefs that plaintiff made an oral motion *in limine* that Sue testify outside the presence of the parties and that after hearing arguments from both sides, the arbitrator granted the motion. Although we have no transcript of either the arbitration or the hearing upon defendant's motion to vacate, the trial court found the facts as stated in the briefs, and these findings are not challenged on appeal, so we take them as true.

the parties a right to be present during all testimony and that the arbitrator should not have excluded him from Sue's testimony. But defendant's argument based upon paragraph 11 is still defeated by paragraph 20, since defendant was required to make a timely written objection if he believed the arbitrator was conducting the hearing improperly. Even if defendant made an oral objection, as the trial court found, the consent order required a timely written objection filed with the arbitrator.

B. Deviation from Standard Arbitration Terms

Defendant argues that because the Rules of Civil Procedure and Evidence were to govern the hearing, both of which generally require parties to be present during witness testimony, the Consent Order "deviat[ed] significantly from standard arbitration practice[.]" We agree that the Rules of Civil Procedure and Evidence do generally give parties the right to be present during all witness testimony, but the parties elected to draft an arbitration agreement and to conduct the arbitration under the terms they established. Defendant's argument emphasizes the importance of paragraph 20's requirement that a timely written objection be filed with the arbitrator.

C. Absurd Results

Defendant argues that "Plaintiff's argument distorts Paragraph 20 completely and would lead to absurd results" and then provides an example of a party having to halt proceedings in order to file a written motion during a witness's testimony regarding hearsay. Defendant then proposes that paragraph 20 applies only to certain types of objections that are "fundamental to the scope or propriety of arbitration[,]" arguing:

> Instead, Paragraph 20 is properly interpreted to contemplate objections that can be made in advance of arbitration that are fundamental to the scope or propriety of arbitration. Requiring these types of objections to be in writing and providing for a waiver if the objecting party proceeds with arbitration without asserting the objection in writing serves two purposes: (1) it allows the parties to obtain a ruling from the trial court on the issue before the commencement of arbitration, after which the trial court would abstain from exercising jurisdiction, and (2) it prevents unfairness to the non-objecting party who proceeds with arbitration -- and obtains a favorable award -- without notice of a fundamental objection from the other party that could undo the entire award.

Although Paragraph 20 does not limit its provisions to certain kinds of objections, even assuming defendant's argument was correct, he certainly had the opportunity to "obtain a ruling from the trial court on the issue before the commencement of arbitration[.]" We note that such a request would require that defendant file some sort of written motion or objection with the trial court. Under the consent order, defendant would not have had to file anything with the trial court, but only with the arbitrator, in order to preserve his objections. Defendant was aware of the plaintiff's intent to file a motion *in limine* prior to arbitration and still failed to make any sort of written objection. As to the second part of defendant's argument, requiring a written objection, under paragraph 20, "prevents unfairness to the non-objecting party" — here plaintiff — "who proceed[ed] with arbitration – and obtained a favorable award -- without notice" that defendant considered his position on Sue's testimony to be "a fundamental objection[.]"

We also note that paragraph 20 does not require that the proceedings be halted; it requires only filing a timely written objection. We do not find the requirement of a timely, written objection to be absurd at all. During an arbitration hearing, which may not be recorded, requiring a written objection to be provided to the arbitrator either before the hearing or during the hearing would ensure (1) that the arbitrator and other party are aware that the objecting party believes a serious violation of the agreement may occur or is occurring; (2) that the objection is made prior to or at the hearing, or at the very least before the final award is entered, when the opposing party and arbitrator still have the opportunity to address it; and (3) that a clear record of the objection is made so that it may be reviewed by the trial court upon motion by a party to vacate the award or by the appellate court on appeal from the trial court's order. Most attorneys today are quite capable of preparing a typed, written document during a hearing, but if not, writing the objection on a piece of paper and handing a copy to the other party and to the arbitrator is still a perfectly valid means of making a written objection.[4]

D. Defendant's Attorney's E-mail

Defendant next argues that if a written objection was required, his emails to plaintiff's attorney satisfy that requirement. Plaintiff argues

4. Defendant could also have filed a request to re-open the evidence even after completion of the hearing so that he could recall Sue to testify in his presence under paragraph 19: "Reopening Hearing. The hearing may be reopened on the arbitrator's initiative, or upon any party's application, at any time before the award is made. The arbitrator may reopen the hearing and shall have thirty (30) days from the closing of the reopened hearing within which to make an award." However, defendant chose not to invoke paragraph 19.

that defendant did not make this argument to the trial court, and although we have no transcript of the hearing, plaintiff is correct that defendant's motion does not allege that he made any sort of written objection, even by email. Furthermore, even defendant concedes his emails were addressed to plaintiff's attorney, and he does not assert that any written objections were filed "with the arbitrator" as is required by paragraph 20. In fact, plaintiff's attorney emailed defendant's attorney and stated she thought the arbitrator should be included in the emails regarding Sue's testimony, but defendant's attorney responded, "I would object to any email to [the arbitrator] on this matter."

E. North Carolina General Statute § 50-54

Defendant then broadly turns to North Carolina General Statute § 50-54(a), arguing the trial court properly vacated the decisions because the arbitrator "exceeded [his] power" and "committed an error of law prejudicing a party's, [his], rights." N.C. Gen. Stat. § 50-54(3), (8). We do not disagree with defendant's contentions that he had a right to be present for Sue's testimony, based upon paragraphs 11 and 15 of the consent order, the Rules of Civil Procedure and Evidence.[5] Furthermore, we do not disagree that his absence could be grounds for vacatur pursuant to North Carolina General Statute § 50-54(3) and (8) -- except that rights can be waived -- and under paragraph 20, defendant waived his right. Defendant's arguments still ignore the plain language of paragraph 20 of the consent order, and defendant waived his right to raise these arguments by failing to file a timely written objection with the arbitrator.

F. Summary

As defendant waived his right to object to the circumstances of Sue's testimony prior to, during, and even after the arbitration -- until after the award was announced -- we conclude that defendant has also waived his right to challenge the arbitration decisions on this basis. *See generally State v. Johnson*, 204 N.C. App. 259, 266, 693 S.E.2d 711, 716–17 (2010) ("As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal."). The trial court therefore erred in vacating the awards based upon the

5. We are not asserting that defendant has shown how his exclusion from Sue's testimony prejudiced him. Defendant's attorneys were present and questioned Sue, and he failed to record the arbitration proceedings so that we may consider how her testimony may have differed in his presence. Although defendant did raise other objections to the arbitration award, defendant has not identified any substantive grounds which could have been affected by Sue's testimony.

arbitrator's decision to receive testimony from Sue outside the presence of the parties.

III. Conclusion

We reverse the order of the trial court vacating the arbitration decisions and remand for further proceedings consistent with this opinion. We note that defendant raised other issues regarding the substance of the arbitration awards in his motion to vacate and we express no opinion on those issues. We also note that plaintiff's motion to confirm the awards still remains to be determined, as the order on appeal is reversed.

Reversed and Remanded.

Judges STEPHENS and DAVIS concur.

DURON LAMAR HAMPTON, PLAINTIFF
v.
ANDREW T. SCALES, DEFENDANT

No. COA15-1335

Filed 5 July 2016

1. Attorneys—legal malpractice—standard of care—plea arrangement

The trial court did not err in a legal malpractice case by granting summary judgment in favor of defendant attorney on the issue of whether defendant's representation of plaintiff met the standard of care for an attorney representing a criminal defendant who has directed his counsel that his preference was to resolve the charges against him with a plea arrangement. The evidence was sufficient to establish that defendant did not breach his duty to plaintiff and to shift the burden to plaintiff.

2. Attorneys—legal malpractice—duty to exercise reasonable care and diligence

The trial court did not err in a legal malpractice case by granting summary judgment in favor of defendant attorney on the issue of whether defendant breached his duty to exercise reasonable care and diligence. Plaintiff failed to offer any evidence that plaintiff would have been entitled to funds for the services of an expert or

an investigator, or that defendant was remiss in not attempting to obtain funds for this purpose.

3. Attorneys—legal malpractice—review of videotaped interview

The trial court did not err in a legal malpractice case by granting summary judgment in favor of defendant attorney on the issue of plaintiff's allegation that defendant failed to properly review the videotaped interview of the victim or to accurately convey its contents to plaintiff. Plaintiff failed to establish that he could offer a prima facie case of legal malpractice based on defendant's alleged failure to accurately inform plaintiff that the victim did not identify him during the videotaped interview.

4. Attorneys—legal malpractice—failure to show damage

Plaintiff failed to properly allege or to support with evidence any basis upon which to conclude that defendant attorney's alleged negligence while representing him, even if proven, caused plaintiff any damage.

Appeal by plaintiff from judgment entered 13 July 2015 by Judge Joseph N. Crosswhite in Stanly County Superior Court. Heard in the Court of Appeals 28 April 2016.

The Law Office of Charles M. Putterman, P.C., by Charles M. Putterman, for plaintiff-appellant.

Poyner Spruill LLP, by E. Fitzgerald Parnell, III, T. Richard Kane, and J. M. Durnovich, for defendant-appellee.

ZACHARY, Judge.

Duron Hampton (plaintiff) appeals from an order granting summary judgment in favor of Andrew Scales (defendant) on plaintiff's claim of legal malpractice against defendant. Defendant previously represented plaintiff on eight charges of second-degree rape and one charge of crime against nature. On appeal plaintiff argues that the trial court erred by entering summary judgment against him, on the grounds that the evidence before the trial court presented a genuine issue of material fact on the issue of whether defendant's representation of plaintiff on these charges met the applicable standard of care. We conclude that the trial court did not err by granting summary judgment for defendant and that its order should be affirmed.

I. Factual and Procedural Background

On 30 June 2011, Sharon Thomas reported to Albemarle Police Officer Star Gaines that her fifteen-year-old daughter "Tina"[1] had been having sex with a twenty-one year old man whom Tina identified as "Run Run." Plaintiff has admitted that he was previously known by the nickname Run Run. Detective Cindi Rinehart investigated Ms. Thomas's allegation. During this investigation, Tina was evaluated at the Butterfly House Children's Advocacy House ("Butterfly House"), where she was interviewed by Registered Nurse Amy Yow, a licensed forensic interviewer and a certified sexual assault nurse examiner. Nurse Yow first conducted a videotaped interview of Tina, during which Tina told Nurse Yow that she had previously had sexual relations with three men, whom she identified as "DeShawn," "Frankie," and "Cameron." At the end of the videotaped portion of the interview, Nurse Yow and Tina were joined by certified nurse midwife Rebecca Huneycutt, who performed a comprehensive physical examination of Tina. As Nurse Yow, Nurse Huneycutt, and Tina walked to the examination room, Tina told the two nurses that she had also had sex with plaintiff, whom she identified as Run Run. Officer Gaines, Detective Rinehart, Nurse Yow, and Nurse Huneycutt each executed an affidavit averring that Tina had stated that she had sex with plaintiff. In addition, Detective Rinehart obtained a statement from D.H., a friend of Tina's, in which D.H. stated that Tina had called D.H. on more than ten occasions to talk about having sexual intercourse with plaintiff.

Detective Rinehart also reviewed Tina's school records. In 2002, when Tina was six years old and in kindergarten, testing indicated that her I.Q. was around 64 and she was classified by the school system as being an "educable mentally disabled" student. When Tina was reevaluated in 2009, she was classified as having a "mild" intellectual disability. In her interview with Nurse Yow, Tina reported that she was in a "special class" at school.

On 14 February 2012, arrest warrants were issued charging plaintiff with eight charges of second-degree rape, in violation of N.C. Gen. Stat. § 14-27.3,[2] and one charge of crime against nature in violation of N.C. Gen. Stat. § 14-177. The charges of second-degree rape alleged that plaintiff had engaged in intercourse with a person who is mentally

1. To protect the privacy of the victim, we refer to her by the pseudonym "Tina."

2. N.C. Gen. Stat. § 14-27.3 was recodified as N.C. Gen. Stat. § 14-27.22, effective 1 December 2015. Plaintiff was charged with offenses occurring in 2011 and was charged under former N.C. Gen. Stat. § 14-27.3.

disabled. These warrants were served on plaintiff while he was in the Stanly County jail on other charges. After plaintiff was charged with these offenses, he sent a note to Detective Rinehart asking her to obtain "a good plea offer" that would enable plaintiff to be released from jail and return to his wife and child.

On 2 March 2012, defendant was appointed by the Court to represent plaintiff on these charges. Plaintiff sent several notes to defendant. None of the letters in the record that were written by plaintiff to defendant include any assertion by plaintiff that he was factually innocent of the charged offenses or that he wanted a jury trial. Instead, all of plaintiff's notes urgently requested defendant to negotiate a plea bargain that would enable plaintiff to be released from jail as soon as possible. For example, on one occasion plaintiff wrote the following to defendant:

> Sir, I am not trying to fight these charges in no way. I have a wife and daughter at home that desperately need me. You are the best attorney for this case. I just want to plea out. These charges are from last year before I went to prison, and I'm truly a changed person with responsibilities. I was attending college before these new charges. I am no longer breaking laws, getting in all kinds of mess. . . . I'm asking for you [to] please get my life back. This is it for me. My family is my everything. Please move speedily on a plea of any kind of probation. I'll take it.

Defendant was successful in negotiating a plea bargain with the prosecutor and on 27 April 2012, plaintiff pleaded guilty to one charge of taking indecent liberties in violation of N.C. Gen. Stat. § 14-202.1 (2014), a Class F felony. Plaintiff entered a guilty plea pursuant to *N.C. v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). "A defendant enters into an *Alford* plea when he proclaims he is innocent, but intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *State v. Cherry*, 203 N.C. App. 310, 314, 691 S.E.2d 40, 44 (2010) (citation omitted). In exchange for plaintiff's guilty plea, the prosecutor dismissed the eight charges of second-degree rape and the charge of crime against nature. Plaintiff was released from jail, placed on probation, and required to register with the North Carolina Sex Offender Registry. Additional details about the charges against plaintiff will be discussed below, as relevant to the issues raised on appeal.

About a year after pleading guilty to taking indecent liberties, plaintiff obtained a signed statement from Tina stating that she and plaintiff had not had any sexual contact. Plaintiff retained defendant to prepare

a motion for appropriate relief, and Mr. Patrick Currie was appointed to represent plaintiff in court. A hearing on plaintiff's motion for appropriate relief was conducted by Judge Anna Wagoner on 13 May 2013, at which testimony was elicited from Ms. Thomas and Tina in support of plaintiff's contention that in 2011 Tina had falsely accused him of having sexual relations with her. On 24 May 2013, Judge Wagoner entered an order granting plaintiff's motion for appropriate relief, setting aside his guilty plea, dismissing all charges against plaintiff related to sexual contact with Tina, and removing plaintiff from the Sex Offender Registry.

On 24 July 2014, plaintiff filed the instant suit against defendant seeking damages for legal malpractice and asserting that defendant had been negligent in his representation of plaintiff on the criminal charges discussed above. Plaintiff alleged that defendant had failed to "properly investigate" the charges against him and had mistakenly told plaintiff that during the videotaped portion of Tina's interview she named plaintiff as one of the men with whom she had sex. Plaintiff did not identify any specific damages, but alleged generally that as a "direct and proximate result" of defendant's negligence plaintiff had "sustained pecuniary damages, mental anguish and emotional distress[.]" Defendant filed a motion for summary judgment on 1 July 2015. Following a hearing on defendant's motion, the trial court entered an order on 13 July 2015 granting summary judgment in favor of defendant and dismissing plaintiff's complaint. Plaintiff has appealed to this Court from the summary judgment order entered against him.

II. Standard of Review

Pursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 56(c) (2014), summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1 Rule 56(e) requires that evidence presented to the trial court on a motion for summary judgment must be admissible at trial. " 'When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party.' " *Ron Medlin Constr. v. Harris*, 364 N.C. 577, 580, 704 S.E.2d 486, 488 (2010) (quoting *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)).

> The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met "by proving that an essential

> element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim."

DeWitt v. Eveready Battery Co., 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (quoting *Collingwood v. G.E. Real Estate Equitie*s, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)) (other citation omitted). " '[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.' " *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)).

In the course of a trial court's ruling on a motion for summary judgment, " '[a] verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.' " *Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C. App. 600, 605, 676 S.E.2d 79, 83-84 (2009) (quoting *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972)). "On the other hand, 'the trial court may not consider an unverified pleading when ruling on a motion for summary judgment.' Plaintiff's complaint in this case was not verified, so it could not be considered in the course of the trial court's deliberations concerning Defendant's summary judgment motion." *Rankin v. Food Lion*, 210 N.C. App. 213, 220, 706 S.E.2d 310, 315-16 (2011) (quoting *Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999), *disc. review improvidently allowed*, 352 N.C. 145, 531 S.E.2d 213 (2000)).

"We review a trial court's order granting or denying summary judgment *de novo*. 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

In a negligence action, "summary judgment for defendant is correct where the evidence fails to establish negligence on the part of defendant . . . or determines that the alleged negligent conduct complained of was not the proximate cause of the injury." *Bogle v. Power Co.*, 27

N.C. App. 318, 321, 219 S.E. 2d 308, 310 (1975), *cert. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976) (citation omitted). " 'If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision.' " *Point South v. Cape Fear Public Utility*, __ N.C. App. __, __, 778 S.E.2d 284, 287 (2015) (quoting *Nifong v. C.C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465 (1996)).

III. Legal Malpractice: General Principles

It is axiomatic that:

> [W]hen an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause.

Hodges v. Carter, 239 N.C. 517, 519, 80 S.E.2d 144, 145-46 (1954) (citations omitted). In the present case, plaintiff does not assert that defendant lacked "the requisite degree of learning, skill, and ability" or that he failed to exercise his best judgment. Instead, plaintiff's claim of legal malpractice is based on his assertion that defendant failed to "exercise reasonable and ordinary care and diligence" in his representation of plaintiff.

A plaintiff who seeks damages on a claim of professional malpractice based on negligence by an attorney "has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, as set forth by *Hodges*, 239 N.C. 517, 80 S.E. 2d 144, and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985). " 'To establish that negligence is a proximate cause of the loss suffered, the plaintiff must establish that the loss would not have occurred but for the attorney's conduct.' " *Belk v. Cheshire*, 159 N.C. App. 325, 330, 583 S.E.2d 700, 704 (2003) (quoting *Rorrer*, at 361, 329 S.E.2d at 369).

IV. Legal Analysis

As discussed above, the elements of a claim for legal malpractice are a breach of the attorney's duty to his or her client, and damages that proximately result from the attorney's negligence. In the present case,

we conclude that plaintiff has failed to produce evidence of a *prima facie* case that the acts and omissions upon which plaintiff bases his negligence claim, even if proven, constituted a breach of the standard of care or proximately caused damage to plaintiff.

A. Defendant's Evidence Shifted the Burden of Proof

[1] It is undisputed that defendant repeatedly directed defendant to negotiate a plea bargain with the prosecutor, under the terms of which plaintiff would be released from jail and allowed to rejoin his family. There is no evidence in the record to suggest that plaintiff ever indicated any desire to resolve the charges against him at a jury trial. Consequently, the question raised by plaintiff's complaint was whether defendant's representation of plaintiff met the standard of care for an attorney representing a criminal defendant who has directed his counsel that his preference is to resolve the charges against him with a plea arrangement. The standard of care for an attorney representing a criminal defendant requires more extensive investigation and preparation for a jury trial than for entry of a plea of guilty. Nonetheless, we agree with plaintiff's general proposition that a client's preference for a plea bargain as opposed to a trial does not relieve the attorney of the duty to exercise reasonable care and diligence in negotiating an appropriate plea arrangement and representing the client's interests in this regard.

In this case, plaintiff was charged with eight Class C felonies and one Class I felony, for which he was potentially subject to imprisonment for more than forty years. Had the charges gone to trial, the primary evidence against plaintiff would have been Tina's testimony.[3] In addition, the record includes extensive corroborating evidence, including the following:

> 1. The affidavit of Albemarle Police Officer Gaines stating that on 30 July 2011 Ms. Thomas reported that her daughter, Tina, had admitted having sex with plaintiff.
>
> 2. A statement from D.H. that Tina had called her a number of times to discuss having sex with plaintiff.
>
> 3. The affidavit of Nurse Yow stating that after the initial videotaped interview ended and as she, Tina, and Nurse Huneycutt were walking to the medical examination

3. In 2014, Tina signed a statement saying that she had falsely accused plaintiff of having sex with her. Our evaluation of plaintiff's legal malpractice claim depends, however, on the evidence available in 2012, when defendant represented plaintiff.

> room, Tina told the two nurses that she had had sex with plaintiff.
>
> 4. The affidavit of Nurse Huneycutt stating that during her physical examination of Tina she asked Tina if she had anything else to report and that Tina "promptly responded that she had had sexual relations with [plaintiff]."
>
> 5. The affidavit of Detective Rinehart summarizing her investigation of the charges, including her interview with Ms. Thomas, review of Tina's school records, interview of D.H., and her review of Tina's interview and examination at Butterfly House.
>
> 6. Tina's school records, which established that she was intellectually disabled.

On this record, we conclude that the charges against plaintiff were supported by adequate evidence to take the case to the jury. Defendant successfully negotiated a plea arrangement pursuant to the terms of which plaintiff pleaded guilty to one charge of taking indecent liberties, agreed to register with the North Carolina Sex Offender Registry, and would be released from jail, in exchange for which the State dismissed the numerous other serious charges against plaintiff. Given plaintiff's insistence on pleading guilty, the seriousness of the charges against plaintiff, and the strength of the evidence supporting these charges, the plea bargain arranged by defendant appears to reflect a reasonable exercise of professional skill on defendant's part.

Moreover, the record reflects that defendant was aware of both the strengths and weaknesses of the State's case. At the hearing during which plaintiff pleaded guilty to taking indecent liberties, plaintiff shared the following with the court:

> DEFENDANT: Your Honor, this is a case Mr. Hampton and I have spoken at length [about]. He's obviously, very conflicted. He's got a wife and a young daughter. And why he's entering the *Alford* plea, because of the liability, the criminal liability that he's facing, exposed to, with [the] amount of charges that is a Class C felony. And actually, I think the District Attorney's office was seeking to send superseding indictments to the grand jury for the B1 felonies. So therefore, even more exposure.
>
> I explained to him the risks. And with hesitation and with concern, he's wanting to take the plea. I've asked him

numerous times if he was sure, and he says that he is, but he's doing it because -- not because he's guilty, but because he wants to get out and be with his family.

I've made abundantly sure that he's wanting to do this. Again, he's hesitant, but is doing it for those reasons. That's why we're entering it as an *Alford* plea.

Your Honor, there's certainly holes in this case. Statements that the victim gave doesn't mention Mr. Hampton the first time. Then she goes to the Butterfly House, and then Mr. Hampton's name comes up, and then it happens eight or nine times. Then there's, apparently, a friend that she told that to.

But there's also people, when she's mentioning her sexual partners, doesn't mention Mr. Hampton. The dates of offense happened for the course of a month in May of last year. It was just reported in February of this year. So there's definitely issues in the case.

And I explained to Mr. Hampton that those are triable issues and we'd have to cross-examine the witness at a trial. And I advised him that [there] would be things that would affect her credibility, things that would look good for his case in his defense.

He has decided to not go that route because of what it could mean if the jury believed her. And I understand what he's doing, respect what he's doing in a way to get out and support his family. Young daughter is his first child.

But he's very upset about it, as you can tell. And I just wanted to be clear and want the court to make sure they're clear with him that this is what he's doing, he's doing it and he knows what he's doing and he has other options. And I've explained that to him, but I want to make sure we're good there. (emphasis added).

We conclude that defendant produced uncontradicted evidence that (1) plaintiff directed him to negotiate a plea bargain; (2) defendant's investigation of the charges against plaintiff was sufficient to apprise defendant of the general strengths and weaknesses of the State's evidence; (3) defendant negotiated a plea bargain that met plaintiff's expressed requirement that he be released from jail; and (4) the terms of

the plea arrangement were reasonable, given the strength of the State's case against plaintiff and plaintiff's potential exposure to a lengthy prison term.

This evidence was sufficient to establish that defendant did not breach his duty to plaintiff, and to shift the burden to plaintiff to produce admissible evidence demonstrating that he could make at least a *prima facie* case that defendant breached his duty of care to plaintiff and that defendant's negligence proximately caused damage to plaintiff. "If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial." *Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

B. Failure to Hire an Expert or a Private Investigator

[2] Plaintiff's argument that defendant breached his duty to exercise reasonable care and diligence in representing plaintiff is based upon the following allegations:

> 1. Plaintiff alleges generally that defendant was negligent in that he failed to "properly investigate" the charges against him, and specifically that defendant failed to consider hiring an expert or a private investigator.
>
> 2. Plaintiff alleges that defendant was negligent in that he may have failed to review the videotape of Tina's interview at Butterfly House and that defendant inaccurately told plaintiff that Tina had named him as one of her sexual contacts on the video.

We first consider plaintiff's allegation that defendant was negligent by failing to properly consider whether he should seek funds to hire an expert or private investigator. Defendant was appointed by the court to represent plaintiff, who qualified for appointment of counsel as an indigent criminal defendant. Therefore, before defendant could retain an expert or private investigator, he would have needed to seek funding from the Stanly County superior court.

> In order to receive state-funded expert assistance, an indigent defendant must make "a particularized showing that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." . . . Furthermore, "the State is not required by law to finance a fishing expedition for the defendant in the

> vain hope that 'something' will turn up." "Mere hope or suspicion that such evidence is available will not suffice."

State v. McNeill, 349 N.C. 634, 650, 509 S.E.2d 415, 424 (1998) (quoting *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992), *State v. Alford*, 298 N.C. 465, 469, 259 S.E.2d 242, 245 (1979), and *State v. Tatum*, 291 N.C. 73, 82, 229 S.E.2d 562, 568 (1976)).

Plaintiff has failed to indicate a proposed area of expertise for the "expert" or any specific role for the expert as part of negotiating a plea bargain for plaintiff. Similarly, plaintiff has not articulated a basis for a request to obtain funds from the Stanly County superior court with which to hire an investigator. Neither plaintiff's evidence at the trial level nor his appellate brief addresses the legal standard for securing funds for expert or investigative assistance for an indigent criminal defendant, and plaintiff has not advanced an argument that a hypothetical request by defendant for funds with which to hire an expert or an investigator would have met this standard. In the absence of any specific evidentiary or legal goal to be pursued by the expert or investigator posited by plaintiff, their roles as experts would appear to be speculative and, as stated in *Parks*, "the State is not required by law to finance a fishing expedition for the defendant in the vain hope that 'something' will turn up." We conclude that plaintiff has failed to offer any evidence, or even a colorable argument, that plaintiff would have been entitled to funds for the services of an expert or an investigator, or that defendant was remiss in not attempting to obtain funds for this purpose.

C. Video Recording of Nurse Yow's Interview of Tina

[3] The other basis of plaintiff's claim for legal malpractice is plaintiff's allegation that defendant failed to properly review the videotaped interview of Tina or to accurately convey its contents to plaintiff. For the reasons discussed below, we conclude that plaintiff is not entitled to relief on the basis of this argument.

Plaintiff's legal malpractice action is premised almost entirely upon his allegation that, although Tina did not name plaintiff as a person with whom she had previously had sex during her videotaped interview, defendant erroneously told plaintiff that he had been identified by Tina on the video. In his appellate brief, plaintiff supports this contention with a detailed recitation of questions that Nurse Yow asked Tina and of her answers, in order to establish that during the videotaped interview Tina named three men with whom she had sex in the past but did not name plaintiff, even when Nurse Yow asked her if she had anything to add. It was only after the videotape was turned off and Nurse Huneycutt joined

Tina and Nurse Yow, when Nurse Huneycutt asked Tina if she had anything else to share, that Tina stated that she had also had sex with plaintiff.

The record on appeal includes three CDs containing identical depictions of the videotaped interview between Tina and Nurse Yow. In each of these CDs the interview ends before Nurse Yow asks Tina to identify the individuals with whom she has had sexual relations, and the CDs do not include the part of the interview upon which plaintiff bases most of his arguments. N.C. R. App. P. 9(a) provides in relevant part:

> In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, . . . and any [other] items filed with the record on appeal pursuant to Rule 9(c) and 9(d). Parties may cite any of these items in their briefs and arguments before the appellate courts.

"Pursuant to the North Carolina Rules of Appellate Procedure, our review is limited to the record on appeal . . . and any other items filed with the record in accordance with Rule 9(c) and 9(d)." *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (2008). Our appellate courts " 'can judicially know only what appears of record.' . . . 'An appellate court cannot assume or speculate that there was prejudicial error when none appears on the record before it.' " *State v. Price*, 344 N.C. 583, 593-94, 476 S.E.2d 317, 323 (1996) (quoting *Jackson v. Housing Authority*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988), and *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254, *disc. rev. denied*, 315 N.C. 188, 337 S.E.2d 862 (1985)). Because the videotaped interview that was made a part of the record and was provided to this Court in the form of three identical CDs does not include the questions and answers discussed by plaintiff on appeal, we cannot consider these alleged statements in our analysis of the trial court's summary judgment order.

For the reasons discussed above, we conclude that plaintiff failed to establish that he could offer a *prima facie* case of legal malpractice based on either defendant's alleged failure to properly consider hiring an investigator or expert, or upon defendant's alleged failure to accurately inform plaintiff that Tina did not identify him during the videotaped interview.

D. Damages

[4] Plaintiff has also failed to identify any damages resulting from defendant's alleged negligence in representing him on the criminal charges discussed above. In his complaint, plaintiff makes a generalized

allegation that he "sustained pecuniary damages, mental anguish and emotional distress and is entitled to recover damages in a sum in excess of . . . $10,000." This is a conclusory assertion without reference to specific factual evidence; moreover, plaintiff's complaint is unverified and therefore was not proper for the trial court's consideration in ruling on defendant's motion for summary judgment. In his affidavit, plaintiff avers that if defendant had informed him that Tina did not identify him during the videotaped interview, he would have "continued to reject the plea to indecent liberties with a minor[.]" However, plaintiff does not identify any damages that he sustained as a result of pleading guilty. We have carefully reviewed the record and conclude that plaintiff has failed to properly allege or to support with evidence any basis upon which to conclude that defendant's alleged negligence, even if it were proven, caused plaintiff any damage.

"It is well established that in order to prevail in a negligence action, plaintiffs must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages." *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995) (citation omitted). Because plaintiff failed to offer evidence of the element of damages, we are unable to evaluate whether defendant's alleged malpractice proximately caused damage to plaintiff.

As discussed above, we have concluded that defendant offered evidence that his representation of plaintiff met the standard of care for an attorney representing a criminal defendant who wishes to enter a plea of guilty, and that plaintiff has failed to produce evidence either that defendant breached the duty he owed to plaintiff or that plaintiff suffered any damages. Having reached this conclusion, we do not reach the other arguments advanced by the parties.

For the reasons discussed above, we conclude that the trial court did not err by granting defendant's motion for summary judgment and that its order should be

AFFIRMED.

Chief Judge McGEE and Judge DILLON concur.

J. RANDY HERRON, PETITIONER
v.
NORTH CAROLINA BOARD OF EXAMINERS FOR
ENGINEERS AND SURVEYORS, RESPONDENT

No. COA15-1382

Filed 5 July 2016

Engineers and Surveyors—revocation of land surveyor license—due process of law

The trial court erred by reversing respondent North Carolina Board of Examiners for Engineers and Surveyors' order revoking the land surveyor's license held by petitioner based upon the trial court's conclusion that the procedure employed by respondent violated petitioner's due process rights. The trial court's ruling was based solely on an analysis of the administrative structure under which respondent decided petitioner's case. Further, there is a critical distinction between disqualifying bias against a particular party and permissible pre-hearing knowledge about the party's case.

Appeal by respondent from order entered 15 September 2015 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 26 May 2016.

Long Parker Warren Anderson & Payne, P.A., by Robert B. Long, Jr., and Andrew B. Parker, for petitioner-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields, for respondent-appellant.

ZACHARY, Judge.

The North Carolina Board of Examiners for Engineers and Surveyors (respondent) appeals from an order of the trial court that reversed respondent's order revoking the land surveyor's license held by J. Randy Herron (petitioner). In its order, the trial court concluded that the procedures followed by respondent in its revocation of petitioner's surveyor's license "violated the Petitioner's Due Process rights to a fair and impartial hearing by an unbiased fact-finder" and "constituted unlawful procedure." On this basis, the trial court reversed and vacated respondent's order revoking petitioner's surveyor's license, and remanded for a hearing *de novo* before an Administrative Law Judge. On appeal, respondent

argues that the trial court erred in reaching these conclusions and in reversing respondent's order. We agree.

I. Background

Respondent is an administrative agency that was established under Chapter 89C of the North Carolina General Statutes and that is charged with regulation of the practice of land surveying in North Carolina. "Chapter 89C of the General Statutes . . . provides that, '[i]n order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering and the practice of land surveying in this State are hereby declared to be subject to regulation in the public interest.' " *In re Suttles Surveying, P.A.*, 227 N.C. App. 70, 75, 742 S.E.2d 574, 578 (2013), *disc. review improvidently allowed*, 367 N.C. 319, 754 S.E.2d 416 (2014).

Petitioner was first licensed as a land surveyor in 1989. In July 2004, respondent notified petitioner that, after a review of plats prepared by petitioner, respondent found "sufficient evidence which supports a charge of gross negligence, incompetence, or misconduct." Respondent issued a formal reprimand against petitioner, imposed a civil penalty of $2000.00, and required petitioner to complete a continuing education course in professional ethics within ninety days. Petitioner failed to complete the required course within ninety days and in April 2005, respondent suspended petitioner's surveyor's license, which was reinstated after he completed the professional ethics class. In November 2009, respondent again notified petitioner that, following its investigation into several plats prepared by petitioner, respondent had evidence of gross negligence, incompetence, or misconduct. Petitioner did not contest this ruling and in May 2010, respondent imposed a civil penalty of $2000.00 against petitioner and suspended petitioner's surveyor's license for a period of three months, after which petitioner's license was reinstated. The record thus establishes that at the time of the events giving rise to this appeal, respondent had previously imposed formal discipline against petitioner on two occasions.

In November 2011, less than two years after respondent had suspended petitioner's surveyor's license for three months, respondent sent petitioner an annual notification regarding renewal of his surveyor's license. Respondent informed petitioner that his surveyor's license would expire on 31 December 2011 unless renewed. Although petitioner had been subject to the annual renewal requirement for more than twenty years, he failed to renew his surveyor's license in a timely fashion. Petitioner's surveyor's license was suspended from 31 January

2012 until petitioner renewed his license on 28 February 2012. During February 2012, while petitioner's surveyor's license was suspended, petitioner conducted surveys, signed and certified five plats, and recorded one survey plat with the Haywood County Register of Deeds. Petitioner admitted that he practiced surveying while his license was inactive or expired, in violation of N.C. Gen. Stat. § 89C-16(c) (2015).

On 13 June 2012, respondent sent petitioner a letter informing him that it was investigating petitioner's practice of surveying while his license was expired. The letter stated that during this investigation respondent had reviewed the five plats that petitioner signed and sealed in February 2012, and had determined that these plats violated certain provisions of the North Carolina Administrative Code (NCAC) governing the practice of surveying. On 14 November 2012, respondent mailed petitioner a Notice of Contemplated Board Action, informing petitioner that respondent intended to revoke petitioner's surveyor's license, but that petitioner had the right to request "a settlement conference and a formal hearing of [this] matter in the event that it could not be resolved consensually." Petitioner requested a settlement conference and on 28 February 2013, petitioner and his counsel met with respondent's Settlement Conference Committee. The Committee's recommendation was that petitioner's surveyor's license be revoked without a hearing, unless a hearing was requested by petitioner.

On 13 March 2013, respondent conducted a meeting of its Board. During this meeting a Board member moved that the Board "approve [the] consent agenda as presented." The "consent agenda" included "Board-authorized case openings, comity applications, firm applications for nine professional corporations, 17 limited liability companies, [and] two business firms, one Chapter 87 corporation name change request, four d/b/a requests, minutes, settlement committee recommendations, and [a] request for retired status[.]" The written materials that accompanied the consent agenda included a written report by the Settlement Conference Committee concerning petitioner's case, with all identifying information redacted. The Settlement Conference Committee recommended that petitioner's surveyor's license should be revoked "without [a] hearing unless requested by [petitioner]." However, none of the Board members reviewed the written materials associated with petitioner's case. Instead, the Board summarily passed the motion to approve the consent agenda in its entirety, without discussion or review of the individual items on the agenda. As a result, although respondent unanimously approved the consent agenda that included petitioner's case, none of the Board members were "aware of the facts of the settlement

conference . . . [or] of the settlement recommendations" of the committee until the formal hearing on petitioner's case.

On 14 August 2013, respondent wrote to petitioner, acknowledging his request for a formal hearing and setting out the specific allegations against petitioner. On 11 and 12 September 2013, several months after the Board meeting at which the Board had approved the consent agenda that included the Settlement Conference Committee's recommendation concerning petitioner's case, respondent conducted a hearing on the allegations against petitioner. The two Board members who had served on the Settlement Conference Committee - the Board's public member and Gary Thompson, a surveyor member of the Board - were recused from participation in the hearing. Despite this precaution, at the outset of the hearing, petitioner moved that his case be heard by an Administrative Law Judge instead of by respondent. Petitioner's motion was based on the fact that at the March 2013 Board meeting, respondent had approved the consent agenda that included a recommendation by the Settlement Conference Committee that petitioner's surveyor's license be revoked without a hearing unless a hearing was requested by petitioner. The record indicates, as discussed above, that the Board had passed a motion for a blanket approval of the entire consent agenda, but had not read or heard any information concerning petitioner's case in particular, and had not even known that the Committee was recommending revocation of petitioner's license. Petitioner, however, argued that the fact that the Board previously approved a consent agenda including his case was sufficient to establish that respondent had prejudged his case and could not afford him a "disinterested" review of the evidence. After a brief recess, petitioner's motion was denied, and each of the Board members stated on the record that he could be impartial.

At the hearing, David Evans, respondent's assistant executive director, testified that in February 2012 he was informed that petitioner was practicing surveying without a license. Review of the records of the Haywood County Register of Deeds revealed that petitioner had signed five plats during February 2012, while his license was suspended. Respondent therefore established a Settlement Conference Committee to conduct further investigation into petitioner's practice of surveying while his license was suspended and also into whether the plats that petitioner signed in February 2012 complied with respondent's rules for the preparation of plats.

Kristopher Kline was respondent's primary witness on the issue of petitioner's compliance with the standards of practice for land surveyors. Mr. Kline had been a licensed land surveyor for over twenty years,

had extensive experience in teaching and writing on subjects related to surveying, and had served for three years as the chairman of the education committee of the North Carolina Society of Surveyors. Although Mr. Kline practices surveying in Haywood County, he also testified that the rules and standards for surveying and preparation of plats are uniform across North Carolina. Mr. Kline was familiar with petitioner's work as a surveyor, and had observed a "regular pattern of substandard work" by petitioner over a period of years. Mr. Kline had previously reported petitioner to respondent for failure to comply with the requirements for surveyors. Mr. Kline had examined the plats signed by petitioner while his license was suspended and found numerous violations of the rules for the preparation of plats or property survey maps. The defects that Mr. Kline observed in petitioner's plats may be generally summarized as follows:

> 1. Practice of surveying without a license.
>
> 2. Failure to indicate or mark any ties or tie lines on some of his plats.[1]
>
> 3. Failure to employ ties that are external to the parcel being surveyed, including ties to the corners of an adjoining parcel so long as neither corner is on a common boundary line.
>
> 4. Repeated failure to properly mark right of ways (ROWs), including failure to indicate the source of a ROW, its width, and where the ROW crosses the property's boundary line.
>
> 5. Failure to include a ROW that appeared in a prior map, based on petitioner's belief that it was not a valid ROW or easement.
>
> 6. Lack of monumentation.[2]
>
> 7. Petitioner's practice of signing his plats in red ink, which he admitted was done to make it harder for a plat to be copied, although N.C. Gen. Stat. § 37-40 requires the signature to be legible and the plat to be reproducible.

Mr. Kline testified that the ties employed by petitioner in his plats did not comply with the purpose of a surveying tie as stated in respondent's

1. In the practice of surveying, a tie consists of a link between a point on the property being surveyed with another point that has previously been surveyed.

2. The United States Bureau of Land Management defines a "monument" as a "physical structure, such as an iron post . . . which marks the location of a corner point."

Survey Ties Guidelines manual ("the Guidelines"), which is provided to North Carolina surveyors. The Guidelines provide that "[t]he purpose of a tie is to reproduce a boundary when all or most of the property corners have been destroyed, or to verify the position of any given corner without the necessity of resurveying the entire tract of land." The Guidelines further instruct surveyors that:

> The North Carolina Board of Examiners for Engineers and Surveyors is providing this document to serve as an interpretative guide for proper ties to comply with Board Rule 21-56.1602(g). The variation in surveys makes it difficult to prepare a finite list of procedures for proper ties. Use of the ties shown and described herein will assure the Professional Land Surveyor (PLS) that a tie will comply with the requirements for a tie in the Board Rules. Professional judgment must be used to prepare and document a tie on a plat or report of survey. Variations from the examples given here may be acceptable to the Board if the intent of the rule is met.

The ties depicted in the Guidelines are all ties to points outside the property being surveyed. Mr. Kline testified that without a tie to an external point, it would not be possible to reproduce the survey without conducting a new survey. No evidence was elicited to contradict that point.

Petitioner presented the testimony of three local attorneys whose practices included real estate transactions, each of whom testified that he considered petitioner to be a competent surveyor and had found petitioner's surveys to be adequate for his use. However, each of petitioner's witnesses also testified that he was unfamiliar with the rules and regulations governing the practice of surveying and did not know whether petitioner's plats met these requirements.

Petitioner testified at the hearing and admitted that he had practiced surveying during February 2012 while his license was suspended. Petitioner also admitted that the Guidelines stated that the purpose of marking and indicating ties in a plat was to enable another surveyor to reconstruct the survey in the event that the property's corners were destroyed, and that without external ties this situation would require a new survey. However, petitioner also tendered various explanations for why he believed that his plats were in compliance with the rules for the practice of surveying. Petitioner generally conceded that he was "in the wrong" and that it was appropriate for respondent to impose discipline against him, and admitted that he had been disciplined by respondent on two prior occasions.

On 19 September 2013, respondent issued its final decision revoking petitioner's land surveying license. Petitioner appealed to the Buncombe County superior court. Following a review of the record in August 2015, the trial court entered an order on 15 September 2015. In its order, the trial court concluded that the administrative procedure followed by respondent, in which the Settlement Conference Committee made a recommendation, followed by a full hearing if requested by petitioner, constituted a violation of petitioner's due process right to a "fair and impartial hearing by an unbiased fact finder and adjudicator[.]" The trial court reversed and vacated respondent's final decision and ordered that the case be "remanded to Respondent to cause an Administrative Law Judge to be appointed, which appointed Administrative Law Judge shall hear this matter *de novo* to render a final decision in this matter." Respondent noted an appeal to this Court from the trial court's order.

II. Standard of Review

N.C. Gen. Stat. § 150B-43 provides that "[a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision." N.C. Gen. Stat. § 150B-51(b) authorizes a trial court to reverse or modify an agency's decision if the petitioner's substantial rights have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under [N.C. Gen. Stat. §§] 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

" 'The North Carolina Administrative Procedure Act governs both trial and appellate court review of administrative agency decisions.' 'On judicial review of an administrative agency's final decision, the substantive nature of each [issue on appeal] dictates the standard of review.' " *Nanny's Korner Care Ctr. v. N.C. Dep't of Health & Hum. Servs.*, 234 N.C. App. 51, 57, 758 S.E.2d 423, 427 (2014) (quoting *Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 596, 446 S.E.2d 383,

387, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994), and *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004)). " 'The first four grounds for reversing or modifying an agency's decision . . . may be characterized as 'law-based' inquiries,' while '[t]he final two grounds . . . may be characterized as 'fact-based' inquiries.' " *Nanny's Korner*, 234 N.C. App. at 58, 758 S.E.2d at 427 (quoting *Carroll*, 358 N.C. at 659, 599 S.E.2d at 894).

" '[Q]uestions of law receive *de novo* review,' whereas fact-intensive issues 'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.' " *Carroll*, at 358 N.C. 659, 599 S.E.2d at 894 (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (quoting *Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319). " 'Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions.' " *Blackburn v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 784 S.E.2d 509, 517-18 (2016) (quoting *Henderson v. N.C. Dept. of Human Resource*s, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988)). "Substantial evidence" is defined as "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8b) (2015). It is well-established that:

> In reviewing the whole record, the trial court "is not the trier of fact but rather sits as an appellate court and may review both (i) sufficiency of the evidence presented to the municipal board and (ii) whether the record reveals error of law." "It is not the function of the reviewing court, in such a proceeding, to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board." . . . The trial court examines the whole record to determine whether the Board's decision is supported by competent, material, and substantial evidence. In doing so, "the trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency."

Good Neighbors v. County of Rockingham, __ N.C. App. __, __, 774 S.E.2d 902, 907-08 (quoting *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjust.*, 334 N.C. 132, 136, 431 S.E.2d 183, 186 (1993), *In re Campsites Unlimited*, 287 N.C. 493, 498, 215 S.E.2d 73, 76 (1975), and

Cumulus Broadcasting, LLC v. Hoke Cnty. Bd. of Comm'rs, 180 N.C. App. 424, 426, 638 S.E.2d 12, 15 (2006)), *disc. rev. denied*, 368 N.C. 429, 778 S.E.2d 78 (2015).

III. Trial Court's Ruling on Due Process

The trial court vacated and reversed respondent's final decision and remanded the case for the appointment of an administrative law judge, based upon the trial court's conclusion that the procedure employed by respondent violated petitioner's right to due process of law. We conclude that the trial court erred in reaching this conclusion.

Without question, " '[p]rocedural due process requires that an individual receive adequate notice and a meaningful opportunity to be heard before he is deprived of life, liberty, or property.' Moreover, a professional license, such as a surveyor's license, is a property interest, and is thus protected by due process." *Suttles*, 227 N.C. App. at 77, 742 S.E.2d at 579 (quoting *In re Magee*, 87 N.C. App. 650, 654, 362 S.E.2d 564, 566 (1987)). In this case, the trial court found and concluded that petitioner's right to due process was violated in that he did not receive a hearing before a fair and unbiased tribunal.

> Whenever a government tribunal . . . considers a case in which it may deprive a person of life, liberty or property, it is fundamental to the concept of due process that the deliberative body give that person's case fair and open-minded consideration. "A fair trial in a fair tribunal is a basic requirement of due process."

Crump v. Bd. of Education, 326 N.C. 603, 613, 392 S.E.2d 579, 584 (1990) (quoting *In re Murchinson*, 349 U.S. 133, 136, 99 L. Ed. 942, 946 (1955)). In *Crump*, our Supreme Court discussed the term "bias":

> While the word "bias" has many connotations in general usage, the word has few specific denotations in legal terminology. Bias has been defined as "a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction," Black's Law Dictionary 147 (5th ed. 1979)[.] . . . Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination. [The plaintiff] . . . alleged that one or more Board members came into his hearing having already decided to vote against him, based on "factual" information obtained outside the hearing process. This type [of] bias can be labeled a "prejudgment of adjudicative facts."

Crump, 326 N.C. at 615, 392 S.E.2d at 585. In the instant case, as in *Crump*, petitioner has alleged that respondent prejudged the adjudicative facts of his case. "A party claiming bias or prejudice may move for recusal and in such event has the burden of demonstrating 'objectively that grounds for disqualification actually exist.' " *In re Ezzell*, 113 N.C. App. 388, 394, 438 S.E.2d 482, 485 (1994) (quoting *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993)). " 'However, in order to prove bias, it must be shown that the decision-maker has made some sort of commitment, due to bias, to decide the case in a particular way.' " *Smith v. Richmond Cty. Bd. of Education*, 150 N.C. App. 291, 299, 563 S.E.2d 258, 265-66 (2002) (quoting *Evers v. Pender County Bd. of Educ.*, 104 N.C. App. 1, 15, 407 S.E.2d 879, 887 (1991), *aff'd*, 331 N.C. 380, 416 S.E.2d 3 (1992)), *disc. review denied*, 356 N.C. 678, 577 S.E.2d 297 (2003). "This Court has held that there is a 'presumption of honesty and integrity in those serving as adjudicator' on a quasi-judicial tribunal." *In re N. Wilkesboro Speedway, Inc.*, 158 N.C. App. 669, 675-76, 582 S.E.2d 39, 43 (2003) (quoting *Taborn v. Hammonds*, 83 N.C. App. 461, 472, 350 S.E.2d 880, 887 (1986)).

The trial court made the following findings of fact directly pertinent to its conclusion that petitioner's due process rights were violated. Other findings by the trial court might be construed as part of the trial court's analysis of due process. For example, the court's finding that there was no substantial evidence to support respondent's findings that petitioner failed to comply with surveying regulations might be intended to support the trial court's conclusion that respondent was biased. However, the findings and conclusions listed below are the ones that are more directly pertinent to the issue of due process.

. . .

> 11. . . . [O]n November 14, 2012, the Board mailed Herron a Notice of Contemplated Board Action, stating that the Board intended to revoke the land surveying certificate of licensure of Petitioner, and offering him an opportunity for a settlement conference and a formal hearing of his matter in the event it could not be resolved consensually.
>
> 12. Herron requested and engaged in a settlement conference accompanied by his counsel on February 28, 2013 with the Settlement Conference Committee of the Board, composed of two Board members, along with the Executive Director of the Board and Board Counsel.

13. The Settlement Conference Committee and Herron were unable to resolve the issues, and Petitioner's counsel requested a Board hearing.

. . .

15. . . . [A]t the March 13, 2013 Board meeting of Respondent ("March Board Meeting"), before any notice of any hearing at which Herron or his counsel were permitted to attend and present evidence, cross-examine witnesses, or otherwise present a defense, the Board received factual information concerning this disputed matter from the Settlement Committee . . . without the use of Herron's name, and further received the recommendation of the Settlement Conference Committee to revoke Herron's license, and then affirmatively and unanimously voted to approve the recommendation for license revocation upon the alleged facts then made known to it.

16. The Board's vote to revoke Herron's surveying license at the March Board Meeting was confirmed by letter to Petitioner's counsel . . . [stating] in pertinent part, that: "The full Board at its March 13, 2013 meeting approved the recommendation of the Settlement Conference Committee which was to revoke Herron's surveying Certificate of License. The Board acknowledges the request of your client for a hearing. . . . "

17. Thereafter, the Board provided notice of a hearing . . . on or about August 14, 2013 to Petitioner.

18. The hearing was held before the Board on September 11 and 12, 2013, at which hearing Herron was represented by his counsel.

19. At the outset of such hearing, Petitioner, by and through his counsel, moved to disqualify the Board from hearing the contested case and that an Administrative Law Judge should be appointed because the Board had already made a decision before hearing evidence to approve the recommendation of the Settlement Conference Committee to revoke Petitioner's license from a range of penalty options that were available, and that constituted prejudgment of this matter and a biased fact-finder and adjudicator of the outcome of this matter.

> 20. The motion to disqualify [respondent] . . . was denied following a closed session during which members of the Board deliberated without further participation by Petitioner Herron or his counsel.
>
> 21. All of the participating Board members at the September 11, 2013 hearing, with the exception of Board Member Willoughby, were in attendance and voted to approve the recommendation of the Settlement Conference Committee at the March Board Meeting.
>
> 22. The Final Decision entered by the Board did in fact revoke Petitioner's Professional Land Surveying License[.]

Based on its findings of fact, the trial court made the following conclusions of law regarding petitioner's right to due process:

> 3. Petitioner was entitled to a fair and impartial hearing by an unbiased fact finder and adjudicator under the Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment to the Constitution, and under Article I, Section 19 of the Constitution of North Carolina.
>
> 4. That at the March Board Meeting, where Petitioner and his counsel were not present or provided an opportunity to be heard, and prior to any hearing, the entire Board, except for one absent member, received facts of the case as submitted by the Settlement Conference Committee, without the name of Petitioner, and voted affirmatively to approve the recommendation of the Settlement Conference Committee to revoke Petitioner's certificate of licensure without hearing unless requested by the respondent, and thereby was made upon unlawful procedure and violated the Petitioner's Due Process rights to a later fair and impartial hearing.
>
> 5. The denial of Petitioner's motion to disqualify the Board from hearing the matter and for reference to an Administrative Law Judge, as provided in NCGS § 150B-40(e), and thereafter conducting the hearing violated the Petitioner's Due Process rights to a fair and impartial hearing by an unbiased fact-finder and adjudicator contrary to both the aforesaid constitutional provisions and constituted unlawful procedure.

We note that petitioner did not claim, and the trial court did not find, that anyone involved in this matter had a personal bias against petitioner individually or on the basis of an aspect of petitioner's identity such as race or religion. Instead, the trial court's ruling is based solely on an analysis of the administrative structure under which respondent decided petitioner's case. The trial court's conclusion that petitioner's right to due process was violated was based on the following:

> 1. During respondent's March 2013 Board meeting, respondent passed a motion approving an extensive "consent agenda" that included the recommendation of the Settlement Conference Committee on petitioner's case. None of the Board members reviewed the Committee's written report, which had redacted all identifying information.
>
> 2. In September 2013, respondent conducted a hearing on the allegations against petitioner, at which the Board members heard sworn testimony, received documentary evidence, and rendered a decision. All but one of the Board members at the hearing were also present at the earlier meeting.

We conclude that these circumstances, which were not accompanied by evidence that any member of respondent's Board was personally biased against petitioner, do not support the trial court's holding on the issue of due process. We have reached this conclusion for several reasons.

We first clarify the nature of the action taken by respondent at its March 2013 meeting. The trial court found that at this meeting respondent "received factual information concerning this disputed matter" and then "unanimously voted to approve the recommendation for [petitioner's] license revocation." The trial court also found that respondent's "vote to revoke" petitioner's surveying license was confirmed in a letter to Petitioner's counsel. These findings suggest that at its March 2013 meeting respondent evaluated the evidence against petitioner and rendered a decision as to the appropriate level of discipline. This implication is not accurate.

As discussed above, the Board did not receive a presentation from the Settlement Conference Committee at the March 2013 Board meeting. Although the Board passed a motion for a blanket approval of the entire consent agenda that included written materials prepared by the Committee in petitioner's case, it did so without reading these documents or discussing petitioner's case. The wisdom of this procedure,

whereby significant decisions are made without discussion or review, may be subject to question. However, our focus is not on the merits of respondent's internal procedures, but on whether these procedures violated petitioner's due process rights. The record shows that respondent's approval of the consent agenda did not include any review or assessment by the Board of the evidence in petitioner's case, or any analysis of whether revocation of petitioner's license would be appropriate. As a result, the trial court's findings of fact to the contrary lack evidentiary support.

The trial court essentially held that the respondent's blending of investigative and adjudicative functions violated petitioner's constitutional right to due process as a matter of law, without requiring evidence that any individual on respondent's Board was biased against petitioner. We conclude that although respondent technically "approved" the Settlement Conference Committee's recommendation, it did so without learning that the Committee recommended revocation of petitioner's license and without any exposure to the evidence or investigation that had led to this recommendation. Moreover, this Court has previously held that "[t]there is a critical distinction between disqualifying bias against a particular party and permissible pre-hearing knowledge about the party's case." *Wilkesboro Speedway*, 158 N.C. App. at 676, 582 S.E.2d at 43 (citing *Farber v. N.C. Carolina Psychology Bd.*, 153 N.C. App. 1, 9, 569 S.E.2d 287, 294 (2002), *cert. denied*, 356 N.C. 612, 574 S.E.2d 679 (2003)). " '[M]ere familiarity with the facts of a case gained by an agency in the performance of its statutory duties does not disqualify it as a decision-maker.' " *Farber*, 153 N.C. App. at 9, 569 S.E.2d at 294 (quoting *Thompson v. Board of Educatio*n, 31 N.C. App. 401, 412, 230 S.E.2d 164, 170 (1976), *reversed on other grounds*, 292 N.C. 406, 233 S.E.2d 538 (1977)).

In *Farber*, the North Carolina Psychology Board (the respondent) assigned a staff psychologist to investigate a report that the petitioner, a licensed psychologist, had engaged in an improper romantic relationship with a patient. The investigator presented his findings to respondent, with the petitioner's name redacted, and the respondent found probable cause to issue a formal complaint against the petitioner. At the formal hearing on the matter, the petitioner moved to disqualify those board members who had heard the investigator's report and sought to have his case heard by an administrative law judge. The petitioner's motion was denied and following the hearing respondent suspended the petitioner's license for two years. The petitioner appealed to the superior court, which reversed on the grounds that the respondent had violated the petitioner's due process and statutory rights. This Court reversed the trial court, holding that:

> Regarding bias in the context of an administrative agency, the United States Supreme Court has cautioned that "[t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators[.]" . . . This Court has echoed the Supreme Court's warning, stating that "there is no per se violation of due process when an administrative tribunal acts as both investigator and adjudicator on the same matter." Thus, "[a]bsent a showing of actual bias or unfair prejudice petitioner cannot prevail."

Farber, at 153 N.C. App. 9, 569 S.E.2d at 294 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 43 L. Ed. 2d 712, 723-24 (1975), and *Hope v. Charlotte-Mecklenburg Bd. of Education*, 110 N.C. App. 599, 603-04, 430 S.E.2d 472, 474-75 (1993)). We conclude that *Farber* is controlling on the issue of whether respondent's administrative procedure constitutes a *per se* violation of petitioner's right to due process.

Petitioner attempts to distinguish *Farber* from this case on the grounds that in *Farber* the pre-hearing knowledge of the petitioner's case arose when the board made a preliminary finding of probable cause to pursue the allegations against the petitioner. However, because the board in *Farber* made a finding of probable cause based upon an assessment of the evidence against that petitioner, there was more, rather than less, opportunity for the board in *Farber* to develop a bias against the petitioner than in the case now before this Court, in which respondent approved the recommendation of the Settlement Conference Committee without review of the evidence or even of the nature of that recommendation.

We conclude that the trial court erred by holding that petitioner's due process rights were violated. We reverse the trial court's order and remand for further proceedings applying the standard of review discussed above, in Section II of this opinion.

REVERSED AND REMANDED.

Judges STEPHENS and McCULLOUGH concur.

HOOVER v. HOOVER

[248 N.C. App. 173 (2016)]

PATRICIA B. HOOVER, PLAINTIFF
v.
GEORGE BARRY HOOVER, DEFENDANT

No. COA15-1396

Filed 5 July 2016

Divorce—alimony—modification—substantial change of circumstances—retirement—bad faith

The trial court did not err in an alimony case by finding that defendant was retired or by concluding that there had been a substantial change of circumstances. Further, plaintiff failed to preserve for review the issue of whether defendant had acted in bad faith such that the trial court should have imputed income to defendant in calculating his earning capacity.

Appeal by plaintiff from order entered 7 August 2015 by Judge Edward L. Hedrick, IV, in Iredell County District Court. Heard in the Court of Appeals 12 May 2016.

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

No brief submitted for defendant-appellee.

ZACHARY, Judge.

Patricia Hoover (plaintiff) appeals from an order modifying the amount of alimony that George Hoover (defendant) is obligated to pay her on a monthly basis. On appeal, plaintiff argues that the trial court erred by finding that defendant had retired and by concluding that there had been a substantial change of circumstances, and that because defendant had voluntarily suppressed his earnings in bad faith the trial court should have imputed income to defendant. We conclude that the trial court did not err by finding that defendant was retired or by concluding that there had been a substantial change of circumstances, and that plaintiff failed to preserve for our review the issue of whether defendant had acted in bad faith such that the trial court should have imputed income to defendant in calculating his earning capacity.

I. Background

Plaintiff and defendant were married on 8 March 1978, separated on 29 December 1993 and divorced on 21 July 1999. There were no children born of the parties' marriage. A consent order entered in 2003 required defendant to pay plaintiff permanent alimony of $400.00 per week. Pursuant to an order entered on 25 July 2007, defendant's alimony obligation was reduced to $750.00 per month.

On 2 January 2015, defendant filed a motion to modify alimony. Defendant alleged that there had been a substantial change of circumstances since the 2007 alimony order was entered, in that he was seventy-two years old, he had several serious medical problems, and his sole income consisted of a monthly Social Security payment of "approximately $1508.00." The trial court conducted a hearing on defendant's motion on 2 July 2015. On 7 August 2015, the trial court entered an order finding that there had been a substantial change of circumstances and reducing defendant's alimony payment to $195.00 per month. On 8 September 2015, plaintiff appealed to this Court from the trial court's order modifying alimony.

II. Standard of Review

Pursuant to N.C. Gen. Stat. § 50-16.9(a) (2014), an order for alimony "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party[.]" " 'As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay.' " *Parsons v. Parsons*, 231 N.C. App. 397, 399, 752 S.E.2d 530, 532 (2013) (quoting *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982)). On appeal:

> "The well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding. Conclusions of law are, however, entirely reviewable on appeal." A trial court's unchallenged findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal."

Mussa v. Palmer-Mussa, 366 N.C. 185, 191, 731 S.E.2d 404, 408-09 (2012) (quoting *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994), and *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

III. Trial Court's Order

In its order, the trial court's findings of fact included the following:

. . .

4. Pursuant to an Order entered . . . July 25, 2007, the Defendant's obligation to pay Alimony was modified to $750.00 per month beginning July 6, 2007.

5. [In July 2007] . . . Defendant was employed part-time at NAPA Auto Parts earning $241.52 per week and lived with his mother in her former residence which she had conveyed to him and his two siblings. . . .

6. On January 10, 2008, the Defendant moved to modify his Alimony obligation and . . . [alleged] that Plaintiff . . . was no longer dependent. . . . Defendant's motion was denied.

7. On September 2, 2011, the parties agreed to reduce Defendant's Alimony obligation by $290.00 per month pending Defendant's knee surgery. Defendant's obligation pursuant to that Order would revert to $750.00 per month upon the Defendant's return to work.

8. On August 1, 2014, when the Defendant was approximately 72 years old, he quit his job at NAPA Auto Parts because he desired to retire. At the time he left employment, he was making $9.90 per hour. His gross income from this employment in 2014 was $14,663.46.

9. The Defendant continues to live in the same home with his mother. The home is owned by Defendant and his two siblings; however, he divides the expenses associated with the home with his mother equally[.] . . . When he has insufficient money to pay ½ of the expenses, his mother pays them all. In fact, his mother pays most of the utilities. The home is worth approximately $150,000.

10. Defendant's current income is solely in the form of social security retirement in the gross amount of $1,528.90 per month. For the last several years, his mother has given the Defendant and his siblings $10,000 per year, but has not given him the gift in 2015.

> 11. Defendant is 73 years old. Defendant had a heart attack 8 years ago and a knee replacement 3 years ago. He also had a hip replacement just before his knee replacement. Very recently, he suffered severe vision loss in one eye. Although he had surgery, his vision remains only 30% of that enjoyed by the eye prior to the retinal tear.
>
> 12. Defendant's reasonable monthly expenses can be found in the following table . . . [table omitted, showing a total monthly expense amount of $ 1,467.38].
>
> 13. Upon the factors about which no evidence was presented, the Court will find the Defendant failed to prove a substantial change in circumstances related to those factors outline[d] in N.C.G.S. §50-16.3A and the dependency of the Plaintiff.
>
> 14. Defendant is earning at his capacity. There is insufficient evidence for the Court to find that retiring at the age of 72 was done by the Defendant in a bad faith attempt to disregard his marital obligations.
>
> 15. Defendant owes medical providers more than $42,000 for past medical treatment.
>
> 16. Defendant receives unearned benefits from his mother in the sum of $133.44 per month as outlined in the table above.
>
> 17. Therefore, the Defendant's monthly income and benefits exceed his reasonable needs by $194.96.

The trial court's conclusions of law included the following:

> . . .
>
> 2. A substantial change in circumstances has occurred since the entry of the last Order affecting Defendant's ability to pay Alimony and his Motion to Modify Alimony should be allowed.
>
> 3. Although Defendant's reduction in income was voluntary, it was not in bad faith.
>
> 4. Considering the resources of the Defendant and the other factors outlined above, it would be appropriate for the Court to modify Defendant's obligation to pay Alimony as of August 1, 2015.

5. Defendant has the ability to pay the amount ordered herein.

Based upon its findings and conclusions, the trial court granted defendant's motion to modify alimony and ordered him to pay plaintiff alimony "in the sum of $195.00 per month beginning August 1, 2015, which shall be garnished from the Defendant's social security check and be paid directly to the Plaintiff." We conclude that the trial court's findings of fact are supported by the evidence, and that its findings support its conclusions of law.

In reaching this conclusion, we have considered plaintiff's arguments for a contrary result. We first note that plaintiff has not argued that the modification order has resulted in plaintiff's lacking adequate funds with which to support herself. Moreover, plaintiff does not challenge the evidentiary facts found by the trial court, but only the trial court's ultimate finding that defendant had retired, and its conclusions that defendant was earning at his capacity because he had not left work in a bad faith attempt to evade his alimony obligation, and that there had been a substantial change of circumstances.

Regarding the trial court's finding that defendant had retired, the undisputed evidence established the following facts:

1. Defendant was 72 years old[1] when he quit work, and was 73 at the time of the hearing on defendant's motion.

2. During the time between entry of the 2007 alimony order and the hearing on defendant's motion to modify alimony, defendant had experienced the following medical problems: (a) a heart attack; (b) a knee replacement; (c) a hip replacement; (d) instances of skin cancer; (e) hearing loss; and (f) 70% loss of vision in one eye.

3. After defendant left his employment, his only ongoing source of income was a monthly Social Security check of approximately $1530.00 per month.

4. Defendant was 73 years old and living with his 99 year old mother who contributed to the payment of his expenses.

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1. We note that employment beyond the age of 72 is prohibited in some circumstances. *See* N.C. Gen. Stat. § 7A-4.20 (2015).

We hold that the evidence of these circumstances, which is not challenged on appeal, clearly supports the trial court's finding that defendant had retired. Plaintiff is not entitled to relief on the basis of this argument.

Plaintiff also argues that the trial court erred by concluding that there had been a substantial change of circumstances. Plaintiff asserts on appeal that in its determination of whether there had been a change of circumstances, the trial court should have made a finding that defendant acted in bad faith and should have imputed income to defendant in the amount of his previous earnings. We have carefully reviewed the transcript of the hearing in this matter, and conclude that plaintiff did not argue before the trial court that defendant had acted in bad faith, and did not argue that the trial court should impute income to defendant.

Because plaintiff did not argue at the trial level that the trial court should find that defendant acted in bad faith and, on that basis, should impute income to defendant, neither defendant nor the trial court had an opportunity to address this issue. N.C.R. App. P. Rule 10(a)(1) (2014) provides in relevant part that in order to preserve an issue for appellate review, "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and must have "obtain[ed] a ruling upon the party's request, objection, or motion." "As a general rule, the failure to raise an alleged error in the trial court waives the right to raise it for the first time on appeal." *State v. Johnson*, 204 N.C. App. 259, 266, 693 S.E.2d 711, 716-17 (2010).

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

Cushman v. Cushman, __ N.C. App. __, __, 781 S.E.2d 499, 504 (2016) (quoting *Balawejder v. Balawejder*, 216 N.C. App. 301, 307, 721 S.E.2d 679, 683 (2011)). We conclude that, by failing to raise this issue at the trial level, plaintiff waived review on appeal.

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

AFFIRMED.

Judges DILLON and DAVIS concur.

IN RE ADOPTION OF C.H.M.

[248 N.C. App. 179 (2016)]

IN THE MATTER OF THE ADOPTION OF C.H.M., A MINOR CHILD

No. COA15-1057

Filed 5 July 2016

Adoption—consent of father required—funds for child saved in lockbox

Where, upon learning that his former girlfriend was pregnant, respondent-father contacted her on numerous occasions expressing his enthusiasm for becoming a father and offering financial support, saved approximately $100 to $140 per month for the baby by depositing it in a lockbox kept in his residence, and sought in other ways to be involved in the life of the baby despite resistance by the mother, the Court of Appeals affirmed the trial court's order concluding that respondent-father's consent was required to proceed with the adoption of his minor daughter by petitioners.

Appeal by Petitioners from order entered 9 February 2015 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 8 March 2016.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for Petitioners.

Marshall & Taylor, PLLC, by Travis R. Taylor, for Respondent.

STEPHENS, Judge.

Petitioners Michael T. Morris and Carolyn L. Morris appeal from the district court's order concluding that Respondent-father Venson Allen Westgate's consent is required to proceed with the adoption of his minor daughter, C.H.M. We affirm the district court's order.

Factual Background and Procedural History

Westgate is a 31-year-old resident of Illinois. Beginning in 2009, he became involved in an on-and-off intimate relationship with C.H.M.'s biological mother, Brandi Wood, who also resided in Illinois at that time. In 2012, Westgate saved money for several months to purchase an engagement ring and asked Wood to marry him, but she rejected his proposal. However, she later became pregnant after the two rekindled their intimate relationship in late October or early November 2012.

In January 2013, Wood married a member of the military stationed in North Carolina, but she remained in Illinois. Around the same time, Wood told Westgate that she was pregnant and that he might be the father; however, Wood also demanded that Westgate keep her pregnancy secret. Westgate promised that he would not tell anyone about Wood's pregnancy until she told him he could, but continued to visit Wood at the Dollar General store where she worked and also communicated with her extensively on the social networking site Facebook. In February 2013, shortly after learning of Wood's pregnancy, Westgate offered via Facebook to start setting money aside for their child; although Wood rebuffed this offer, Westgate replied that he wanted to do so anyway in order to ensure that the child had everything he or she would ever need. In addition to offering financial support, Westgate also offered to pay for Wood's medical bills and to purchase specific items for the child. Wood refused these offers as well. However, in March 2013, she allowed Westgate to accompany her to a prenatal medical appointment, which was paid for by her husband's insurance. In Facebook messages he sent to Wood around this time, Westgate expressed his enthusiasm for becoming a father and his concerns for the health of Wood and her child, discussed research he had conducted into healthcare providers, suggested potential baby names, requested pregnancy pictures, and stated his intent to be present at the child's birth. In the months that followed, Wood told Westgate that it was impossible for him to be the father of her child because she had become pregnant as a result of a sexual assault by an unknown person in the autumn of 2012. Westgate reaffirmed that if the child was his, he wanted to be there as a father, and repeatedly requested to take a DNA test to confirm or exclude the possibility of his paternity, but Wood refused.

Before giving birth, Wood moved to North Carolina to join her husband in Onslow County. Westgate did not know Wood's North Carolina phone number or address and had no way of contacting her other than Facebook messages; eventually, Wood blocked Westgate on Facebook. On 28 June 2013, Wood gave birth to C.H.M. and subsequently placed her for adoption with A Child's Hope, LLC ("ACH"), an adoption agency. Wood did not inform Westgate that she had given birth, did not tell him she had placed C.H.M. for adoption, nor did she identify Westgate to the adoption agency as the child's biological father; instead, Wood told ACH that her pregnancy resulted from a sexual assault by an unknown person. On 9 July 2013, the Morrises filed a petition in Wake County District Court to adopt C.H.M.

On 27 July 2013, Wood returned to Illinois and asked Westgate to meet her at a bar, at which point he realized she was no longer pregnant.

However, Wood did not inform Westgate she had placed C.H.M. for adoption and instead told him that the child was hospitalized due to a heart problem. Westgate again requested a DNA test but Wood refused, offering an array of reasons why he could not be the father, including that her pregnancy had resulted from a sexual assault, that the timing of conception and birth did not align with their intimate encounter, and that Westgate's blood type and hair color did not match that of the child. At some point in September or October 2013, Westgate began to contact attorneys in Illinois and North Carolina to inquire about his legal rights. However, in November 2013, Wood admitted to Westgate that she had placed the child for adoption and that he was the father. On 27 November 2013, Westgate was served with a notice of pendency of adoption proceedings. A subsequent DNA test, paid for by ACH, confirmed Westgate's paternity.

On 23 December 2013, Westgate filed a response to notice and objection to the adoption. A hearing in this matter was held during the 23 April 2014 civil session of Wake County District Court, the Honorable Debra Sasser, Judge presiding. At the hearing, Westgate testified that he has been employed for several years as a repairman for J&J Ventures in Illinois and earned approximately $35,000 per year during the term of Wood's pregnancy. Westgate testified further that once he learned Wood was pregnant, on several occasions via Facebook messages and in person, he offered to provide financial support for Wood and C.H.M. and told Wood he had been saving money to do so, but that Wood rebuffed him because she did not want her husband to know about their relationship. According to Westgate, despite Wood's refusal to accept financial support, he immediately began saving money for his child by depositing cash withdrawn from ATMs, cashback purchases from Walmart, and monthly dividend checks into a "lockbox" he kept in his residence. Westgate testified that he typically deposited at least $100 to $140 per month and sometimes more into the lockbox. He also testified that although he had a bank account, he generally lived paycheck to paycheck and chose to utilize the lockbox because he wanted to assure the funds for his child were kept separate for her exclusive use. Westgate provided his bank statements dating back to before C.H.M.'s conception, and testified extensively about his monthly expenses and withdrawals. Westgate also introduced the lockbox into evidence, which, by the time of the hearing, held $3,260. Westgate acknowledged that he had contacted attorneys in Illinois and North Carolina several months after his daughter's birth in September and October 2013 to inquire about suing Wood for custody or demanding a DNA test, but stated that he planned to pay any legal or associated fees from his bank account, rather than

from the lockbox. In addition, Westgate testified that after the DNA test confirmed his paternity, he purchased items for C.H.M. and made arrangements to transfer his employment to the town in Illinois where his parents lived and to move in with them in order to better facilitate childcare for his daughter.

Wood did not appear at the hearing. Although Wood had been served in Illinois with a subpoena to compel her appearance approximately one week prior to the hearing, counsel for the Morrises explained that after Wood was served, she contacted him. He informed her that if she was present in North Carolina, she would have to comply with the subpoena, but in the event she had changed her state of residence to Illinois, he did not believe the subpoena was valid.

On 9 February 2015, the district court entered an order in favor of Westgate. In its findings of fact, the court found that Westgate had acknowledged paternity of C.H.M. and had regularly visited and communicated with Wood throughout her pregnancy. The court also found that "[w]hile there are legal issues in dispute the [c]ourt finds that the major fact in dispute is whether [Westgate's] testimony regarding putting money aside for the minor child and Mrs. Wood is credible." The court ultimately found Westgate's testimony credible. In light of the evidence that Wood refused to accept any financial support after Westgate told her he was saving money for their child, the court further found that Westgate

> made regular and consistent payments into his lock box/safe for the support of the minor child. These payments were made on a monthly (and sometimes more frequent) basis. While these funds were not deposited into a bank or other financial institution, they were deposited into a safe, and these funds were earmarked for the minor child. No other funds were deposited into this safe.

After entering findings regarding Westgate's income, the court found as fact and concluded as a matter of law that, in accordance with his financial means, Westgate's regular and consistent deposits into the lockbox were a reasonable method of providing support for C.H.M. The court also concluded that Westgate had "presented a legally sufficient payment record of his efforts to provide support." Consequently, the court determined that Westgate had satisfied all three of the statutory requirements imposed by section 48-3-601 of our General Statutes, and therefore his consent was required to proceed with the adoption. The Morrises gave notice of appeal to this Court on 11 March 2015.

Analysis

The Morrises argue that the district court erred in determining that Westgate's consent was necessary for the adoption. Specifically, the Morrises contend that Westgate failed to satisfy the statutory support requirement imposed by section 48-3-601 of our General Statutes. We disagree.

Adoption proceedings are "heard by the court without a jury." N.C. Gen. Stat. § 48-2-202 (2015).

> Our scope of review, when the [c]ourt plays such a dual role, is to determine whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts. This Court is bound to uphold the trial court's findings of fact if they are supported by competent evidence, even if there is evidence to the contrary. Finally, in reviewing the evidence, we defer to the [district] court's determination of witnesses' credibility and the weight to be given their testimony.

In re Adoption of Shuler, 162 N.C. App. 328, 330-31, 590 S.E.2d 458, 460 (2004) (citations and internal quotation marks omitted). The district court's conclusions of law are subject to *de novo* review. *See generally In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001).

Chapter 48 of our General Statutes governs adoption procedures in North Carolina. Section 48-3-601 makes the consent of certain individuals mandatory before a court may grant an adoption petition, and provides that a putative father's consent is only required if he

> [b]efore the earlier of the filing of the [adoption] petition or the date of a hearing under [section] 48-2-206, has acknowledged his paternity of the minor and
>
> . . .
>
> [h]as provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of the pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to communicate with

> the biological mother during or after the term of pregnancy, or with the minor, or with both[.]

N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II) (2015). In construing the purpose of section 48-3-601 in *In re Adoption of Byrd*, our Supreme Court stated:

> We believe the General Assembly crafted these subsections of this statute primarily to protect the interests and rights of men who have demonstrated paternal responsibility and to facilitate the adoption process in situations where a putative father for all intents and purposes has walked away from his responsibilities to mother and child, but later wishes to intervene and hold up the adoption process.

Byrd, 354 N.C. at 194, 552 S.E.2d at 146. In *Byrd*, the putative father, Gilmartin, was an unwed 17-year-old who impregnated his high school girlfriend, O'Donnell. Gilmartin held several part-time jobs in Pea Ridge, where he lived free of charge with his uncle and later his grandparents and, after learning of the pregnancy, he offered to help support and raise the child. *Id.* at 190, 552 S.E.2d at 144. In addition, his family offered O'Donnell a place to live during her pregnancy as well as assistance with her medical bills and living expenses. *See id.* O'Donnell declined these offers. *See id*. At one point, Gilmartin moved to Nags Head to work in construction in an effort to earn and save money for the care of O'Donnell and her expected child. *See id*. However, Gilmartin failed to save any money and ultimately provided no financial support to O'Donnell during the term of her pregnancy. *See id.* One day after giving birth, O'Donnell placed the child for adoption, and an adoption petition was filed the same day. *Id.* at 191, 552 S.E.2d at 145. Four days later, Gilmartin mailed a money order for $100 and some baby clothing to O'Donnell, and subsequently sought custody of the child. *See id*. In evaluating whether Gilmartin had satisfied the statutory support requirement imposed by section 48-3-601, our Supreme Court reasoned that "support is best understood within the context of the statute as actual, real and tangible support, and that attempts or offers of support do not suffice." *Id.* at 196, 552 S.E.2d at 148 (internal quotation marks omitted). Because the record established that Gilmartin had at least some income during the term of O'Donnell's pregnancy but "never provided tangible support within his financial means to [O'Donnell or her child] at any time during the relevant period before the filing of the adoption petition," the Court held that he failed to satisfy the statutory support requirement, and therefore his consent was not required for the adoption. *Id.* at 197, 552 S.E.2d at 148. In summarizing its holding, the Court emphasized that

"[t]he interests of the child and all other parties are best served by an objective test that requires unconditional acknowledgment [of paternity] and tangible support," and reiterated that "attempts or offers of support, made by the putative father or another on his behalf, are not sufficient for the purposes of the statute." *Id.* at 197-98, 552 S.E.2d at 148-49.

In *In re Adoption of Anderson*, 360 N.C. 271, 624 S.E.2d 626 (2006), the Court reaffirmed the distinction drawn in *Byrd* between actual, tangible support and mere offers or attempts. There, the putative father, Avery, impregnated his high school girlfriend, Anderson. *Id.* at 272, 624 S.E.2d at 627. After learning of the pregnancy, Avery, who lived with his parents and paid nothing for rent, utilities, food, or clothing, dropped out of school, obtained gainful employment at the International House of Pancakes, and used some of his earnings to purchase a car for $1,000 and pay for automobile insurance. *Id.* at 273-74, 624 S.E.2d at 627-28. At trial, Avery acknowledged that he never provided any financial support to Anderson before the filing of the adoption petition, but introduced testimony from several witnesses that prior to the filing of the adoption petition, he repeatedly offered Anderson money in person at school, which she refused; drove to her family's residence and attempted to deliver an envelope containing a check for $100, which her father refused; and also had his attorney send her a letter acknowledging paternity and offering financial assistance to her and the child. *Id.* at 274, 624 S.E.2d at 628. The trial court nevertheless concluded that Avery failed to satisfy the statutory support requirement and therefore his consent to the adoption was not required. *Id.* When the case reached our Supreme Court, Avery contended that strict adherence to the standard articulated in *Byrd* risked inviting mothers "to thwart the rights of putative fathers simply by declining to accept support." 360 N.C. at 275, 624 S.E.2d at 628. In rejecting this argument, our Supreme Court stated, "We see no reason to modify *Byrd*'s bright-line rule. The rule comports with the language of the subsection and reflects the importance of a clear judicial process for adoptions." *Id.* at 278, 624 S.E.2d at 630 (internal quotation marks omitted). After reaffirming that mere offers of support are insufficient to satisfy the statutory support requirement, the Court examined the record and determined that competent evidence supported the trial court's factual finding—that despite possessing adequate resources, Avery never provided actual financial support for Anderson. *See id.* In upholding the trial court's conclusion that Avery's consent to the adoption was not required, the Court also explained that "our resolution of the instant case does not grant biological mothers the power to thwart the rights of putative fathers" because the language of section 48-3-601 "obliges

putative fathers to demonstrate parental responsibility with reasonable and consistent payments *for* the support of the biological mother." *Id.* at 279, 624 S.E.2d at 630 (citation and internal quotation marks omitted; emphasis in original). As the Court reasoned,

> [t]he legislature's deliberate use of "for" rather than "to" suggests the payments contemplated by the subsection need not always go directly to the mother. So long as the father makes reasonable and consistent payments *for* the support of mother or child, the mother's refusal to accept assistance cannot defeat his paternal interest.

Id. (emphasis in original). The Court went on to note that Avery "could have supplied the requisite support any number of ways, such as opening a bank account or establishing a trust fund for the benefit of Anderson or their child." *Id.* at 279, 624 S.E.2d at 631. "Had he done so, Anderson's intransigence would not have prevented him from creating a payment record through regular deposits into the account or trust fund in accordance with his financial resources." *Id.*

This Court has since recognized that *Anderson* did not purport to provide an exhaustive list of ways that a putative father can satisfy the statutory support requirement when his child's biological mother refuses his offers of support. *See In re Adoption of K.A.R.*, 205 N.C. App. 611, 696 S.E.2d 757 (2010), *disc. review denied*, 365 N.C. 75, 706 S.E.2d 236 (2011). *In K.A.R.*, the putative father, Alvarez, was an unemployed high school dropout who lived with his parents. *Id.* at 612-13, 696 S.E.2d at 759. However, after learning that his girlfriend, Richardson, was pregnant, Alvarez obtained employment at a rate of $8.00 per hour, attended prenatal classes with Richardson, and accompanied her to doctor's visits until she requested that he stop. *Id.* at 613, 696 S.E.2d at 759. As soon as Alvarez had income from his job, and prior to the child's birth and the filing of the adoption petition, "he began purchasing equipment and supplies for the child, such as: a car seat, a baby crib mattress, and clothing worth over $200." *Id.* Based on this evidence, the district court concluded that Alvarez had satisfied the statutory support requirement, and that his consent was therefore required for the adoption. *Id.* On appeal, we affirmed the district court's determination, emphasizing that, in contrast to the putative fathers in *Byrd* and *Anderson*, Alvarez "independently provided items of support for the child, even after his efforts to provide support and assistance directly to [Richardson] were rebuffed." *Id.* at 617, 696 S.E.2d at 761. Because competent evidence supported the district court's findings that the support Alvarez provided was consistent and reasonable in accordance with his financial means,

we held that Alvarez had complied with "the bright-line requirement [established in *Byrd* and reaffirmed in *Anderson*]——that the support contemplated by the statute must be provided prior to the filing of the petition." *Id.* at 617, 696 S.E.2d at 762. In so holding, we explained:

> There are few options available to a young unmarried biological father who has shown in many ways his strong desire to keep his child, and whose efforts to provide direct support to the mother have been rebuffed. [The *Anderson* Court] suggested one way a father could provide support independently of the mother; the father in this case, as determined by the trial court, has shown another.

Id.

In the present case, the Morrises contend that the district court erred in concluding that Westgate satisfied the statutory support requirement imposed by section 48-3-601. Specifically, the Morrises argue that Westgate's efforts to save money for C.H.M. in the lockbox he kept in his home were legally insufficient to satisfy the statutory support requirement because, by failing to either keep a detailed ledger of his deposits in the lockbox or subpoena records of cashback purchases he testified he made at Walmart, Westgate failed to create the sort of "payment record" the Morrises claim is required under *Anderson* to prove that he provided tangible support through reasonable and consistent payments according to his financial means. This argument is unavailing. Our holding in *K.A.R.* demonstrates that although *Anderson* suggested that opening a trust fund or bank account would satisfy the statutory support requirement, *Anderson* did not purport to provide an exhaustive list of ways for a father to do so, nor did it explicitly impose any sort of specific accounting requirements. Indeed, contrary to the Morrises' characterization of the "payment record" as a bright line rule, *K.A.R.* also indicates that the objective, bright line test established in *Byrd* and reaffirmed in *Anderson* focused on the distinction between mere offers or attempts and actual, tangible support. While a formal record of payments by a father would certainly be illustrative of the latter, *K.A.R.* mandates that where there is competent evidence in the record to support a district court's determination that, prior to the filing of an adoption petition, a putative father provided reasonable and consistent payments for the support of his child in accordance with his financial means, this Court will not disturb such a determination on appeal.

In the present case, the Morrises challenge numerous findings related to the court's determination that Westgate satisfied the statutory support

requirement, complaining, for example, that Westgate's testimony that he made offers of financial support to Wood and saved money for C.H.M. was uncorroborated by any other witness, that his bank records do not definitively prove that the cash he withdrew was deposited in the lockbox, and that the director of ACH testified that Westgate told her via telephone he was saving money to hire an attorney and pay for DNA testing. However, our standard of review makes clear that this Court is "bound to uphold the trial court's findings of fact if they are supported by competent evidence, even if there is evidence to the contrary," and we must "defer to the [district] court's determination of witnesses' credibility and the weight to be given their testimony." *Shuler*, 162 N.C. App. at 330-31, 590 S.E.2d at 460. Based on the record before us—which includes extensive testimony from Westgate regarding his efforts to set aside money for C.H.M. in the lockbox, as well as over one year's worth of his bank records, and hundreds of pages of his Facebook messages with Wood—we conclude there is ample evidence to support the district court's determination that Westgate provided reasonable and consistent payments for the support of C.H.M. before the filing of the adoption petition.

The Morrises also argue that the district court improperly shifted Westgate's burden of proof when it found his testimony credible despite its additional findings that Wood was "the only witness who could either confirm or contradict [Westgate's] testimony as to his offers of financial support for her or the minor child that he made through sources other than social media accounts," that Wood did not appear at the hearing and failed to comply with the subpoena served on her in Illinois, and that there was no evidence the Morrises or ACH ever sought to depose Wood or compel her appearance at the hearing. While the Morrises may be correct that they were under no obligation to produce a witness who could corroborate Westgate's testimony, we do not read the court's findings on this point as any indication that it somehow penalized the Morrises or rewarded Westgate or otherwise shifted the burden of proof based on Wood's failure to appear. While these challenged findings shed light on the context in which the court determined Westgate's testimony was credible, they do nothing to undermine the competent evidence in the record on which that determination was based. We are similarly unpersuaded by the Morrises' related argument that Westgate failed to meet his burden of proof based on their contention that the subpoena served on Wood in Illinois was invalid. Despite the Morrises' protestations to the contrary, we do not believe that Wood's absence from the hearing, standing alone, rendered Westgate's testimony incompetent or precluded the court from finding it credible. In our view, the Morrises'

arguments on this point serve as little more than an indirect invitation to second-guess the district court's credibility determinations, which we decline to do.

In addition, the Morrises also challenge the sufficiency of the court's findings that the support Westgate provided was consistent with his financial means. Specifically, they highlight the court's finding that "the evidence presented at trial was insufficient to determine a presumptive amount of child support" under our State's child support guidelines. The Morrises contend that this finding demonstrates Westgate failed to meet his burden of proof. This argument misconstrues our case law as well as the court's findings on this issue. Our prior holdings recognize that the application of child support guidelines in calculating whether a putative father's payments were reasonable is a matter within the court's discretion. *See Miller v. Lillich*, 167 N.C. App. 643, 647, 606 S.E.2d 181, 183 (2004) ("Although such a measure is not required by [section 48-3-601], it was within the [district] court's discretion to make its determination of reasonableness based on the comparison."). Moreover, in the present case, the court's findings make clear that "[t]here are no child support guidelines for the determination of the reasonable amount of support that a putative father should provide to a birth mother who is married to someone else at the time the putative father learns of the pregnancy," and that even if the guidelines were applicable, any attempt to calculate them would be futile in light of the fact that because Wood failed to appear at the hearing, there was no credible evidence of her income or living expenses while she was staying with her relatives in Illinois and her husband was living in North Carolina. In any event, we conclude that the court's determination that Westgate's regular and consistent deposits into his lockbox were reasonable in accordance with his financial means was adequately supported by competent evidence. This argument is without merit.

For these reasons, the district court's order is

AFFIRMED.

Judges BRYANT and McCULLOUGH concur.

IN RE FORECLOSURE OF CAIN

[248 N.C. App. 190 (2016)]

IN THE MATTER OF THE FORECLOSURE BY GODDARD & PETERSON, PLLC, SUBSTITUTE TRUSTEE, OF A DEED OF TRUST EXECUTED BY LILLIAN A. CAIN DATED OCTOBER 19, 1999 AND RECORDED ON OCTOBER 27, 1999 IN BOOK NO. 5183 AT PAGE 131 OF THE CUMBERLAND COUNTY PUBLIC REGISTRY

No. COA15-591

Filed 5 July 2016

1. Appeal and Error—appealability—motion to dismiss—failure to obtain written ruling on motion

The trial court did not err by denying respondent's motion to dismiss a foreclosure proceeding based on petitioner's purported judicial admissions. Respondent failed to obtain a written ruling on her motion and thus could not appeal.

2. Mortgages and Deeds of Trust—foreclosure—former substitute trustee appearing as counsel—no fiduciary duty

The trial court did not err by allowing RTT, the former substitute trustee, to appear as counsel for petitioner and advocate against respondent in a de novo foreclosure hearing. RTT had no specific fiduciary duty to respondent when the de novo foreclosure hearing was conducted. Further, respondent failed to demonstrate any legal or ethical violation in connection with RTT's representation of petitioner at that proceeding.

3. Witnesses—qualified witness—affidavit—authorized signer—default loan records

The trial court did not abuse its discretion in a foreclosure proceeding by admitting an affidavit and attachments into evidence from an authorized signer for petitioner. The authorized signer was a qualified witness under Rule 803(6) and petitioner's records regarding respondent's default on her loan account were properly introduced through the affidavit.

Appeal by respondent from order entered 16 February 2015 by Judge Ebern T. Watson, III in Cumberland County Superior Court. Heard in the Court of Appeals 3 November 2015.

Rogers Townsend & Thomas, PC, by Matthew T. McKee, for petitioner-appellee.

Brent Adams & Associates, by Brenton D. Adams, for respondent-appellant.

CALABRIA, Judge.

Lillian Cain ("respondent") appeals from an order authorizing the Substitute Trustee, Goddard & Peterson, PLLC ("G&P"), to proceed with the foreclosure of the Deed of Trust for 1478 Thelbert Drive in Fayetteville, North Carolina ("the property"). We affirm.

I. Background

On 19 October 1999, respondent borrowed $74,500 by executing a promissory note ("the Note"). To secure the loan evidenced by the Note, respondent executed a Deed of Trust on the property. Initially, the Note was specially endorsed to Household Realty Corporation ("HRC") by Household Bank, FSB; HRC later specially endorsed the Note to Beal Bank, S.S.B. ("petitioner"). Subsequently, respondent defaulted on the deed of trust.

In April 2012, petitioner executed a Substitution of Trustee of the Deed of Trust substituting Rogers Townsend & Thomas ("RTT") for the original trustee, Andre F. Barrett. Roughly a month later, RTT sent respondent a preforeclosure notice for the property that included the date of her last scheduled payment, which was made on 1 December 2011. In June 2012, RTT sent respondent a letter informing her, *inter alia*, that it had been retained to initiate foreclosure proceedings for the property, and that she could pay the amount of the debt ($68,559.51), dispute the debt, or dispute that petitioner was the creditor. On 17 September 2012, RTT executed an affidavit certifying that a Notice of Hearing and a Notice of Substitute Trustee's Foreclosure Sale of the property were mailed to respondent.

On 24 September 2012, the Clerk of Superior Court of Cumberland County heard evidence and found, *inter alia*, that notice was given to the record owner of the property, that petitioner was the holder of the Note and Deed of Trust, that the Note was in default, and that the Deed of Trust gave petitioner the right to foreclose under a power of sale. Consequently, the clerk entered an order allowing RTT to proceed with the foreclosure sale. Respondent noted an appeal to Cumberland County Superior Court from the clerk's order.

On 23 September 2013, respondent served RTT with a Request for Admissions, which asked petitioner to admit it was not the holder of the Note and the Deed of Trust. Respondent also filed a Certificate of Service specifying that copies of the Request had been served on all parties and were properly addressed to the attorney or attorneys for all parties. The only names listed on the Certificate of Service, however,

were attorneys David W. Neill and Michael Morris from RTT, which was acting as Substitute Trustee at the time. It appears that petitioner never responded to the Request for Admissions.

On 13 October 2013, petitioner executed another Substitution of Trustee, substituting G&P for RTT. After being relieved from its duties as Substitute Trustee, RTT began representing petitioner in the foreclosure proceedings. In April 2014, G&P filed a Notice of Appeal Hearing and certified that respondent and her attorney were served.

On 16 February 2015, the Honorable Ebern T. Watson, III presided at the hearing on respondent's appeal from the clerk's Order. Before any evidence was presented, respondent served petitioner with a motion to dismiss the foreclosure proceedings and presented the unfiled motion to Judge Watson. The motion was based entirely upon petitioner's purported failure to answer respondent's Request for Admissions. Because the motion had not been scheduled to be heard separately or at the *de novo* hearing, neither petitioner nor G&P had notice that respondent planned to move the superior court to dismiss the proceeding. Judge Watson orally denied respondent's motion.

During the hearing, petitioner introduced an Affidavit of Indebtedness which was executed by Tracy Duck ("Duck"), an "authorized signer" for petitioner. A number of exhibits were attached to Duck's affidavit, including photocopies of the Note, the Deed of Trust, and accounting records pertaining to respondent's loan from petitioner. Duck's affidavit was admitted into evidence over respondent's objection, as were the exhibits. Respondent also objected to the appearance of RTT as petitioner's counsel, but Judge Watson overruled the objection and proceeded with the hearing.

After hearing all the evidence, the superior court entered an order on 16 February 2015 that authorized G&P to proceed with the foreclosure sale. Respondent appeals.

II. Standard of Review and Generally Applicable Law

" 'The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings.' " *In re Foreclosure of Adam*s, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010) (citation omitted). " 'Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding.' " *Id.* at 321, 693 S.E.2d at 708 (citations omitted).

" 'A power of sale is a contractual arrangement [which may be contained] in a mortgage or a deed of trust[.]' " *Id.* (citation omitted). When a deed of trust contains a power of sale provision, the trustee or mortgagee is vested with the " 'power to sell the real property mortgaged without any order of court in the event of a default.' " *In re Michael Weinman Assocs. Gen. P'ship*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (citation and internal quotation marks omitted). "A foreclosure by power of sale is a special proceeding commenced without formal summons and complaint and with no right to a jury trial." *United Carolina Bank v. Tucker*, 99 N.C. App. 95, 98, 392 S.E.2d 410, 411 (1990) (citation omitted). Once a mortgagee or trustee has filed a notice of hearing with the clerk of court and served that notice on the necessary parties, N.C. Gen. Stat. § 45-21.16(d) (2015) provides that the clerk shall conduct a hearing on the matter. At the hearing, the lender must prove and establish the following six criteria before the clerk of court may authorize the mortgagee or trustee to proceed with the foreclosure under a power of sale:

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

Id.

In the context of a section 45-21.16 foreclosure proceeding, "the clerk . . . is limited to making the six findings of fact specified under subsection (d) . . . ." *In re Foreclosure of Young*, 227 N.C. App. 502, 505, 744 S.E.2d 476, 479 (2013). The clerk's decision may be appealed to superior court for a hearing *de novo*, N.C. Gen. Stat. § 45-21.16(d1), but the superior court is similarly limited to determining whether subsection 45-21.16(d)'s six criteria have been satisfied. *In re Foreclosure of Carter*, 219 N.C. App. 370, 373, 725 S.E.2d 22, 24 (2012). However, in conducting its review, the superior court may consider evidence of legal defenses that would negate the findings required under section 45-21.16. *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993). "A foreclosure under power of sale is a type of special proceeding, to which our Rules of Civil Procedure apply." *Lifestore Bank v. Mingo Tribal Pres. Trust*, 235 N.C. App. 573, 577, 763 S.E.2d 6, 9 (2014), *review denied*, __ N.C. __, 771 S.E.2d 306 (2015).

III. Motion to Dismiss

[1] Respondent first argues that the trial court erred by denying her motion to dismiss the foreclosure proceeding. According to respondent, since petitioner did not respond to her formal Request for Admissions, it was conclusively established that petitioner was not the holder of the Note or the Deed of Trust. Respondent asserts that by ignoring these judicial admissions, the superior court erroneously found that petitioner was "the holder of the Note and Deed of Trust sought to be foreclosed." We disagree.

Rule 36(a) of the North Carolina Rules of Civil Procedure provides, in pertinent part, that when a written request for admissions is properly served upon a party to a lawsuit,

> [t]he matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney[.]

N.C. Gen. Stat. § 1A-1, Rule 36(a) (2014). Rule 36(b), which governs the effect of admissions, provides that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." *Id.* § 1A-1, Rule 36(b). "In order to avoid having requests for admissions deemed admitted, a party must respond within the period of the rule if there is any objection whatsoever to the request." *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 162, 394 S.E.2d 698, 701 (1990). "Failure to do so means that the facts in question are judicially established." *J.M. Parker & Sons, Inc. v. William Barber, Inc.*, 208 N.C. App. 682, 688, 704 S.E.2d 64, 68 (2010).

> "A judicial admission is a formal concession which is made by a party in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute. Such an admission is not evidence, but it, instead, serves to remove the admitted fact from the trial by formally conceding its existence."

Eury v. N.C. Emp't Sec. Comm'n, 115 N.C. App. 590, 599, 446 S.E.2d 383, 389 (1994) (internal citation omitted) (quoting *Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 604, 276 S.E.2d 375, 379 (1981)).

In the instant case, respondent's motion to dismiss was based entirely upon petitioner's purported judicial admissions. Unfortunately

for respondent, she failed to obtain a written ruling on her motion. Although the superior court announced its decision to deny respondent's motion at the *de novo* hearing, "an order rendered in open court is not enforceable until it is 'entered,' i.e., until it is reduced to writing, signed by the judge, and filed with the clerk of court." *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998); N.C. Gen. Stat. § 1A-1, Rule 58 ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."); *see also Onslow Cnty. v. Moor*e, 129 N.C. App. 376, 388, 499 S.E.2d 780, 788 (1998) (explaining that "Rule 58 applies to judgments **and** orders, and therefore, an order is entered when the requirements of . . . Rule 58 are satisfied"). The record reveals that respondent has appealed only from the superior court's order authorizing G&P to proceed with the foreclosure sale. This order neither mentions respondent's motion nor does it contain any findings or conclusions of law on the motion. Since a written order was never "entered" on respondent's motion to dismiss, no appeal could be taken from it. *Mastin v. Griffith*, 133 N.C. App. 345, 346, 515 S.E.2d 494, 494-95 (1999) ("Entry of judgment by the trial court is the event which vests jurisdiction in this Court. Thus, an order may not properly be appealed until it is entered." (internal citation and quotations marks omitted)). Accordingly, the issue respondent raises regarding her motion to dismiss is not properly before us.[1]

IV. Appearance of Counsel

[2] Respondent next argues that the court erred in allowing RTT, the former Substitute Trustee, to appear as counsel for petitioner and advocate against respondent in the *de novo* foreclosure hearing. Respondent's argument, as we understand it, is that (1) RTT owed a fiduciary duty to her when this matter went before the superior court, and that (2) RTT's representation of petitioner constituted a breach of that duty. We disagree.

Although fiduciary relationships often escape precise definition, they generally arise when "there has been a special confidence reposed

1. We further note that respondent's Request for Admissions was served one year after entry of the clerk's order authorizing the foreclosure sale and approximately a year and a half before the *de novo* hearing in the superior court. Thus, petitioner's purported failure to respond to the Request was old news when the *de novo* hearing was held. Although we impute no bad faith to respondent, the basis of her motion—judicial admissions under Rule 36(b)—and the manner in which it was presented to the superior court—with no prior notice to the court or respondent—suggest nothing more than an attempt to introduce confusion into the *de novo* hearing and perhaps complete a "Hail Mary" before the foreclosure clock ran out.

in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013) (quoting *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001)) (internal quotation marks omitted). Fiduciary relationships are characterized by " 'confidence reposed on one side, and resulting domination and influence on the other.' " *Dalton*, 353 N.C. at 651, 548 S.E.2d at 708 (citation and emphasis omitted). "To state a claim for breach of fiduciary duty, a plaintiff must allege that a fiduciary relationship existed and that the fiduciary failed to 'act in good faith and with due regard to [the plaintiff's] interests[.]' " *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 70, 614 S.E.2d 328, 337 (2005) (quoting *White v. Consol. Planning Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004)). Furthermore "[t]his Court has held that breach of fiduciary duty is a species of negligence or professional malpractice. Consequently, [such] claims require[ ] proof of an injury proximately caused by the breach of duty." *Farndale Co., LLC v. Gibellini*, 176 N.C. App. 60, 68, 628 S.E.2d 15, 20 (2006) (citations and internal quotation marks omitted).

"In deed of trust relationships, the trustee is a disinterested third party acting as the agent of both [parties]." *In re Proposed Foreclosure of McDuffie*, 114 N.C. App. 86, 88, 440 S.E.2d 865, 866 (1994). As such, in a typical foreclosure proceeding, trustees have a long-recognized fiduciary duty to both the debtor and the creditor. *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 397, 722 S.E.2d 459, 465 (2012). "Upon default [a trustee's] duties are rendered responsible, critical and active and he is required to act discreetly, as well as judiciously, in making the best use of the security for the protection of the beneficiaries." *Id.* (quoting *Mills v. Mut. Bldg. Loan Ass'n*, 216 N.C. 664, 669, 6 S.E.2d 549, 552 (1940)). More specifically, "the trustee . . . is required to discharge his duties with the strictest impartiality as well as fidelity, and according to his best ability." *Hinton v. Pritchard*, 120 N.C. 1, 3, 26 S.E. 627, 627 (1897).

Here, since RTT was removed as Substitute Trustee on 13 October 2013, its formal fiduciary duties to respondent ended well before the 2 February 2015 *de novo* hearing in superior court. Apart from citing the general fiduciary duties of an *acting* trustee, respondent fails to explain how RTT's representation of petitioner at the *de novo* hearing either violated a specific principle of law or was undertaken in bad faith. Also absent from respondent's brief is an argument that she sustained some specific injury that was proximately caused by RTT's conduct. We suspect this argument has not been made because it does not exist. At the time of the hearing, G&P, the acting Substitute Trustee, was charged

with acting in the best interests of both petitioner and respondent. When the parties appeared before the superior court, RTT had no obligation to act as a disinterested party. Consequently, we discern no prejudice to respondent's rights or interests as a result of RTT's representation of petitioner.

Furthermore, looking beyond the substantive law, we cannot see how RTT's representation of petitioner allowed petitioner to procure an unfair advantage in the foreclosure proceeding. While not precedential authority for this Court, North Carolina State Bar Ethics Opinions ("RPCs" and "CPRs") "provide ethical guidance for attorneys and . . . establish . . . principle[s] of ethical conduct." 27 N.C. Admin. Code 1D.0101(j) (2015). Our State Bar has addressed the specific issue that respondent has raised. N.C. CPR 220 (1979) provides that if a lawyer who is acting as a trustee for a deed of trust resigns his position as trustee, the lawyer may represent the petitioner bringing the foreclosure claim "as long as no prior conflict of interest existed because of some prior obligation to the opposing party." N.C. RPC 82 (1990) states that "former service as a trustee does not disqualify a lawyer from assuming a partisan role in regard to foreclosure under a deed of trust." N.C. RPC 90 (1990) ties it all together, and provides that

> [i]t has long been recognized that former service as a trustee does not disqualify a lawyer from assuming a partisan role in regard to foreclosure under a deed of trust. CPR 220, RPC 82. This is true whether the attorney resigns as trustee prior to the initiation of foreclosure proceedings or after the initiation of such proceedings when it becomes apparent that the foreclosure will be contested.

Furthermore, in 2013, the State Bar adopted Formal Opinion 5, which more specifically defined RPC 90, by stating:

> [A] lawyer/trustee must explain his role in a foreclosure proceeding to any unrepresented party that is an unsophisticated consumer of legal services; if he fails to do so and that party discloses material confidential information, the lawyer may not represent the other party in a subsequent, related adversarial proceeding unless there is informed consent.

N.C. Formal Opinion 5 (2013).

In the instant case, respondent does not argue that she was an unrepresented, unsophisticated consumer of legal services or that she

disclosed material confidential information to RTT when it was acting as Substitute Trustee. Instead, the record suggests that respondent was represented by counsel throughout the contested foreclosure proceedings held before the clerk and the superior court, which spanned more than three years. Further, respondent has not demonstrated that RTT failed to notify her of its intent to represent petitioner in the foreclosure proceedings. Because the record is replete with correspondence from RTT notifying respondent of and updating her on the *de novo* hearing in superior court, she has failed to demonstrate any legal or ethical violation in connection with RTT's representation of petitioner at that proceeding. Accordingly, the superior court did not err in overruling respondent's objection to such representation.

V. Duck's Affidavit of Indebtedness

[3] Respondent's final argument is that the trial court erred in admitting Duck's affidavit and its attachments into evidence. Specifically, respondent contends that (1) Duck was not a qualified witness as required under Rule 803(6) of the North Carolina Rules of Evidence ("the business records exception" to the hearsay rule), (2) the Note and Deed of Trust were not business records and were not properly authenticated, and (3) certain statements contained in Duck's affidavit were inadmissible hearsay. We disagree.

"The admissibility of evidence in the trial court is based upon that court's sound discretion and may be disturbed on appeal only upon a finding that the decision was based on an abuse of discretion." *In re Foreclosure by David A. Simpson, P.C.*, 211 N.C. App. 483, 488, 711 S.E.2d 165, 170 (2011). As a result, the superior court's ruling may be reversed only upon a showing that it was so arbitrary that it could not be the result of a reasoned decision. *Reis v. Hoots*, 131 N.C. App. 721, 727, 509 S.E.2d 198, 203 (1998).

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2015). Unless allowed by statute or the North Carolina Rules of Evidence, hearsay evidence is not admissible in court. N.C. Gen. Stat. § 8C-1, Rule 802 (2015).

Pursuant to the business records exception, the following items of evidence are not excluded by the hearsay rule, even though the declarant is unavailable as a witness:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or

> diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C. Gen. Stat. § 8C-1, Rule 803(6) (2015). Qualifying business records are admissible under Rule 803(6) "when a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *In re S.D.J.*, 192 N.C. App. 478, 482, 665 S.E.2d 818, 821 (2008) (citations and internal quotation marks omitted). " '[An] '[o]ther qualified witness' has been construed to mean a witness who is familiar with the business entries and the system under which they are made.' " *Steelcase, Inc. v. Lilly Co.*, 93 N.C. App. 697, 702, 379 S.E.2d 40, 44 (1989) (citation omitted). "While the foundation must be laid by a person familiar with the records and the system under which they are made, there is 'no requirement that the records be authenticated by the person who made them.' " *In re S.D.J.*, 192 N.C. App. at 482-83, 665 S.E.2d at 821 (citation omitted).

Generally, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2015); *see also Gilreath v. N.C. Dep't of Health and Human Servs.*, 177 N.C. App. 499, 505, 629 S.E.2d 293, 296 (2006) (requiring affidavits to be made on personal knowledge "setting forth facts admissible in evidence"). Rule 56(e) of the North Carolina Rules of Civil Procedure requires that affidavits supporting or opposing a summary judgment motion "be made on personal knowledge . . . ." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2015). "Knowledge obtained from the review of records, qualified under Rule 803(6), constitutes 'personal knowledge' within the meaning of Rule 56(e)." *Hylton v. Koontz*, 138 N.C. App. 629, 635, 532 S.E.2d 252, 256 (2000). This principle applies with equal force here. *Cf. U.S. Leasing Corp. v. Everett, Creech, Hancock, and Herzig*, 88 N.C. App. 418, 423, 363 S.E.2d 665, 667 (1988) (even though a witness's knowledge was "limited to the contents of [the] plaintiff's file with which he had familiarized himself, he could

properly testify about the records and their significance so long as the records themselves were admissible under [Rule 803(6)]").

In the instant case, while the Note and Deed of Trust were identified as attachments, the only specific "business records" that petitioner sought to introduce through Duck's affidavit were documents related to respondent's loan account. Our review of the record reveals that the foundational requirements of Rule 803(6) were satisfied through the submission of Duck's affidavit, which provided that petitioner's financial records were made and kept in the regular course of business by persons having knowledge of the information set forth at or near the time of the acts, events, or conditions recorded. Furthermore, Duck—an "authorized signor" for petitioner who was permitted "to make the representations contained" in the affidavit—specifically stated that her averments were "based upon [her] review of [petitioner's] records relating to [respondent's] loan and from [her] own personal knowledge of how they are kept and maintained." As a result, Duck was a qualified witness under Rule 803(6) and petitioner's records regarding respondent's default on her loan account were properly introduced through Duck's affidavit.

Respondent also briefly argues that the Note and Deed of Trust are not "business records" and were not properly authenticated by Duck's affidavit. Even assuming respondent raised this objection below—*see Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (holding that where a theory argued on appeal was not raised before the trial court, "the law does not permit parties to swap horses between courts in order to get a better mount [in the appellate court]")—we will not address it. Except for a passing reference to Rule 803(6), respondent fails to cite any legal authority in support of her contentions. Since "[i]t is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein[,]" respondent has abandoned her arguments as to admission of the Note and the Deed of Trust. *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005); N.C.R. App. P. 28(b)(6) (2014) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Finally, respondent argues that certain statements contained in Duck's affidavit constituted inadmissible hearsay. For example, respondent takes issue with Duck's statement that petitioner "is the holder of the loan." We reject respondent's argument for two reasons.

We first note that in a foreclosure hearing before the clerk of court, "the clerk shall consider the evidence of the parties and may consider . . . affidavits and certified copies of documents. N.C. Gen. Stat. § 45-21.16(d). In addition, this Court has held that affidavits may be used as competent evidence to establish the required statutory elements in *de novo* foreclosure hearings. *In re Foreclosure of Brown*, 156 N.C. App. 477, 486-87, 577 S.E.2d 398, 404 (2003). The borrower in *Brown* contended that affidavits—which testified as to the existence of the statutory elements for a section 45-21.16 foreclosure—from the California-based lender's assistant secretary were inadmissible hearsay. *Id.* at 485, 577 S.E.2d at 404. After noting that "[a] power of sale provision in a deed of trust is a means of avoiding lengthy and costly foreclosures by action[,]" this Court held that "the 'necessity for expeditious procedure' substantially outweigh[ed] any concerns about the efficacy of allowing [the secretary] to testify by affidavit, and the trial court properly admitted her affidavit into evidence." *Id.* at 486, 577 S.E.2d at 404-05 (citation omitted).

The record in the instant case reveals that Duck (and presumably petitioner) is based in Illinois, and respondent cites no authority that would support requiring out-of-state lenders seeking to foreclose under a power of sale to present live witness testimony in North Carolina. We conclude, as the *Brown* Court did, that Duck's Affidavit of Indebtedness was the most certain and expeditious way to prove and establish certain criteria required by subsection 45-21.16(d).

Moreover, this Court has previously held that whether an entity is a "holder" is "a legal conclusion . . . to be determined by a court of law on the basis of factual allegations." *In re Simpson*, 211 N.C. App. at 495, 711 S.E.2d at 173. However, " '[s]tatements in affidavits as to opinion, belief, or conclusions of law are of no effect [.]' " *Lemon v. Combs*, 164 N.C. App. 615, 622, 596 S.E.2d 344, 349 (2004) (citation omitted); *In re Simpson*, 211 N.C. App. at 495, 711 S.E.2d at 173 (disregarding the affiant's "conclusion as to the identity of the 'owner and holder' of the [promissory note and deed of trust]"). Thus, even though we disregard Duck's conclusion of law that petitioner is the holder of the Note, we reject respondent's argument that this, and any other, legal conclusion Duck may have made resulted in the affidavit being admitted in error. Accordingly, for the reasons stated above, the trial court did not abuse its discretion in allowing Duck's affidavit and its accompanying attachments into evidence.

VI. Conclusion

Since an order was never entered on respondent's motion to dismiss, she cannot appeal from the superior court's denial of that motion. Furthermore, the superior court did not err in allowing RTT to represent petitioner because the firm had no specific fiduciary duty to respondent when the *de novo* foreclosure hearing was conducted, and there is no evidence that the representation was injurious to respondent or was undertaken in bad faith. Finally, the superior court did not err in allowing Duck's affidavit and its attachments to be admitted into evidence. For these reasons, the superior court properly authorized G&P to proceed with the foreclosure sale. We therefore affirm the superior court's order.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

AARON JENKINS, JR, PLAINTIFF
v.
RICHARD E. BATTS, AND RICHARD E. BATTS PLLC, DEFENDANTS

No. COA15-655

Filed 5 July 2016

Prisons and Prisoners—personal injury arising out of incarceration—motion for summary judgment—motion to dismiss

The trial court erred by granting defendants' motion for summary judgment and motion to dismiss claims for personal injury actions arising out of plaintiff's incarceration in 2009. The complaint did not state a claim upon which relief could be granted, and considering the additional affidavits and information considered by the trial court, genuine issues of material fact remained to be resolved by a jury.

Appeal by plaintiff from order entered 9 February 2015 by Judge Cy A. Grant in Superior Court, Edgecombe County. Heard in the Court of Appeals 19 November 2015.

Benson, Brown & Faucher, PLLC, by Drew Brown, for plaintiff-appellant.

Richard E. Batts, PLLC, by Richard E. Batts, for defendants-appellees.

STROUD, Judge.

Plaintiff Aaron Jenkins, Jr. appeals from the superior court's order granting defendants' ("defendant Batts" and "defendant PLLC") motion for summary judgment and motion to dismiss. On appeal, plaintiff argues that the trial court erred in granting defendants' motion to dismiss and motion for summary judgment. As the trial court considered the motions as a summary judgment motion, we review its order on that basis and conclude that the complaint does state a claim upon which relief may be granted, and considering the additional affidavits and information considered by the trial court, genuine issues of material fact remain to be resolved by a jury. Accordingly, we reverse the trial court's order.

Facts

Plaintiff's complaint tended to show the following facts. According to plaintiff, defendant Batts agreed to represent plaintiff in personal injury actions arising out of plaintiff's incarceration in 2009. Plaintiff and defendant Batts met on 19 July 2011 and defendant agreed to represent plaintiff in the personal injury actions at that time. In 2012, the statute of limitations ran on plaintiff's claims, but no lawsuit was ever filed by defendant Batts with the North Carolina Industrial Commission. Plaintiff alleged that defendant Batts, as a lawyer practicing law in this state, owed a duty to of care towards plaintiff to act within the requisite standard of care. Plaintiff argued that defendant Batts breached that duty by failing to timely file and preserve his claims; failing to advise on statute of limitations; failing to notify plaintiff orally or in writing if he was not going to represent him; and failing to safeguard and provide plaintiff with his entire file.

In response, defendants filed a motion to dismiss, answer, and affirmative defenses on 3 September 2014. Defendants' first defense and motion to dismiss stated defendant Batts' version of the events. Defendant Batts acknowledged that he interviewed plaintiff on 19 July 2011 regarding two alleged incidents that occurred when plaintiff was incarcerated. The first involved injuries to plaintiff arising from another inmate tying a blanket around one of his legs while asleep, which caused him to fall and led to a herniated disk in his back. The other alleged incident occurred when plaintiff was shackled and handcuffed in the front, walking down a ramp to be loaded into the jail van and be taken back to jail from the courthouse. In that incident, plaintiff said he lost his footing on the ramp because it was icy and fell on his back and was injured.

In relation to the first incident, defendants alleged that plaintiff "was informed of the unlikelihood of recovery on the facts as he stated them and that any action against the Sheriff would be pursued only with advance retainer payments." As for the second incident, defendants again alleged that defendant Batts discussed the challenges of the case with plaintiff and pointed out potential issues with contributory negligence since other inmates used the same ramp without falling. Defendants alleged further that plaintiff was told that defendant Batts could not commit to filing any action on plaintiff's behalf "until additional research supported a conclusion that Plaintiff stood a good chance of being successful[.]" Furthermore, defendants claimed that plaintiff "was informed of the statute of limitations and the consequences of same and that an action would not be pursued unless he provided payment of an amount believed to be $280.00." Defendants alleged that plaintiff never paid that amount, so he had "no reasonable expectation" that an action would be filed on his behalf by defendants. Defendants also alleged that defendant Batts initially had contact with plaintiff on 25 June 2011 in relation to a traffic charge of driving while his license was revoked, and he was able to get a reduction of plaintiff's charge but then was never paid more than $50.00 by plaintiff.

Defendants' answer included additional defenses and motions to dismiss for breach of contract, lack of vicarious liability, contributory negligence, failure to state a claim, and good faith belief that best judgment was used by defendant Batts when initially advising on plaintiff's case. Defendants also attached, as Exhibit 1, defendant Batts' client interview notes from his meeting with plaintiff on 19 July 2011. In addition, defendants attached defendant Batts' notes from his interview with plaintiff on 25 June 2011.

Plaintiff filed an affidavit on 6 January 2015 disputing some of the facts alleged in defendants' answer. For example, plaintiff asserted that defendant Batts "did agree to take [his] civil cases on a contingency fee basis." Furthermore, plaintiff alleged that defendant Batts "mentioned nothing to [him] at all about the statute of limitations or that [he] needed to do anything else to preserve [his] rights" and never sent a letter advising him about such limits.

Plaintiff also filed an affidavit of Brian Walker, an attorney practicing in North Carolina, who asserted that in his opinion, defendant Batts "violated the standard of care [for practitioners in North Carolina] by failing to advise plaintiff of the applicable statute of limitations and failing to timely file the actions." Mr. Walker also asserted that "[e]ven if the jury believed [defendant] Batts['] version of events, [defendant] Batts

violated the standard of care by failing to advise [plaintiff] in writing of the applicable statutes of limitations and their impacts." Finally, Mr. Walker stated that "[t]he underlying matters had merits and in my opinion as a practitioner, the plaintiff would have recovered damages in each case had they been timely filed and handled."

On 20 January 2015, defendants filed a memorandum in support of their motions to dismiss and for summary judgment stating much of the same information as in the earlier answer. The trial court held a hearing on 20 January 2015 regarding defendant's motion for summary judgment and motion to dismiss. At the hearing, defendant Batts briefly described defendants' version of the facts. Defendant Batts then referenced plaintiff's affidavit, stating: "But he has produced a – there's an affidavit from him that indicates he disagrees with two things. One, that I charged him a fee up front and, two, that I told him about statute of limitations." Defendant Batts, while noting that the hearing was for a summary judgment motion, explained: "And so to get through summary judgment, obviously, [plaintiff is] contesting whether or not there was a requirement to pay up front money. So that's we might say for the jury." Defendant Batts also argued that two of his defenses in his motion, a motion to dismiss and motion to dismiss based on contributory negligence, were both based on plaintiff's failure to pay. Defendant Batts pointed out again, however, that plaintiff "disagrees with that" contention.

Plaintiff's counsel then addressed the court, noting that in contrast to defendants' recitation of the facts, plaintiff contended "that he was told by [defendant] Batts that he was representing him on the personal injury action on a contingency fee basis only." Plaintiff's counsel pointed out that defendant Batts' intake notes refer to plaintiff as "client" and claimed that those notes would support a ruling in plaintiff's favor, but noted "that would ultimately be up to a jury." Plaintiff's counsel brought an affidavit from a licensed attorney who would testify at trial that defendant Batts violated the standard of care. Once again, plaintiff's counsel argued that "[i]t's a question of fact for the jury as to the credibility of the two parties."

Defendant Batts responded,[1] in relation to a contingency fee agreement document, that "[o]ne was not produced for [plaintiff] because he

1. The transcript shows a "Mr. Battle" as the person who spoke these words. Considering the fact that no one of such name was present at the hearing, that defendant Batts' name is similar, and the context of the words, we can reasonably assume this name was written in error and defendant Batts was the person who made these statements at the hearing.

had not, we had [sic] agreed to take his case yet. But, again, that's a matter for the jury." Defendant Batts argued that evidence was missing from the record to show that any negligence on the part of defendants caused plaintiff to not recover. Defendant Batts pointed out that "in the summary judgment action, there should be a forecast of the type of evidence that would be produced to a jury from which the jury can do something other than speculate or guess or surmise about whether or not recovery would have actually taken place." Thus, defendant Batts argued that "the case is completely deficient of a showing that there is a proximate, that the negligence was a proximate cause of the person not being able to recover money."

Plaintiff's counsel, by contrast, argued that such evidence was not missing but rather could be found in plaintiff's affidavit. Plaintiff pointed out that while "a typical [slip and fall on] ice case is a tough case," that is not so "when you're in shackles and there's nothing you can do about it." After the court questioned precisely what the licensed attorney that plaintiff's counsel identified as his "expert" would testify to in regards to a violation of the standard of care, plaintiff argued that such specifics were not what was at issue at the hearing, but rather "[w]hat's before you today is a question of did [defendant Batts] agree to represent [plaintiff] on a contingency fee basis." Plaintiff reiterated that what was before the court "is a he said, she said summary judgment." The trial court cut off plaintiff before he could finish his statement, concluding "I'm going to allow the motion for summary judgment."

On 9 February 2015, the trial court issued an order granting defendants' motion to dismiss and for summary judgment, dismissing all of plaintiff's claims with prejudice. Plaintiff timely appealed to this Court. On 29 April 2015, defendants filed a motion for extension of time to settle and file the record on appeal, which was granted on 1 May 2015. Since the parties did not agree on the record, it was settled by operation of rule on 30 May 2015 and subsequently filed and docketed on 8 June 2015. Documents that the parties did not agree on that were requested by defendants were included in a Rule 11(c) supplement to the record on appeal. In addition, on 24 August 2015, this Court granted plaintiff's motion to supplement the record on appeal pursuant to Rule 9(b)(5)(b) of the Rules of Appellate Procedure.[2]

2. Defendant argues in his appellate brief that the record on appeal contains "material deficiencies" that should result in this Court dismissing plaintiff's appeal. Since this Court allowed plaintiff's motion to supplement the record on appeal, addressing the main issues defendant raises, we decline to address these arguments further.

Discussion

I. Motion to Dismiss

The first issue raised on appeal is whether the trial court erred in granting defendants' motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that the complaint failed to state a claim upon which relief can be granted. Plaintiff argues that his complaint states a claim upon which relief can be granted and, therefore, we should reverse the trial court's granting of defendants' motion to dismiss.

Because the trial court considered matters outside the pleadings and treated the matter as a motion for summary judgment, we need not specifically address defendants' motion to dismiss under Rule 12(b)(6). While the trial court's written order grants both defendants' motion to dismiss and the motion for summary judgment, the trial court clearly rendered its ruling as if it was based on a summary judgment motion. Defendants' memorandum in support of the motion to dismiss and motion for summary judgment requested, in the prayer for relief, that the trial court grant summary judgment in favor of defendants. Furthermore, it is evident from both the record itself and the hearing that the trial court considered more than just the pleadings, but also plaintiff's affidavit and other additional information.

Thus, even if defendants had only made a motion to dismiss, the trial court's consideration of affidavits and other information outside the pleadings would have converted such motion into a motion for summary judgment. *See*, *e.g.*, *Morris v. Moore*, 186 N.C. App. 431, 434, 651 S.E.2d 594, 596 (2007) ("When material outside of the pleadings is presented to the trial court during a hearing considering a motion to dismiss pursuant to Rule 12(b)(6), and the material is not excluded by the trial court, the motion is treated as one for summary judgment and disposed of pursuant to Rule 56 of the North Carolina Rules of Civil Procedure."). Accordingly, we focus our analysis on the court's granting of defendant's motion for summary judgment.

II. Summary Judgment

The second -- and primary -- issue on appeal, therefore, is whether the trial court erred when it granted defendants' motion under Rule 56 of the Rules of Civil Procedure on the grounds that there was no genuine issue of material fact. Plaintiff argues that the trial court erred in entering summary judgment for defendant because "[t]here was sufficient

evidence of each of the elements for the tort to necessitate denying the Motion for Summary Judgment."

Under Rule 56(c) of the Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "A trial court's decision to grant a summary judgment motion is reviewed on a *de novo* basis." *Austin Maint. & Constr., Inc. v. Crowder Constr. Co.*, 224 N.C. App. 401, 408, 742 S.E.2d 535, 541 (2012).

Thus, this Court's review is limited to "whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Campbell v. Duke University Health Sys., Inc.*, 203 N.C. App. 37, 42, 691 S.E.2d 31, 35 (2010). "When considering a motion for summary judgment, the trial court must consider the evidence in the light most favorable to the non-moving party." *Manecke v. Kurtz*, 222 N.C. App. 472, 474, 731 S.E.2d 217, 220 (2012) (internal quotations and brackets omitted). Furthermore, this Court has noted to prevail in a summary judgment action, "[t]he movant . . . bears the burden of showing that (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim." *Andresen v. Progress Energy, Inc.*, 204 N.C. App. 182, 184, 696 S.E.2d 159, 161 (2010) (internal quotations omitted).

In this case, in an effort to show that an element of plaintiff's claim is nonexistent, defendants claim that plaintiff failed to properly allege and could not prove "that any failure to timely file Plaintiff's action resulted in the loss of damages to Plaintiff." We disagree. Plaintiff's complaint identifies the underlying causes of action and alleges that defendant Batts failed to file or inform plaintiff that he was not going to file a claim on his behalf while also failing to notify him of the statute of limitations for his claims. Furthermore, plaintiff alleges that he would have prevailed in at least one of his underlying claims to recover "in excess of $10,000" and claims that "[a]s a result of [defendant] Batts['] negligent acts, [plaintiff] has been damaged in an amount in excess of $10,000." Construing the allegations in the light most favorable to plaintiff, we find defendants' argument to be without merit.

Defendants further claim on appeal that plaintiff's complaint is fatally deficient because it fails to allege any actual physical injury suffered by plaintiff as a result of negligence by the Edgecombe County Sheriff or

the State of North Carolina. Although we need not spend much time addressing this issue, we once again disagree. The trial court treated the matter as a summary judgment motion and considered not just the complaint but also additional documents including defendants' answer and interview notes, which both noted that plaintiff alleged that he had a herniated disk from the first incident and that his back was injured in the fall on the icy ramp. In the complaint itself, plaintiff alleged that he "would have prevailed in at least one of the underlying claims which [defendant] Batts failed to file which would have resulted in a recovery in excess of $10,000." This is sufficient to survive summary judgment.

In addition, defendants present arguments on appeal claiming that defendants made a "reasonable showing" of affirmative defenses presented in their answer to defeat plaintiff's complaint. Defendants may have affirmative defenses upon which they will ultimately prevail but that is not relevant to our review of the trial court's summary judgment motion. What matters is whether any genuine issue of material fact exists, taking all of the allegations in the light most favorable to plaintiff. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c). In this case, there is no question that such material factual issues remain, and defendant himself identified them in his argument to the trial court when he stated, "that's a matter for the jury."

Here, plaintiff's complaint states a claim for professional negligence. Plaintiff alleged that defendants agreed to represent plaintiff in the underlying actions, owed him a duty of care in that representation, and then breached that duty by failing to timely file and preserve plaintiff's claims, failing to advise plaintiff on the statute of limitations for his claims, and failing to timely notify plaintiff that defendants would not be representing plaintiff. When the affidavits and other evidence -- including that produced by defendants -- are viewed in the light most favorable to plaintiff, they show that plaintiff was seriously injured in both alleged incidents and they support a claim for professional negligence. Defendant Batts' client notes contain additional support for plaintiff's claims, as defendant Batts refers to plaintiff as "client" and lists the facts of the alleged incidents.

The evidence presented to the court further shows genuine issues of material fact that remain and should have been left for a jury. At the hearing, defendants themselves actually identified several genuine issues of material fact regarding their agreement on representation and the failure to inform plaintiff on the statute of limitations as "for the jury." Furthermore, in defendants' memorandum in support of his motion to dismiss and for summary judgment, defendant identifies a material

issue when he notes his argument regarding plaintiff being contributorily negligent for failing to pay. Defendants' memorandum claims that "[n]o attorney client relationship existed, and attorney had no duty [to] file any action on Plaintiff's behalf, after properly informing Plaintiff of his obligation to pay legal service fees and the consequences of his failure to do so." Plaintiff, in contrast, argued that he and defendants did have an attorney-client relationship and that defendant Batts never informed him of the statute of limitations and consequences.

In addition, at the hearing on defendants' motion, defendant Batts himself identified a genuine issue of material fact when he was discussing the facts and plaintiff's affidavit, stating "But [plaintiff] has produced a – there's an affidavit from him that indicates he disagrees with two things. One, that I charged him a fee up front and, two, that I told him about statute of limitations." Moreover, defendant Batts later made the following statement: "And so to get through summary judgment, obviously, he's contesting whether or not there was a requirement to pay up front money. So that's we might say for the jury." This evidence, viewed as a whole and in plaintiff's favor, indicates that genuine issues of material fact remained in dispute.

Similarly, defendants also assert on appeal that the trial court "could reasonably have determined that Defendants met their burden of (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." "Reasonable determination" is not, however, the proper standard of review for a summary judgment motion or a motion to dismiss which is being considered as a summary judgment motion, as explained in Rule 56(c).

Defendants dispute plaintiff's allegations, but plaintiff has plead the elements of a professional negligence action and supported his allegations with affidavits, and the material facts surrounding the action remain in dispute. Plaintiff is not required to produce a forecast of evidence until defendants have met their burden; nevertheless, in this case, plaintiff has produced a sufficient forecast of evidence to demonstrate issues of material fact which prevent summary judgment. *See*, *e.g.*, *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000) ("Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial."). Since material factual

issues remain in this case, defendants have not -- and cannot -- meet that burden. Thus, we need not address this argument in more detail.

Defendants also argue that summary judgment in favor of defendant PLLC is proper even if not as to defendant Batts individually. This argument, however, is misplaced, as it addresses the wrong issue. Defendants' argument refers to the assignment of legal malpractice claims *to another* to prosecute, which has nothing to do with the liability of the PLLC for defendant Batts' actions in the course and scope of his employment. The issue in this case regarding defendant PLLC is not assignability, but rather, vicarious liability. As defendants' argument regarding the PLLC is irrelevant to the facts of this case, we decline to address it further.

As this Court has noted, "[s]ummary judgment is a drastic measure, and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Harrison v. City of Sanford*, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676 (2006). Here, plaintiff alleged all the essential elements of a professional negligence claim in his complaint and supported them by affidavits. Even the defendant acknowledged before the trial court that genuine issues of material fact remain that should be resolved by a trier of fact. Consequently, we find that the court below erred when it granted defendants' motion for summary judgment in this case.

Conclusion

In sum, we conclude that plaintiff's complaint does state a claim upon which relief may be granted and there are genuine issues of material fact in dispute. We hold, therefore, that the trial court erred in granting defendants' motion to dismiss and motion for summary judgment. Accordingly, we reverse the decision of the court below.

REVERSED.

Judges DIETZ and TYSON concur.

THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. COA15-896

Filed 5 July 2016

Taxation—trust—out-of-state

The trial court's order granting summary judgement for a trust and directing the Department of Revenue to refund taxes and penalties was affirmed where the connection between North Carolina and the Trust was insufficient to satisfy the requirements of due process. The Trust was established by a non-resident settlor, governed by laws outside of North Carolina, operated by a non-resident trustee, and did not make any distributions to a beneficiary residing in North Carolina during the pertinent period.

Appeal by defendant from order entered 23 April 2015 by Judge Gregory P. McGuire in Wake County Superior Court. Heard in the Court of Appeals 23 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Peggy S. Vincent, for the State.

Moore & Van Allen, PLLC, by Thomas D. Myrick, Neil T. Bloomfield and Kara N. Bitar, for plaintiff-appellee.

BRYANT, Judge.

Where North Carolina did not demonstrate the minimum contacts necessary to satisfy the principles of due process required to tax an out-of-state trust, we affirm the lower court's grant of summary judgment in favor of the trust and uphold the order directing the Department of Revenue to refund taxes and penalties paid by the trust.

On 21 June 2012, representatives of plaintiff The Kimberley Rice Kaestner 1992 Family Trust (the Trust) filed a complaint against the North Carolina Department of Revenue (the Department) after the Department denied a request to refund taxes the Trust paid during tax years 2005 through 2008. The claims brought forth alleged that taxes imposed upon the Trust pursuant to N.C. Gen. Stat. § 105-160.2 were imposed in violation of due process, the Commerce Clause, and

the North Carolina Constitution. Pursuant to section 105-160.2, taxes are "computed on the amount of taxable income of the estate or trust that is for the benefit of a resident of this State[.]"

In 1992, an *inter vivos* trust (original trust) was established by settlor Joseph Lee Rice III, with William B. Matteson as trustee. The situs, or location, of the original trust was New York. The primary beneficiaries of the original trust were the settlor's descendants (none of whom lived in North Carolina at the time of the trust's creation). In 2002, the original trust was divided into three separate trusts: one for each of the settlor's children (Kimberley Rice Kaestner, Daniel Rice, and Lee Rice). At that time in 2002, Kimberley Rice Kaestner, the beneficiary of plaintiff Kimberley Rice Kaestner 1992 Family Trust, was a resident and domiciliary of North Carolina. On 21 December 2005, William B. Matteson resigned as trustee for the three separate trusts. The settlor then appointed a successor trustee, who resided in Connecticut. Tax returns were filed in North Carolina on behalf of the Kimberley Rice Kaestner 1992 Family Trust for tax years ending in 2005, 2006, 2007, and 2008 for income accumulated by the Trust but not distributed to a North Carolina beneficiary. In 2009, representatives of the Trust filed a claim for a refund of taxes paid to the Department amounting to $1,303,172.00, for tax years 2005, 2006, 2007, and 2008. The claim was denied. Trust representatives commenced a contested case action in the Office of Administrative Hearings (OAH). However, the OAH dismissed the contested case for lack of jurisdiction: the sole issue was the constitutionality of the enabling statute, G.S. § 105-160.2. The current action commenced in Wake County Superior Court and, thereafter, was designated as a mandatory complex business case.

On 11 February 2013, the Honorable John R. Jolly, Jr., Chief Special Superior Court Judge for Complex Business Cases, entered an order ruling on a motion to dismiss filed by the Department.[1] Based on the Court's order, the Department asserted Rules 12(b)(1), (2), and (6) as a basis for dismissal of the constitutional claims and the injunctive relief. Judge Jolly found that "[N.C. Gen. Stat. §] 105-241.19 set out exclusive remedies for disputing the denial of a requested refund and expressly prohibit[ed] actions for injunctive relief to prevent the collection of a tax." Judge Jolly granted the Department's motion to dismiss the Trust's claim for injunctive relief which sought a refund of all taxes paid. However, Judge Jolly denied the Department's motion to dismiss the

1. The Department's motion to dismiss was not made a part of the record on appeal.

Trust's constitutional claims, concluding "there is at least a colorable argument that North Carolina's imposition of a tax on a foreign trust based solely on the presence of a beneficiary in the state does not conform with the Due Process Clause, the Commerce Clause or Section 19 [of Article I of the North Carolina Constitution]."

On 8 July 2014, the Trust moved for summary judgment, alleging there were no genuine issues of material fact: the Trust had paid the State of North Carolina over $1.3 million in taxes for tax years 2005 through 2008; the Trust was established by a non-resident settlor, governed by laws outside of North Carolina, operated by a non-resident trustee, and did not make any distributions to a beneficiary residing in North Carolina during the pertinent period. The Trust requested that the court declare General Statutes, section 105-160.2 unconstitutional and order a refund of all taxes and penalties paid by the Trust.

The Department also filed a motion for summary judgment. In it, the Department acknowledged that all of the Trust assets were intangibles, and that during the pertinent years, the Trust beneficiaries received no distributions from the Trust. However, quoting a case from the State of Connecticut, *Chase Manhattan Bank v. Gavin*, 249 Conn. 172, 204–05, 733 A.2d 782, 802 (1999), the Department stated:

> [J]ust as the state may tax the undistributed income of a trust based on the presence of the trustee in the state because it gives the trustee the protection and benefits of its laws; *it may tax the same income based on the domicile of the sole noncontingent beneficiary because it gives her the same protections and benefits.*

(emphasis added).

A summary judgment hearing was held in Wake County Superior Court before the Honorable Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases. In an order entered 23 April 2015, Judge McGuire granted the motion for summary judgment filed on behalf of the Trust and denied the Department's motion. Judge McGuire concluded that N.C. Gen. Stat. § 105-160.2 was unconstitutional as applied and ordered the Department to refund any taxes and penalties paid pursuant to that statute. The Department appeals.

On appeal, the Department argues that the Trust cannot meet its burden to prove it is entitled to a refund of state taxes paid on its accumulated income. Specifically, the Department contends that the

Business Court erred when it concluded that taxation of the Trust based on the residence of the beneficiary violated (A) due process under both the federal and state constitutions, as well as (B) the Commerce Clause of the federal constitution. We disagree.

Standard of Review

> When assessing a challenge to the constitutionality of legislation, this Court's duty is to determine whether the General Assembly has complied with the constitution. . . . In performing our task, we begin with a presumption that the laws duly enacted by the General Assembly are valid. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991). North Carolina courts have the authority and responsibility to declare a law unconstitutional, but only when the violation is plain and clear. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). Stated differently, a law will be declared invalid only if its unconstitutionality is demonstrated beyond reasonable doubt. *Baker*, 330 N.C. at 334–35, 410 S.E.2d at 889.

Hart v. State, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

Due Process

The Department contends that the trial court erred when it concluded that taxation of the Trust based solely on the residence of the beneficiaries violated due process under both the federal and state constitutions.

"The Fourteenth Amendment to the United States Constitution provides that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]' U.S. Const. amend. XIV." *Johnston v. State*, 224 N.C. App. 282, 304, 735 S.E.2d 859, 875 (2012) (alteration in original), *writ allowed*, *review on additional issues denied*, 366 N.C. 562, 738 S.E.2d 360, *aff'd*, 367 N.C. 164, 749 S.E.2d 278 (2013). "No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. " 'The term "law of the land" as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with "due process of law" as used in the Fourteenth Amendment to the Federal Constitution.' " *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quoting *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976)). "For purposes of taxation, 'the requirements of . . . "due process" are, for all practical purposes, the same under both the State and Federal Constitutions.' " *In re appeal of*

Blue Ridge Hous. of Bakersville LLC, 226 N.C. App. 42, 58, 738 S.E.2d 802, 813 (2013) (citation omitted) (quoting *Leonard v. Maxwell*, 216 N.C. 89, 93, 3 S.E.2d 316, 320 (1939)) .

> In analyzing federal constitutional questions, we look to decisions of the United States Supreme Court. We also look for guidance to the decisions of the North Carolina Supreme Court construing federal constitutional and State constitutional provisions, and we are bound by those interpretations. *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749, (2006) ("The Supreme Court of the United States is the final authority on federal constitutional questions.")[.] We are also bound by prior decisions of this Court construing those provisions, which are not inconsistent with the holdings of the United States Supreme Court and the North Carolina Supreme Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

Johnston, 224 N.C. App. at 288, 735 S.E.2d at 865.

> The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 305–306, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). . . . The "broad inquiry" subsumed in both constitutional requirements is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state—that is, whether the state has given anything for which it can ask return.

MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24–25, 170 L. Ed. 2d 404, 412 (2008) (citations and quotations omitted). "The Due Process Clause requires [(1)] some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, and [(2)] that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Quill Corp. v. N. Dakota*, 504 U.S. 298, 306, 119 L. Ed. 2d 91, 102 (1992).

Minimum Contacts

As to the question of whether there exists some minimum connection between a state and the . . . property . . . it seeks to tax, *see id.*, "[our

Supreme Court has] framed the relevant inquiry as whether a [party] had minimum contacts with the jurisdiction 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Id.* at 307, 119 L. Ed. 2d at 103 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)).

> Application of the "minimum contacts" rule will vary with the quality and nature of the [party's] activity, but it is essential in each case that there be some act by which the [party] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Skinner v. Preferred Credit, 361 N.C. 114, 123, 638 S.E.2d 203, 210–11 (2006) (citation and some quotation marks omitted).

On this point, we note that Judge McGuire made the following unchallenged findings of fact:

> 23. [N]othing in the record indicates, and [the Department] does not argue, that [the Trust] maintained any physical presence in North Carolina during the tax years at issue. The undisputed evidence in this matter shows that [the Trust] never held real property located in North Carolina, and never invested directly in any North Carolina based investments. . . . The record also indicates that no trust records were kept or created in North Carolina, or that the trust could be, in any other manner, said to have a physical presence in the State. Moreover, because the trustee's usual place of business where trust records were kept was outside the State, it is clear from the record that [the Trust's] principal place of administration was not North Carolina.
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> . . .
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> 26. [The Department] concedes that the only "connection between the [Plaintiff] trust and North Carolina in the case at hand is the residence of the beneficiaries."

The Department supports its argument that the residence of the beneficiaries is sufficient to satisfy the minimum contacts criteria of the Due Process Clause by citing to state court opinions from Connecticut and California: *Chase Manhattan Bank v. Gavin*, 249 Conn. 172, 733 A.2d 782 (1999), and *McCulloch v. Franchise Tax Bd.*, 61 Cal. 2d 186, 390 P.2d 412 (1964).

In both *Gavin* and *McCulloch*, the state appellate court noted that the United States Supreme Court had previously upheld the taxation of trust income based on the domicile of the *trustee*, citing *Greenough v. Tax Assessors*, 331 U.S. 486, 91 L. Ed. 1621 (1947). And the *Gavin* and *McCulloch* courts reasoned that similar to the benefits and protections provided by a state to a trustee, the state of the beneficiary's domicile provided benefits and protections sufficient to satisfy the minimum contacts criteria of due process for taxation of the trust. *See Gavin*, 249 Conn. at 204–05, 733 A.2d at 802 ("[J]ust as a state may tax all of the present income of a domiciliary, . . . a state may . . . tax the income of an inter vivos trust that is accumulated for the ultimate benefit of a noncontingent domiciliary, and that is subject to her ultimate power of disposition."); *McCulloch*, 61 Cal. 2d at 196, 390 P.2d at 419 ("[T]he beneficiary's state of residence may properly tax the *trust* on income which is payable in the future to the beneficiary, although it is actually retained by the trust, since that state renders to the beneficiary that protection incident to his eventual enjoyment of such accumulated income."). On this basis, the Department contends that its taxation of the Trust, predicated solely on the residency of Kimberley Kaestner in North Carolina did not violate due process.

Representatives of the Trust, on the other hand, assert that the Department's contention that a beneficiary's domicile alone is sufficient to satisfy the minimum contacts requirement of the Due Process Clause and allow the state to tax a non-resident trust conflates what the law recognizes as separate legal entities—the trust and the beneficiary. "[W]e do not forget that the trust is an abstraction, . . . [and] the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions." *Anderson v. Wilson*, 289 U.S. 20, 27, 77 L. Ed. 1004, 1010 (1933). In other words, for income tax purposes the trust has a separate existence. *Id.*

In support of their position, the Trust representatives direct our attention to *Greenough*, 331 U.S. 486, 91 L. Ed. 1621, a United States Supreme Court opinion. *Greenough* upheld a Rhode Island law authorizing the levy of an *ad valorem* tax upon a resident *trustee* based on a proportionate legal interest of a foreign trust, finding no violation of due process. *Greenough* was a decision from which four justices, including the Chief Justice, dissented. We note with particular interest the dissent of Justice Rutledge, who wrote that "if the beneficiary's residence alone is insufficient to sustain a state's power to tax the corpus of the trust, *cf. Brooke v. Norfolk*, 277 [U.S.] 27, 72 [L. Ed.] 767, 48 [S. Ct.] 422, it would seem that the mere residence of one of a number of trustees

hardly would supply a firmer foundation." *Id.* at 503, 91 L. Ed. at 1633 (footnote omitted). After a careful look at *Brooke*, 277 U.S. 27, 72 L. Ed. 767 (1928), we find it to be not only relevant to the instant case, but also controlling.

In *Brooke*, the petitioner—a Virginia resident and trust beneficiary—appealed to the United States Supreme Court after the City of Norfolk and the State of Virginia assessed taxes upon the corpus of a trust created by a Maryland resident. *Id.* at 28, 72 L. Ed. at 767–78. The petitioner contended that the assessment of the taxes was contrary to the Fourteenth Amendment. *Id.* at 28, 72 L. Ed. at 767. The Maryland resident created a testamentary trust and bequeathed to it $80,000.00, naming petitioner as beneficiary. The trustee, Safe Deposit & Trust Company of Baltimore, was directed to pay income from the trust to the petitioner for life. *Id.* at 28, 72 L. Ed. at 768. The Court noted that "[t]he property held in trust has remained in Maryland and no part of it is or ever has been in Virginia." *Id.*

> The petitioner has paid without question a tax upon the income received by her. But the doctrine contended for now is that the petitioner is chargeable as if she owned the whole. . . . But here the property is not within the state, does not belong to the petitioner and is not within her possession or control. The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done. *See Wachovia Bank & T. Co. v. Doughton*, 272 U. S. 567, 575, 71 L. [E]d. 413, 419, 47 Sup. Ct. Rep. 202.

Id. 28–29, 72 L. Ed. at 768.

The strong similarities between the facts in *Brooke* and the instant case cannot be ignored. While the trust in *Brooke* was a testamentary trust and the Trust here an *inter vivos* trust, both were created and governed by laws outside of the state assessing a tax upon the trust. The trustee for both trusts resided outside of the state seeking to tax the trust. The beneficiary of the trust who resided within the taxing state had no control over the trust during the period for which the tax was assessed. And, the trusts did not own property in the taxing state.[2] In the instant case, the Trust's beneficiary did not receive a taxable distribution from the Trust during the years for which the Department has assessed a tax.

2. In *Brooke*, it was duly noted that the petitioner paid tax assessments in Virginia on the distributions made to her as a resident of the state; however, she had no duty

In determining that the authority as set forth by the United States Supreme Court in *Brooke* controls the analysis and outcome of this issue, we must decline the Department's request that we accept as persuasive the authority as set out by the California Supreme Court, *McCulloch*, 61 Cal. 2d 186, 390 P.2d 412, or the Connecticut Supreme Court, *Gavin*, 249 Conn. 172, 733 A.2d 782. Thus, because of *Brooke*, we hold that based on the facts of the instant case, the connection between North Carolina and the Trust was insufficient to satisfy the requirements of due process. Therefore, the Department's assessment of an income tax levied pursuant to the authority set out in General Statutes, section 105-160.2 was in violation of the Due Process Clause of the United States Constitution, and the Law of the Land Clause of the North Carolina Constitution. Accordingly, we affirm Judge McGuire's order granting summary judgment for the Trust and directing that the Department refund any and all taxes and penalties paid by the Trust pursuant to section 105-160.2 with interest.

As a consequence, we do not address the Department's contention that the Business Court erred when it concluded taxation of the Trust based on the residence of the beneficiary violated the Commerce Clause of the federal constitution.

AFFIRMED.

Judges STEPHENS and McCULLOUGH concur.

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under the law (or constitution) to pay taxes on the *corpus* of the trust which existed in another state and over which she had no control. *See* 277 U.S. at 28–29, 72 L. Ed. at 768.

KING FA, LLC v. CHEN

[248 N.C. App. 221 (2016)]

KING FA, LLC, PLAINTIFF
v.
MING XEN CHEN, DEFENDANT

No. COA16-47

Filed 5 July 2016

1. Jurisdiction—standing—LLC—confusion of parties—ratification

An LLC had standing to bring an action and the trial court had jurisdiction where there had been confusion between the LLC and its members in the signing of commercial lease documents and court papers. The tenants' actions in the trial court, to wit, seeking substitution, failing to repudiate the action, and participating actively in the prosecution of the matter, constituted an implicit ratification of the action such that they agreed to be bound by the proceeding.

2. Appeal and Error—parties aggrieved—notice of appeal—confusion between LLC and members

An appeal was dismissed where there was confusion over the proper parties between an LLC and its members in the underlying commercial lease and in court documents. The LLC, despite its name appearing in the caption of most of the documents in this matter, was in no way aggrieved by the final order or the amended order, each of which affected the legal rights only of the real parties in interest in this matter, the tenants. Furthermore, the notice of appeal did not properly name the parties taking the appeal.

Appeal by Plaintiff from orders entered 13 May and 8 September 2015 by Judge Theodore Kazakos in Forsyth County District Court. Heard in the Court of Appeals 9 June 2016.

Scott Law Group, PLLC, by Harvey W. Barbee, Jr., for Plaintiff.

Wake Forest University School of Law Community Law Clinic, by Prof. Steven M. Virgil, for Defendant.

STEPHENS, Judge.

This appeal arises from a dispute between a landlord and his tenants concerning, *inter alia*, which party was responsible for making and paying for necessary repairs under the terms of a commercial lease for a restaurant space. Because the notice of appeal filed in this matter does

not comply with the requirements of Rule of Appellate Procedure 3, we lack jurisdiction to hear this appeal and must dismiss it.

Factual and Procedural History

On 11 October 2013, Saungor Tse and Nap Kin Cheung (collectively, "the tenants") entered into a commercial lease with Defendant Ming Xen Chen for use of certain premises on Randolph Street in Thomasville which the parties intended would be operated as the Mandarin Express restaurant. Before signing the lease, Tse had inspected the building on the premises and Chen informed her about past issues with the roof leaking. However, the lease was silent regarding Chen's responsibility to fix the roof or make any other repairs during the term of the lease. In December 2013, Tse hired a contractor to undertake repairs on the roof at a cost of $1,000. Tse then offset this expense by reducing her January 2014 rental payment to Chen by $1,000. The contractor's repair was inadequate, however, and the restaurant's roof continued to leak. On 21 January 2014, King Fa, LLC ("the LLC") filed a complaint against Chen in Forsyth County District Court alleging breach of contract and breach of the covenant of quiet enjoyment. The LLC is a North Carolina limited liability company organized on 16 October 2013 with the tenants as its only members. The complaint alleged, *inter alia*, that Chen failed to fix the roof leak and to undertake other repairs to the restaurant, and also that Chen requested a review by the health department in hopes that the restaurant would be closed down.[1] On 20 March 2014, the LLC filed an amended complaint asserting the same claims and alleging substantially the same facts.

In his motion to dismiss and answer filed 22 May 2014, Chen moved to dismiss the amended complaint on the basis that the LLC was not a real party in interest as to the lease and thus lacked standing to bring the action. On 26 September 2014, Chen filed a motion for leave to file an amended answer and counterclaim, alleging breach of the lease by nonpayment of rent. In his motion, Chen again asserted that the tenants were the real parties in interest regarding the lease, but expressed concern that if the court determined instead that the LLC was the real party in interest, Chen would be barred from later bringing his compulsory counterclaim for breach of contract. On 9 October 2014, the LLC filed a motion in opposition to Chen's motion to dismiss in which it argued that the LLC was a real party in interest and, in the alternative, moved to

1. Following a health department inspection on 20 February 2014, the restaurant was ordered closed.

substitute the tenants as plaintiffs if the trial court determined that the LLC was not the real party in interest.

The matter came on for trial on 4 February 2015 in Forsyth County District Court, the Honorable Theodore Kazakos, Judge presiding. At that time, the court reserved judgment to allow the parties to file memoranda on their claims and counterclaim. On 12 February 2015, the LLC moved to amend its amended complaint to add claims for constructive eviction and conversion of personal property. The parties apparently appeared again before the trial court on 6 April 2015 to present further arguments, although the only transcript in the record on appeal is from the 4 February 2015 hearing. On 13 May 2015, the court entered an order ("the final order") that, *inter alia*, (1) allowed the tenants[2] to amend their amended complaint to add a claim for constructive eviction, but denied their request to add a claim for conversion; (2) otherwise ruled against the tenants on their claims against Chen for constructive eviction, breach of contract, and breach of the covenant of quiet enjoyment; and (3) decreed that the tenants breached the lease, awarding Chen damages in the amount of $1,800. The final order includes findings of fact that Chen moved to dismiss the LLC's complaint and that the LLC filed a motion opposing the motion to dismiss or in the alternative to substitute parties, but does not contain any ruling regarding either of those motions.

On 18 June 2015, the LLC moved for amended findings of fact and to set aside the final order pursuant to Rule of Civil Procedure 60(b). In that motion, the LLC's counsel explained the following: that he had reviewed the proposed order drafted by Chen's counsel and had requested certain changes to the findings of fact. Some of the changes were made by Chen's counsel and the amended proposed order was again sent to the LLC for review. The LLC requested additional revisions, but Chen's

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2. The final order, which was prepared by a third-year student at Wake Forest University School of Law practicing under the supervision of Chen's trial counsel, a law school professor, is captioned "Saungor Tse and Nap Kin Cheung, Plaintiffs, v. Ming Xen Chen, Defendant/Counterplaintiff[.]" Accordingly, although as discussed in detail later in this opinion, the complaint was brought by the LLC, we use the term "the tenants" here. The final order is the only filing in the record on appeal that lists the tenants as the plaintiffs in this matter, other than a small claims court complaint for money owed filed in Davidson County by Chen against Tse on 8 January 2014 and the order dismissing that complaint on 10 April 2014. Further, much if not all of the post-trial communication between the parties' trial counsel involved the student on behalf of Chen's licensed attorney. However, for ease of reading, we hereafter refer to both the student and his supervising attorney as "Chen's counsel."

counsel submitted the amended proposed order to the court without the LLC's consent. The court then signed the amended proposed order and filed it as the final order on 13 May 2015. Following a hearing on the LLC's motion at the 25 June 2015 session of Forsyth County District Court, the court entered an "Order Amending Findings of Fact" on 8 September 2015 ("the amended order"). The amended order noted that the LLC had withdrawn its Rule 60 motion and also ordered that the final order be amended to clarify portions of two of its findings of fact.

On 24 September 2015, the LLC filed written notice of appeal from the final order entered 13 May 2015 and from the amended order entered 8 September 2015. On 5 October 2015, Chen also filed a written notice of appeal from both orders. However, Chen did not include any proposed issues on appeal in the record before this Court and brings forward no appellant's arguments on appeal, having filed only an appellee's brief. Accordingly, Chen has waived any appellate review arising from his notice of appeal. *See* N.C.R. App. P. 28(a).

Standing

[1] Chen first argues that this appeal must be dismissed for lack of standing by the LLC to bring forward this appeal. Essentially, Chen contends that the LLC lacks standing to bring this appeal because the correct plaintiffs in the matter are the tenants, who, Chen notes, were the named plaintiffs in the final order drafted by his counsel. We agree, but before addressing Chen's argument regarding standing to bring this appeal, we first consider the LLC's standing to bring this action in the trial court.

Standing refers to "a party's right to have a court decide the merits of a dispute[,]" and provides the courts of this State subject matter jurisdiction to hear a party's claims. *Teague v. Bayer AG*, 195 N.C. App. 18, 23, 671 S.E.2d 550, 554 (citation and internal quotation marks omitted), *disc. review denied*, 363 N.C. 381, __ S.E.2d __ (2009). "As a general matter, the North Carolina Constitution confers standing on those who suffer harm: All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . ." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281-82 (2008) (citation, internal quotation marks, and brackets omitted). However, our General Statutes also mandate that "[e]very claim shall be prosecuted *in the name of the real party in interest* . . . ." N.C. Gen. Stat. § 1A-1, Rule 17(a) (2015) (emphasis added). In the context of a breach of contract claim, the parties who *execute* an agreement are real parties in interest and have standing to

sue.[3] *See, e.g.*, *Accelerated Framing, Inc. v. Eagle Ridge Builders, Inc.*, 207 N.C. App. 722, 724, 701 S.E.2d 280, 283 (2010).

As noted *supra*, the original and amended complaints in this matter were filed by the LLC, although the LLC did not execute and was not a party to the lease. While the tenants are the only two members of the LLC, the tenants signed the lease in their individual capacities and not on behalf of the LLC as evidenced by the fact that the LLC was not organized, and thus did not exist, until five days *after* the lease was signed. In addition, while "[a]n action arising out of contract generally can be assigned[,]" *see, e.g.*, *Horton v. New S. Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (citation and internal quotation marks omitted), *disc. review and cert. denied*, 343 N.C. 511, 472 S.E.2d 8 (1996), nothing in the record before this Court indicates that the tenants ever assigned their rights or claims under the lease to the LLC.

However, Rule 17 further provides:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for *ratification of commencement of the action by, or joinder or substitution of*, the real party in interest . . . .

N.C. Gen. Stat. § 1A-1, Rule 17(a) (emphasis added). Here, as discussed *supra*, the LLC filed a motion seeking substitution of the tenants for the LLC in the event that the trial court determined that the LLC was not a real party in interest. However, nothing in the record on appeal indicates that the trial court ever ruled on either Chen's motion to dismiss or on the LLC's alternative motion to substitute parties. Given the court's eventual entry of the final order and amended order, it obviously did not grant Chen's motion to dismiss for lack of standing. Further, with the exception of its reply to Chen's counterclaim filed 19 November 2014, the LLC designated itself, and not the tenants, as the plaintiff in all filings in file number 14 CVD 395, including the notice of appeal to this Court. This suggests that the LLC did not believe that the tenants were ever joined or substituted as plaintiffs by the trial court.

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3. In addition, while not pertinent to this matter, "an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina." N.C. Gen. Stat. § 1A-1, Rule 17(a).

However, "Rule 17(a) [also] permits the real party in interest to ratify the action after its commencement and to have the ratification relate back to the commencement." *Burcl v. N.C. Baptist Hosp., Inc.*, 306 N.C. 214, 230, 293 S.E.2d 85, 95 (1982). "Ratification is defined as the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *Bell Atl. Tricon Leasing Corp. v. DRR, Inc.*, 114 N.C. App. 771, 776, 443 S.E.2d 374, 377 (1994) (citation and internal quotation marks omitted). "Ratification may be express or implied, and intent may be inferred from failure to repudiate an unauthorized act or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act." *Id.* at 776-77, 443 S.E.2d at 377 (citation, internal quotation marks, and ellipsis omitted). Here, although the real parties in interest—the tenants—did not *explicitly* ratify commencement of the action as is the more common practice under Rule 17(a), *see, e.g.*, *S. R. Co. v. O'Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 8-9, 318 S.E.2d 872, 876 (1984) (holding that real parties in interest had ratified the action under 17(a) where they "indicated in writing that they agreed to be made parties, that they ratified and adopted the proceedings up to that point[,] and that they agreed to be bound by the judgment in the case"), we hold that the tenants' actions in the trial court, to wit, seeking substitution, failing to repudiate the action, and participating actively in the prosecution of the matter, constituted an implicit ratification of the action such that they agreed to be bound by the proceeding. Thus, the trial court had subject matter jurisdiction over the matter.

[2] However, we agree with Chen's contention that, because "[n]o legally protected interest belonging to [the] LLC is implicated by" the final order or the amended order, the LLC cannot show an injury and has no right of appeal. Essentially, Chen's argument is that the LLC is not a "party aggrieved" by the final order or the amended order. Only a "party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal." N.C.R. App. P. 3(a). In turn, our General Statues provide that "[*a*]*ny party aggrieved* may appeal . . . ." N.C. Gen. Stat. § 1-271 (2015) (emphasis added). "A 'party aggrieved' is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court." *Selective Ins. Co. v. Mid-Carolina Insulation Co.*, 126 N.C. App. 217, 219, 484 S.E.2d 443, 445 (1997) (citations omitted). As discussed *supra*, the LLC was not a party to the lease and thus had no legal rights or obligations related thereto. Likewise, the LLC, despite its name appearing in the caption of most of the documents in this matter,

is in no way aggrieved by the final order or the amended order, each of which affects the legal rights only of the real parties in interest in this matter—the tenants.

Rule of Appellate Procedure 3 further specifies that "the notice of appeal required to be filed and served by subsection (a) of this rule *shall specify the party or parties taking the appeal* . . . ." N.C.R. App. P. 3(d) (emphasis added). The notice of appeal states that the appeal is being taken by "King Fa, LLC," and neither of the tenants is named in it.[4] "Without proper notice of appeal, this Court acquires no jurisdiction." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (citation and internal quotation marks omitted). "A jurisdictional default . . . precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008); *see also Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563-64, 402 S.E.2d 407, 408 (1991) (*per curiam*) ("If the [notice of appeal] requirements of [Rule 3 of the North Carolina Rules of Appellate Procedure] are not met, the appeal must be dismissed."). Accordingly, this appeal is

DISMISSED.

Judges McCULLOUGH and ZACHARY concur.

4. Recognizing the apparent deficiency of the notice of appeal, on 5 April 2016, counsel for the LLC filed in this Court a "Motion to Substitute Parties in the Alternative[,]" which was denied by order entered 19 April 2016.

TU N. NGUYEN, PLAINTIFF
v.
ALICIA HELLER-NGUYEN, DEFENDANT

No. COA15-1186

Filed 5 July 2016

1. Child Custody and Support—support—modification—contention dismissed

Defendant's contention that the trial court did not have jurisdiction to modify child support in a June order was dismissed where the trial court modified plaintiff's child support obligation in a March order and did not modify child support in June.

2. Appeal and Error—dismissal of contentions—issues not ripe

Contentions concerning a parenting coordinator moving to modify child custody as an interested party were not ripe for review and were dismissed. It is not the duty of the appellate court to supplement appellant's brief with legal authority or arguments not contained therein.

3. Child Custody and Support—parenting coordinator—reappointed

The trial court did not abuse its discretion by reappointing a parenting coordinator, considering the binding and uncontested findings of fact and the trial court's required statutory findings.

4. Child Custody and Support—support arrears—offset

There was error in a child custody order to the extent that it allowed plaintiff to offset vested child support arrears owed to defendant. The trial court was directed to review the procedural requirements and exceptions enumerated in N.C.G.S. § 50-13.10(a) (2015).

Appeal by Defendant from an order entered 11 June 2015 by Judge Anna E. Worley in Wake County District Court. Heard in the Court of Appeals 13 April 2016.

No appellee brief filed by Plaintiff.

Gailor Hunt Jenkins Davis & Taylor, PLLC, by Carrie B. Tortora and Jonathan S. Melton, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Alicia Heller-Nguyen ("Defendant") appeals following an order on Tu N. Nguyen's ("Plaintiff") motion for reappointment of a Parenting Coordinator, Parenting Coordinator Sydney Batch's motion for an order terminating her parenting coordinator appointment and awarding her past due fees, and Parenting Coordinator Sydney Batch's Notice of a Determination that Requires a Court Hearing. On appeal, Defendant contends (1) the trial court did not have jurisdiction to modify child support, (2) erred in reappointing Parenting Coordinator Batch, and (3) erred in offsetting Plaintiff's child support arrears. We affirm in part and remand in part.

I. Factual and Procedural History

Plaintiff and Defendant married on 19 June 1993. They had four children during their marriage, three boys and one girl, ages eleven, twelve, fifteen, and seventeen. They separated on 31 October 2010.

Thereafter, Defendant filed a domestic violence protective order ("DVPO") against Plaintiff on 12 November 2010. The DVPO gave Defendant sole custody of the minor children and prohibited Plaintiff from contacting his children "whatsoever . . . at any time."

On 22 November 2010, Plaintiff filed a verified complaint for joint legal custody and primary physical custody of the children. He alleged the children's best interests would be best served by having the trial court award him temporary and permanent physical custody, with Defendant having visitation rights. Additionally, he moved to have Defendant submit to a psychiatric evaluation.

On 10 January 2011, Defendant filed a verified answer and raised counterclaims for child custody and child support. On 29 January 2011, Defendant filed a verified amended answer and amended counterclaims for child custody, child support, equitable distribution, post separation support, alimony, and moved to have the trial court impose a temporary restraining order on Plaintiff to prevent him from transferring assets, and moved to have Plaintiff submit to a psychiatric evaluation. On 24 February 2011, Plaintiff filed a reply and objected to Defendant's motion for a temporary restraining order and psychiatric evaluation.

On 25 August 2011, the trial court issued a temporary child custody order and found it was in the children's best interests to award the parties joint legal custody and to award Plaintiff physical custody every Wednesday night, and every other Thursday, Friday, and Saturday. The trial court gave Defendant physical custody on all other days and nights. The trial court ordered both parties to undergo psychiatric evaluations.

On 11 October 2011, the trial court appointed Helen Oliver to serve a two-year parenting coordinator term. On 23 December 2011, Plaintiff and Defendant divorced. On 23 July 2012, Parenting Coordinator Oliver moved to be relieved from her duties because Plaintiff failed to pay her for her services.

On 24–25 September 2012, the trial court heard Plaintiff on his complaint and Defendant on her counterclaims. After hearing the testimony of several witnesses and reviewing the evidence, the trial court issued a 27 March 2013 order and found it was in the children's best interests to award the parties joint legal custody. The trial court gave Defendant residential and primary physical custody and gave Plaintiff secondary custody with visitation rights set out in the order. The trial court ordered Plaintiff to pay $2,740.94 on the fifth day of every month as temporary child support, and found him to be in arrears of $7,705.00. The trial court ordered Helen Oliver, or a substitute, to continue serving as a Parenting Coordinator.

On 11 April 2013, the trial court issued an order awarding Defendant $2,982.00 per month in alimony. Further, the trial court found Plaintiff was in $74,550.00 of alimony arrears.

On 8 May 2013, the trial court amended its 27 March 2013 order, corrected typographical errors, and recalculated Plaintiff's arrears based upon medical expenses he paid without being reimbursed. Plaintiff's child support obligation remained the same at $2,740.94 per month.

On 29 August 2013, Plaintiff filed a verified motion to modify child support and alimony. He alleged, "there has been a substantial change in circumstances warranting a reduction of [his] child support obligation and his alimony obligation in that: [his] business and source of income . . . has received a substantially decreased revenue from two major customers . . . which was in no way foreseeable." Further, his business, Healthy Home Insulation, Inc., took on wage and tax expenses, which decreased his income.

On 13 March 2014, the trial court entered a consent order and appointed Sydney Batch to serve as Parenting Coordinator for one year. On 18 June 2014, Parenting Coordinator Batch moved to terminate her appointment because "Defendant has never been able to pay the initial retainer for parenting coordination services," and "[t]o date Defendant has only been able to make one payment of $500.00."

On 25 June 2014, Plaintiff filed a verified motion to modify child custody. He alleged "there has been a substantial change in circumstances

affecting the welfare of the minor children warranting a modification of the [children's] custodial arrangements." He alleged the following, *inter alia:*

> A. The parties agreed to the appointment of Sydney Batch as Parenting Coordinator. Ms. Batch has been in the case since approximately March 13, 2014. Ms. Batch has tried to arrange for the engagement of counselors or therapists to assist with the rehabilitation of Plaintiff's relationship with [his child], which has been alienated and destroyed by Defendant and, upon information and belief, Defendant's mother. Ms. Batch has also attempted to arrange for [two of the other children] to see a counselor. Ms. Batch has researched and recommended counselors and therapists for the parties to consider and approve, but Defendant has found an excuse as to why each counselor should not be used. Plaintiff believes that Defendant does not want the children to see counselors or therapists. Upon information and belief, Defendant has threatened to sue at least one of the therapists if he met with the children.
>
> B. Defendant's behaviors and attitudes towards Plaintiff are toxic, hostile, aggressive, and full of anger, and the intensity of their behaviors and attitudes has grown since the entry of the Custody Order. This has had a direct impact on the minor children and their relationship with Plaintiff.

Plaintiff alleged the 8 May 2013 amended child custody and child support order "does not serve the minor children's best interests" because "[custody] [e]xchanges need to be as few as possible, and the minor children need consistent time and more time with their father." He asked the trial court to modify the 8 May 2013 custody order to give him more time with the children. This motion was made in addition to Plaintiff's 29 August 2013 motion to modify child support.

On 20–22 August 2014, the trial court heard the parties on Plaintiff's 29 August 2013 motion to modify child support and alimony, and his 25 June 2014 motion to modify child custody. Plaintiff argued to reduce child support and alimony based upon a substantial change in circumstances. The trial court did not immediately enter an order following the hearing.

On 15 September 2014, Parenting Coordinator Batch filed, pursuant to N.C. Gen. Stat. § 50-97, Wake County Domestic Form 26, "Parenting

Coordinator's Notice of Determination that Requires a Court Hearing," with the trial court. In the sworn form, Parenting Coordinator Batch "determined that [she] [was] not qualified to address or resolve certain issues in the case," specifically:

> 1. The ordering of reunification therapy and appointment of a reunification therapist for [two] minor children . . . .
>
> 2. The ordering of therapy and appointment of therapists for [the four] minor children . . . .
>
> 3. The ordering of communication between the parties via the Our Family Wizard website.
>
> 4. The modification of the Amended Child Custody and Child Support Order to allow for a change of Wednesday drop-off time.

Parenting Coordinator Batch requested the trial court resolve these issues.

On 3 November 2014, Plaintiff moved to reappoint Parenting Coordinator Batch for "at least another two years." He alleged the following:

> 8. This case has a long and tortuous history. Defendant's behaviors and attitudes towards Plaintiff are toxic, hostile, aggressive, and full of anger, and, upon information and belief, spill over into her parenting and the children's behavior, emotions, and attitudes suffer as a result. The children's mental and emotional wellbeing hangs in the balance, and they are under a tremendous amount of stress while residing with Defendant.
>
> 9. Defendant has successfully alienated [two of the four children] from Plaintiff. Plaintiff has not seen [these two children] in over 10 months, and . . . 6 months [respectively]. . . .
>
> 11. As a result of Defendant's behaviors, the parties have had to employ therapists for each child and [a] reunification therapist so that [two of the children] can be reunified with Plaintiff. . . .
>
> 13. Ms. Batch's services and judgment have been required throughout her appointment. Without her involvement, it is highly unlikely that the reunification process would

> be in its current position; additionally, it is highly unlikely that the children would be as active as they are in therapy.
>
> 14. This case is a "high conflict case" within the meaning of N.C. Gen. Stat. § 50-90. . . .
>
> 17. It would serve the children's best interest for this Court to reappoint Ms. Batch as parenting coordinator for at least another two years, so that Ms. Batch can continue to monitor the children's mental and emotional well being and continue to assist the children in improving and maintaining their relationship with [Plaintiff].
>
> 18. The parties are able to pay the cost of a parenting coordinator. The parties should be ordered to pay the costs of a parenting coordinator as deemed appropriate and fair by the Court.

On 4 November 2014, Parenting Coordinator Batch filed a verified motion to terminate her appointment and collect her past due fees. According to Parenting Coordinator Batch, Defendant stated she could only "afford to pay $80.00 per month" towards her outstanding balance of parenting coordinator fees, even though Plaintiff paid Defendant "over $25,000.00 in the past two months." Parenting Coordinator Batch asked the trial court to remove her as parenting coordinator, order Defendant to pay the past due fees, and sought "any other relief that the Court deems just and proper."

On 6 March 2015, the trial court issued an order on Plaintiff's motions to modify child support and child custody. The trial court found a substantial change in circumstances that affects the children's best interests and warranted a modification of Plaintiff's child support obligation. Further, the trial court found "Defendant was employed by Wake County in its EMS department" and voluntarily quit her job during litigation. The trial court found Plaintiff sold his assets in Healthy Home Insulation, Inc. in July 2014 and began working for Healthy Home's purchaser. The trial court found Plaintiff's gross monthly income decreased by 40–50% and his reasonable monthly expenses including child support were $4,565.00. The trial court found Plaintiff paid Defendant's parenting coordinator fees, totaling $5,382.50. The trial court made the following conclusions of law, *inter alia*:

> 1. This Court has personal and subject matter jurisdiction to enter this Consent Order.

> 2. Each party has the present ability to comply with the provisions of this Order.
>
> 3. Since the entry of the [11 April 2013] Alimony Order, there has been a substantial change in circumstances warranting a modification of Plaintiff's alimony obligation set forth herein, and said modification is [in] in the minor child's best interests.
>
> 4. Since the entry of the [8 May 2013 Amended] Child Support Order, there has been a substantial change in circumstances warranting a modification of Plaintiff's child support obligation as set forth herein, and said modification is in the minor's best interests.

Based upon the substantial change in circumstances, the trial court reduced Plaintiff's alimony obligation to $900.00 per month, and using Worksheet B, reduced his child support obligation to $1,802.46 per month. The trial court concluded Plaintiff's child support arrears totaled $59,826.42, and his alimony arrears totaled $73,407.72.

On 10 March 2015, the trial court heard the parties on Plaintiff's motion for reappointment of a parenting coordinator, and Parenting Coordinator Batch's "Notice of Determination that Requires a Court Hearing" to terminate her services, collect past fees owed to her by Defendant, to order therapy, appoint therapists, order the parties to use the Our Family Wizard website, and change the custody order to allow for Wednesday drop off times. On 11 June 2015, the trial court issued an order on Plaintiff's motion and Parenting Coordinator Bach's motion. The trial court made the following findings of fact and conclusions of law, *inter alia*:

> 18. This case is a complex custody case which has a long, unfortunate history of extremely high conflict and domestic violence. The Court is concerned that the stress and discord between the parties will have a lasting negative affect on the minor children. . . .
>
> 23[–26]. [Each of the four children has been assigned a therapist].
>
> 37. Defendant refused to sign a release for the PC to speak with Defendant's therapist.
>
> 38. Both parties have been inconsistent in bringing the minor children to therapy for scheduled appointments.

39. Defendant has threatened mental health providers with legal action if they saw the children.

40. It is unclear whether Defendant sincerely desires the minor children to have a productive and healthy relationship with Plaintiff.

41. When the PC was appointed, Defendant followed most of the PC's directives. Defendant does not abide by some of the PC's decisions, and the Court considered issuing a show cause [sic] to Defendant from the bench due to her lack of compliance. Defendant has obstructed the therapy process and compounded the problems in this case by refusing to sign releases or by revoking her consent for therapists to speak with one another and/or the PC. Defendant has at times been rude, hostile, and uncooperative in her communications with the PC and other mental health providers. Defendant has not made any progress in deescalating the conflict between the parties, and Defendant believes that at times the PC has been rude, hostile, and biased in her communications with her.

42. Plaintiff wants a relationship with his children, but his efforts are and continue to be frustrated by Defendant. Plaintiff has made progress in understanding the need for therapy for his children, and he has been cooperative with the therapists involved in this case. He has signed all releases requested of him. . . .

46. The PC does not have any impairment which would prohibit her from communicating effectively with either party, and each party has the ability to participate with the PC. There is no indication of favoritism or prejudice for or towards either party by the PC in her interactions with the parties and decisions in this case, and there is certainly no indication that the PC is biased in any way based upon who is paying her fee. . . .

48. The PC's appointment did not expire prior to the hearing, and the appointment should be extended via reappointment as set forth below. . . .

50. Defendant has failed to pay her share of the PC's fees. She owes the PC $5,225.86. Plaintiff is willing to pay Defendant's share of the PC's fees so long as he is

credited, dollar for dollar, with each payment he makes on her behalf as a credit against his outstanding child support arrearage of approximately $30,000.00.

51. Defendant received a lump-sum payment from Plaintiff in the amount of $25,000[.00] in the Fall of 2014 for child support arrears, which she used to pay back taxes, living expenses, and health insurance. . . .

56. The Court has concerns about whether the minor children should remain in the primary custody of Defendant.

CONCLUSIONS OF LAW

3. This is a high conflict custody case.

4. Good cause has been shown to the Court for reappointment of Sydney J. Batch as Parenting Coordinator as authorized by N.C. Gen. Stat. § 50-99(b).

The trial court appointed Parenting Coordinator Batch for one year, and ordered the following:

1. Plaintiff's Motion for Reappointment of Parenting Coordinator is GRANTED.

2. The parties are operating under the following custody/visitation order: Amended Child Custody and Child Support Order entered on May 8, 2013. . . .

7. [Parenting Coordinator] General Authority: The authority of the Parenting Coordinator shall be as delineated herein and shall be limited to matters that will aid the parties in:

A. Identifying disputed issues;

B. Reducing misunderstandings;

C. Clarifying priorities;

D. Exploring possibilities for compromise;

E. Developing methods of collaboration in parenting; and

F. Complying with the Court's order of custody, visitation, or guardianship, including the Custody Order.

8. Areas of Domain of General Authority: If a dispute arises concerning one of the following checked areas, the

Parenting Coordinator has the authority to make minor changes to the custody/visitation order or to make decisions to resolve a dispute if the issue was not addressed in the custody/visitation order:

A. Transition time/pickup/delivery

B. Sharing of vacations and holidays

C. Method of pick up and delivery

D. Transportation to and from visitation . . . .

17. Parenting Coordinator Fees:

A. The parents have the financial capacity to pay for the Parenting Coordinator. The parties shall pay the Parenting Coordinator for all of her time and costs incurred in processing the case. . . . Nonpayment of fees may subject the nonpaying parent to prosecution for indirect contempt of Court for failure to abide by the Order. . . .

B. The Parenting Coordinator's hourly fee shall be paid as follows: Father shall pay 50% and Mother shall pay 50%. . . .

C. If one parent pays 100% of the Parenting Coordinator fee, then that party has a right of indemnification against the other parent up to the percentage allocation for which the other parent was responsible. This reimbursement may be enforced by contempt.

D. If Plaintiff pays for Defendant's share of the Parenting Coordinator's fee, then each dollar paid by Plaintiff on behalf of Defendant shall reduce Plaintiff's child support arrearage by the amount so paid by Plaintiff on Defendant's behalf (since this is a direct benefit for the minor children). . . .

28[–29]. Defendant shall not interfere with the reunification therapy for [the children] with Plaintiff. . . .

39. [I]f Plaintiff pays for Defendant's share of the Parenting Coordinator's fee or a therapist's fee, then each dollar paid by Plaintiff on behalf of Defendant shall reduce Plaintiff's child support arrearage by the amount so paid by Plaintiff on Defendant's behalf (since this is a direct benefit for the minor children), or Plaintiff may seek reimbursement from Defendant for said expense . . . .

> 41. The PC is hereby authorized to speak to all therapists, service providers, doctors, and any other professionals working with the Heller-Nguyen family . . . .

On 2 July 2015, Defendant filed her notice of appeal. On appeal, she contests the 11 June 2015 order. On 7 August 2015, Defendant moved pursuant to Rule 62(d) to stay all custody proceedings in this matter. On 25 September 2015, the trial court granted Defendant's motion to stay.

II. Standard of Review

"In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact." *Peters v. Pennington*, 210 N.C. App. 1, 12–13, 707 S.E.2d 724, 733 (2011) (citations omitted). "The trial court is vested with broad discretion in child custody cases, and thus, the trial court's order should not be set aside absent an abuse of discretion." *Dixon v. Gordon*, 223 N.C. App. 365, 371, 734 S.E.2d 299, 304 (2012) (citation omitted).

III. Analysis

Defendant contends (1) the trial court did not have jurisdiction to modify child support in its 11 June 2015 order (hereinafter "June Order"), (2) erred in reappointing Parenting Coordinator Batch, and (3) erred in offsetting Plaintiff's child support arrears. We affirm in part and remand in part.

Defendant does not challenge the trial court's findings of fact, and therefore, the findings are binding on appeal. *Peters*, 210 N.C. App. at 13, 707 S.E.2d at 733 (citations omitted).

A. Jurisdiction to Modify Child Support

[1] Defendant contends the trial court did not have jurisdiction to modify child support in the June Order because "[t]here was no motion before the trial court to modify child support." However, Defendant does not challenge the trial court's jurisdiction to modify child custody.

Under North Carolina law, a child support order "may be modified or vacated at any time, upon [a] motion in the cause and showing of changed circumstances by either party or anyone interested subject to the limitations of [N.C. Gen. Stat. §] 50-13.10." N.C. Gen. Stat. § 50-13.7(a) (2015). "Once 'the threshold issue of substantial change in

circumstances has been shown' by a preponderance of the evidence, the trial court then 'proceeds to follow the [North Carolina Child Support] Guidelines and to compute the appropriate amount of child support.' " *McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 535–36 (1995) (citation omitted); *see also Armstrong v. Droessler*, 177 N.C. App. 673, 675, 630 S.E.2d 19, 21 (2006) (citation omitted). If a trial court follows this two-step process by making such a finding and calculating the child support obligation under the North Carolina Child Support Guidelines, then the trial court modifies the child support obligation.

The record shows Plaintiff moved to modify child support on 29 August 2013. Through its 6 March 2015 order, the trial court granted Plaintiff's motion and changed his monthly child support obligation from $2,740.94 to $1,802.46. Plaintiff's child support obligation has remained unchanged and the June Order does not modify that amount. Notwithstanding the second issue concerning Plaintiff's child support arrears, we dismiss Defendant's contention because the trial court did not modify Plaintiff's child support obligation.

[2] Additionally, this Court observes there are no jurisdictional issues concerning modification of child custody. Prior to the June Order, Parenting Coordinator Batch, using Wake County Domestic Form 26, requested the trial court modify custody to allow for Wednesday drop off times. Parenting Coordinator Batch's request seems to contemplate the requirements set out by N.C. Gen. Stat. § 50-13.7 (2015), "Modification of order for child support or custody." This tends to raise unanswered questions as to whether a parenting coordinator can move as an interested party to modify a child support or child custody order under N.C. Gen. Stat. § 50-13.7, and whether standard forms like Wake County Domestic Form 26 can qualify as a "motion in the cause . . . showing a changed circumstances." N.C. Gen. Stat. § 50-13.7(a). However, these concerns are not ripe for consideration in the case *sub judice* because "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005). Moreover, the trial court exercised its discretion under N.C. Gen. Stat. § 50-92(b), and gave Parenting Coordinator Batch authority to resolve disputes surrounding transition time, pickup, delivery, and transportation to and from visitation, instead of granting Parenting Coordinator Batch's motion as a motion to modify child custody.[1] *See* N.C. Gen. Stat. § 50-92(b) (2015)

1. "Notwithstanding the appointment of the parenting coordinator, the court shall retain exclusive jurisdiction to determine fundamental issues of custody, visitation, and support, and the authority to exercise management and control of the case." N.C. Gen. Stat. § 50-91(c) (2015).

("[T]he court may authorize a parenting coordinator to decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve."). Accordingly, we dismiss Defendant's first contention.

B. Reappointing Parenting Coordinator Batch

[3] Under North Carolina law, "the [trial] court may appoint a parenting coordinator at any time during the proceedings of a child custody action involving minor children . . . if all parties consent to the appointment." N.C. Gen. Stat. § 50-91(a) (2015). If the parties do not consent to the appointment of a parenting coordinator, "the court may appoint a parenting coordinator . . . upon entry of a parenting plan only if the court also makes specific findings that the action is a high-conflict case, that the appointment of the parenting coordinator is in the best interests of any minor child in the case, and that the parties are able to pay for the cost of the parenting coordinator." N.C. Gen. Stat. § 50-91(b) (2015). Alternatively, for good cause shown, the trial court may terminate or modify a parenting coordinator's appointment "upon motion of either party[,] at the request of the parenting coordinator, upon the agreement of the parties and the parenting coordinator, or by the court on its own motion." N.C. Gen. Stat. § 50-99(a) (2015).

Here, the trial court made the required statutory findings: (1) this is a high conflict case; (2) reappointing Parenting Coordinator Batch serves the best interests of the children; and (3) the parties are able to pay for Parenting Coordinator Batch's services. Defendant contends the trial court found she is able to pay for Parenting Coordinator Batch's services solely because the trial court allowed Plaintiff to pay such fees on her behalf. This contention is not supported by the record. In the uncontested findings of fact, the trial court found "[t]he parties are able to pay the costs of the [Parenting Coordinator]," and noted Plaintiff paid Defendant a lump sum of $25,000.00 in Fall 2014, in addition to monthly alimony and child support payments. Further, the trial court voiced concern about Defendant's interference with her children's therapists, and her continued hostility towards Plaintiff and Parenting Coordinator Batch. Therefore, based upon the binding and uncontested findings of fact and the trial court's required statutory findings, we hold the trial court did not abuse its discretion in reappointing Parenting Coordinator Batch.

C. Offsetting Child Support Arrears

[4] N.C. Gen. Stat. § 50-13.10 (2015), "Past due child support vested; not subject to retroactive modification; entitled to full faith and credit," protects vested child support arrears and defines when child

support obligations become past due arrears. Section 50-13.10 sets out the following:

> (a) Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:
>
> (1) Before the payment is due or
>
> (2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer so precluded. . . .
>
> (d) For purposes of this section, a child support payment or the relevant portion thereof, is not past due, and no arrearage accrues:
>
> (1) From and after the date of the death of the minor child for whose support the payment, or relevant portion, is made;
>
> (2) From and after the date of the death of the supporting party;
>
> (3) During any period when the child is living with the supporting party pursuant to a valid court order or to an express or implied written or oral agreement transferring primary custody to the supporting party;
>
> (4) During any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make the payment. . . .
>
> (e) When a child support payment that is to be made to the State Child Support Collection and Disbursement Unit is not received by the Unit when due, the payment is not a past due child support payment for purposes of this section, and no arrearage accrues, if the payment is actually made to and received on time by the party entitled

> to receive it and that receipt is evidenced by a canceled check, money order, or contemporaneously executed and dated written receipt. Nothing in this section shall affect the duties of the clerks or the IV-D agency under this Chapter or Chapter 110 of the General Statutes with respect to payments not received by the Unit on time, but the court, in any action to enforce such a payment, may enter an order directing the clerk or the IV-D agency to enter the payment on the clerk's or IV-D agency's records as having been made on time, if the court finds that the payment was in fact received by the party entitled to receive it as provided in this subsection.

Id.

In the instant case, the trial court found Parenting Coordinator Batch's services directly serve the best interests of the children. On appeal, this uncontested finding of fact is binding.

N.C. Gen. Stat. § 50-95 states, "The parenting coordinator shall be entitled to reasonable compensation from the parties for services rendered and to a reasonable retainer." N.C. Gen. Stat. § 50-95(a) (2015). The trial court may appoint a parenting coordinator "contingent upon the parties' payment of a specific fee . . . ." N.C. Gen. Stat. § 50-95(b) (2015). In the event the parties do not pay the parenting coordinator, "[t]he parenting coordinator shall not begin any duties until the fee has been paid." *Id.*

In North Carolina, the child's welfare "is the 'polar star' in the matters of custody and maintenance, yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the child and the ability of the father to meet the needs." *Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967) (citation omitted). To achieve this end, the trial court declared, "If Plaintiff pays for Defendant's share of the Parenting Coordinator's fee, then each dollar paid by Plaintiff on behalf of Defendant shall reduce Plaintiff's child support arrearage by the amount so paid by Plaintiff on Defendant's behalf (since this is a direct benefit for the minor children)." This is error to the extent that it allows Plaintiff to offset vested child support arrears owed to Defendant. *See* N.C. Gen. Stat. § 50-13.10(a) (2015).

The trial court may, in its discretion, consider offsetting future advances on Plaintiff's child support obligations. The trial court is directed to review the procedural requirements and exceptions enumerated in N.C. Gen. Stat. § 50-13.10(a) (2015), and to consider other

alternatives to continue Parenting Coordinator Batch's services to best serve the children's interests.

We note in passing that this issue may also be resolved through a civil contempt proceeding against Defendant.

IV. Conclusion

For the foregoing reasons we affirm in part and remand in part.

AFFIRMED IN PART, REMANDED IN PART.

Judges CALABRIA and TYSON concur.

SOUTH CAROLINA TELECOMMUNICATIONS GROUP HOLDINGS, D/B/A SPIRIT COMMUNICATIONS, PLAINTIFF
v.
MILLER PIPELINE LLC, DEFENDANT

No. COA15-969

Filed 5 July 2016

1. Negligence—summary judgment—affidavit—excavation work

The trial court did not err by granting defendant's motion for summary judgment on a negligence claim. An affidavit failed to create a genuine issue of material fact on the issue of whether defendant was negligent and further demonstrated that defendant complied with all relevant portions of the Underground Damage Prevention Act in performing its excavation work.

2. Trespassing—motion for summary judgment—excavation activities—legal authority

The trial court did not err by granting defendant's motion for summary judgment on a trespassing claim. There was no suggestion in the record that defendant lacked legal authorization to conduct the pertinent excavation activities. The impact with the cable was not intentional and instead resulted by accident as a result of the fact that the cable was not properly marked.

Appeal by plaintiff from order entered 2 June 2015 by Judge Jesse B. Caldwell in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 January 2016.

Matthew E. Cox, LLC, by Matthew E. Cox, for plaintiff-appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Jeffrey D. Keister and Joseph D. Budd, for defendant-appellee.

DAVIS, Judge.

South Carolina Telecommunications Group Holdings, d/b/a Spirit Communications ("Plaintiff") appeals from the trial court's order granting summary judgment in favor of Miller Pipeline LLC ("Defendant"). On appeal, Plaintiff contends that the trial court erred by granting Defendant's motion for summary judgment despite the existence of a genuine issue of material fact. After careful review, we affirm the trial court's order.

Factual Background

Plaintiff provides Internet, data, and voice communication services to consumers in South Carolina, North Carolina, and Georgia. To facilitate this service, Plaintiff relies, in part, upon underground fiber optic cables to transmit data. One such fiber optic cable, designated as "NC-W5 Huntsville to Shelby" ("the Cable"), was buried along Highway 27 outside of Bolger City, North Carolina.

On 26 February 2013, Defendant, a company that installs pipelines, entered into a contract with Monroe Roadways Contractors, Inc. to install "a force main, gravity sewer and pump station" in Lincoln County. The project required excavation in the area where the Cable was buried along Highway 27.

Prior to beginning the excavation, Defendant contacted North Carolina's One-Call system ("the One-Call System") in accordance with the provisions of the Underground Damage Prevention Act ("the Act"), formerly codified as N.C. Gen. Stat. § 87-100 *et seq.*,[1] to ensure that all entities with underground utility lines in the vicinity would be provided with notice and afforded the opportunity to clearly mark their underground lines with surface paint in order to minimize the likelihood that Defendant's excavation work would damage them. Plaintiff, upon receiving this notice, hired a company called Synergy One to mark the Cable.

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1. We note that 2013 N.C. Sess. Laws ch. 407, §§ 1-2 repealed and replaced the Act with the Underground Utility Safety and Damage Prevention Act, codified as N.C. Gen. Stat. § 87-115 *et seq.*, effective 1 October 2014. However, the Act was still in effect at the time of the 7 March 2013 incident giving rise to the present appeal.

After all of the underground lines in the vicinity had been marked but before Defendant began its excavation work, rain washed away a significant portion of the surface paint marking the Cable and various other underground lines. Defendant again contacted the One-Call System, and the underground lines in the vicinity — including the Cable — were once again marked with surface paint.

On 7 March 2013, Defendant's employees began their excavation work. At approximately 9:28 a.m. on that same day, an employee of Defendant struck the Cable, damaging it and rendering it out of service for approximately 16 hours before it could be repaired.

On 26 August 2014, Plaintiff filed a complaint against Defendant in Mecklenburg County Superior Court alleging negligence and trespass in connection with the damage caused to the Cable. On 17 April 2015, Defendant filed a motion to dismiss and, in the alternative, a motion for summary judgment. In support of its motion for summary judgment, Defendant filed the affidavits of Eugene Hamilton ("Hamilton"), the lead driller for Defendant, and Richard Bowles ("Bowles"), Defendant's safety and quality coordinator. Plaintiff responded to Defendant's motion by submitting the affidavit of Michael Baldwin ("Baldwin"), Plaintiff's vice-president of legal affairs.

Defendant's motion was heard before the Honorable Jesse B. Caldwell on 19 May 2015. At the conclusion of the hearing, the trial court granted Defendant's motion for summary judgment. A written order reflecting the trial court's ruling was filed on 2 June 2015. Plaintiff gave timely notice of appeal on 15 June 2015.

Analysis

I. Negligence Claim

[1] Plaintiff first argues that the trial court erred in granting summary judgment in favor of Defendant on Plaintiff's negligence claim because Baldwin's affidavit raised a genuine issue of material fact that required resolution by a factfinder at trial. We disagree.

"The entry of summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. An order granting summary judgment is reviewed *de novo* on appeal." *Martin Marietta Materials, Inc. v. Bondhu, LLC*, __ N.C. App. __, __, 772 S.E.2d 143, 145 (2015) (internal citation and quotation marks omitted).

It is well settled that

> [o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. It is also clear that the opposing party is not entitled to have the motion denied on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact. More than allegations are required because anything less would allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Van Reypen Assocs., Inc. v. Teeter, 175 N.C. App. 535, 540, 624 S.E.2d 401, 404-05 (internal citations and quotation marks omitted), *disc. review improvidently allowed*, 361 N.C. 107, 637 S.E.2d 536 (2006).

Rule 56(e) of the North Carolina Rules of Civil Procedure addresses the requirements for affidavits submitted in connection with a motion for summary judgment and provides, in pertinent part, as follows:

> (e) Form of affidavits; further testimony; defense required. — Supporting and opposing affidavits *shall be made on personal knowledge*, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

N.C.R. Civ. P. 56(e) (emphasis added).

In applying Rule 56(e), our appellate courts have held that

> [a]ffidavits supporting a motion for summary judgment must be made on personal knowledge. Although a Rule 56 affidavit need not state specifically it is based on personal knowledge, its content and context must show its material parts are founded on the affiant's personal knowledge. Our courts have held affirmations based on personal awareness, information and belief, and what the affiant thinks, do not comply with the personal knowledge requirement of Rule 56(e). Knowledge obtained from the review of

> records, qualified under Rule 803(6), constitutes personal knowledge within the meaning of Rule 56(e).

Hylton v. Koontz, 138 N.C. App. 629, 634-35, 532 S.E.2d 252, 256 (2000) (internal citations, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001).

This Court has previously stated that

> [t]he Act addresses logistical problems which arise when excavation is necessary in the vicinity of a utility company's underground cable lines. . . . For a utility to undertake excavations, it must know the position of other cables or lines in an area. The Act outlines the framework that should be followed prior to excavating in an area where underground utility lines are present. Generally, a person planning to excavate near underground utility lines must provide at least two days' notice to the utility. Once notified, the onus is on the utility company to locate and describe all of its lines to the excavating party. *Failure to identify proprietary cable lines, after a proper request by the excavating party, absolves an excavator from liability for damage to the notified utility's line.*

Lexington Tel. Co. v. Davidson Water, Inc., 122 N.C. App. 177, 179, 468 S.E.2d 66, 68 (1996) (internal citations omitted and emphasis added).

In the present case, the resolution of Plaintiff's negligence claim hinged on whether the marking procedure contemplated by the Act was followed. In essence, Plaintiff alleges that the Cable was properly marked at the time of the injury, while Defendant has presented evidence to the contrary.

At the summary judgment stage, Defendant submitted the affidavit of Hamilton, its lead driller at the site of the 7 March 2013 excavation, who testified based on his personal knowledge that (1) advance notice was provided by Defendant to the owners of underground utilities in the area; (2) all lines in the area were marked with surface paint applied to the surface of the ground; and (3) "[t]here were no locate markings within 2½ feet (plus the width of the underground line) of the point of impact with the underground line as set forth hereinabove. In fact, the nearest marking was at least 6 feet from this particular point of impact."

Defendant also offered the affidavit of Bowles, who stated that he too had personal knowledge of the events of 7 March 2013 and that (1) "[t]here were no lines, paint, marks, locates or other indication anywhere

in the vicinity of the point of impact with the fiber optic line to notify [Defendant] or others that the line was buried in that location"; and (2) "[t]here were no locate markings within 2½ feet (plus the width of the underground line) of the point of impact with the underground line as set forth hereinabove. In fact, there were no locates at all in the vicinity of this particular point of impact."

The only evidence offered by Plaintiff in response to Defendant's summary judgment motion was the affidavit of Baldwin.[2] In his affidavit, Baldwin simply makes the conclusory statement that "[a]ccording to photographs and video, the fiber optic cables were clearly marked and delineated." Nowhere in the affidavit does Baldwin explain the specific "photographs and video" to which he is referring. Nor does the affidavit provide any indication that he actually possessed personal knowledge on this issue or that the statements in his affidavit were based upon records he reviewed that were admissible under Rule 803(6) of the North Carolina Rules of Evidence.

We find our opinion in *Eugene Tucker Builders, Inc. v. Ford Motor Co.*, 175 N.C. App. 151, 622 S.E.2d 698 (2005), *cert. denied*, 360 N.C. 479, 630 S.E.2d 926 (2006), instructive. In that case, the plaintiff leased a vehicle manufactured by Ford Motor Company ("Ford") from an authorized Ford dealership. Ford provided an express warranty for the vehicle only covering damage resulting from the installation of parts manufactured by *Ford-authorized* manufacturers. *Id.* at 152, 622 S.E.2d at 699.

The plaintiff had an anti-theft device installed in the vehicle that was manufactured by Directed Electronics, Inc. ("DEI"). The device caused severe damage to the vehicle's electronics system, and the plaintiff sued Ford based on the express warranty. *Id.* Ford filed a motion for summary judgment supported by the affidavit of Jim Cooper, a parts supplier for Ford, who testified that DEI was not a Ford-authorized manufacturer and that, for this reason, the anti-theft device was not covered under the express warranty. *Id.* at 155, 622 S.E.2d at 701. In response, the plaintiff submitted the affidavit of James Rhyne, a former manager of the third-party company that installed the DEI anti-theft device, stating his *belief* that DEI was an authorized manufacturer of Ford electronic systems. *Id.* at 153-55, 622 S.E.2d at 699-701. The trial court granted Ford's motion. *Id.* at 153, 622 S.E.2d at 699-700.

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2. We note that Baldwin's job title is vice-president of legal affairs for Plaintiff.

On appeal, we affirmed the trial court's order.

> After carefully reviewing the record, we conclude that plaintiff's affidavit does not create an issue of material fact regarding whether the manufacturer of the anti-theft device, DEI, was a Ford-authorized manufacturer. When affidavits are offered in opposition to a motion for summary judgment, they must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. Here, Mr. Rhyne's affidavit does not indicate how he had personal knowledge that DEI is an authorized Ford parts manufacturer. It appears that the source of Mr. Rhyne's information is an exhibit attached to his affidavit, which is a diagram published by DEI illustrating how to wire an anti-theft bypass to a Ford vehicle. This document does not establish that DEI is a Ford-authorized manufacturer. The document was not published by Ford, and Mr. Rhyne avers no other affiliation with Ford Motor Company or Ford-authorized manufacturers. Also, Mr. Rhyne does not assert that his knowledge is based upon business records that he reviewed in the course of his employment. As the content of the Rhyne affidavit does not satisfy the personal knowledge requirement of Rule 56(e), it could not have been considered by the trial court in ruling on the summary judgment motion.

Id. at 156, 622 S.E.2d at 701 (internal citations, quotation marks, brackets, and ellipses omitted).

In our opinion, we contrasted Rhyne's affidavit with the affidavit from Cooper, noting that Cooper's affidavit "reveals that the affiant has personal knowledge of Ford-authorized manufacturers through employment positions. As the moving party, defendant has established that a non-Ford part was installed on plaintiff's vehicle and that this part is excluded from coverage under the express warranty." *Id.* at 156, 622 S.E.2d at 702.

Similarly, in the present case, Baldwin's affidavit does not state or otherwise provide any indication that his testimony was based on his personal knowledge of the marking of the Cable or of Defendant's excavation activities on 7 March 2013. Moreover, Baldwin's affidavit consists almost entirely of verbatim (or almost verbatim) recitations of the allegations set forth in Plaintiff's complaint. The affidavit is

replete with conclusory statements — many of which contain purely legal conclusions.

We dealt with a similar situation in *Campbell v. Bd. of Educ. of Catawba Cty. Sch. Admin. Unit*, 76 N.C. App. 495, 333 S.E.2d 507 (1985), *disc. review denied*, 315 N.C. 390, 338 S.E.2d 878 (1986), in which we held as follows:

> Plaintiff's affidavit merely restating the allegations of the complaint consists of conclusory allegations, unsupported by facts. It thus does not suffice to defeat a motion for summary judgment. When the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment.

Id. at 498-99, 333 S.E.2d at 510 (internal citations, quotation marks, and brackets omitted).

We similarly conclude here that Baldwin's affidavit failed to create a genuine issue of material fact on the issue of whether Defendant was negligent. Unlike Baldwin, Hamilton and Bowles offered testimony based on their own personal knowledge, and their testimony established that the location of the Cable had not been properly marked. Their affidavits further demonstrate that Defendant complied with all relevant portions of the Act in performing its excavation work. Therefore, summary judgment was properly granted for Defendant as to Plaintiff's negligence claim.

II. Trespass Claim

[2] In a related argument, Plaintiff argues that the trial court erred in granting summary judgment to Defendant on its trespass claim. Once again, we disagree.

The elements of a trespass claim are "(1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass." *Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 289, 618 S.E.2d 768, 772 (2005) (citation and quotation marks omitted), *aff'd per curiam*, 360 N.C. 397, 627 S.E.2d 462 (2006). "[I]n the absence of negligence, trespass to land requires that a defendant intentionally enter onto the plaintiff's land." *Rainey v. St. Lawrence Homes, Inc.*, 174 N.C. App. 611, 614, 621 S.E.2d 217, 220 (2005).

As with its negligence claim, Plaintiff has failed to show a genuine issue of material fact with regard to its trespass claim. There is no suggestion in the record that Defendant lacked legal authorization to conduct the excavation activities at issue. Moreover, as discussed above, the admissible evidence of record established that the impact with the Cable was not intentional and instead resulted by accident as a result of the fact that the Cable was not properly marked. Moreover, Plaintiff tacitly acknowledged Defendant's right to engage in excavation activities by twice hiring a third-party to mark the Cable so that it would not be disturbed during Defendant's excavation activities. Accordingly, no valid trespass claim exists on these facts.[3]

Conclusion

For the reasons stated above, we affirm the order of the trial court granting summary judgment in favor of Defendant.[4]

AFFIRMED.

Judges CALABRIA and TYSON concur.

3. Given the unrebutted evidence that Plaintiff failed to properly mark the Cable, Defendant is also absolved from liability for damages on either of Plaintiff's theories due to the provision of the Act providing that "[f]ailure to identify proprietary cable lines, after a proper request by the excavating party, absolves an excavator from liability for damage to the notified utility's line." *Lexington Tel. Co.*, 122 N.C. App. at 179, 468 S.E.2d at 68.

4. Based on our resolution of this appeal on the grounds set forth herein, we need not address Defendant's alternative argument that Plaintiff was required to produce expert testimony as to the applicable standard of care Defendant should have employed in conducting its excavation activities. *See Youse v. Duke Energy Corp.*, 171 N.C. App. 187, 196, 614 S.E.2d 396, 403 (2005) ("Since our determination of the foregoing issues [is] dispositive of this case on appeal, we need not address plaintiff's remaining assignments of error.").

STATE OF NORTH CAROLINA
v.
BRIAN JACK FRAZIER

No. COA15-1089

Filed 5 July 2016

1. Homicide—felony murder—instruction on premeditation denied—no intent to kill

Defendant was not entitled to an instruction on premeditation and deliberation in a felony murder prosecution where the victim was an infant who was repeatedly struck when she would not stop crying. There was no evidence of any specific intent to kill and the evidence did not support the requested instruction. Moreover, there was no theory that would have supported conviction on any lesser-included offense.

2. Homicide—instructions—underlying offense—automatism—evidence not sufficient

In a felony murder prosecution in which defendant was charged with killing a crying baby after he "snapped" and began punching the baby, there was not a conflict in the underlying evidence supporting a lesser-included offense where defendant's argument was based on the trial court's inclusion of an instruction on automatism. The only evidence of defendant's possible unconsciousness came from his statement to detectives; however, that statement, along with the autopsy evidence, was sufficient to raise a reasonable doubt about defendant's consciousness. Furthermore, defendant's inability to explain why he did certain things does not equate to being in a state of unconsciousness when he did them. Defendant gave a detailed confession, including a description of his actions, which was sufficient to prove he was conscious.

3. Homicide—felony murder—felonious child abuse—specific intent

The trial court did not err by denying defendant's request to instruct the jury on the intent required for the predicate felony (child abuse) in a felony murder prosecution. Felonious child abuse does not require any specific intent.

4. Homicide—felony murder—predicate offense—felonious child abuse—merger doctrine

The trial court did not err in a prosecution for felony murder based on felonious child abuse by denying defendant's motion to dismiss the felony murder charge under the felony murder merger rule. Felonious child abuse does not merge with first-degree murder because felonious child abuse requires proof of elements not required to prove first-degree murder and the merger rule does not apply to the motion to dismiss. The felony murder merger doctrine can apply to sentencing. Here, there was not a separate indictment or separate verdict for felonious child abuse, and the trial court properly sentenced defendant only for first-degree murder.

5. Homicide—felony murder—predicate felony—felonious child abuse

The trial court did not err in a prosecution for felony murder based on felonious child abuse by denying defendant's requested instruction that a single assault on a single victim could not serve as the predicate for felony murder. It is well settled that felonious child abuse with a deadly weapon (defendant's hands) may serve as the predicate felony for felony murder.

Appeal by defendant from judgment entered 8 April 2015 by Judge Richard L. Doughton in Guilford County Superior Court. Heard in the Court of Appeals 8 March 2016.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

BRYANT, Judge.

Where the trial court did not err in instructing the jury on first-degree felony murder and the intent required for felonious child abuse as a predicate felony to felony murder, and where the trial court properly denied defendant's motion to dismiss based on the felony merger doctrine, we affirm the verdict of the jury and find no error in the judgment of the trial court.

In November 2012, twenty-year-old defendant Brian James Frazier was living with his girlfriend, Stefany Ash, in High Point, North Carolina.

Defendant and Ash had two children together, an eighteen-month-old boy and a thirteen-day-old baby boy named Kahn.[1] Defendant had taken time off from high school to help Ash with Baby Kahn, but had stayed up all night for several nights playing video games.

On the afternoon of 27 November 2012, around 3:00 PM, Guilford County Emergency Medical Services ("EMS") received a 911 call to respond to what they believed was the cardiac arrest of an approximately one-month-old child. EMS, High Point Fire Department, and Officer Matthew Blackmon of the High Point Police Department all responded to the call shortly after 3:00 PM. When the responders arrived, they had to knock and wait for defendant to unlock the door and let them in.

Defendant led EMS and Officer Blackmon to a room at the back of the house. They found a bruised infant, Baby Kahn, lying on its back in a bassinet. The 911 call had indicated that the baby's breathing difficulties had just occurred. However, Baby Kahn was cold to the touch, had no pulse, and rigor mortis had already set in. He was also very pale and bloated, with bruises on his chest.

Upon seeing Baby Kahn's body, Officer Blackmon concluded the child's death had not just occurred, and started an investigation. He called the violent crimes supervisor, set in motion the application for a search warrant, and asked defendant to step into the kitchen in order to separate him from Stefany Ash, who was also present and appeared upset.

Detectives Leonard and Meyer of the major crimes unit arrived at the house at approximately 3:30 PM. They took about five minutes to observe garbage, half-eaten food, and raw meat lying on the floor of the house, as well as a sink filled with dirty water, an open refrigerator, and a dirty or moldy high chair. Detective Meyer interviewed Ash while Detective Leonard asked defendant for background information about what occurred.

Defendant stated that the night before he had been playing video games all night until about 5:00 AM. As soon as defendant laid down to go to sleep, Baby Kahn began to stir and cry, and defendant explained that at this point he snapped and lost control. Defendant said he grabbed Baby Kahn by the neck with one hand while he struck him several times with his other hand. Defendant said he hit the baby in the head, body,

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1. The victim in this case is a deceased murder victim. Rules 3.1 and 4(e) of the Rules of Appellate Procedure therefore do not apply in this case. The surviving minor child is not named herein.

and arms. At this point in the conversation, defendant dropped his head in his hands and began to cry.

Defendant was taken to the police department. There he was arrested, then taken to an interview room where he waived the *Miranda* warnings given by Detectives Leonard and Meyer. Defendant talked at length and in detail regarding the manner in which he had caused his son's death. On 11 February 2013, defendant was indicted on one count of first-degree murder. The case came on for jury trial at the 30 March 2015 Session of the Guilford County Superior Court, the Honorable Richard L. Doughton, Judge presiding.

Defendant's interview with Detectives Leonard and Meyer was videotaped and played for the jury at trial and admitted into evidence as State's Exhibit 12. During the taped interview, defendant said he "snapped" and lost control, striking the baby in the head, body, and arms. Defendant said he was in high school, but had been staying home to take care of Baby Kahn and the other minor child while Ash healed from surgery after giving birth by C-section. Defendant told the detectives about several social workers and a doctor who regularly came to the house to help them, stating that these visits started after the first baby was born because someone had anonymously reported that the house they were living in had black mold.

Defendant recounted the events of the night before, saying he had stayed up all night playing video games for the past three or four nights, and right when he went to lay down to go to sleep, the baby woke up and started fussing. Defendant said he "guessed he just couldn't take it," "snapped," and "lost control." Defendant said he was not thinking; he was so exhausted he claimed it was as if he had blacked out. Defendant stated that he had never lost control like this with either of the children before, he did not use drugs or alcohol, and he had never been in trouble. He also did not think he had hurt Baby Kahn because the baby seemed to be breathing normally when defendant laid back down to go to sleep.

Defendant slept until about 2:00 PM the next afternoon. Ash got up first and said she was going to check on Baby Kahn and feed him. When she told defendant that Baby Kahn looked pale, defendant walked over to look at him and found the baby dead. After they discovered the baby was dead, Ash attempted to convince defendant to flee, but defendant claimed he did not want to do that, he knew he had done wrong and needed to pay for it.

Dr. Lauren Scott, a forensic pathologist in the Office of the Chief Medical Examiner, testified that she performed an autopsy on Baby

Kahn on 28 November 2012. The body had several external bruises: two bruises on the left forehead, one bruise to the side of the left eye, a small bruise on the right eyelid, a larger bruise on the central chest, a smaller bruise to the right of the center chest, and a small bruise on the left abdomen. There were also tiny hemorrhages in the lining of the eyes.

The internal examination revealed bruising within the abdominal cavity underlying the bruise on the outside. There was a tear or laceration on the underside of the liver and some bleeding from that tear into the capsule that surrounds the liver and into the abdominal cavity. Inside the scalp were several small bruises on the left forehead region and a large area of bleeding from the back to the top of the head across the midline, injuries consistent with blunt force trauma. There was also bleeding between the two membranes that surround the brain and between the brain surface and inner membrane. The distribution of bleeding on the brain indicated there were at least two different applications of blunt force injury to the head.

Dr. Scott's opinion as to the cause of death was blunt force trauma to the abdomen and head. Her opinion was that there were at least three instances of blunt force trauma applied to Baby Kahn—at least two separate injuries to the head and at least one, and up to three, injuries to the abdomen and chest region. Dr. Scott opined that death would likely have been instantaneous given the significant bleeding and injuries in the head.

At the close of the State's evidence and at the close of all the evidence at trial, defendant moved to dismiss the charge of felony murder, based on the State's asserted failure to provide evidence of the required *mens rea*, and based on the felony merger doctrine. Defendant also argued that the submission of the charge of felony murder would violate the Fifth, Sixth, and Fourteenth Amendments. The trial court denied these motions to dismiss.

On 8 April 2015, the jury found defendant guilty of first-degree murder. The trial court entered a sentence of life imprisonment without parole. Defendant appeals.

On appeal, defendant contends that the trial court erred by (I) denying defendant's requests for certain jury instructions on premeditation and deliberation; (II) instructing the jury that defendant did not need to intend to seriously injure the child; (III) denying defendant's motion to dismiss based on the felony merger doctrine; and (IV) denying

defendant's request to instruct the jury that a single assault on a single victim cannot serve as the predicate felony for felony murder.

I

[1] Defendant first argues that the trial court erred by denying defendant's request to instruct the jury on first-degree murder based on premeditation and deliberation and on other lesser included offenses. He also argues that an instruction based on premeditation and deliberation was appropriate because the evidence of the underlying felony was in conflict. We disagree.

"Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence." *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001) (citation omitted). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Epps*, 231 N.C. App. 584, 586, 752 S.E.2d 733, 734 (2014) (alteration in original) (citation omitted), *aff'd*, 368 N.C. 1, 769 S.E.2d 838 (2015). Here, defendant was tried and convicted for first-degree murder based on felony murder.

Felony murder is defined as "[a] murder which shall be . . . committed in the perpetration or attempted perpetration of [certain named felonies] . . . with the use of a deadly weapon" and is considered "murder in the first degree . . . ." N.C. Gen. Stat. § 14-17(a) (2015). "[P]remeditation and deliberation are not elements of the crime of felony-murder." *State v. Swift*, 290 N.C. 383, 407, 226 S.E.2d 652, 669 (1976).

During the charge conference, defendant requested that the jury be instructed on premeditation and deliberation with lesser offenses included, as well as on felony murder. Defendant argued that preventing the defense from arguing premeditation and deliberation "denie[d] [defendant] due process, equal protection, cruel and unusual punishment . . . ." The trial court denied defendant's request.

We hold that the trial court did not err in denying defendant's request for an instruction on premeditated first-degree murder, because there was no evidence that defendant possessed a "specific intent to kill formed after some measure of premeditation and deliberation." *State v. Peterson*, 361 N.C. 587, 595, 652 S.E.2d 216, 223 (2007) (citations omitted). "Specific intent to kill . . . is . . . a necessary constituent of the elements of premeditation and deliberation." *State v. Jones*, 303 N.C.

500, 505, 279 S.E.2d 835, 838–39 (1981) (citation omitted); *see also State v. Holt*, 342 N.C. 395, 397–98, 464 S.E.2d 672, 673 (1995) ("Premeditation and deliberation are necessary elements of first-degree murder based on premeditation and deliberation . . . . Premeditation means that the defendant thought out the act beforehand for some length of time, however short. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.").

Indeed, defense counsel, in requesting the instruction, acknowledged that the evidence did not meet the sufficiency standard for first-degree murder: "I'm not suggesting [the facts are] sufficient to convict [on first-degree murder], but I think there's enough from which a juror -- jury may want to address it . . . ." Defendant's counsel argued during the charge conference that because the choking and strangling of Baby Kahn took place after defendant heard the baby making noises, this might mean defendant was not unconscious or "blacked out" and therefore there was premeditation and deliberation on the part of defendant. Notwithstanding defendant's argument, which was rejected by the trial court, all of the evidence at trial tended to show that defendant "snapped," not that his actions were premeditated. Further, the evidence showed that even when defendant was pressed by the detectives to admit he planned his actions, defendant insisted he did not plan them, that he was not thinking, and that he "just snapped."

Here, there was no evidence of any specific intent to kill. Rather, the evidence consistently showed that defendant "lost control" and punched two-week-old Baby Kahn. Because there was no evidence of specific intent to kill, the existing evidence was insufficient to support an instruction on first-degree murder based on premeditation and deliberation.

In addition, there was no theory that would have supported conviction of any lesser-included offense (second-degree murder, involuntary or voluntary manslaughter) of first-degree murder. Second-degree murder cannot be a lesser-included offense of first-degree murder based on felony murder alone, because malice is not an element of felony murder. *State v. Golden*, 143 N.C. App. 426, 434–35, 546 S.E.2d 163, 169 (2001) (citing *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982), *overruled on other grounds*, *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993)). There is also no offense of second-degree felony murder in this jurisdiction. *Id.* at 435, 546 S.E.2d at 169 (citation omitted).

We realize defendant argued zealously at trial, and now on appeal, that the trial court should have given a first-degree murder instruction based on premeditation and deliberation, and further realize that defendant's trial counsel's only reason for pressing for the instruction was to have the option of lesser-included offenses—second-degree murder, manslaughter, etc.—presented to the jury for their consideration. However, defendant's arguments, no matter how strongly stated, do not change the law. Felony murder was the only first-degree murder theory on which the trial court could properly instruct the jury.

"[W]hen the law and evidence justify the use of the felony murder rule," as it does here, "the State is not required to prove premeditation and deliberation, and neither is the [trial] [c]ourt required to submit to the jury second degree murder or manslaughter unless there is evidence to support [such lesser offenses]." *See State v. Strickland*, 307 N.C. 274, 292, 298 S.E.2d 645, 657 (1983) (citation and quotation mark omitted), *overruled on other grounds*, 317 N.C. 193, 344 S.E.2d 775 (1986). Defendant's argument that he was entitled to an instruction on premeditation and deliberation is overruled.

[2] Defendant also argues that because the underlying felony (here, child abuse) was in conflict, such conflicting evidence supports a lesser-included offense. When the State proceeds on a theory of felony murder only, the question "turns on whether the evidence of [the underlying felony] was in conflict." *State v. Gwynn*, 362 N.C. 334, 337, 661 S.E.2d 706, 707 (2008) (citation omitted). Specifically, defendant contends that because the trial court submitted the pattern jury instruction on automatism, it must have found evidence that supported the jury's possible finding of lack of *mens rea* required for the underlying felony.

"The practical effect of automatism is that the 'absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.' " *State v. Boggess*, 195 N.C. App. 770, 772, 673 S.E.2d 791, 793 (2009) (quoting *State v. Fields*, 324 N.C. 204, 208, 376 S.E.2d 740, 742 (1989)). "The rule in this jurisdiction is that where a person commits an act without being conscious thereof, the act is not a criminal act even though it would be a crime if it had been committed by a person who was conscious." *State v. Jerrett*, 309 N.C. 239, 264, 307 S.E.2d 339, 353 (1983) (citations omitted). "[A]utomatism . . . is a complete defense to a criminal charge . . . and . . . the burden rests upon the defendant to establish this defense, unless it arises out of the State's own evidence . . . ." *State v. Cadell*, 287 N.C. 266, 290, 215 S.E.2d 348, 364 (1975).

Here, the only evidence of defendant's possible unconsciousness arose from defendant's statement to detectives where he indicated he was exhausted from playing video games and it "was if he blacked out." However, defendant's statements to detectives, along with the medical evidence of the condition of Baby Kahn's body at autopsy, was sufficient to show beyond a reasonable doubt that defendant was conscious when he hit Baby Kahn.

Furthermore, a defendant's inability to explain why he did certain criminal acts does not equate to having been in a state of unconsciousness at the time he committed those acts. In other words, defendant's inability to explain *why* he assaulted the child did not render him unable to explain *what* he did to Baby Kahn. *See State v. Boyd*, 343 N.C. 699, 714, 473 S.E.2d 327, 334–35 (1996) (finding the defendant failed to support defense of automatism where he had given a detailed recollection of his actions to police on the day of the murder and only later claimed not to recall the events); *State v. Fisher*, 336 N.C. 684, 705, 445 S.E.2d 866, 877–78 (1994) (holding defendant's detailed statement the day of the murder belied his claim of unconsciousness).

In the instant case, defendant gave a detailed confession to police, including a description of his actions—how he held the baby around the neck with one hand while punching him with the other. We think defendant's own detailed statement is sufficient evidence to prove defendant was conscious when he committed the acts charged. Even on appeal, defendant highlights only his inability to articulate a *reason* for the assault and not any inability to *recall* the events. Defendant's asserted defense of automatism does not render any element of felonious child abuse in conflict in this case. Accordingly, where defendant's proposed instruction was not supported by the evidence, defendant has shown no error. This argument is overruled.

II

[3] Defendant next argues that the trial court erred by denying defendant's request to instruct the jury on the intent required for the predicate felony to felony murder. Specifically, defendant contends the trial court was required to instruct the jury that defendant must have intended to inflict serious physical injury on the child, as opposed to intentionally assaulting the child which proximately resulted in serious physical injury, and the trial court's failure to so instruct violated defendant's constitutional right to due process and to be free of cruel or unusual punishment. We disagree.

To sustain a conviction for felonious child abuse, the State must prove that defendant is "[a] parent or any other person providing care to *or* supervision of a child less than 16 years of age" and that the defendant "intentionally inflict[ed] any serious physical injury upon or to the child or . . . intentionally commit[ed] an assault upon the child which result[ed] in any serious physical injury to the child." N.C. Gen. Stat. § 14-318.4(a) (2015) (emphasis added). "In felonious child abuse cases, the State is not required to prove that the defendant specifically intended that the injury be serious." *State v. Krider*, 145 N.C. App. 711, 713, 550 S.E.2d 861, 862 (2001) (citations and quotation marks omitted). " 'This crime does not require the State to prove any specific intent on the part of the accused.' " *State v. Perry*, 229 N.C. App. 304, 319, 750 S.E.2d 521, 533 (2013) (quoting *State v. Pierce*, 346 N.C. 471, 494, 488 S.E.2d 576, 589 (1997)).

Felony murder where the predicate felony is felonious child abuse requires the State to prove that "the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon." *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589. "When a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons." *Id.* Furthermore, to support a felony murder conviction based on felonious child abuse, the State does not have to show that a defendant intended for the injury to be serious; the State must only show that the defendant intended to assault the child, which resulted in serious injury. *See Perry*, 229 N.C. App. at 319, 750 S.E.2d at 533 (holding "that the record contained sufficient circumstantial evidence to support a determination that [the d]efendant used his hands as a deadly weapon" on a 14-month-old child).

Indeed, in *Perry*, the defendant appealed his conviction for first-degree murder to this Court, arguing that " 'felony child abuse is not a viable underlying felony' sufficient to support a conviction for first degree murder under the felony murder rule[,]" while at the same time acknowledging " 'that this issue has been decided adversely [to his position] by the Court of Appeals[.]' " *Id.* at 322, 750 S.E.2d at 534 (alteration in original); *see Krider*, 145 N.C. App. at 714, 550 S.E.2d at 863 (affirming the defendant's conviction for first-degree murder based on the felony murder rule where "defendant actually intended to commit the underlying offense (felonious child abuse) with the use of her hands as a deadly weapon").

As defendant's argument on this point is practically identical to the defendant's argument in *Perry*, and because of well-established precedent that "the State is not required to prove any specific intent on the part of the accused" for the crime of felony murder based on child abuse, we overrule defendant's argument.

III

[4] Defendant next argues that the trial court erred by denying his motion to dismiss the felony murder charge for insufficiency of the evidence because the felony murder merger doctrine prevents conviction of first-degree murder when there is only one victim and one assault. Defendant contends the trial court's failure to dismiss the felony murder charge violated his constitutional rights as he was deprived of life and liberty without due process of law. We disagree.

Felony murder elevates a homicide to first-degree murder if the killing is committed in the perpetration or attempted perpetration of certain felonies or any "other felony committed or attempted with the use of a deadly weapon[.]" N.C.G.S. § 14-17(a); *see also State v. Abraham*, 338 N.C. 315, 331–32, 451 S.E.2d 131, 139 (1994) ("[T]he legislature clearly *intended* . . . that felony murder included a killing committed during the commission or attempted commission of a felony 'with the use of a deadly weapon.' " (emphasis added) (quoting *State v. Wall*, 304 N.C. 609, 614, 286 S.E.2d 68, 72 (1982)). "Felony murder, by its definition, does not require intent to kill as an element that must be satisfied for a conviction." *State v. Cagle*, 346 N.C. 497, 517, 488 S.E.2d 535, 548 (1997) (citation and quotation marks omitted).

Here, the offense of felonious child abuse, where defendant's hands were a deadly weapon, served to elevate the killing to first-degree murder under the felony murder rule. Felonious child abuse does not merge with first-degree murder because the crime of felonious child abuse requires proof of specific elements which are not required to prove first-degree murder: that the victim is a child under sixteen, and that defendant was a parent or any other person providing care to or supervision of the child. The crime of felonious child abuse is among those offenses that address specific types of assaultive behavior that have special attributes distinguishing the offense from other assaults that result in death. *See, e.g.*, *State v. Coria*, 131 N.C. App. 449, 456–57, 508 S.E.2d 1, 6 (1998) (holding a defendant may be convicted of and punished for assault with a deadly weapon with intent to kill and for assault with a firearm on a law enforcement officer arising out of the same shooting because each offense contains an element not present in the other). Therefore, our

courts have declined to apply the "merger doctrine" in cases where the underlying felony (here, child abuse) was not an offense included within the murder.

However, defendant's merger argument might apply to sentencing (as opposed to his motion to dismiss). "The felony murder merger doctrine provides that when a defendant is convicted of felony murder only, the underlying felony constitutes an element of first-degree murder and merges into the murder conviction" for purposes of sentencing. *State v. Rush*, 196 N.C. App. 307, 313–14, 674 S.E.2d 764, 770 (2009) (citation and quotation marks omitted). Therefore, "when the sole theory of first-degree murder is the felony murder rule, a defendant cannot be *sentenced* on the underlying felony in addition to the *sentence* for first-degree murder[.]" *State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996) (emphasis added) (citation omitted), *abrogated by State v. Millsaps*, 365 N.C. 556, 572 S.E.2d 770 (2002).

> The merger doctrine does not preclude indictments for both the murder and the underlying felony, nor a guilty verdict for both; rather it requires that, *if a defendant is found guilty of both felony murder and the underlying felony*, the judgment on the underlying felony is arrested, and "merges" into the felony murder conviction.

State v. Juarez, ___ N.C. App. ___, ___, 777 S.E.2d 325, 329 (2015), *review allowed*, *writ allowed*, ___ N.C. ___, 781 S.E.2d 473 (2016).

In the instant case, there was no separate indictment and no separate verdict for the underlying offense of felony child abuse. The jury had only to decide whether defendant was guilty of first-degree murder. The verdict was guilty as to one count of first-degree murder. Defendant was sentenced accordingly. Thus, to the extent that defendant's argument is that he cannot be convicted of felony murder where the underlying felony is child abuse, we reaffirm our analysis in Section II and overrule defendant's argument. *See Perry*, 229 N.C. App. at 322, 750 S.E.2d at 534 (upholding felony murder based on felonious child abuse where hands used as deadly weapon); *Krider*, 145 N.C. App. at 714, 550 S.E.2d at 863 (affirming the "defendant's conviction for first-degree murder based on the felony rule" where "the State proved be-yond a reasonable doubt that the defendant actually intended to commit the under-lying offense (felonious child abuse) with the use of her hands as a deadly weapon").

The trial court did not *sentence* defendant for both first-degree murder and felonious child abuse as the underlying offense of felonious child

abuse was an element of first-degree murder and merged with defendant's first-degree murder conviction. Accordingly, as the trial court did not err in denying defendant's motion to dismiss, and properly sentenced defendant on felony murder, defendant's argument is overruled.

IV

[5] Lastly, defendant argues that the trial court erred by denying defendant's request to instruct the jury that a single assault on a single victim cannot serve as the predicate felony for felony murder. Defendant contends the trial court's denial of this request to instruct the jury that separate and distinct acts were necessary to find felony murder violated defendant's constitutional rights to a fair trial by a unanimous verdict, due process of law, and freedom from cruel and unusual punishment. We disagree.

Defendant had filed a written request for a special jury instruction that a single assault on a single victim cannot serve as the predicate felony for felony murder. The trial court denied defendant's request.

"[R]equested instructions need only be given in substance if correct in law and supported by the evidence." *State v. McNeill*, 360 N.C. 231, 250, 624 S.E.2d 329, 341–42 (2006) (alteration in original) (quoting *State v. Morgan*, 359 N.C. 131, 169, 604 S.E.2d 886, 909 (2004)). The trial court's failure to give a requested instruction is reviewed *de novo*. *Osorio*, 196 N.C. App. at 466, 675 S.E.2d at 149.

As shown in Section III, *supra*, it is well-settled that felonious child abuse with a deadly weapon (here, defendant's hands) may serve as the predicate felony for felony murder. *See Perry*, 229 N.C. App. at 322, 750 S.E.2d at 534; *Krider*, 145 N.C. App. at 714, 550 S.E.2d at 863; *Pierce*, 346 N.C. at 493, 488 S.E.2d at 589. Accordingly, the trial court did not err by denying defendant's requested instruction as it was not a correct statement of the law. Defendant's argument is overruled.

NO ERROR.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
JAMISON CHRISTOPHER GOINS

No. COA15-1183

Filed 5 July 2016

Search and Seizure—traffic stop—suspicion of drug activity

Where officers in a marked, visible patrol vehicle observed defendant's car slowly drive through an apartment complex toward a building that had been identified as a place frequently used for drug sale and distribution, and they simultaneously observed a male appear in front of the building, see their patrol vehicle, and make a loud warning noise, immediately after which the vehicle accelerated and quickly exited the complex, the Court of Appeals held that the trial court erred by denying defendant's motion to suppress evidence obtained in a subsequent stop of defendant by the officers.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered 29 May 2015 by Judge Richard S. Gottlieb in Superior Court, Guilford County. Heard in the Court of Appeals 31 March 2016.

Attorney General Roy Cooper, *by Assistant Attorney General Shawn R. Evans*, *for the State.*

Willis Johnson & Nelson PLLC, *by Drew Nelson*, *for Defendant.*

McGEE, Chief Judge.

Jamison Christopher Goins ("Defendant") was indicted on 8 September 2014 for possession of a firearm by a felon, possession with intent to sell or deliver marijuana, felony possession of marijuana, and possession of drug paraphernalia. The charges against Defendant resulted from evidence obtained following a stop of Defendant's vehicle, a Hyundai Elantra ("the Elantra"), just after midnight on the morning of 14 July 2014. Officer A.T. Branson ("Officer Branson") and Officer T.B. Cole ("Officer Cole") (together, "the officers"), of the Greensboro Police Department, were patrolling in the vicinity of the Spring Manor Apartment Complex ("the apartment complex") late on 13 July 2014 and

into 14 July 2014. At some time prior to 14 July 2014, Officer Branson was talking to the manager of the apartment complex concerning an unrelated matter when the manager stated to him: " 'The apartment complex is getting bad again,' . . . and she also mentioned that she received word from residents in the apartment complex that the occupants of Apartment 408 were involved in both the sale and use of illegal narcotics." "Apartment 408" was actually a building comprised of multiple apartments. Both officers testified the apartment complex was situated in a high-crime drug area, and Officer Cole referred to the apartment complex as "basically an open-air drug market."

Just after midnight on 14 July 2014, the officers were driving a marked police car ("the police car") and decided to drive through the parking lot of Spring Valley Shopping Center ("the shopping center"), which was directly across the street from the apartment complex. Officer Branson was driving the police car, and he turned the police car so that its headlights were focused in the direction of the apartment complex. At the suppression hearing, Officer Cole testified:

> Not long after I began looking, we noticed a white Hyundai Elantra pull into the [apartment] complex and proceed very slowly through.
>
> I observed no one out in the parking lot, no other vehicles running. As I made – as I watched the Elantra and it came around the u-shaped driveway, I noticed an individual [("the man")] standing outside building 408. I advised Officer Branson to pay attention to [the man] and the [Elantra].
>
> As [the Elantra] came around the corner and became – or drove closer to [the man] and that building, 408, I noticed [the man] turn and look towards our police car, because our headlights at that point had basically turned to the point that we were lighting his direction.
>
> He looked at us, looked back at the Elantra, looked at us again, and then shouted something at the passenger side, whatever – that was the side facing him – toward the Elantra. At that point [the man] began to back away and head back into the apartment complex.
>
> The [Elantra] sped up and pulled out of the parking lot. I told Officer Branson to stick with the [Elantra], because you can't get both. After that we decided, based on the

> totality of the circumstances and the reasonable suspicion that we had at that time, that we would go ahead and conduct a traffic stop on the [Elantra].[1]

Officer Branson testified he observed the Elantra driving slowly around the "U-shaped" drive of the apartment complex parking lot; observed the man standing outside building 408, illuminated by the headlights of the police car; observed the man "look in [the] direction [of the police car] and look back at the . . . Elantra, which was [by then] almost in front of [the man;]" was informed by Officer Cole that Officer Cole had "heard someone yell[;]" then observed the Elantra increase its speed and "quickly" exit the apartment complex parking lot; and observed the man turn around and enter apartment building 408. The officers then initiated the stop of the Elantra based upon a belief that there was reasonable suspicion that the occupants of the Elantra and the man were about to conduct an illegal drug transaction.[2] As a result of this stop, the officers discovered that Defendant was in possession of a firearm, marijuana, and drug paraphernalia.

Defendant moved to suppress all evidence obtained as a result of the stop based upon his argument that there was not reasonable suspicion sufficient to justify the stop. Defendant's motion was heard on 13 April 2015, and was denied by order entered 15 April 2015. Defendant preserved his right to appeal the denial of his motion to suppress, and entered guilty pleas for the charges of possession of a firearm by a felon, possession with intent to sell or distribute marijuana, and possession of drug paraphernalia. The charge of possession of marijuana was dismissed pursuant to the plea agreement. Defendant was sentenced to a cumulative eighteen to forty months, the sentences were suspended, and Defendant was placed on supervised probation. Defendant appeals.

Defendant argues that the trial court erred in denying his motion to suppress all evidence obtained pursuant to the stop of the Elantra on 14 July 2014. We agree.

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1. The dissenting opinion cites additional testimony by Officer Cole that the man standing in front of building 408 "warned [Defendant] that we were across the street, and they drove out and left[,]" and that the man "yelled something to them, which caused them to speed up and leave the complex[.]" It is clear from all the testimony that Officer Cole suspected or believed that the man may have warned Defendant of police presence. There is not record evidence to support any definitive statement that the man warned Defendant of police presence, or that Defendant understood any "yell" from the man to be a warning of police presence.

2. The officers could not see inside the Elantra, so they did not know how many occupants it contained, nor could they observe any actions of Defendant, who was in fact the sole occupant.

Defendant specifically argues the following: (1) the record evidence did not support the trial court's finding that Defendant's actions constituted "flight," (2) that the trial court erred in that there was insufficient evidence of any nexus between the police presence and Defendant's action in exiting the parking lot of the apartment complex – and that there was no evidence, nor finding, that Defendant noticed the officers across the street, and (3) there was insufficient evidence supporting reasonable suspicion that criminal activity was afoot.

Our standard of review is as follows:

> "[T]he scope of appellate review of [a denial of a motion to suppress] is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." A trial court's factual findings are binding on appeal "if there is evidence to support them, even though the evidence might sustain findings to the contrary." We review the trial court's conclusions of law *de novo*.

State v. Mello, 200 N.C. App. 437, 439, 684 S.E.2d 483, 486 (2009) (citations omitted).

Our Supreme Court has discussed the obligations and prerequisites for making a vehicle stop consistent with the Fourth Amendment:

> The Fourth Amendment protects individuals "against unreasonable searches and seizures." The North Carolina Constitution provides similar protection. A traffic stop is a seizure "even though the purpose of the stop is limited and the resulting detention quite brief." Such stops have "been historically viewed under the investigatory detention framework first articulated in *Terry v. Ohio*[.]" Despite some initial confusion following the United States Supreme Court's decision in *Whren v. United States*, . . . courts have continued to hold that a traffic stop is constitutional if the officer has a "reasonable, articulable suspicion that criminal activity is afoot."
>
> Reasonable suspicion is a "less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." Only " 'some minimal level of objective justification' " is required. This

> Court has determined that the reasonable suspicion standard requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." Moreover, "[a] court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion" exists.

State v. Barnard, 362 N.C. 244, 246-47, 658 S.E.2d 643, 645 (2008) (citations omitted). "[T]he 'constitutionality of a traffic stop depends on the objective facts, not the officer's subjective motivation[.]' " *State v. Heien*, 366 N.C. 271, 276, 737 S.E.2d 351, 354 (2012) (citations omitted). The trial court's determination of whether the totality of the circumstances supports a reasonable suspicion that the defendant might be engaged in criminal activity is a conclusion of law subject to *de novo* review. *State v. Wilson*, 155 N.C. App. 89, 93-94, 574 S.E.2d 93, 97 (2002). Furthermore, the trial court's conclusions of law based on the totality of circumstances " 'must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 121 (2002) (citations omitted).

In order to evaluate the trial court's conclusion that the stop in the present case was justified, we begin with the United States Supreme Court opinion *Illinois v. Wardlow*, 528 U.S. 119, 145 L. Ed. 2d 570 (2000), which recognized that "flight" from police presence can be a factor in support of finding reasonable suspicion:

> On September 9, 1995, Officers Nolan and Harvey were working as uniformed officers in the special operations section of the Chicago Police Department. The officers were driving the last car of a four-car caravan converging on an area known for heavy narcotics trafficking in order to investigate drug transactions. The officers were traveling together because they expected to find a crowd of people in the area, including lookouts and customers.
>
> As the caravan passed 4035 West Van Buren, Officer Nolan observed respondent Wardlow standing next to the building holding an opaque bag. Respondent looked in the direction of the officers and fled. Nolan and Harvey turned their car southbound, watched him as he ran through the gangway and an alley, and eventually cornered him on the street.

Id. at 121-22, 145 L. Ed. 2d at 574-75.

It was in this context that Officer Nolan decided to investigate Wardlow after observing him flee. An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime. But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a "high crime area" among the relevant contextual considerations in a *Terry* analysis.

In this case, moreover, it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. We conclude Officer Nolan was justified in suspecting that Wardlow was involved in criminal activity, and, therefore, in investigating further.

Such a holding is entirely consistent with our decision in *Florida v. Royer*, 460 U.S. 491 (1983), where we held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. And any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." But unprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with

> the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Id. at 124-25, 145 L. Ed. 2d at 576-77 (citations omitted). In *Wardlow*, the uniformed officers involved were part of a four-car caravan entering an area of "heavy narcotics trafficking" for the purpose of policing illegal drug activity. The officers anticipated there would be large numbers of people in the area and expected "lookouts" to be present, ready to alert those persons of police presence. The officers observed the defendant standing near a building holding an opaque bag in his hands. When the defendant noticed the officers, he fled on foot. The United States Supreme Court discussed this behavior by the defendant as follows: "Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* at 124, 145 L. Ed. 2d at 576. The *Wardlow* Court then clarified how this behavior was different than that in earlier opinions, in which it had made clear that, absent reasonable suspicion to detain a person, "[t]he person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Florida v. Royer*, 460 U.S. 491, 497-98, 75 L. Ed. 2d 229, 236 (1983) (citation omitted). Refusing to stop for the police and "going about one's business" cannot, absent more, justify detention. However:

> Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.

Wardlow, 528 U.S. at 125, 145 L. Ed. 2d at 577.

In the present matter, the trial court heard the testimonies of the officers. Officer Branson testified that he based his reasonable suspicion on the following:

> Time of night, prior info given by the manager about Apartment 408, and knowing that the complex is a high drug crime area, as well as the business in that intersection, suspicious travel, nobody entering or exiting the [Elantra] as it traveled through the apartment complex, being alerted, that an individual called out as the [Elantra] was traveling through and once that call was made by the individual the [Elantra] exited more rapidly than it began -- or than it was traveling, and then the quick exit upon that.

Officer Cole testified as follows:

> Not long after I began looking, we noticed a white Hyundai Elantra pull into the complex and proceed very slowly through. I observed no one out in the parking lot, no other vehicles running. As I made -- as I watched the Elantra and it came around the u-shaped driveway, I noticed an individual standing outside building 408. I advised Officer Branson to pay attention to that subject and the [Elantra]. As it came around the corner and became -- or drove closer to that subject and that building, 408, I noticed the subject turn and look towards our police car, because our headlights at that point had basically turned to the point that we were lighting his direction. He looked at us, looked back at the Elantra, looked at us again, and then shouted something at the passenger side, whatever -- that was the side facing him -- toward the Elantra. At that point he began to back away and head back into the apartment complex. The [Elantra] sped up and pulled out of the parking lot. I told Officer Branson to stick with the [Elantra], because you can't get both. After that we decided, based on the totality of the circumstances and the reasonable suspicion that we had at that time, that we would go ahead and conduct a traffic stop on the [Elantra].

As in *Wardlow*, the officers in the present case testified that Defendant was in an area of high crime and drug activity. However, the testimony in *Wardlow* suggested a much more active drug scene than the testimony in the present case. Officer Branson testified that the manager of the apartment complex had informed him:

> "The apartment is getting bad again," referring -- I'm assuming that she was referring to general activity, but she made specific mention to building 408 and that she believes the individuals, through what other residents have told her, that they are involved in the use and sale of illegal narcotics.

In *Wardlow*, the defendant was seen holding an opaque bag, which officers believed might contain illegal drugs. In the present case, although Defendant was seen driving in the direction of the apartment building that officers had been told might be the site of drug transactions, officers did not observe Defendant, nor the man, in possession of a container typical of the type used to carry illegal drugs.

Defendant's mere presence in an area known for criminal narcotics activity could not, standing alone, have provided the reasonable suspicion necessary for the officers to initiate the stop of the Elantra. As in *Wardlow*, the outcome in the present case is determined by the presence or absence of *additional* circumstances sufficient to rise to the level of reasonable suspicion. In *Wardlow*, the defendant fled on foot after observing uniformed police officers approaching, and the causal link between the approach of the police and the "unprovoked flight" of the defendant was easily drawn. In the present case, that link is not as readily ascertainable. Officers Branson and Cole both testified they could not see Defendant in his vehicle; they could not observe Defendant's behavior or actions, other than by observing the Elantra itself.

> Q. At the point that you were looking at . . . my client driving around the parking lot there. Did you see him with any guns or drugs?
>
> A. No, sir. I was across the street.
>
> Q. Okay. Did you see him with any paraphernalia?
>
> A. No, sir.
>
> Q. Okay. Did you see him with any money?
>
> A. This is why I conducted the investigative stop.
>
> Q. Did you see him try to destroy anything?
>
> A. No, sir.
>
> Q. Did you see him try to conceal anything?
>
> A. No, sir. But this all stems back to I can't see inside of a vehicle from across West Meadowview Road.

Further, there was no evidence to indicate Defendant personally observed the police car across the street before he left the parking lot of the apartment complex.

Evidence of flight is much clearer in situations such as those in *Wardlow*, where a defendant's actions consisted of running away from police on foot, than is the evidence in the present matter. Officer Branson testified that Defendant's driving "raised [his] *suspicion* to fleeing upon police presence, although there wasn't like a running flight or extreme changing from driving slowly through the [apartment] complex to speeding up as our police vehicle was observed." (Emphasis added). Defendant did not break any traffic laws in his exit from the apartment

complex; the stop of the Elantra was based solely on the officers' suspicion that Defendant had been driving through the apartment complex in order to make a drug-related transaction. As this Court has stated in *Mello*,

> merely leaving a drug-ridden area in a normal manner is not sufficient to justify an investigatory detention. *See In re J.L.B.M.*, 176 N.C. App. 613, 619–22, 627 S.E.2d 239, 243–45 (2006) (holding that information that a suspicious person wearing baggy clothes had been seen in a drug-ridden area and that he walked away upon the approach of law enforcement officers did not suffice to support an investigatory detention); *State v. Roberts*, 142 N.C. App. 424, 430, n. 2, 542 S.E.2d 703, 708, n. 2 (2001) (stating that "evidence that Defendant walked away from [a police officer] after he asked Defendant to stop is not evidence that Defendant was attempting to flee from [the police officer] and, thus, indicates nothing more than Defendant's refusal to cooperate"); *State v. Rhyne*, 124 N.C. App. 84, 89–91, 478 S.E.2d 789, 791–93 (1996) (holding that an officer lacked reasonable suspicion to frisk a defendant who was sitting in an area known to be a center of drug activity without taking evasive action or otherwise engaging in suspicious conduct); *State v. Fleming*, 106 N.C. App. 165, 170–71, 415 S.E.2d 782, 785 (1992) (holding that the fact that defendant was standing in an open area between two apartment buildings and walked away upon the approach of law enforcement officers did not justify an investigatory detention).

Mello, 200 N.C. App. at 449-50, 684 S.E.2d at 492.

In *Mello*, this Court held that the challenged stop was proper based upon the following facts:

> At approximately 10:30 a.m. on 26 August 2006, Officer Pritchard was patrolling the area of Chandler and Amanda Place when he observed a vehicle driven by Defendant stop about fifteen to twenty yards away. At that time, Officer Pritchard watched "two other individuals approach the vehicle putting their hands into the vehicle;" however, he did not see any exchange or transfer of money. Officer Pritchard had not previously seen Defendant, but he recognized the two men standing outside the vehicle. He did not, however, know their names or whether he had previously arrested

> them. Officer Pritchard characterized the area of Chandler and Amanda Place as "a very well-known drug location" where he had previously made drug-related arrests.
>
> Based on his observation of the interaction between Defendant and the two individuals who approached his vehicle, Officer Pritchard suspected that he had witnessed a "drug transaction," something he had seen on numerous prior occasions. After seeing the episode at Defendant's automobile, Officer Pritchard drove a short distance before turning around. At that point, the two individuals fled the area, with one of them quickly entering a house. In addition, Defendant started driving away from the area in the opposite direction from that in which Officer Pritchard was traveling. According to Officer Pritchard, Defendant did not commit any traffic offense as he attempted to drive away. Officer Pritchard turned around again and stopped Defendant's vehicle.

Id. at 438, 684 S.E.2d at 485. The *Mello* Court reasoned:

> The fact that the two pedestrians fled in the immediate aftermath of an interaction with Defendant that could be reasonably construed as a hand-to-hand drug transaction which took place in "a well[-]known drug location with high drug activity" would clearly have raised a reasonable suspicion in the mind of a competent and experienced law enforcement officer that further investigation was warranted; the fact that Defendant did not drive away at a high rate of speed or take some other obvious evasive action himself does not change that fact. The federal and state constitutions do not, under existing decisional authority, require more in order for a valid investigatory detention to take place.

Id. at 450-51, 684 S.E.2d at 492-93. These factors are similar to those relied upon in *Wardlow* – except that the flight from the police was by the defendant in *Wardlow*, whereas in *Mello* the flight was by the individuals who were conducting the suspicious activity with the defendant.

By contrast, in the present case, the officers suspected that Defendant *might* be approaching the man outside building 408 to conduct a drug transaction, but unlike in *Mello*, Defendant and the man were not observed conducting any suspicious activity together. The man standing

outside building 408 did not approach the Elantra and did not reach his hand inside the Elantra. Although Officer Cole testified he suspected the man saw the police car and then yelled a warning to Defendant, the man and Defendant were never in close contact with each other. As with the defendant in *Mello*, Defendant in the present case drove away from the scene in a lawful manner. However, unlike in *Mello*, the man standing near the Elantra did not flee upon seeing the police – he simply turned around and walked into the apartment building. The manner in which Defendant left the parking lot of the apartment complex cannot be reasonably described as "headlong flight." In *Wardlow*, *Mello*, and other cases in which "flight" has been used to render legal a stop that would have otherwise been illegal, the officers readily observed actual flight, and based their reasonable suspicion of criminal activity upon a totality of circumstances which included actual observed flight.

The dissenting opinion objects to our distinction between "actual flight" and "suspected flight." We simply make a distinction between evidence sufficient to support a finding that a defendant was attempting to evade police contact and evidence that can only support a suspicion or conjecture that a defendant was attempting to evade police contact. Suspicion or conjecture that a defendant might have been attempting to flee police presence, absent additional suspicious circumstances, is insufficient to support reasonable suspicion that someone leaving a known drug area was engaged in criminal activity. *See*, *e.g.*, *In re J.L.B.M.*, 176 N.C. App. 613, 621-22, 627 S.E.2d 239, 245 (2006); *State v. Fleming*, 106 N.C. App. 165, 170-71, 415 S.E.2d 782, 785 (1992). In each of the cases cited in the dissenting opinion there were additional elements involved, which served to raise what could have been categorized as a mere suspicion of alleged flight to a reasonable inference that flight had actually occurred. *State v. Jackson*, 368 N.C. 75, 80, 772 S.E.2d 847, 850 (2015) (emphasis added) ("In making this determination, we are mindful of the dangers identified by defendant in his brief and at oral argument of making the simple act of walking in one's own neighborhood a possible indication of criminal activity. Here, defendant was walking in, and "the stop occurred in[,] a 'high crime area' [which is] among the relevant contextual considerations in a *Terry* analysis." However, we do not hold that those circumstances, standing alone, suffice to establish the existence of reasonable suspicion. Here, in contrast, the trial court based its conclusion on more than defendant's presence in a high crime and high drug area. The findings of fact show defendant stood at 9:00 p.m. in a specific location known for hand-to-hand drug transactions that had been the *site of many narcotics investigations*; defendant and Benton *split up and walked in opposite directions*

upon seeing a marked police vehicle approach; they came back very near to the same location once the patrol car passed; and they walked apart a second time upon seeing Officer Brown's return.[3] We conclude that these facts go beyond an inchoate suspicion or hunch[.]"); *State v. Butler*, 331 N.C. 227, 233, 415 S.E.2d 719, 722 (1992) (emphasis added) ("1) defendant was seen in the midst of a group of people congregated on a corner known as a 'drug hole'; 2) Hedges had had the *corner under daily surveillance for several months*; 3) Hedges knew this corner to be a center of drug activity because he had made *four to six drug-related arrests there in the past six months*; 4) Hedges was aware of other arrests there as well; 5) defendant was a *stranger* to the officers [who had been surveilling this corner for months]; 6) *upon making eye contact* with the uniformed officers, defendant *immediately moved away*,[4] behavior that is evidence of flight[.]"); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (emphasis added) ("Defendant left a suspected drug house *just before the search warrant was executed*. Defendant set out on foot and took *evasive action* when he *knew he was being followed*. And, at the suppression hearing, Detective Sholar testified that defendant had *exhibited nervous behavior*."). Each of these cases presents additional indicia of potential criminal activity and flight absent from the case presently before us.

Further, there must be some nexus between a suspect's "flight" and the presence of the police, and that "flight" must reasonably demonstrate "evasive action." *State v. White*, 214 N.C. App. 471, 479-80, 712 S.E.2d 921, 928 (2011); *see also J.L.B.M.*, 176 N.C. App. at 622, 627 S.E.2d at 245 (holding there was no reasonable suspicion where an officer "relied solely on the dispatch that there was a suspicious person at the Exxon gas station, that the juvenile matched the 'Hispanic male' description of the suspicious person, that the juvenile was wearing baggy clothes, and that the juvenile chose to walk away from the patrol car"); *Fleming*, 106 N.C. App. at 170-71, 415 S.E.2d at 785 ("In the case now before us, at the time Officer Williams first observed defendant and his companion, they

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3. In *Jackson*, the defendant and his companion *twice* split up and walked away from a known high drug transaction location upon seeing the police car approaching. The evidence that the defendant in *Jackson* was engaging in evasive behavior was much stronger than the evidence presently before us.

4. In *Butler*, there was direct evidence of cause and effect between the defendant noticing the officers and his immediate decision to move away from the officers. Further, there was additional non-flight evidence supporting a finding of reasonable suspicion. In the present case, there is only conjecture that Defendant might have seen the police car across the street.

were merely standing in an open area between two apartment buildings. At this point, they were just watching the group of officers standing on the street and talking. The officer observed no overt act by defendant at this time nor any contact between defendant and his companion. Next, the officer observed the two men *walk* between two buildings, out of the open area, toward Rugby Street and then begin *walking* down the public sidewalk in front of the apartments. These actions were not sufficient to create a reasonable suspicion that defendant was involved in criminal conduct, it being neither unusual nor suspicious that they chose to walk in a direction which led away from the group of officers."); *cf.*, *State v. Jackson*, 368 N.C. 75, 80, 772 S.E.2d 847, 850-51 (2015) (citation omitted) (Supreme Court reversed this Court's determination that no reasonable suspicion existed because "the trial court based its conclusion on more than defendant's presence in a high crime and high drug area. The findings of fact show defendant stood at 9:00 p.m. in a specific location known for hand-to-hand drug transactions that had been the site of many narcotics investigations; defendant and Benton split up and walked in opposite directions upon seeing a marked police vehicle approach; they came back very near to the same location once the patrol car passed; and they walked apart a second time upon seeing Officer Brown's return. We conclude that these facts go beyond an inchoate suspicion or hunch and provide a 'particularized and objective basis for suspecting [defendant] of [involvement in] criminal activity.' ").

In the present case, the officers observed activity which made them suspect that Defendant's actions in leaving the apartment complex might constitute flight, and then this *suspicion* of flight was used in turn to support the suspicion that criminal activity was afoot. We hold that the record evidence does not support the trial court's finding that Defendant "fled" from the officers. We further hold, on these facts, that the *suspicion* of flight from an area of known illegal narcotics activity, in the form of accelerating the Elantra in a lawful manner and driving away from the apartment complex, *without more*, did not justify the stop of the Elantra and the detention of Defendant. Contrary to the assertion in the dissenting opinion, our holding is not based solely upon the insufficiency of the evidence to support the trial court's finding of "flight," but upon the totality of the circumstances in this case. The circumstances in the present case do not include the kind of additional suspicious activity required to form a reasonable suspicion – unlike the circumstances present in *Wardlow*, *Jackson*, *Butler*, *Willis*, and similar opinions. We reverse the trial court's denial of Defendant's motion to suppress and remand to the trial court for further action consistent with this opinion.

REVERSED AND REMANDED.

Judge INMAN concurs.

Judge TYSON dissents with separate opinion.

TYSON, Judge, dissenting.

These experienced officers had reasonable, articulable, and objective suspicion to initiate a lawful investigatory stop of Defendant's vehicle, based upon the totality of the circumstances. The trial judge's underlying findings of fact are supported by competent evidence, and are conclusively binding on appeal. These findings support the trial judge's ultimate conclusions of law to deny Defendant's motion to suppress.

The majority's conclusion to reverse the trial court's order is unduly focused upon their characterization of Defendant's flight, while disregarding the "totality of the circumstances." Their conclusion ignores or minimizes all the surrounding factors, and is contrary to controlling decisions of the Supreme Court of the United States, the Supreme Court of North Carolina, and this Court. *See United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). I respectfully dissent.

I. Standard of Review

> [T]he scope of appellate review of [a denial of a motion to suppress] is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.

State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted).

A trial court's findings of fact are binding on appeal "if there is evidence to support them, *even though the evidence might sustain findings to the contrary*." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (emphasis supplied) (citations and quotation marks omitted).

II. Analysis

"An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting

Brown v. Texas, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). A court must consider "the totality of the circumstances—the whole picture" to determine whether reasonable suspicion to make an investigatory stop exists. *Cortez*, 449 U.S. at 417, 66 L. Ed. 2d at 629.

An investigatory stop is reviewed for "specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Mello*, 200 N.C. App. 437, 443-44, 684 S.E.2d 483, 488 (2009) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968)). "The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *Mello*, 200 N.C. App. at 444, 684 S.E.2d at 488 (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)).

The Supreme Court of the United States has held an individual's mere presence in a neighborhood frequented by drug users is an insufficient basis, standing alone, for concluding a defendant himself is engaged in criminal activity. *Brown*, 443 U.S. at 52, 61 L. Ed. 2d at 362-63. However, an individual's flight from uniformed law enforcement officers is an additional factual circumstance, within "the totality of the circumstances" which may be used to support a reasonable suspicion of criminal activity. *See State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 722-23 (1992) (holding defendant's presence on specific corner known for drug activity, coupled with fact that "defendant immediately moved away" upon making eye contact with officers, was sufficient suspicion for officers to make a lawful stop).

At Defendant's suppression hearing, Officer Cole testified he observed a vehicle enter the Spring Manor apartment complex. Officer Cole stated: "The car proceeded through the parking lot slowly, never stopping, though, at any particular building. Once I noticed the individual standing outside of [building] 408, it appeared that he was waiting on that vehicle." No other individuals were outside of building 408, the immediate area or in the parking lot at that time after midnight.

Officer Cole continued to testify: "As that car came around the corner, that's when [the individual standing outside] noticed us and looked at the vehicle. When the vehicle made the turn he yelled something to them, which caused them to speed up and leave the complex, and he backed up and went back into the apartment."

Officer Cole testified he believed "that car was coming to visit that individual standing outside 408" and intended "to either purchase or sell illegal drugs." The individual outside of building 408 "warned [Defendant]

that [the officers] were across the street, and they drove out and left and [the individual standing outside] went back into his apartment." These articulated and reasonable suspicions are an unbroken chain of events and were based on Officer Cole's training and experience. Officer Cole testified to "seven-plus years as an experienced Greensboro police officer" and had prior knowledge of illegal narcotics being sold out of apartment building 408.

Officer Branson also testified he was aware of illegal activities taking place in the Spring Manor apartment complex, prior to the date in question. Officer Branson testified the apartment complex manager reported other residents had specifically mentioned individuals in building 408 were involved in the use and sale of illegal narcotics.

Officer Branson testified he observed "the individual [outside of building 408] yelling and then looking back at [Defendant's] vehicle, and at that point [Defendant] increased his speed and exited the parking lot much more rapidly than he was traveling initially." After the yell, he saw the unbroken sequence of the vehicle "chang[e] from driving slowly through the complex to speeding up as our police vehicle was observed." The person who had yelled, "backed up and went back into the apartment [408]." Officer Branson testified this behavior "raised [his] suspicion to fleeing upon police presence." From the time of the event until the stop, the officers never lost sight of the vehicle with Defendant inside.

Based on these officers' testimonies, the trial court made the following pertinent findings of fact:

> 5) . . . Officers Branson and Cole were in a highly visible, marked, Greensboro Police Department patrol vehicle and located in the Spring Valley Shopping Center parking lot area, directly across the street from the Spring Manor apartment complex.
>
> 6) Prior to 14 July 2014, Officer Cole had made numerous illegal drug arrests in the Spring Manor apartment complex and in the immediate area of the Spring Manor apartment complex.
>
> 7) As of 14 July 2014, Officer Cole knew that the Spring Manor apartment complex and its immediate surrounding area was an "open air drug market."
>
> 8) Prior to 14 July 2014, the manager of the Spring Manor apartment complex informed Officer Branson that the Spring Manor apartments were getting worse, and

specifically identified apartment [building] 408 as a place for using illegal drugs and for the sale and distribution of illegal drugs.

9) Prior to 14 July 2014, Officer Branson was aware of numerous crimes that had been committed in the Spring Manor apartment complex.

10) As of 14 July 2014, Officers Branson and Cole knew that the Spring Manor apartment complex was in a high drug and crime-ridden area.

. . . .

12) On Monday morning at approximately 12:15 a.m. on 14 July 2014, Officers Branson and Cole observed a white, Hyundai Elantra ("Elantra"), enter the Spring Manor apartment complex parking lot, circling the parking lot at a very slow rate of speed.

13) Officers Branson and Cole observed that the Elantra never pulled into any parking space or stopped anywhere but instead drove at a very slow rate of speed toward the area of Spring Manor apartment [building] 408.

14) Almost simultaneously to observing the Elantra as set forth above, Officers Branson and Cole observed a male directly in front of Spring Manor apartment [building] 408.

15) Thereafter, Officers Branson and Cole observed said male directly in front of Spring Manor apartment [building] 408 look directly at their highly visible, marked, Greensboro Police Department patrol vehicle that was in plain view and only a short distance away from said male.

16) Officers Branson and Cole next observed said male, after identifying their Greensboro Police Department patrol vehicle as set forth above, look directly at the Elantra, which was by then only a short distance away from said male, and make a loud warning noise, which was heard by Officer Cole.

17) Immediately after making said warning noise as set forth above, Officers Branson and Cole observed the Elantra accelerate and quickly exit the Spring Manor apartment complex and flee the area unprovoked, and flee from Officers Branson and Cole unprovoked.

Based on these findings of fact, the trial court concluded:

> 1) Based on the totality of the circumstances, the State has proven by a preponderance of the credible and believable evidence that the investigatory stop of the Elantra driven by Defendant in this case was based on specific and articulable facts, as well as the rational inferences from those facts as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.
>
> 2) Based on the totality of the circumstances, . . . the investigatory stop of the Elantra driven by Defendant was legal and valid, and that Officers Branson and Cole had a reasonable and articulable suspicion for making the investigatory stop of said Elantra.
>
> 3) Based on the totality of the circumstances, . . . Officers Branson and Cole had a reasonable suspicion supported by articulable facts that criminal activity may be afoot.

Considering these undisputed facts and the officers' testimonies at Defendant's suppression hearing, the trial court's findings of fact, particularly that the officers "observed [Defendant] accelerate and quickly exit the Spring Manor apartment complex and flee the area," are amply supported by competent record evidence. These findings of fact in turn support the trial court's conclusion of law that the officers had "a reasonable suspicion . . . that criminal activity may be afoot" to justify their investigative stop of Defendant's vehicle. *Mello*, 200 N.C. App. at 439, 684 S.E.2d at 486.

The majority's protestations to the contrary, their reversal of the trial court's ruling apparently turns on a notion of, and fictional distinction between, "suspected" versus "actual" flight and not from the "totality of the circumstances." No precedents lend support to this contrived distinction. *See State v. Jackson*, 368 N.C. 75, 80, 772 S.E.2d 847, 850 (2015) (holding reasonable suspicion justified investigatory stop where defendant stood "in a specific location known for hand-to-hand drug transactions" and defendant and another "split up and walked in opposite directions upon seeing a marked police vehicle approach); *Butler*, 331 N.C. at 234, 415 S.E.2d at 722-23 (holding defendant's presence in neighborhood frequented by drug users, coupled with him immediately leaving the corner and walking away after making eye contact with officers, constituted reasonable suspicion to conduct investigatory stop); *In re I.R.T.*, 184 N.C. App. 579, 585-86, 647 S.E.2d 129, 134-35 (2007)

(holding officer had reasonable grounds to conduct investigatory stop where juvenile in known high drug area began walking away as officer approached him, while keeping his head turned away from officer); *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997) (holding officers had reasonable suspicion to conduct investigatory stop of defendant where he was seen leaving a suspected drug house and officers observed him "exhibit[ing] nervous behavior" when he knew he was being followed). Whether Defendant's speed exceeded the posted speed limit or violated some other motor vehicle law is not determinative of Defendant's flight from the known drug area.

Considering the past history of drug activity and arrests at the Spring Manor Apartments, the time, place, manner, the unbroken sequence of observed events, Defendant's actions upon being warned and the "totality of the circumstances," the officers' testimonies and the trial court's findings of fact "go beyond an inchoate suspicion or hunch and provide a particularized and objective basis for suspecting defendant of involvement in criminal activity." *Jackson*, 368 N.C. at 80, 772 S.E.2d at 850-51 (citation and internal quotation marks omitted). The trial court correctly found and concluded the officers had a reasonable and articulable suspicion, based upon the totality of the circumstances, to conduct a lawful investigatory stop of Defendant's vehicle. The trial court did not err by denying Defendant's motion to suppress evidence recovered as a result of the lawful investigatory stop.

III. Conclusion

The trial court's findings of fact are supported by competent testimonial and record evidence. These findings of fact are "conclusively binding on appeal[.]" *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. These findings of fact in turn support the trial court's ultimate conclusions citing the "totality of the circumstances" that the officers had reasonable suspicion to conduct a lawful investigatory stop of Defendant's vehicle. The trial court's findings of fact are binding upon this Court on appeal where "there is evidence to support them, even though the evidence might sustain findings to the contrary." *Adams*, 354 N.C. at 63, 550 S.E.2d at 503.

I vote to affirm the trial court's denial of Defendant's motion to suppress and find no error in Defendant's convictions or the judgment entered thereon. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JUSTIN KYLE MILLS

No. COA16-64

Filed 5 July 2016

1. Appeal and Error—jurisdiction—failure to designate court—writ of certiorari

The Court of Appeals, in its discretion, granted certiorari where defendant's notices of appeal did not designate the court to which the appeal was taken.

2. Criminal Law—self-defense—instruction not given

The trial court properly refused to instruct the jury on self-defense in a prosecution for assault with a deadly weapon inflicting serious injury where defendant left his property and entered the victim's property with a rifle which he had retrieved and loaded; there was no evidence that the victim had a weapon or that defendant had a good faith belief that the victim was armed; and defendant fired before the victim made any threatening movement.

3. Criminal Law—prosecutor's argument—personal belief—weakness of defendant's case

Defendant did not establish any gross impropriety in the prosecutor's opening statement that defendant's claim of self-defense would be shot down (to which defendant did not object). Defendant failed to show that the State's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

Appeal by defendant from judgment entered 6 May 2015 by Judge W. Douglas Parsons in Carteret County Superior Court. Heard in the Court of Appeals 7 June 2016.

Attorney General Roy Cooper, by Assistant Attorney General Roberta A. Ouellette, for the State.

William D. Spence for defendant-appellant.

TYSON, Judge.

Justin Kyle Mills ("Defendant") appeals from a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury. We find no error in Defendant's conviction or judgment entered thereon.

I. Background

On 29 October 2014, Michael LeClair ("Mr. LeClair") lived on his father's lot at the Lakeview Mobile Home Estates in Carteret County, North Carolina. Mr. LeClair's niece, Heather Davis ("Ms. Davis"), lived with Defendant on an adjoining lot within the same mobile home park. The two lots are separated by a row of large bushes.

That evening, Defendant and Ms. Davis arrived home and heard their dogs barking loudly. Mr. LeClair heard Defendant and Ms. Davis yelling at the dogs and at each other. He subsequently yelled at Defendant and Ms. Davis from his lot, instructing them to "knock it off." Defendant and Mr. LeClair exchanged verbal insults and threats with one another from their respective properties. Defendant and Mr. LeClair had previously engaged in physical altercations and made verbal threats to each other.

Defendant went inside his trailer and retrieved a 30.06 bolt-action rifle. Armed with the rifle, Defendant went over to Mr. LeClair's lot and confronted Mr. LeClair. Mr. LeClair was not armed with a weapon during the altercation. After an additional exchange of words, Defendant fired a warning shot into the ground. Mr. LeClair testified he moved toward Defendant in order to take the rifle from him. When Mr. LeClair was approximately ten feet away from Defendant, Defendant shot Mr. LeClair in the groin. Defendant called 911, and was later arrested.

Ms. Davis testified, on the evening in question, Mr. LeClair continually yelled at Defendant to "[g]et your ass over here." Ms. Davis testified Defendant carried the rifle with him upon entering onto Mr. LeClair's property because "he was afraid for his life," and had the rifle with him "just in case." The defense asserts, when Mr. LeClair ran towards Defendant, Defendant had no choice but to shoot Mr. LeClair. At trial, Defendant requested a jury instruction on self-defense. The trial court declined to instruct the jury on self-defense.

The jury returned a verdict finding Defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to an active term of a minimum of 33 months and a maximum of 52 months imprisonment.

II. Jurisdiction

[1] On 6 May 2015, Defendant filed a handwritten notice of appeal. His notice failed to designate this Court as the court to which the appeal was taken, and it was not served on the District Attorney as required by Rule 3(d) of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 3(d). Defendant's trial attorney also filed a written notice of appeal and served it on the District Attorney's Office on 7 May 2015. This notice of appeal also failed to designate the court to which the appeal was taken. Defendant's failure to designate the court to which his appeal is taken violates Rule 3(d). *Id.* The trial court prepared the Appellate Entries noticing the appeal and appointing appellate counsel on 7 May 2015.

On 17 February 2015, Defendant petitioned this Court issue its writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure. "This Court has liberally construed this requirement and has specifically held that a failure to designate this Court in its notice of appeal is not fatal where the . . . intent to appeal can be fairly inferred and the [appellees] are not mislead by the . . . mistake." *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011); *see also State v. Springle*, __ N.C. App. __, __, 781 S.E.2d 518, 520-21 (2016).

The State neither filed any response to Defendant's petition, nor argues on appeal that it has incurred any prejudice from Defendant's errors in filing his notice of appeal. In our discretion, we grant Defendant's petition and issue writ of certiorari to permit review of the substantive issues presented in Defendant's appeal.

III. Issues

Defendant argues the trial court erred by: (1) failing to instruct the jury on self-defense; and (2) failing to intervene *ex mero motu* during the District Attorney's opening statement.

IV. Jury Instruction on Self-Defense

A. Standard of Review

"Whether evidence is sufficient to warrant an instruction on self-defense is a question of law; therefore, the applicable standard of review is *de novo*." *State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54 (citing *State v. Lyons*, 340 N.C. 646, 662-63, 459 S.E.2d 770, 778-79 (1995), *aff'd*, 346 N.C. 417, 700 S.E.2d 222 (2010)). The trial court's choice of jury instructions rests within its discretion and will not be overturned absent

a showing of abuse of discretion. *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002).

"However, an error in jury instructions is prejudicial and requires a new trial only if there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (citations and internal quotation marks omitted).

B. Analysis

[2] To determine whether an instruction on self-defense must be given, "the evidence is to be viewed in the light most favorable to the defendant." *State v. Moore*, 363 N.C. 793, 796, 688 S.E.2d 447, 449 (2010). When the defendant's evidence, taken as true, is sufficient to show that he acted in self-defense, the instruction "must be given even though the State's evidence is contradictory." *Id.*

Where a defendant is charged with assault with a deadly weapon, a jury instruction on self-defense should be given "only if the circumstances at the time the defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm." *State v. Whetstone*, 212 N.C. App. 551, 558, 711 S.E.2d 778, 784 (2011) (citation omitted); *State v. Spaulding*, 298 N.C. 149, 154, 257 S.E. 2d 391, 394-95 (1979) (holding there must be a real or apparent necessity for the defendant to kill in order to protect himself).

In 2011, the General Assembly enacted several statutes related to self-defense and individual rights related to firearms. 2011 N.C. Sess. Laws 1002. N.C. Gen. Stat. § 14-51.3 describes the circumstances under which deadly force may be used in self-defense. N.C. Gen Stat. § 14-51.4 clarifies when the justification for defensive force is available. Neither statute has been amended since it was enacted.

N.C. Gen. Stat. 14-51.3 provides in pertinent part:

> (a) . . . [A] person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if . . .
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

N.C. Gen. Stat. 14-51.3 (2015).

N.C. Gen. Stat. § 14-51.4 provides in pertinent part:

> [J]ustification [for defensive force] is not available to a person . . . who:
>
> (2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:
>
> a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.
>
> b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

N.C. Gen. § 14-51.4 (2015).

Defendant argues the evidence he presented at trial required the trial court to provide a self-defense instruction to the jury. Specifically, Defendant asserts Mr. LeClair had an aggressive nature and provoked the confrontation with Defendant. Ms. Davis testified Mr. LeClair had attacked Defendant about a year prior to the shooting. Ms. Davis stated Mr. LeClair had entered Defendant's property and grabbed Defendant "by the neck with one hand." Ms. Davis also testified, on the night of the shooting, Mr. LeClair yelled to Defendant: "Get over here, you pu—y," and threatened, "I will slit your f—king throat right in front of your kid."

However, the evidence tends to show Defendant provoked the confrontation at issue here. Defendant willingly and voluntarily left his property and entered onto Mr. LeClair's property with a loaded rifle. Defendant was not forced into the confrontation. Defendant escalated the confrontation by affirmatively opting to retrieve his rifle, load it, and carry it with him onto Mr. LeClair's property. There is no evidence, tending to show either Mr. LeClair possessed a weapon on his person during the altercation or Defendant had a good faith belief Mr. LeClair

was armed with a weapon. Defendant fired the first shot before Mr. LeClair made any threatening movement.

The evidence, viewed in the light most favorable to Defendant, does not show Defendant was "in imminent danger of death or serious bodily harm[.]" N.C. Gen. Stat. § 14-51.3; N.C. Gen. Stat. 14-51.4. Defendant did not communicate an intent to "withdraw[], in good faith, from physical contact with" Mr. LeClair or a "desire to withdraw and terminate the use of force" at any time. N.C. Gen. Stat. § 14-51.4(2)(b).

In this case, Defendant was not justified under N.C. Gen. Stat. § 14-51.3 or N.C. Gen. Stat. § 14-51.4 to use deadly force against Mr. LeClair and claim self-defense as an affirmative defense. A person of ordinary firmness, in the Defendant's position, could not have reasonably believed that shooting Mr. LeClair in the groin was necessary in order to escape "imminent danger of death or serious bodily harm." N.C. Gen. Stat. § 14-51.4; *see also Whetstone*, 212 N.C. App. at 558, 711 S.E.2d at 784.

In *State v. Plemmons*, 29 N.C. App. 159, 223 S.E.2d 549 (1976), the victim fired a gun into the air while in front of his mobile home, after the defendant had fired a shotgun near the victim. The defendant had already driven a short distance away from the victim's property when the victim fired his gun. *Id.* After the victim fired his gun, the defendant exited his vehicle and fired another shot at the victim. This shot struck the victim in the face. *Id* at 160, 223 S.E.2d at 560.

This Court held, although the evidence showed the victim had fired a shot in the direction of the defendant, the defendant had fired the first shot, and had not abandoned or withdrawn from the altercation. Therefore, "[a]n instruction on self-defense was not warranted by the evidence and the court properly omitted it from his charge." *Id.* at 162-63, 223 S.E.2d at 551.

Here, as in *Plemmons*, Defendant never abandoned or withdrew from the altercation. *See also* N.C. Gen. Stat. § 14-51.4(b) (requiring a clear indication to withdraw and terminate the use of force in order to justify use of deadly force against the person who was provoked). Mr. LeClair was unarmed and had not physically engaged with Defendant before or at the time Defendant shot him. Viewing the evidence in the light most favorable to Defendant, the trial court properly refused to instruct the jury on self-defense. *Moore* at 796, 688 S.E.2d at 449. We find no error in the trial court's ruling.

V. *Ex Mero Motu*

[3] Defendant argues the prosecutor expressed his personal belief about the weakness of Defendant's case during his opening remarks. Defendant failed to object to this statement at trial, but asserts the trial court should have intervened *ex mero motu*. Defendant contends this statement deprived him of a fair trial before a partial, unbiased jury. Defendant also argues the prosecutor's remarks improperly shifted the State's burden of proof onto Defendant.

A. Standard of Review

"The standard of review when a defendant fails to object at trial is whether the closing argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. McCollum*, 177 N.C. App. 681, 685, 629 S.E.2d 859, 861-62 (2006) (citation and internal quotation marks omitted). "In determining whether the prosecutor's argument was . . . grossly improper, this Court must examine the argument in the context in which it was given and in light of the overall factual circumstances to which it refers." *State v. Hipps*, 348 N.C. 377, 411, 501 S.E.2d 625, 645 (1998).

> In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002).

B. Analysis

In his opening statement, the prosecutor stated, "[T]he only thing [D]efendant can rely on to escape this is some self-defense claim. And I contend to you that what Judge Parsons tells you what this is in North Carolina, that will be shot down also."

To determine whether a statement was grossly improper, this Court must examine the context in which the remarks were made and the factual circumstances to which they refer. *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998). In order to demonstrate prejudicial error, a defendant must show "[t]here is a reasonable possibility that, had the error in question not been committed, a different result would have

been reached at the trial out of which the appeal arises. The burden of showing such prejudice . . . is upon the defendant." N.C. Gen. Stat. § 15A-1443(a) (2015).

In this case, the prosecutor contended to the jury that a claim of self-defense would be "shot down" and Defendant failed to object. In *State v. Braxton*, 352 N.C. 158, 202, 532 S.E.2d 428, 454 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001), which was decided prior to the enactment of the use of defensive force statutes, the prosecutor argued to the jury as follows:

> And then you move to the third element of what this cowardly bully has to have to come in here and hang his hat on a valid principle of law of self-defense, and it besmirches and degrades self-defense. It's spitting in the eye of the law. It's vomit. It's vomit on the law of North Carolina for this man to try to use self-defense because he's got to show, in addition to the other two, that he was not the aggressor.

This Court held the prosecutor's statement "constitutes a permissible expression of the State's position that, in light of the overwhelming evidence of defendant's guilt, the jury's determination that the defendant acted in self-defense would be an injustice." *Id.* at 203, 532 S.E.2d at 454. Therefore, "the prosecutor's statement was not so grossly improper as to require the trial court to intervene *ex mero motu*." *Id.* As in *Braxton*, the prosecutor's statement in the present case was a permissible expression of the State's position. *Id.*

Defendant retrieved his rifle and fired the first shot before Mr. LeClair moved toward Defendant in an attempt to disarm him. Mr. LeClair was not armed with a weapon, nor did he provoke Defendant, to justify his use of deadly force. As discussed *supra*, the evidence, viewed in the light favorable to Defendant, did not warrant a jury instruction on self-defense. There is not a "reasonable possibility" the Defendant would have prevailed had the trial court intervened. N.C. Gen. Stat. § 15A-1443(a).

Defendant has failed to establish any gross impropriety in the State's opening statement in order to warrant a new trial. Defendant failed to show the State's comments "so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) (citation omitted), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). We find no error.

VI. Conclusion

Viewing the evidence in the light most favorable to Defendant, the trial court properly refused to instruct the jury on self-defense. Defendant has failed to carry his burden of showing any gross impropriety in the State's opening remarks.

Defendant received a fair trial free from prejudicial errors he preserved and argued. We find no error in Defendant's conviction or the judgment entered thereon.

NO ERROR.

Judges BRYANT and INMAN concur.

STATE OF NORTH CAROLINA
v.
KELVIN LEANDER SELLERS, DEFENDANT

No. COA 15-1163

Filed 5 July 2016

1. Fraud—financial card theft—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of financial card theft where the card was stolen from its rightful owner, someone other than the owner swiped the card at two stores later on the same day, there was surveillance video from one store showing defendant in the store when the card was swiped, and the store owner testified that defendant attempted to use a card with another person's name. The State presented sufficient evidence that defendant obtained the card from its owner without her consent and with intent to use the card.

2. Possession of Stolen Property—indictment—elements missing—knowledge that property was stolen

There was a facial defect in an indictment for possession of stolen property where the indictment did not allege the essential elements that the listed personal property was stolen or that defendant knew or had reason to know that the property was stolen.

3. Constitutional Law—effective assistance of counsel—motion for appropriate relief required

A claim for ineffective assistance of counsel was dismissed without prejudice to the right to file a motion for appropriate relief. Claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not directly on appeal.

Appeal by Defendant from judgments entered 2 April 2013 by Judge L. Todd Burke and Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 9 March 2016.

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

Kimberly P. Hoppin, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Defendant appeals from judgments entered 2 April 2013 by Judges L. Todd Burke and V. Bradford Long after a jury convicted him of financial card theft, possession of stolen property, and the status of being an habitual felon. Our review of the indictment reveals the indictment did not contain all of the elements of possession of stolen property. Therefore, we vacate the judgment as it pertains to Defendant's conviction for possession of stolen property. Defendant contends the trial court erred in denying his motion to dismiss the charges of financial card theft because the State failed to present sufficient evidence of those offenses. Defendant also argues he was denied the effective assistance of counsel, though he did not file a motion for appropriate relief with the trial court. We hold the trial court did not err in part, but we vacate the conviction of possession of stolen goods, and dismiss the ineffective assistance of counsel claims without prejudice for Defendant to file a motion for appropriate relief with the trial court.

I. Factual and Procedural Background

On 3 October 2011, a grand jury charged Defendant with breaking and entering a motor vehicle, financial card theft, and possession of stolen property. For the charge of possession of stolen property, the indictment reads as follows:

> And the jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully,

> willfully, and feloniously did possess one handbag containing personal items, one wallet, one Wachovia debit/credit card, one social security card, one check book, and $30.00 in United States currency.

Defendant's case came for a jury trial 2 April 2013 in superior court. The State's evidence tended to show the following.

Sabrina McMasters, a service manager for Wells Fargo, testified as follows: On 12 May 2011, while taking her daughter to daycare in Trinity, North Carolina, from her home in Greensboro, it began to rain. At approximately 8 a.m., she parked in a small parking lot in front of the building. Because of the rain, she rushed to get her daughter inside of the daycare center which took five to eight minutes.

On her return, the glove box was open and her pocketbook, containing her driver's license, checkbook, social security card, house keys, pictures of her daughter, and a debit card, was missing. McMasters ran into the daycare office and called the police. Approximately ten minutes later, Officer Andrews arrived.

Billy Andrews, a police officer for the City of Archdale, responded to a larceny call at Trendel Children's Center. When he arrived at 8:20 a.m., he saw McMasters standing next to her vehicle, a white Dodge Durango, crying. McMasters told him her pocketbook, containing bank cards, two checkbooks, and three social security cards was stolen.

After this conversation, McMasters called her bank to report her debit card had been stolen. The bank's records showed recent purchases on her card at a gas station, The Pantry, and Food Lion. McMasters drove to The Pantry, where she spoke with the owner, Andrew Lee. After she explained her circumstances, she searched around the store, but she did not find her pocketbook or any of its contents. She then drove to Food Lion, where she walked around the premises to search for her pocketbook. She found nothing.

McMasters told Officer Andrews her debit card was used that morning. The bank reported someone swiped McMasters' debit card at Food Lion at 8:16 a.m. and subsequently at The Pantry around 8:34 a.m. to purchase gas and to make a cash withdrawal. Officer Andrews testified Suzie Sellers, a daycare employee, informed him she saw a white man in his forties that morning sitting across the street from the daycare and smoking a cigarette. No other daycare employees reported any unusual activity at or around the daycare that morning.

Later that afternoon, David Jones, a sergeant in investigations with the City of Archdale, began investigating McMasters' file. His investigation revealed someone swiped McMasters' debit card at a Food Lion at 8:16 a.m. for $114. This Food Lion is located one-half mile from Defendant's home. At 8:34 a.m., the debit card was at The Pantry for $40.01 to buy gasoline. Someone then attempted to use the card inside the store to make a withdrawal from the ATM, but that withdrawal was unsuccessful.

Detective Jones obtained a surveillance video from The Pantry dated 12 May 2011 and played a copy of the video for the jury. The video is not contained in the record on appeal. The next day, Detective Jones went to Defendant's house, and questioned him about these events. Defendant explained he was home alone that day, and had been home alone for two weeks due to a medical issue. Hanging on the banister just inside the front door of Defendant's townhome, Detective Jones saw a green baseball cap. He recognized the cap from the surveillance video from The Pantry. During this discussion, Detective Jones obtained a lottery ticket from the Defendant's person which was purchased at 10 a.m. on 13 May 2011, during the time which Defendant said he did not leave his home. Detective Jones did not attempt to obtain surveillance video from Food Lion because "Food Lion is one of the tougher businesses to get video from and to work with." He said it generally takes six months to one year to obtain video from Food Lion.

Describing the video from The Pantry, Detective Jones explained Defendant placed two fruit drinks on the counter in front of Lee. In the video, Defendant attempted to pay. At that time, Lee and Defendant discussed tornado damage in Alabama and scratch off tickets. Defendant asked for a $100 gift card, but Lee refused because he would only accept cash. Lee told Defendant he needed to use the ATM. At that time, the time stamp on the video showed it was 8:34 a.m. Defendant walked away from the counter and out of the screen, presumably toward the ATM. Defendant left the store without returning to the counter to make a purchase.

The State rested. At that time, Defendant moved to dismiss all charges because the State failed to meet its burden. The court denied Defendant's motion.

Defendant testified on his own behalf. Defendant works part-time at Kohl's and Bitlocks and is a pastor at the Second Chance Community Mission. Defendant had prostate surgery 27 April 2011, and returned to the doctor to have his staples removed 4 May 2011.

Defendant went to The Pantry on the morning of 12 May 2011, shortly after his wife left for work. Defendant missed Mother's Day because of his surgery, so he went to The Pantry to get his wife a gift card as well as a drink and a newspaper for himself. At the register, Defendant spoke with Lee, who he knows personally. Defendant goes to The Pantry every Thursday or Friday to cash his check. When Lee told him he could not purchase a gift card unless he paid with cash, Defendant left the store through the back door near the drink machine. Defendant drove home and remained at home for the rest of the day. On cross-examination, Defendant agreed he misled the police by telling them he did not leave his house that day. The defense rested.

Lee, the owner of The Pantry, testified for the State in rebuttal. Lee remembered Defendant coming into his store on 12 May 2011. He remembers Defendant attempting to use someone else's card that day, but the transaction was denied. Lee knows Defendant, whose first name is Kelvin. The name on the card was not Kelvin, but he does not remember the name on the card.

The Defendant renewed his motion to dismiss at the close of all of the evidence. The trial court granted Defendant's motion as to breaking and entering a motor vehicle, but denied the motion as to possession of stolen goods and financial card theft. The jury returned guilty verdicts for financial card theft and misdemeanor possession of stolen goods.

Subsequently, the trial court dismissed the jury. The court stated:

> At this juncture it's a transcript of plea to fill out whether or not you are – attained a habitual felon status. I will be perfectly honest with you. You can contest that if you wanted to. You can contest it and say I am not a habitual felon. State's going to bring a clerk up or either he is going to – the DA's going to admit your prior convictions where you have been charged with an offense, convicted of an offense, charged with another offense, convicted of it, charged with another offense, and then convicted of it.
>
> We can have a hearing on that or you can just fill out a transcript of the plea acknowledging or admitting or pleading guilty to being a habitual felon and then the Court's going to sentence you. It's up to you.
>
> You want to go ahead and admit that you are a habitual felon or do you want to have a trial on that?

Defendant's trial attorney, Biggs, accepted the plea on behalf of Defendant. Then, the following exchange occurred:

> The Court: Are you satisfied with your lawyer's services?
>
> Defendant: At this point right now going to prison I am not satisfied.
>
> The Court: Whether you are satisfied or not, do you still want to enter this plea to being habitual felon.
>
> Defendant: Yes.

Defendant stipulated there was a factual basis for the plea. Judge L. Todd Burke entered judgment against Defendant on 2 April 2013, sentencing him to 76 to 104 months imprisonment. The same day, Judge V. Bradford Long entered a corrected judgment against Defendant, correcting the maximum sentence to 101 months. Defendant asked for an appellate defender, but did not file a timely written notice of appeal.

II. Jurisdiction

Defendant filed a *pro se* handwritten petition for writ of certiorari on 27 March 2015. This Court granted certiorari for the purpose of "reviewing the judgment entered on 2 April 2013 by Judge L. Todd Burke." We amend our grant of certiorari to include review of the judgment entered 2 April 2013 by Judge V. Bradford Long, a judgment entered to correct a clerical error in sentencing from the previous judgment entered by Judge L. Todd Burke.

III. Standard of Review

This Court reviews the denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Upon a defendant's motion for dismissal, the question for the trial court is "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d. 150 (2000). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). Upon review of a motion to dismiss, we review all of the evidence, including circumstantial evidence, in the light most favorable to the State. *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002), *cert. denied*, 537 U.S. 10085, 154 L. Ed. 2d 403 (2002).

We also review the sufficiency of an indictment *de novo*. *State v. McKoy*, 196 N.C. App. 650, 652, 675 S.E.2d 406, 409 (2009). Where an indictment is allegedly facially invalid, the indictment may be challenged at any time, even if it was uncontested in the trial court. *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000).

IV. Analysis

A. Financial Card Theft

[1] A person is guilty of financial transaction card theft if he "[t]akes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it[.]" N.C. Gen. Stat. § 14-113.9(a)(1) (2015). Defendant contends the evidence was insufficient to prove Defendant took or obtained Ms. McMasters' financial transaction card with the intent to use it. The surveillance video, Defendant argues, places Defendant in The Pantry at the time the card was used, but does not show him using the ATM.

The theft charges here relate to a card stolen from McMasters, the card's rightful owner. The evidence presented at trial tended to show that someone stole the card from McMasters' car the morning of 12 May 2011. The same day, someone other than McMasters swiped the card at Food Lion and The Pantry. The State presented surveillance video from The Pantry showing Defendant in the store at the time the card was swiped. Lee testified Defendant attempted to use a card with another person's name on its face. Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence Defendant obtained the card from McMasters without her consent and with intent to use the card. The trial court did not err by denying the Defendant's motion to dismiss and allowing the charge to proceed to the jury.

B. Possession of Stolen Goods

[2] As with all courts, both trial and appellate, the initial duty of a judge is to determine whether the court has jurisdiction. Whether it is by motion to dismiss from one of the parties or by the court *sua sponte*, this initial responsibility of the court stems from the duty of the courts to provide the efficient and fair administration of justice. If the parties to a litigation are put to the expense of a trial on issues in which the court lacks the authority to determine, the time and cost of the proceedings and other scarce judicial resources are misapplied.

In a trial or appellate court setting, the burden of establishing jurisdiction is placed upon the party seeking to invoke the trial court's jurisdiction. *See Marriott v. Chatham County*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007), *appeal denied*, 362 N.C. 472, 666 S.E.2d 122 (2008). "[I]t is [appellant's] burden to produce a record establishing the jurisdiction of the court from which appeal is taken, and his failure to do so subjects [the] appeal to dismissal." *State v. Phillips*, 149 N.C. App. 310, 313–314, 560 S.E.2d 852, 855 (2002). "When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). "When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed." *Id.* at 176, 273 S.E.2d at 711.

A court must have subject matter jurisdiction in order to decide a case. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). "Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]" *Id.* (citing *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956)). As a result, subject matter jurisdiction may be raised at any time, whether at trial or on appeal, *ex mero motu*. *See In re S.F.*, 190 N.C. App. 779, 781–782, 660 S.E.2d 924, 926 (2008). "A party may not waive jurisdiction, and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 882 (2000).

"Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. 1, § 22. An indictment must charge the "essential elements of the offense" to confer subject matter jurisdiction. *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (citation omitted). "[T]he evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense." *State v. Walston*, 140 N.C. App. 327, 334, 536 S.E.2d 630, 635 (2000). The purpose of an indictment is to give defendant reasonable notice of the charges against him so that he may prepare for his upcoming trial. *State v. Campbell*, __ N.C. __, __, 772 S.E.2d 440, 443 (2015) (citing *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981)). "North Carolina law has long provided that there can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008) (citation and internal quotation marks omitted).

Knowing possession of stolen property valued at not more than $1000 is a misdemeanor. N.C. Gen. Stat. § 14-71.1, 14-72(a) (2015). The elements of possession of stolen goods are: "(1) possession of personal property; (2) which has been stolen, (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose." *State v. Tanner*, 364 N.C. 229, 232, 695 S.E.2d 97, 100 (2010) (quoting *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982)).

Here, the indictment states: "[T]he defendant named above unlawfully, willfully and feloniously did possess one handbag containing personal items, one wallet, one Wachovia debit/credit card, one social security card, one check book, and $30.00 in United States currency." The indictment does not allege the essential elements that the listed personal property was stolen or that Defendant knew or had reason to know the property was stolen, creating a facial defect in the indictment. Accordingly, Defendant's conviction for possession of stolen goods must be vacated.

C. Ineffective Assistance of Counsel

[3] Lastly, Defendant contends the final judgment should be vacated because he received ineffective assistance of counsel. Generally, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not directly on appeal. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001) (citations omitted). "Our Supreme Court has instructed that should the reviewing court determine the [ineffective assistance of counsel] claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's rights to reassert them during a subsequent MAR proceeding." *Id.* at 554, 557 S.E.2d at 547 (internal quotation marks and citation omitted). Therefore, we dismiss this claim without prejudice to the right of Defendant to file a motion for appropriate relief with the trial court.

V. Conclusion

For the foregoing reasons, we find no error in part, vacate in part, and dismiss in part without prejudice.

NO ERROR IN PART; VACATE IN PART; DISMISS IN PART.

Judges ELMORE and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JULY 2016)

COVINGTON v. ALAN VESTER MOTOR CO., INC. No. 15-1002	Halifax (10CVS560)	Dismissed
EDWARDS v. TR. OF HAYWOOD CMTY. COLL. No. 15-1227	Haywood (14CVS557)	Affirmed
IN RE N.J.D. No. 16-24	Forsyth (15JB28)	Affirmed in part; vacated and remanded in part
JORDAN v. BRADSHER No. 15-808	Wake (14CVD5121)	Reversed and Remanded
MESSER v. POLLACK No. 15-1351	Haywood (09CVD589)	No Error
NEREIM v. CUMMINS No. 15-1253	Mecklenburg (14CVS15968)	Affirmed
STATE v. ALLEN No. 16-29	Union (14CRS53345)	No Error
STATE v. BLACK No. 15-1283	Wake (13CRS220893)	No error in part; no prejudicial error in part
STATE v. BLACKMON No. 15-1374	Sampson (14CRS395) (14CRS395)	No Error
STATE v. BLAZEVIC No. 15-1343	Mecklenburg (13CRS223087) (13CRS223092) (13CRS223094) (13CRS223095)	No Error
STATE v. BRYANT No. 15-1325	Forsyth (13CRS58009)	No Error
STATE v. CALLAHAN No. 15-1140	Mecklenburg (14CRS202901-04)	Vacated and Remanded
STATE v. COREY No. 15-1207	Caldwell (14CRS52929)	Vacated

STATE v. DOVE No. 15-1379	Onslow (13CRS55009-10)	REMANDED FOR RESENTENCING; MOTION FOR APPROPRIATE RELIEF REMANDED; RESTITUTION ORDER AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.
STATE v. EDWARDS No. 15-1336	Buncombe (13CRS59305)	Vacated and Remanded
STATE v. FRIONE No. 15-1143	Columbus (13CRS53114) (13CRS53115) (13CRS956)	No Error and No Plain Error
STATE v. HAIZLIP No. 15-886	Guilford (11CRS24788) (11CRS87042)	NO PREJUDICIAL ERROR
STATE v. HARDY No. 15-1122	Wayne (11CRS52676)	No Error
STATE v. HOLLOMAN No. 15-1261	Wayne (12CRS2103) (12CRS50170)	No plain error
STATE v. HOOKER No. 15-1175	Forsyth (14CRS53193) (14CRS53209) (14CRS53210) (14CRS53211) (14CRS55775) (14CRS57004)	Affirmed in Part; Remanded in Part.
STATE v. McEACHIN No. 15-1256	Johnston (12CRS54812)	Affirmed
STATE v. MOSTELLER No. 16-9	Cleveland (14CRS50812)	No error in part, vacated and remanded in part
STATE v. PETERS No. 16-34	Forsyth (12CRS55855-56) (12CRS805)	No Error

STATE v. PETWAY No. 15-1386	Nash (15CRS637)	Affirmed
STATE v. POTEAT No. 15-603	Cabarrus (12CRS54882-83)	Vacated in part, no error in part; remanded for resentencing
STATE v. ROBINSON No. 15-1312	Mecklenburg (13CRS209503) (13CRS209505) (13CRS209507) (13CRS209509) (13CRS209510) (13CRS209512)	Affirmed
STATE v. WELLS No. 16-206	Edgecombe (12CRS52140)	No Error
STATE v. WESTERN No. 15-1264	Wayne (14CRS50650)	Affirmed
STATE v. WHITLEY No. 15-1246	Wake (11CRS229725)	No error in part; no plain error in part; vacated and remanded in part
STATE v. WOODS No. 16-23	Alamance (13CRS57662-63)	Affirmed
TILLERY v. TILLERY No. 15-506	Wilson (14CVS980)	Affirmed
TOWN OF BEECH MOUNTAIN v. MILLIGAN No. 15-1267	Watauga (14CVS271)	Affirmed
TRUDEL v. TCI ARCHITECTS/ ENG'RS/ CONTRACTOR No. 15-1297	N.C. Industrial Commission (14-723693)	Affirmed
USHER v. CHARLOTTE- MECKLENBURG HOSP. AUTH. No. 15-880	Mecklenburg (11CVS21847)	Affirmed
WRIGHT v. WAL-MART, INC. No. 15-888	N.C. Industrial Commission (W66377)	Vacated and Remanded

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