248 N.C. App.—No. 3 Pages 305-455

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 20, 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

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FILED 19 JULY 2016

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APPEAL AND ERROR

Appeal and Error—interlocutory orders and appeals—substantial right—privilege—The trial court did not err by denying defendant's motion to dismiss an appeal from a discovery order. Defendants provided a document privilege log describing the privilege relating to each withheld document, and thus, their assertion of privilege affected a substantial right allowing for an immediate appeal. **Sessions v. Sloane, 370.**

Appeal and Error—mootness—involuntary commitment—commitment period expired—A respondent's appeal from an involuntary commitment order was not moot even though the commitment period had expired. This commitment might form the basis of a future commitment and there could be other collateral legal consequences. **In re Shackleford, 357.**

Appeal and Error—record—involuntary commitment—hearing transcript—not available—adequate alternative—There was not an adequate alternative to a verbatim transcript of an involuntary commitment hearing where the entire transcript was missing (rather than the transcript being partially unavailable) and the hearing was reconstructed from bare bone, partially legible notes taken by one person. **In re Shackleford, 357.**

Appeal and Error—record—involuntary commitment—lack of required verbatim transcript—prejudice—The respondent in an appeal from an involuntary commitment was prejudiced by the lack of a verbatim transcript even though he did not identify any specific errors or defects. The transcript was missing in its entirety and could not be adequately reconstructed; the prejudice was the inability to determine whether an appeal was appropriate and which arguments should be raised. **In re Shackleford, 357.**

Appeal and Error—record—involuntary commitment—verbatim transcript—not available—A respondent appealing an involuntary commitment was entitled by statute to receive a verbatim transcript of the involuntary commitment hearing, but the unavailability of the transcript does not automatically constitute reversible error in every case. Prejudice must be demonstrated, but general allegations of prejudice are not sufficient. There must be a determination of whether respondent made sufficient efforts to reconstruct the hearing. In this case that burden was carried in that respondent wrote to people present at the hearing. **In re Shackleford, 357.**

Appeal and Error—record—involuntary commitment—verbatim transcript not available—meaningful appellate review—Meaningful appellate review of an involuntary commitment proceeding was denied where the required verbatim transcript in its entirety was missing and could not be entirely reconstructed. **In re Shackleford, 357.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Child Abuse, Dependency, and Neglect—neglect—necessary findings—supporting evidence lacking—The trial court erred by adjudicating a child neglected. The trial court could not make the necessary findings of fact absent evidence that the child suffered physical, mental, or emotional impairment, or that he was at a substantial risk of such impairment. **In re K.J.B., 352.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Child Abuse, Dependency, and Neglect—permanency placement plan—non-relatives—grandmother not considered—The trial court erred in a child neglect proceeding by choosing guardianship with non-relatives as the permanent plan without making specific findings explaining why placement with the paternal grandmother was not in the children's best interest. **In re E.R., 345.**

CHILD CUSTODY AND SUPPORT

Child Custody and Support—order requiring weekend visitation or family therapy camp—additional dates and locations for visitation—within scope of existing comprehensive custody order—Where the trial court entered an order requiring weekend visitation between a father and his minor son and requiring the divorced parents and the son to attend a family therapy camp if they failed to comply, the Court of Appeals affirmed the order. By requiring the parties to participate in a specific method of treatment within the scope of an existing comprehensive child custody order, the trial court's order did not modify the terms of custody and therefore did not require a finding of changed circumstances or a motion to modify the governing order. The provision of additional dates and locations for custodial visitation also was not inconsistent with the governing order. **Tankala v. Pithavadian, 429.**

CONFESSIONS

Confessions and Incriminating Statements—probationer—motion to suppress—Miranda warnings—handcuffs—totality of circumstances—The trial court did not err in a possession with intent to manufacture, sell, and deliver cocaine case by denying defendant probationer's motion to suppress his statements to a parole officer based on its conclusion that defendant was not "in custody" for *Miranda* purposes. Based on the totality of circumstances, a reasonable person in defendant's situation, although in handcuffs, would not believe his restraint rose to a level associated with a formal arrest. This decision does mean that a person on probation is never entitled to the protections of *Miranda*. **State v. Barnes, 388.**

CONSTITUTIONAL LAW

Constitutional Law—due process—zoning—expert witness not accepted—Petitioners' due process rights were not violated in a zoning case involving a special use permit for a broadcast tower where their witness was accepted as an expert on land appraisal but not on harmony with the surrounding area. There is no violation of due process rights when petitioners are given the right to offer testimony, cross-examine witnesses, and inspect documents. **Davidson Cty. Broad. Co., Inc. v. Iredell Cty., 305.**

Constitutional Law—ineffective assistance of counsel—termination of parental rights—remanded to trial court for hearing—Because it could not be discerned from the record on appeal whether respondent mother received ineffective assistance of counsel at trial during the proceedings to terminate her parental rights, the case was remanded to the trial court for a hearing on this issue. **In re T.D., 366.**

Constitutional Law—right to trial by jury—waiver—date of arraignment—The trial court was constitutionally authorized to accept defendant's waiver of his right to a jury trial where his arraignment occurred after the effective date of the

CONSTITUTIONAL LAW—Continued

constitutional amendment and session law that allowed criminal defendants to waive their right to a trial by jury in non-capital cases. **State v. Jones, 418.**

CRIMINAL LAW

Criminal Law—bench trial—confession suppressed before trial—judge aware of confession—Defendant could not argue that he had been prejudiced in a non-jury trial where the same judge that had suppressed his confession before trial conducted the trial, so that the judge as fact finder was aware of the confession. Defendant chose to waive his right to a trial by jury with the knowledge that the same judge who had suppressed the confession had would serve as the judge in the bench trial. **State v. Jones, 418.**

Criminal Law—bench trial—inadmissible—presumed ignored—Defendant did not rebut the presumption that the judge in a bench trial ignores inadmissible evidence in a prosecution in which the trial judge had suppressed defendant's confession before trial and was thus aware of the confession. No prejudice exists by virtue of the simple fact that evidence was made known to the judge. **State v. Jones, 418.**

Criminal Law—jury instructions—flight—intentional assault—The trial court erred in a child abuse case by giving a flight instruction to the jury. There existed no evidence upon which a reasonable theory of flight could be based. Because intentional assault was required for a felony child abuse conviction, it was reasonably possible that the jury returned a felony conviction based on the erroneous instruction. A new trial was warranted. **State v. Campos, 393.**

Criminal Law—jury instructions—intentional assault—handling—child abuse—The trial court did not err or commit plain error in a child abuse case by its use of the term "handling" to describe for the jury the element of intentional assault, which was required for his felony conviction. The trial court's decision was appropriate as it adequately explained the law as it applied to the evidence. Further, defendant failed to object to the proffered language and characterized the trial court's language of "handling" in describing the assault as the most reasonable proposal defendant has heard. **State v. Campos, 393.**

Criminal Law—prosecutor's arguments—credibility of witness—In defendant's trial for charges related to sexual assault and kidnapping, the trial court did not err when it did not give the jury a curative instruction after sustaining defense counsel's objection to the prosecutor's allegedly improper statement during closing argument or when it did not intervene ex mero motu to a subsequent allegedly improper statement. Defendant did not request a curative instruction, and the trial court had issued proper general instructions to the jury at the outset of the trial; further, the additional statement by the prosecutor provided clarification as to the prosecutor's prior statement asking jurors to use their common sense and experience in determining a witness's credibility. **State v. Gordon, 403.**

DISCOVERY

Discovery—compelling production—attorney client privilege—subject line of email—The trial court did not abuse its discretion by requiring defendants to produce the subject lines of the pertinent emails. The same five-part test applies for the subject line of an email as it does for any communication allegedly protected under attorney-client privilege. There was no evidence defendants met their burden. **Sessions v. Sloane, 370.**

DISCOVERY—Continued

Discovery—compelling production—burden of proof—documents under seal not provided for review—The trial court did not abuse its discretion by compelling the production of documents withheld by defendants based on a failure to meet the burden of proof. There was no evidence to determine if the claims of privilege were bona fide. The documents were not provided under seal to the Court of Appeals for review, and thus, appellants ran the risk of providing insufficient evidence for the Court to make the necessary inquiry. **Sessions v. Sloane, 370.**

Discovery—compelling production—in camera review—The trial court did not abuse its discretion by failing to conduct an in camera review prior to issuing its order compelling discovery. There was no evidence defendants made a request for an in camera inspection of the documents at trial or submitted the documents for inspection. **Sessions v. Sloane, 370.**

Discovery—compelling production—joint defense privilege—work product doctrine—emails—The trial court did not abuse its discretion by failing to make findings of fact regarding whether pertinent documents withheld by defendants were prepared in anticipation of litigation. The burden rested on defendants to demonstrate the emails fell within the shield of the work product or joint defense doctrines. **Sessions v. Sloane, 370.**

INDECENT EXPOSURE

Indecent Exposure—misdemeanor statute—precluded from guilt for both misdemeanor and felony—Although there was no error in finding defendant guilty of felony indecent exposure in the presence of a female victim under the age of sixteen, the trial court erred by convicting defendant of misdemeanor indecent exposure. The misdemeanor statute precluded him from being found guilty of both misdemeanor and felonious indecent exposure even though there were multiple witnesses for actions stemming from the same conduct. The case was remanded to the trial court for resentencing. **State v. Hayes, 414.**

INDICTMENT AND INFORMATION

Indictment and Information—variance between indictment and evidence—time of offense—not fatal—There was not a fatal variance between the indictment and the evidence in a prosecution for second-degree sexual exploitation of a minor where the indictment and the evidence did not list the same date for the receipt of pornographic images. Time is an element of second-degree sexual exploitation of a minor, and defendant did not attempt to advance a time-based defense. **State v. Jones, 418.**

JURISDICTION

Jurisdiction—standing—subject matter jurisdiction—class action—bankruptcy—fraudulent misrepresentations—The trial court erred in two class action lawsuits by determining the Newton and Diorio plaintiffs lacked standing to sue. The injuries arising from the alleged fraudulent misrepresentations that induced each class member's individual contract were separate and distinct from any injury to AmerLink or any other creditor of the bankruptcy estate. **Newton v. Barth, 331.**

JURISDICTION—Continued

Jurisdiction—standing—subject matter jurisdiction—class action—bankruptcy—fraudulent misrepresentations—The trial court erred in two class action lawsuits by determining the Newton and Diorio plaintiffs lacked standing to sue. The injuries arising from the alleged fraudulent misrepresentations that induced each class member's individual contract were separate and distinct from any injury to AmerLink or any other creditor of the bankruptcy estate. **Diorio Forest Prods., Inc. v. Barth, 331.**

KIDNAPPING

Kidnapping—first-degree—victim not released in safe place—Where defendant took the victim by gunpoint to a secluded area in the woods off of Interstate 85, sexually assaulted her, and then abandoned her in the place of the assault, there was sufficient evidence to permit a reasonable juror to infer that the victim was not released by defendant in a safe place and therefore the trial court did not err by denying defendant's motion to dismiss the first-degree kidnapping charge. **State v. Gordon, 403.**

SEXUAL OFFENSES

Sexual Offenses—sexual exploitation of minor—second-degree—evidence of knowledge—sufficient—There was sufficient circumstantial evidence of defendant's knowledge of the contents of computer files in a prosecution for second-degree sexual exploitation of a minor. **State v. Jones, 418.**

STATUTES OF LIMITATION AND REPOSE

Statutes of Limitation and Repose—fraud—unfair and deceptive trade practices—The trial court erred in two class action lawsuits by granting defendants' Rule 12(b)(6) motion to dismiss Newton and Diorio plaintiffs' claims based on an alleged failure to bring suit within the applicable statute of limitations. Because they filed their respective complaints well within three years of Spoor's initial complaint, the Newton and Diorio Plaintiffs commenced their actions within the three-year statute of limitations for fraud claims and the four-year statute of limitations for unfair and deceptive trade practices claims. **Newton v. Barth, 331.**

Statutes of Limitation and Repose—fraud—unfair and deceptive trade practices—The trial court erred in two class action lawsuits by granting defendants' Rule 12(b)(6) motion to dismiss Newton and Diorio plaintiffs' claims based on an alleged failure to bring suit within the applicable statute of limitations. Because they filed their respective complaints well within three years of Spoor's initial complaint, the Newton and Diorio Plaintiffs commenced their actions within the three-year statute of limitations for fraud claims and the four-year statute of limitations for unfair and deceptive trade practices claims. **Diorio Forest Prods., Inc. v. Barth, 331.**

TRUSTS

Trusts—resulting trust—home titled in brother-in-law's name—dismissal of claims—Where plaintiff learned upon her husband's death that her home with her husband was titled in the name of her husband's brother (defendant), and plaintiff subsequently commenced an action against defendant for the claims of resulting trust, specific performance, injunctive relief, and declaratory relief, the Court of Appeals affirmed the trial court's sua sponte dismissal of her complaint for failure

to state a claim upon which relief may be granted. Whether the Court of Appeals considered only the face of plaintiff's complaint to support the dismissal, or whether it also considered the forecast of evidence as would be proper upon summary judgment motions, there was no genuine issue of material fact and plaintiff's claims failed as a matter of law. **Tuwamo v. Tuwamo, 441.**

ZONING

Zoning—comprehensive land plan—special permit—broadcast tower—The superior court properly determined that that a comprehensive land plan existed and that the special use permit application provided a standard for granting the permit which incorporated the plan of development for the county. The superior court appropriately applied the de novo standard of review to the issue of whether the land use plan was relevant to the determination of general conformity. **Davidson Cty. Broad. Co., Inc. v. Iredell Cty., 305.**

Zoning—conditional use application—burden of proof—An improper burden of proof was imposed on an applicant for a conditional use permit for a solar farm where one of the commissioners stated that the applicant had not proven its case beyond a reasonable doubt and the Board in its findings stated that, although the applicant had met its burden of production, its evidence was not persuasive. Once the applicant presents a prima facie case, the Board's decision not to issue the permit must be based on contrary findings supported by competent, material, and substantial evidence that appears in the record. **Dellinger v. Lincoln Cty., 317.**

Zoning—conditional use permit—hearing—participation of new commissioner—no error—There was no error in the hearing of a conditional use application on remand where a new commissioner participated. The new commissioner had the opportunity to read and review all of the evidence previously considered, and the change in the Board's membership had no effect upon the petitioner's ability to present its arguments. Furthermore, petitioners failed to show any prejudice from the participation of the new commissioner. **Dellinger v. Lincoln Cty., 317.**

Zoning—conditional use permit—solar farm—prima facie showing—harmony with surrounding area—value of adjoining property not injured—An applicant for a conditional use for a solar farm produced substantial, material, and competent evidence to establish its prima facie case for a conditional use permit where the applicant produced substantial, material, and competent evidence that the solar farm would be in harmony with the area and would not substantially injure the value of adjoining or abutting properties. **Dellinger v. Lincoln Cty., 317.**

Zoning—radio tower—effect on community—There was sufficient evidence for the superior court to conclude that a proposed radio tower was not in harmony with the surrounding area where the court considered photos of the property; a diagram showing that the tower would be a height comparable to the Empire State Building; and there was testimony that the tower would change the rural landscape, that strobe lights from the tower would be visible in bedrooms, and that the construction of the tower would change the character of the community. **Davidson Cty. Broad. Co., Inc. v. Iredell Cty., 305.**

Zoning—special use permit—standard of review—de novo—The superior court appropriately and properly used the de novo standard of review when reviewing a board of adjustment decision concerning a special use permit for a broadcast tower. **Davidson Cty. Broad. Co., Inc. v. Iredell Cty., 305.**

Zoning—special use permit—superior court review—whole record test—not arbitrary and capricious—The superior court applied the appropriate standard of review (whole record), and applied it appropriately, in a zoning case involving a special use permit for a broadcast tower. **Davidson Cty. Broad. Co., Inc. v. Iredell Cty., 305.**

Zoning—standard of review—level of review—appellate—In a zoning case, the local municipal board, the superior court, and the appellate court each have a particular standard of review. The appellate review is to determine whether the superior court properly used the appropriate standard. **Davidson Cty. Broad. Co., Inc. v. Iredell Cty., 305.**

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.

DAVIDSON CTY. BROAD. CO., INC. v. IREDELL CTY.

[248 N.C. App. 305 (2016)]

DAVIDSON COUNTY BROADCASTING COMPANY INC., LARRY W. EDWARDS, AND WIFE, SHIRLEY EDWARDS, PETITIONERS
v.
IREDELL COUNTY, RESPONDENTS
v.
WAYNE MCCONNELL, RUSTY N. MCCONNELL, ANN AND DON SCOTT, BILL MITCHELL AND DAVID LOWERY, INTERVENING RESPONDENTS

No. COA15-959

Filed 19 July 2016

1. Zoning—standard of review—level of review—appellate

In a zoning case, the local municipal board, the superior court, and the appellate court each have a particular standard of review. The appellate review is to determine whether the superior court properly used the appropriate standard.

2. Zoning—special use permit—standard of review—de novo

The superior court appropriately and properly used the de novo standard of review when reviewing a board of adjustment decision concerning a special use permit for a broadcast tower.

3. Zoning—radio tower—effect on community

There was sufficient evidence for the superior court to conclude that a proposed radio tower was not in harmony with the surrounding area where the court considered photos of the property; a diagram showing that the tower would be a height comparable to the Empire State Building; and there was testimony that the tower would change the rural landscape, that strobe lights from the tower would be visible in bedrooms, and that the construction of the tower would change the character of the community.

4. Zoning—comprehensive land plan—special permit—broadcast tower

The superior court properly determined that that a comprehensive land plan existed and that the special use permit application provided a standard for granting the permit which incorporated the plan of development for the county. The superior court appropriately applied the de novo standard of review to the issue of whether the land use plan was relevant to the determination of general conformity.

5. Zoning—special use permit—superior court review—whole record test—not arbitrary and capricious

The superior court applied the appropriate standard of review (whole record), and applied it appropriately, in a zoning case involving a special use permit for a broadcast tower.

6. Constitutional Law—due process—zoning—expert witness not accepted

Petitioners' due process rights were not violated in a zoning case involving a special use permit for a broadcast tower where their witness was accepted as an expert on land appraisal but not on harmony with the surrounding area. There is no violation of due process rights when petitioners are given the right to offer testimony, cross-examine witnesses, and inspect documents.

Appeal by petitioners from order entered 12 March 2015 by Judge Joseph N. Crosswhite in Iredell County Superior Court. Heard in the Court of Appeals 26 January 2016.

Allegra Collins Law, by Allegra Collins, for petitioner-appellants.

Pope McMillan Kutteh & Schieck, P.A, by Lisa Valdez, for respondent-appellee Iredell County.

Smith Moore Leatherwood LLP, by Thomas E. Terrell, Jr. and Kip D. Nelson, for intervening respondent-appellees.

BRYANT, Judge.

Where petitioners were unable to show they were entitled to a special use permit for their proposed tower which was determined to not be in conformity with the county's plan of development and not in harmony with the area, the Board's denial was proper, and the Superior Court utilized the appropriate standard of review in upholding the Board's decision. Further, where the Superior Court properly applied the appropriate standard of review, we affirm the order of the Superior Court.

On 18 November 2013, petitioners Larry W. Edwards and Shirley M. Edwards, on behalf of Davidson County Broadcasting Company, Inc., (the Broadcasting Company) filed an application for a special use permit with the Iredell County Zoning Board of Adjustment (the Board or the Board of Adjustment). Per the application, the Broadcasting Company broadcast an FM radio signal from a 1,014-foot tower in Davidson

County and proposed the construction of a 1,130-foot lattice radio tower, plus a sixty-foot antenna, in Iredell County, on the property of Larry W. Edwards and Shirley M. Edwards. The Edwards owned 133 acres of property, with 91.07 acres located in Iredell County. The property was "zoned R-A (Residential Agricultural District)." Per the Iredell County Land Development Code, radio transmission towers greater than 300 feet were eligible for placement on R-A property, with the approval of a special use permit by the Board of Adjustment. The Broadcasting Company asserted the following as factors relevant to the issuance of the special use permit:

> (A) THE USE REQUESTED, I.E. A RADIO TOWER IS AN ELIGIBLE SPECIAL USE IN A R-A DISTRICT IN WHICH THE EDWARDS' PROPERTY IS LOCATED.
>
> . . .
>
> (B) THE SPECIAL USE "WILL NOT MATERIALLY ENDANGER THE PUBLIC HEALTH OR SAFETY" IF LOCATED ON THE EDWARDS' PROPERTY AS PROPOSED ON THE ATTACHED SITE PLAN AND DEVELOPED ACCORDING TO THE PROPOSED PLAN.
>
> . . .
>
> (C) THE PROPOSED SPECIAL USE MEETS ALL REQUIRED CONDITIONS AND SPECIFICATIONS OF THE IREDELL COUNTY LAND DEVELOPMENT CODE . . . .
>
> . . .
>
> (D) THE CONSTRUCTION, OPERATION AND MAINTENANCE OF THE RADIO TOWER AS HEREIN DESCRIBED, WILL NOT SUBSTANTIALLY INJURE THE VALUE OF ADJOINING OR ABUTTING PROPERTY.
>
> . . .
>
> (E) THE LOCATION AND CHARACTER OF THE SPECIAL USE, DEVELOPED ACCORDING TO THE PROPOSED PLAN . . . IS IN HARMONY WITH THE AREA IN WHICH IT IS LOCATED, AND IN GENERAL CONFORMITY WITH THE IREDELL COUNTY LAND USE AND DEVELOPMENTAL PLAN.

A public hearing on the petition was held before the Board of Adjustment on 19 December 2013 and 23 January 2014. On 20 March 2014, the Board issued an order denying petitioners' request for a special use permit, finding that "[t]he Special Use [would not] be in harmony with the area in which it is to be located and [would not] be in general conformity with the plan of development of the county." The Board concluded that "there [was] an absence of material, competent, and substantial evidence supporting all necessary findings for the application in the affirmative . . . ."

On 21 April 2014, petitioners filed a petition for writ of certiorari in Iredell County Superior Court seeking review of the decision of the Board of Adjustment. Specifically, petitioners argued that the Board of Adjustment erroneously adopted the conclusion that the evidence presented in opposition to their application for a special use permit was sufficient to rebut the prima facie showing of harmony.

Upon the issuance of a writ of certiorari, a complete record of the proceedings before the Board was prepared and submitted for review by the trial court. The appeal was heard during the 2 March 2015 Civil Session of Iredell County Superior Court before the Honorable Joseph N. Crosswhite, Judge presiding. On 12 March 2015, the court issued its order affirming the Board's decision denying petitioners a special use permit for a broadcast tower.

Petitioners appeal.

On appeal, petitioners argue (I) that the Board's denial of the special use permit was erroneous as a matter of law and arbitrary and capricious. Furthermore, petitioners argue (II) that the Board violated petitioners' due process rights.

Standard of review

[1] A local municipal board, a superior court, and this Court each have a particular standard of review. When it considers an application for a special use permit, a board of adjustment sits as the finder of fact. *Cook v. Union Cnty. Zoning Bd. of Adjust.*, 185 N.C. App. 582, 585–86, 649 S.E.2d 458, 463 (2007). Upon the issuance of a writ of certiorari, a superior court reviews the decision of the board in the posture of an appellate court. *Bailey & Assoc., Inc. v. Wilmington Bd. of Adjust.*, 202 N.C. App. 177, 189, 689 S.E.2d 576, 585 (2010). And, in that capacity, the court is tasked with the following:

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

Mann Media, Inc. v. Randolph Cnty. Planning Bd., 356 N.C. 1, 12–13, 565 S.E.2d 9, 16 (2002) (citation omitted); *see also* N.C. Gen. Stat. § 160A-393(k) (2015) ("Appeals in the nature of certiorari").

[2] Where a party appeals the superior court's order to this Court, we review the order to "(1) determine whether the superior court exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly." *Cook*, 185 N.C. App. at 587, 649 S.E.2d at 464 (citation, quotation marks, and brackets omitted).

> The standard of review [exercised by the superior court] depends on the nature of the error of which the petitioner complains. If the petitioner complains that the Board's decision was based on an error of law, the superior court should conduct a de novo review. If the petitioner complain[ed] that the decision was not supported by the evidence or was arbitrary and capricious, the superior court should apply the whole record test. The whole record test requires that the trial court examine all competent evidence to determine whether the decision was supported by substantial evidence.

Morris Commc'ns Corp. v. Bd. of Adjust. of Gastonia, 159 N.C. App. 598, 600, 583 S.E.2d 419, 421 (2003) (citation omitted).

I

[3] Petitioners argue that the Board's denial of petitioners' application for a special use permit was error as a matter of law, and was also arbitrary and capricious. Petitioners contend that there was a legal presumption the proposed tower would be in harmony with the area and that

there was no evidence to support the Board's finding to the contrary. We disagree.

> It is a settled principle, essential to the right of self-preservation in every organized community, that however absolute may be the owner's title to his property, he holds it under the implied condition 'that its use shall not work injury to the equal enjoyment and safety of others, who have an equal right to the enjoyment of their property, nor be injurious to the community.'

City of Durham v. Eno Cotton Mills, 141 N.C. 615, 639 (141 N.C. 480, 497), 54 S.E. 453, 461 (1906). "For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances." N.C. Gen. Stat. § 153A-340(a) (2015). "The regulations may . . . provide that the board of adjustment . . . may issue special use permits . . . in accordance with the principles, conditions, safeguards, and procedures specified therein and may impose reasonable and appropriate conditions and safeguards upon these permits." *Id.* § 153A-340(c1). Zoning ordinances and special use permits also act as limitations to "forbid arbitrary and unduly discriminatory interference with property rights in the exercise of [a municipality's delegated authority]." *Heaton v. City of Charlotte*, 277 N.C. 506, 513, 178 S.E.2d 352, 356 (1971) (citation omitted). A special use permit allows uses which the zoning ordinance authorizes under stated conditions upon proof that those conditions, as detailed in the ordinance, exist. *Mann Media, Inc.*, 356 N.C. at 10, 565 S.E.2d at 15.

The Iredell County Land Development Code, a zoning ordinance, allowed for the use of radio transmission towers on property zoned R-A (Residential-agricultural), with the approval of a special use permit by the Board of Adjustment. In granting a special use permit, the ordinance required that the Board make affirmative findings that the special use will not materially endanger the public health, will meet all required conditions and specifications, will not substantially injure the value of abutting property, and "will be in harmony with the area in which it is to be located and will be in general conformity with the plan of development of the county." Iredell County Land Development Code, section 12.2.4 (D.).

The plan of development at issue here—the 2030 Horizon Plan—is a comprehensive land use plan. The Horizon Plan was adopted on 15 September 2009 (updated in November 2013). Thereafter, on 1 July 2011, the Iredell County Land Development Code was enacted to codify the Horizon Plan.

A.

Petitioners contend that "the ordinance was sufficient evidence of harmony as a matter of law, the Board committed legal error by ignoring the legal presumption of harmony and finding that it 'did not hear sufficient evidence that the proposed tower would be in harmony with the area.' " However, we note the findings of the trial court on *de novo* review that the ordinance before the Board, as set forth in the Board's order, "w[ere] sufficient to overcome the legal presumption that listing the proposed broadcast tower as an allowed use in the zoning district established a prima facie case that the tower would be harmonious with the area."

In the petition for writ of certiorari to the Superior Court, petitioners argued that

> the inclusion of the Use of radio/broadcast towers as a special use in the R-A District [as established by the Iredell County Land Development Code] establishes a prima facie case that the said permitted use was in fact in harmony with the general zoning plan and in general conformity with the plan of development of Iredell County.

"The opponents of the [Special Use Permit] failed to present competent material and substantial evidence to rebut the Petitioner's evidence." "Contrary to law, the Board adopted a 'Conclusion of Law[]' that the evidence presented in opposition by the opponents was sufficient to rebut the prima facie showing of harmony." "It was an error of law for the Board of Adjustment to conclude that . . . Petitioners 'failed to present substantial evidence showing how the proposed tower was in general conformity with the plan of development of the County . . . .' "It was an error of law for the Board of Adjustment to find that the proposed tower would be prominently seen and therefore inconsistent with the surrounding parcels when its own Land Development Code provides that a radio/broadcast tower is an eligible Special Use in a R-A District . . . ." And, "[i]t was an error of law for the Board of Adjustment to find and hold that the lighting of the tower would negatively impact nearby property owners when . . . Respondent's own Land Development Code requires . . . that radio towers have a Determination of No Hazard from the Federal Aviation Administration, which governs the lighting of the tower."

In its order, after having granted certiorari, the Superior Court firmly concluded there was no legal error committed by the Board on any of the bases raised by petitioner.

> The [Superior] Court . . . finds upon de novo review that the evidence presented by Respondents and cited by the Board in its Order was sufficient to overcome the legal presumption that listing the proposed broadcast tower as an allowed use in the zoning district established a prima facie case that the tower would be harmonious with the area. *Vulcan Materials Co. v. Guilford County Bd. of County Comm'rs.*, 115 N.C App. 319, 444 S.E.2d 639 (1994).
>
> The [Superior] Court further finds, upon de novo review, that the Board did not commit legal error when [it] found that it "did not hear sufficient evidence [from the Petitioner] that the proposed tower would be in harmony with the area," nor when it found that the tower "would be prominently seen and inconsistent with its surrounding parcels." The [Superior] Court further finds it was not legal error for the Board to find, based upon the evidence in the Record, that the lighting of the tower would not be in harmony with the area.

As stated, where petitioners challenged the Board's decision on the basis of an error of law, the Superior Court utilized *de novo* review. We hold this to be the appropriate standard. *See Morris Commc'ns Corp.*, 159 N.C. App. at 600, 583 S.E.2d at 421 ("If the petitioner complains that the Board's decision was based on an error of law, the superior court should conduct a de novo review." (citation omitted)). We now consider whether the court applied the standard properly.

"[T]he inclusion of a use as a conditional use in a particular zoning district establishes a prima facie case that the permitted use is in harmony with the general zoning plan." *Mann Media, Inc.*, 356 N.C. at 19, 565 S.E.2d at 20 (citation and quotation marks omitted). "If a *prima facie* case is established, a denial of the permit then should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Id.* at 12, 565 S.E.2d at 16 (citation and quotation marks omitted).

In its order, the court cites *Vulcan Materials Co.*, 115 N.C App. 319, 444 S.E.2d 639, in support of its conclusion that "the evidence . . . was sufficient to overcome the legal presumption that listing the proposed broadcast tower as an allowed use in the zoning district established a prima facie case that the tower would be harmonious with the area." In *Vulcan Materials Co.*, this Court reasoned that "[i]f . . . competent, material, and substantial evidence reveals that the use contemplated is not in

fact in 'harmony with the area in which it is to be located' the Board may so find." *Id.* at 324, 444 S.E.2d at 643 (citations omitted).

Reviewing the record before this Court, it appears that the Superior Court considered competent, material, and substantial evidence presented before the Board before concluding that such evidence was sufficient to overcome the legal presumption that the tower would be harmonious with the area, including the following: the 2030 Horizon Plan; photos of the subject property; a diagram showing the height of the radio broadcast tower to be comparable to that of the Empire State Building; testimony from nearby property owners on the tower's height, industrial appearance, and lighting, including testimony that an 1,130-foot industrial steel tower would change the rural landscape; that its overbearing height—eighty times taller than the height of the average building—would be an overbearing change to the skyline; that the strobe lights from the tower would be visible from the bedroom of some neighbors; and that construction of the tower would change the character of the small rural community. Therefore, we hold the superior court utilized the appropriate standard of review, *de novo*, in reviewing the Board's decision for an error of law and did so properly. Accordingly, petitioner's argument on this point is overruled.

B.

[4] Next, petitioners contend that the tower would be in general conformity with the surrounding area and the county development plan where there was a legal presumption of conformity pursuant to the county zoning ordinance. Petitioners contend that the 2030 Horizon Plan, Iredell County's land use plan—a policy statement—was not relevant to the determination of general conformity. Thus, petitioners assert that the Board erred as a matter of law in utilizing the 2030 Horizon Plan as a measure of general conformity and, further, lacked competent, material, and substantial evidence to rebut the presumption of harmony. We disagree.

In its 12 March 2015 order, the Superior Court ruled that "the Board did not commit legal error when it found the 2030 Horizon Plan to be of critical relevance in addressing [the question of whether the proposed broadcast tower was 'in general conformity with the plan of development of the county.']" In reaching its conclusion, the court made the following findings.

> Exercising de novo review, the [c]ourt is persuaded by the following[:] . . . First, N.C. Gen. Stat. § 153A-341 provides that "Zoning regulations shall be made in accordance with

> a comprehensive plan." No party contests that the 2030 Horizon Plan is the comprehensive land use plan adopted by Iredell County.
>
> Second, while a special use permit application does not have the force of law, it is noted that the County signaled its expectations to . . . [p]etitioner in the way its application articulates this standard ("Is the location and character of the special use developed according to the proposed plan in harmony with the area in which it is proposed to be located and in general conformity with the Iredell County Land Use and Development Plan?")
>
> Third, special use permit Standards 1 and 3 specifically address the issue of conformity with the Land Development Plan ("(1) The Use is among those listed as an eligible Special Use in the District in which the subject property is located; (3) The Special use meets all required conditions and specifications"). Under Standard 1, the Land Development Code addresses the legal presumption of harmony and compatibility as a threshold inquiry, yet provides that being a listed use in the zoning district only makes the proposed use "eligible" to be considered for a special use permit. Consequently, Standard [3] ("That the location and character of the Special use . . . will be in general conformity with the plan of development of the County") requires something more than indicating a second time whether a use is listed in the zoning ordinance as a permitted use in that district.

In addressing the issue, the Superior Court considered the relationship between zoning regulations and a comprehensive land use plan, as provided by our General Statutes, *see* N.C. Gen. Stat. § 153A-341 (2015), and properly determined that the 2030 Horizon Plan was Iredell County's comprehensive land use plan, and that the special use permit application provides a standard for granting the permit which incorporates the plan of development for Iredell County. This Court has upheld the use of a comprehensive land use plan as an advisory instrument for a body tasked with interpreting a zoning ordinance in the process of issuing a special use permit. *See Piney Mountain Neighborhood Ass'n v. Town of Chapel Hill*, 63 N.C. App. 244, 251, 304 S.E.2d 251, 255 (1983) ("Taking due note of the advisory nature of the Comprehensive Plan, we find that the above material and competent evidence, taking contradictions into account, substantially supports the finding that the development

conforms with the general plans for physical development of the Town."). In the instant case, the comprehensive plan—2030 Horizon Plan—was determined to be relevant to the Board's determination of whether the proposed special use was in conformity with the area and with the plan. Consistent with the precedent of this Court, we hold the Superior Court appropriately applied the *de novo* standard of review to the issue of whether the land use plan was relevant to the determination of general conformity. In addition, we note we have already determined there was sufficient evidence to rebut the legal presumption of harmony. Accordingly, we overrule petitioners' argument.

[5] Furthermore, in response to petitioners' contention that the Board's denial of a special use permit was arbitrary and capricious, we hold that that the Superior Court applied the appropriate whole record review standard. *See Morris Commc'ns Corp.*, 159 N.C. App. at 600, 583 S.E.2d at 421 ("If the petitioner complain[ed] that the decision . . . was arbitrary and capricious, the superior court should apply the whole record test. The whole record test requires that the trial court examine all competent evidence to determine whether the decision was supported by substantial evidence." (citation omitted)). And, upon review of the record, including what appeared to be competent, material, and substantial evidence of nonconformity, we hold that the Superior Court applied the whole record test appropriately. Accordingly, we affirm the order of the Superior Court.

II

[6] Next, petitioners argue that the Board violated petitioners' due process rights by denying petitioners the opportunity to present testimonial evidence regarding the proposed tower and its harmoniousness with the surrounding area. We disagree.

> Our Supreme Court has made clear that the task of a court reviewing a decision of a municipal body performing a quasi-judicial function, such as the Board of Adjustment's decision here, includes:
>
> . . .
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents . . . .

Fehrenbacher v. City of Durham, ___ N.C. App. ___, ___, 768 S.E.2d 186, 191 (2015) (citation omitted).

The record indicates that during the hearing before the Board, petitioners called Scott Robinson as a witness. Robinson was presented as an expert real estate appraiser: he had twenty years of experience in real estate appraisal; had earned MAI and RSA designations; had performed eighteen tower impact studies; and served as an expert witness in "numerous cases involving towers." Robinson provided the Board with a study setting forth his review of the market impact the presence of similar towers had on existing residential, commercial, and rural markets. Robinson's assessment considered the performance of the buyers and sellers based on sales data from residential and rural areas adjacent, in close proximity, and/or in view of towers of similar size and visual impact. Intervening respondents had raised an objection that Robinson was not qualified to testify to the tower's harmony with the surrounding area where his impact study examined only data assessing property value and use, not harmony. The Board accepted Robinson as an expert on the issue of land appraisal and heard his testimony that the tower would not substantially devalue adjoining property. However, Robinson was not allowed to testify to his opinion on the issue of harmony with the surrounding area.

In its 12 March 2015 order affirming the Board's denial of petitioners' request for a special use permit, the superior court acknowledged petitioners' challenge to the Board's ruling to preclude Robinson from giving opinion testimony on the proposed tower's harmony with the surrounding area.

> Exercising do novo review, the [Superior] Court finds that Mr. Robinson had not been properly qualified or accepted as an expert in a field that would qualify him to express an opinion at the hearing on the matter of the broadcast tower's harmony with the surrounding area, and the Board's ruling was not in error. The Court notes that Mr. Robinson's opinion on the question of harmony was fully expressed in his written report, which was not objected to by counsel for Intervening-Respondents and which therefore was accepted by the Board. . . .
>
> Further exercising de novo review, and based in part on Mr. Robinson's full expression of his opinion in his written report, the Court finds that Petitioners' rights of due process were not violated as alleged.

Where the record shows petitioners were given the right to offer testimony, cross-examine witnesses, and inspect documents, there

was no violation of due process rights. Accordingly, we overrule petitioner's argument.

In this case, we hold that the Superior Court exercised the appropriate standard of review in upholding the Board's denial of petitioners' special use permit and did so appropriately. We therefore affirm the judgment of the Superior Court.

AFFIRMED.

Judges DILLON and ZACHARY concur.

GARY DELLINGER, VIRGINIA DELLINGER, AND TIMOTHY S. DELLINGER, PETITIONERS
v.
LINCOLN COUNTY, LINCOLN COUNTY BOARD OF COMMISSIONERS, AND STRATA SOLAR, LLC, RESPONDENTS
AND
TIMOTHY P. MOONEY, MARTHA MCLEAN, AND THE SAILVIEW OWNERS ASSOCIATION, INTERVENOR RESPONDENTS

No. COA15-1370

Filed 19 July 2016

1. Zoning—conditional use permit—solar farm—prima facie showing—harmony with surrounding area—value of adjoining property not injured

An applicant for a conditional use for a solar farm produced substantial, material, and competent evidence to establish its prima facie case for a conditional use permit where the applicant produced substantial, material, and competent evidence that the solar farm would be in harmony with the area and would not substantially injure the value of adjoining or abutting properties.

2. Zoning—conditional use permit—hearing—participation of new commissioner—no error

There was no error in the hearing of a conditional use application on remand where a new commissioner participated. The new commissioner had the opportunity to read and review all of the evidence previously considered, and the change in the Board's membership had no effect upon the petitioner's ability to present its arguments. Furthermore, petitioners failed to show any prejudice from the participation of the new commissioner.

3. Zoning—conditional use application—burden of proof

An improper burden of proof was imposed on an applicant for a conditional use permit for a solar farm where one of the commissioners stated that the applicant had not proven its case beyond a reasonable doubt and the Board in its findings stated that, although the applicant had met its burden of production, its evidence was not persuasive. Once the applicant presents a prima facie case, the Board's decision not to issue the permit must be based on contrary findings supported by competent, material, and substantial evidence that appears in the record.

Appeal by petitioners from order entered 17 July 2015 by Judge Yvonne Mims Evans in Lincoln County Superior Court. Heard in the Court of Appeals 24 May 2016.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Jason White, for petitioners-appellants.

Scarbrough & Scarbrough, PLLC, by James E. Scarbrough and John F. Scarbrough, for intervenor respondents-appellees.

TYSON, Judge.

Gary Dellinger, Virginia Dellinger, and Timothy S. Dellinger (collectively, "the Dellingers" or "Petitioners") appeal from order affirming the decision of the Lincoln County Board of Commissioners ("the Board") to deny Strata Solar, LLC's application for a conditional use permit. We affirm in part, reverse in part, and remand.

I. Factual Background

The Dellingers own three tracts of real property in Denver, Lincoln County, North Carolina, which total approximately fifty-four acres. In May 2013, the Dellingers contracted with Strata Solar, LLC ("Strata Solar") for it to lease a portion of their property for the installation and operation of a solar energy facility. The Dellingers' property was zoned for residential-single family use ("R-SF") under the Lincoln County Unified Development Ordinance ("the Ordinance"). The properties directly adjoining or abutting the Dellingers' property are zoned as planned development-residential ("PD-R") and general industrial ("I-G").

The Ordinance schedules the operation of a solar energy farm as a permitted use on properties with this zoning classification, upon

application for a conditional use permit. According to the Ordinance, an applicant for a conditional use permit must meet four conditions:

> (1) The use will not materially endanger the public health or safety if located where proposed and developed according to the plan;
>
> (2) The use meets all required conditions and specifications;
>
> (3) The use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity; and
>
> (4) The location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located and will be in general conformity with the approved Land Development Plan for the area in question.

On 23 July 2013, Strata Solar filed its conditional use permit application to construct a solar energy facility on a 35.25-acre portion of the land owned by the Dellingers. Strata Solar presented evidence in support of its application to the Lincoln County Planning Board during quasi-judicial hearings conducted on 9 September and 25 November 2013. The Lincoln County Planning Director reviewed the application, found it satisfied the four conditions, and recommended issuance of the permit. The Lincoln County Planning Board voted 4-4 on its recommendation to the Board of Commissioners for the conditional use permit.

On 2 December and 16 December 2013, the Board of Commissioners held quasi-judicial hearings for consideration of and a final determination on Strata Solar's application. One commissioner recused himself from the vote. Twenty-four witnesses testified at the 2 December hearing.

The hearing resumed on 16 December, and after the testimony and evidence was presented, the Board of Commissioners voted 3 to 1 to deny Strata Solar's application. The Board concluded Strata Solar had met the first two conditions in order to issue the conditional use permit. However, the Board voted against Strata Solar's application on not meeting the third and fourth conditions: (3) "[t]he use will not substantially injure the value of adjoining or abutting property unless the use is a public necessity;" and, (4) "[t]he location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is located and will be in general conformity with the approved Land Development Plan for the area in question."

The Dellingers filed a Notice of Appeal and Petition for Writ of Certiorari in the Lincoln County Superior Court on 17 January 2014. The superior court also entered an order, which permitted property owners Timothy P. Mooney, George Gerard Arena, Martha McLean, and the Sailview Owners Association (collectively, "Intervenors-Respondents") to intervene in this action. One of the intervenors, George Gerard Arena, subsequently took a voluntary dismissal and withdrew from the case, after he sold his residence within the Sailview subdivision during the pendency of the action. No evidence was presented on the value of, or factors surrounding, this sale within Sailview.

On 7 August 2014, the superior court entered an order limiting the Dellingers' appeal to exclude "matters that could have been raised at the quasi-judicial hearing." The superior court concluded:

> The Petitioners, [the Dellingers,] by their failure to participate in the quasi-judicial hearing, waived their rights on appeal to complain of or object to those issues which could have been raised in the quasi-judicial hearing such that the scope of review is now limited to whether the Lincoln County Board of Commissioners' decision was supported by substantial competent evidence in view of the entire record and/or whether the Board's decision was arbitrary or capricious using the "whole record" test.

The Dellingers' appeal was heard on 26 January 2015. The superior court entered a written order on 25 February 2015, in which the court concluded it was "unable to determine whether the Board's decision on the third requirement was supported or unsupported by substantial competent evidence in view of the entire record." The superior court also held "[t]he Board did not make sufficient findings of fact regarding the third requirement," and "remand[ed] the matter to the Board for additional findings of fact regarding its decision to find in the negative as to the third requirement that 'the use will not substantially injure the value of adjoining property unless the use is a public necessity.' "

The superior court also reversed the Board's decision concerning Strata Solar's compliance with the fourth condition. The superior court concluded: "After reviewing the entire record, . . . there is not substantial evidence to support the Board's decision that the use is not in harmony with the area." This ruling on Strata Solar's compliance with the fourth condition was not appealed from, and is binding upon all parties.

Following the superior court's remand, the matter came before the Board of Commissioners for the second time on 16 March 2015. No new

testimony or additional evidence was taken. The membership of the Board had changed to include two new members since the initial decision was rendered on 16 December 2013.

The Chair of the Board had originally recused himself, and did so once again. New Commissioner Beam, the Vice-Chair, also recused himself, against the advice of the County Attorney, and stated he was not a member of the Board when it issued its original decision. Commissioner Martin Oakes ("Commissioner Oakes"), another new member of the Board, stated he had reviewed the entire record of the prior proceedings and participated in the 16 March vote.

The Board voted 2 to 1 to deny the conditional use permit application in a written decision dated 20 March 2015. The Dellingers filed a second Notice of Appeal and Petition for Writ of Certiorari. The Lincoln County Superior Court issued a second writ of certiorari on 16 April 2015. The superior court permitted the Intervenors-Respondents to intervene in the second action by order entered 8 June 2015.

The Dellingers' appeal was heard on 26 May 2015. The superior court entered its Decision on Appeal on 17 July 2015, which affirmed the Board's denial of the conditional use permit. The Dellingers gave timely notice of appeal to this Court. While Lincoln County and its Board of Commissioners are listed as party-defendants, neither filed a brief on appeal nor was either entity represented during oral arguments before this Court.

II. Issues

The Dellingers argue the superior court erred by affirming the Board's decision because: (1) the application for a conditional use permit was supported by competent, material, and substantial evidence; (2) the Board erred by allowing Commissioner Oakes to participate in the hearing and vote, and by requiring an improper burden of proof; and, (3) the Board's denial of the conditional use permit was not supported by competent, material, and substantial evidence.

III. Standard of Review

"A legislative body such as the Board, when granting or denying a conditional use permit, sits as a quasi-judicial body." *Sun Suites Holdings, LLC v. Bd. of Alderman of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000).

Our Supreme Court has recognized, "[d]ue process requirements mandate that certain *quasi-judicial* [land use] decisions comply with all fair trial standards when they are made." *County of Lancaster v. Mecklenburg Cty.*, 334 N.C. 496, 506, 434 S.E.2d 604, 611 (1993) (emphasis supplied). In addition to prior notice and an impartial decision-maker, our Supreme Court has explained these "fair trial standards" also include "an evidentiary hearing with the right of the parties to offer evidence; cross-examine adverse witnesses; inspect documents; have sworn testimony; and have written findings of fact supported by competent, substantial, and material evidence." *Id.* at 507-08, 434 S.E.2d at 612 (citations omitted).

The Board's decisions "shall be subject to review of the superior court in the nature of certiorari[,]" N.C. Gen. Stat. § 160A-381(c) (2015), in which "the superior court sits as an appellate court, and not as a trier of facts." *Tate Terrace Realty Inv'rs, Inc. v. Currituck Cty.*, 127 N.C. App. 212, 217, 488 S.E.2d 845, 848 (citation omitted), *disc. review denied*, 347 N.C. 409, 496 S.E.2d 394 (1997).

The role of the superior court in reviewing the decision of a Board of Commissioners, sitting as a quasi-judicial body, has been defined as follows:

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

Coastal Ready-Mix Concrete Co., Inc. v. Bd. of Comm'rs of Town of Nags Head, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

"This Court's task on review of the superior court's order is twofold: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *SBA, Inc. v. City of Asheville City Council*,

141 N.C. App. 19, 23, 539 S.E.2d 18, 20 (2000) (citations and internal quotation marks omitted).

> In reviewing the sufficiency and competency of the evidence at the appellate level, the question is not whether the evidence before the superior court supported that court's order but whether the evidence before the [county] board was supportive of its action. In proceedings of this nature, the superior court is not the trier of fact. Such is the function of the [county] board.

Coastal Ready-Mix, 299 N.C. at 626, 265 S.E.2d at 383.

When a party alleges the Board of Commissioners' decision was based upon an error of law, both the superior court, sitting as an appellate court, and this Court reviews the matter *de novo*, considering the matter anew. *Humane Soc'y of Moore Cty., Inc. v. Town of S. Pines*, 161 N.C. App. 625, 629, 589 S.E.2d 162, 165 (2003) (citation omitted).

When a party challenges the sufficiency of the evidence or when the Board's decision is alleged to have been arbitrary and capricious, this Court employs the whole record test. "The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *SBA, Inc.*, 141 N.C. App. at 26, 539 S.E.2d at 22 (citations and internal quotation marks omitted). "The reviewing court should not replace the [Board's] judgment as between two reasonably conflicting views; while the record may contain evidence contrary to the findings of the agency, this Court may not substitute its judgment for that of the agency." *Id.* (citation and internal quotation marks omitted).

IV. Analysis

A. Strata Solar's *Prima Facie* Case

Petitioners first argue the superior court erred by affirming the Board's decision and asserts Strata Solar's application for a conditional use permit was supported by competent, substantial, and material evidence. We agree.

Our Supreme Court has stated:

> Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms. It has been held that well-founded doubts as to the meaning

> of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property.

Yancey v. Heafner, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (citation and quotation marks omitted); *see also Vance S. Harrington & Co. v. Renner*, 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952) ("Every person owning property has the right to make any lawful use of it he sees fit, and restrictions sought to be imposed on that right must be carefully examined . . . ."); *Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 354, 578 S.E.2d 688, 691 (2003) ("Zoning ordinances derogate common law property rights and must be strictly construed in favor of the free use of property.").

"When an applicant for a conditional use permit produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made a *prima facie* showing of entitlement to a permit." *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002) (citation and internal quotation marks omitted). Material evidence is "[e]vidence having some logical connection with the facts of consequence or the issues." Black's Law Dictionary 638 (9th ed. 2009). Substantial evidence is "evidence a reasonable mind might accept as adequate to support a conclusion." *Humane Soc'y of Moore Cty.*, 161 N.C. App. at 629, 589 S.E.2d at 165 (citation and quotation marks omitted). "It must do more than create the suspicion of the existence of the fact to be established. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 471, 202 S.E.2d 129, 137 (1974) (citation, internal quotation marks, and alterations omitted).

Our Supreme Court held:

> When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Id. at 468, 202 S.E.2d at 136 (citations omitted).

"[W]hether competent, material and substantial evidence is present in the record is a conclusion of law." *Clark v. City of Asheboro*, 136 N.C. App. 114, 119, 524 S.E.2d 46, 50 (1999) (internal quotation marks

omitted). "[W]e review *de novo* the initial issue of whether the evidence presented by [P]etitioner[s] met the requirement of being competent, material, and substantial. The [county's] ultimate decision about how to weigh that evidence is subject to whole record review." *American Towers, Inc. v. Town of Morrisville*, 222 N.C. App. 638, 641, 731 S.E.2d 698, 701 (2012), *disc. review denied*, 366 N.C. 603, 743 S.E.2d 189 (2013). *See also SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 23-29, 539 S.E.2d 18, 20-24 (2000) (determining petitioner did not present sufficient evidence under *de novo* review and employing whole record test to find respondent properly weighed the evidence before it).

As discussed *supra*, the Ordinance requires an applicant to meet four conditions prior to issuance of a permit. In order for Strata Solar to make a *prima facie* showing of entitlement to a conditional use permit, it was required to present competent, substantial, and material evidence to meet the four conditions enumerated in the Ordinance. There is no dispute on appeal that Strata Solar's evidence met Conditions (1), (2), and (4) of the Ordinance. We focus our analysis on Condition (3).

[1] We first consider whether Strata Solar made a *prima facie* showing of entitlement to a conditional use permit on Condition (3). At the hearings on 2 and 16 December 2013, the Board of Commissioners heard evidence in favor of and against the application for the conditional use permit for the proposed solar farm.

Strata Solar produced "evidence that a solar farm would not emit noise, odors, or generate traffic, things that are considered to affect or reduce value to neighboring properties." Strata Solar presented the testimony and report of Richard Kirkland ("Mr. Kirkland"), a licensed and certified real estate appraiser, who has achieved the National Appraisal Institute's highest designation as a Member of the Appraisal Institute ("MAI"). Mr. Kirkland was tendered and admitted as an expert witness without objection, and testified the proposed solar farm would be in harmony with the area and its presence would not substantially injure the value of adjoining or abutting properties.

Mr. Kirkland's testimony was based upon his market review and analysis of paired and matched sales of real property, which adjoin a solar farm, in order to determine whether the solar farm's presence impacted the value of the adjoining or abutting properties. Mr. Kirkland specifically examined sales of homes in the Spring Garden subdivision, located in Goldsboro, North Carolina. Mr. Kirkland analyzed five sales in Spring Garden— two of which had occurred since the announcement of the solar farm, and three of which occurred after the solar farm was

constructed. Of these five homes, four of them "back up to," *i.e.* "adjoin or abut," the property hosting the solar farm.

Mr. Kirkland explained the results of the matched pair data analysis demonstrated the properties sold for similar prices both before and after the construction of the solar farm. Mr. Kirkland stated: "The prices being paid for are pretty much what the builder is asking." Based on these results, Mr. Kirkland testified, in his professional opinion, that proximity to a solar farm did not have a negative impact upon the value of the adjoining or abutting property.

Mr. Kirkland acknowledged the average value of homes in Spring Garden are $220,000.00 to $240,000.00, while the houses located within one mile of Strata Solar's proposed solar facility average more than $460,000.00. Mr. Kirkland testified he also "looked at some property in Chapel Hill," where a home which was adjacent to a solar farm was under contract for approximately $750,000.00, within the same price range of the homes in the Sailview subdivision.

Strata Solar also submitted into the record evidence the sworn affidavit of Mr. Kirkland. In his affidavit, Mr. Kirkland attested, in his professional opinion, "the proposed solar farm will not substantially injure the value of adjoining property and is in harmony with the area in which it is located." This expert testimony and affidavit were not objected to, were properly admitted into evidence, and constitute competent, material, and substantial evidence to support a *prima facie* showing of Strata Solar's compliance with Condition 3 of the Ordinance and entitlement to the permit.

Strata Solar also elicited testimony from Damon Bidencope ("Mr. Bidencope"), another licensed and certified real estate appraiser, who had also achieved the MAI designation. Mr. Bidencope testified the Sailview subdivision was designed and landscaped to form "an insulated enclave," which is isolated from other properties and developments in the area. He also testified the proposed solar facility would likely not be visible to those traveling on Webbs Road, or by residents or visitors from within the Sailview subdivision, due to the multiple layers of landscaping and fencing surrounding the proposed solar farm.

Mr. Bidencope testified he reviewed seven different solar farms in and around the area "because we were also trying to look and locate information that showed a significant or any deleterious effect on properties. We were unable to find it in our research."

The Board found Strata Solar had met its "burden of production" but "found the evidence unpersuasive." The Board denied the conditional use permit and concluded Strata Solar failed to satisfy Condition (3) — that the use would not substantially injure "the value of adjoining or abutting property." The Board voted 2 to 1 that Strata Solar had failed to make out its *prima facie* case under Condition (3).

The superior court reiterated: "[T]here was not substantial, material and competent evidence submitted by the Applicant, Strata Solar, to support a conclusion that issuance of a conditional use permit would not substantially injure the value of adjoining or abutting property." In light of the evidence summarized above, we hold that the superior court erred by upholding the Board's conclusion that Strata Solar failed to present substantial, material, and competent evidence to make a *prima facie* showing it was entitled to issuance of the conditional use permit.

The record shows Strata Solar produced substantial, material, and competent evidence to establish its *prima facie* case of entitlement for issuance of the conditional use permit. We reverse that portion of the superior court's order, which affirmed the Board's decision that Strata Solar had failed to present substantial, material, and competent evidence to establish a *prima facie* case of meeting Condition (3) to warrant issuance of the conditional use permit.

B. Commissioner Martin Oakes' Participation and Improper Burden of Proof

1. Commissioner Oakes' Participation

[2] Petitioners argue the Board erred by allowing Commissioner Oakes to participate in the Board's vote on remand, because he was not on the Board when it rendered its original decision to deny issuing Strata Solar's conditional use permit. We disagree.

In *Brannock v. Zoning Bd. of Adjustment*, 260 N.C. 426, 132 S.E.2d 758 (1963), the petitioners argued a special use permit was improperly granted because, *inter alia*, the membership of the Zoning Board of Adjustment changed between the original hearing and the final approval of the application. In a *per curiam* opinion, our Supreme Court affirmed the grant of the special use permit because "[t]he new members had access to the minutes and records of the various hearings and the required majority participated and joined in all decisions." *Id.* at 427, 132 S.E.2d at 759.

Here, although the addition of two new Board members had changed the membership composition of the Board from the time of the initial hearings in December 2013 to the time the Board reviewed the matter on 16 March 2015 after remand, both new Board members had an opportunity to read and review all of the evidence previously considered. Commissioner Oakes stated he "reviewed the entire record of the prior proceedings" before participating in the 16 March vote.

The change in Board membership composition had no effect upon Petitioners or Strata Solar's ability to present its arguments in favor of issuance of the conditional use permit. *See Cox v. Hancock*, 160 N.C. App. 473, 483, 586 S.E.2d 500, 507 (2003) (holding "access to the minutes and exhibits from the earlier meeting" assured petitioners were provided with due process and change in Board membership had no effect on petitioners' ability to present arguments).

Petitioners have failed to show any prejudice by new Commissioner Oakes' participation in the hearing and vote on remand. *See Baker v. Town of Rose Hill*, 126 N.C. App. 338, 342, 485 S.E.2d 78, 81 (1997) (holding petitioners failed to show prejudice where four of five members of Town Board voted in favor of resolution to issue conditional use permit). This argument is overruled. The superior court's ruling on this issue is affirmed.

2. Improper Burden of Proof

[3] Petitioners argue an improper burden of proof was imposed and their Due Process rights were violated because Commissioner Patton stated he was voting against issuing the permit because the applicant did not prove its case "beyond a doubt," and Commissioner Oakes and the Board's findings of fact stated "[a]lthough [Strata Solar] did meet its burden of production and provided evidence as to this element, we found the evidence unpersuasive." We review this alleged error of law *de novo*. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417 (2000) ("If a petitioner contends the Board's decision was based on an error of law, *de novo* review is proper."), *aff'd*, 354 N.C. 298, 554 S.E.2d 634 (2001).

The above-mentioned statements were made during the Board's 16 March 2015 deliberations upon remand from the superior court. The transcript of the 16 March deliberations and the record before us support Petitioners' argument that the Board's decision was based upon holding Strata Solar to an improper burden and legal standard. The superior court concluded "there were no procedural errors in the Board of Commissioners' decision on remand" and Commissioner Patton's

statement "does not suggest to the Court that he applied the wrong legal standard, but rather that he merely used a layman's term."

"This Court must examine the trial court's order for error of law just as with any other civil case." *Tate Terrace*, 127 N.C. App. at 219, 488 S.E.2d at 849 (citation and internal quotation marks omitted). Based on the evidence presented, the Board found "the applicant has failed to meet its burden of proof. Although it did meet its burden of *production* and provided evidence as to this element, we found the evidence unpersuasive." (emphasis supplied).

In *Woodhouse v. Bd. of Comm'rs of Nags Head*, 299 N.C. 211, 217, 261 S.E.2d 882, 887 (1980), our Supreme Court noted: "It is well settled [sic] that an applicant has the initial burden of showing compliance with the standards and conditions required by the ordinance for the issuance of a conditional use permit." Our Supreme Court further stated:

> To hold that an applicant must first anticipate and then prove or disprove each and every general consideration would impose an intolerable, if not impossible, burden on an applicant for a conditional use permit. An applicant need not negate every possible objection to the proposed use. Furthermore, once an applicant shows that the proposed use is permitted under the ordinance and presents testimony and evidence which shows that the application meets the requirements for a special exception, the burden . . . falls upon those who oppose the issuance of a special exception.

Id. at 219, 261 S.E.2d at 887-88 (citations and internal quotation marks omitted).

Commissioner Patton's reference to holding Strata Solar to a "beyond a doubt" standard during the deliberations, in addition to Commissioner Oakes stating and the Board's order denying Strata Solar's permit because it "failed to meet its burden of proof" tends to show the Board imposed an improper standard or failed to recognize the requisite burden-shifting to the Intervenors-Respondents after Strata Solar had made its *prima facie* case for entitlement. *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 136 (citations omitted).

Once Strata Solar established its *prima facie* case, the Board's decision not to issue the permit must be "based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Id.*

Here, the Board not only required Strata Solar to meet its burden of production to make its *prima facie* case, but one decision-maker apparently imposed a "beyond a doubt" burden of proof on Strata Solar. The Board also incorrectly implemented a "burden of persuasion" upon Strata Solar after Strata Solar it presented a *prima facie* case, rather than shifting the burden to the Intervenors-Respondents to produce rebuttal evidence contra to overcome Strata Solar's entitlement to the conditional use permit.

The Board's requirements are contrary to our Supreme Court's holdings in *Humble Oil* and *Woodhouse*, and as consistently applied in their progeny. *See Cumulus Broad., LLC v. Hoke Cty. Bd. of Comm'rs*, 180 N.C. App. 424, 427, 638 S.E.2d 12, 15-16 (2006) ("When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it." (citation and quotation marks omitted)); *Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227 ("Once an applicant makes [its *prima facie*] showing, the burden . . . falls upon those who oppose the issuance of the permit." (citation omitted)).

The superior court's order is reversed on this issue and remanded to that court for further remand to the Board for additional quasi-judicial proceedings, utilizing the proper legal procedures and standards, which hold Strata Solar and Intervenors-Respondents to their respective burdens of proof. In light of this decision, we need not address Petitioners' remaining argument that the Board's denial of Strata Solar's conditional use permit was not supported by competent, substantial, and material evidence.

V. Conclusion

Strata Solar produced substantial, material, and competent evidence to establish a *prima facie* case of entitlement to the issuance of a conditional use permit by Lincoln County.

Petitioners have failed to carry their burden to show they were prejudiced or denied Due Process by new Commissioner Oakes' participation in the Board's decision upon remand. Petitioners' argument that Strata Solar was held to an improper burden of proof and that the Board failed to shift the burden of proof to the Intervenors-Respondents is supported by the record.

The order of the superior court, which upheld the Board's denial of Strata Solar's application for a conditional use permit, is reversed

and remanded with further instructions to remand to the Board for further proceedings consistent with this opinion. *See* N.C. Gen. Stat. § 160A-393(k)(3) (2015), *Dobo v. Zoning Bd. of Adjustment of Wilmington*, 149 N.C. App. 701, 712-13, 562 S.E.2d 108, 115-16 (2002) (Tyson, J., dissenting), *rev'd per curiam*, 356 N.C. 656, 576 S.E.2d 324 (2003).

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED.

Judges BRYANT and INMAN concur.

JOHN NEWTON, HARRY SCHATMEYER, CHERYL SCHATMEYER, JUANVELASQUEZ, ROBERT THOMPSON, KRISTI THOMPSON, DALE F. CAMARA, A.J. RICE, VIOLANE RICE, RANDALL SLAYTON, MARIE PALADINO, MARCAR ENTERPRISES, INC., MAYNARD SIKES, NANCY SIKES, BILLY BACON, BEVERLY BACON, SABINA HOULE, KENNETH COURNOYER, LAWANNA COURNOYER, GARY GROSS, ELKE GROSS, JACK DONNELLY, AND JOSEPH KINTZ, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED, PLAINTIFFS

AND RICHARD B. SPOOR, PLAINTIFF

v.

JOHN BARTH, JR., AND JOHN BARTH, (SR.), DEFENDANTS

DIORIO FOREST PRODUCTS, INC., 919 MARKETING COMPANY, INC., AND JAMES B. ENTERPRISES, INC., FORMERLY EPPERSON LUMBER SALES, INC., ON BEHALF OF THEMSELVES AND ALL ENTITIES SIMILARLY SITUATED, PLAINTIFFS

AND RICHARD B. SPOOR, PLAINTIFF

v.

JOHN BARTH, JR., AND JOHN BARTH (SR.), DEFENDANTS

Nos. COA15-1209, COA15-1210

Filed 19 July 2016

1. Jurisdiction—standing—subject matter jurisdiction—class action—bankruptcy—fraudulent misrepresentations

The trial court erred in two class action lawsuits by determining the Newton and Diorio plaintiffs lacked standing to sue. The injuries arising from the alleged fraudulent misrepresentations that induced each class member's individual contract were separate and distinct from any injury to AmerLink or any other creditor of the bankruptcy estate.

2. Statutes of Limitation and Repose—fraud—unfair and deceptive trade practices

The trial court erred in two class action lawsuits by granting defendants' Rule 12(b)(6) motion to dismiss Newton and Diorio plaintiffs' claims based on an alleged failure to bring suit within the applicable statute of limitations. Because they filed their respective complaints well within three years of Spoor's initial complaint, the Newton and Diorio Plaintiffs commenced their actions within the three-year statute of limitations for fraud claims and the four-year statute of limitations for unfair and deceptive trade practices claims.

Appeals by Plaintiffs John Newton, et al., from Order and Judgment entered 8 June 2015 and Plaintiffs Diorio Forest Products, Inc., *et al.*, from Order and Judgment entered 18 June 2015 by Judge Robert T. Sumner in Wake County Superior Court. Heard in the Court of Appeals 9 June 2016.

Barry Nakell, and Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, for Plaintiffs.

Manning Fulton & Skinner, P.A., by Judson A. Welborn and J. Whitfield Gibson, for Defendant John M. Barth, Jr.

Wilson & Ratledge, PLLC, by Reginald B. Gillespie, Jr., and N. Hunter Wyche, Jr., and Foley & Lardner LLP, by Michael J. Small and David B. Goroff, for Defendant John M. Barth.

STEPHENS, Judge.

Plaintiffs John Newton, *et al.*, and Diorio Forest Products, Inc., *et al.*, appeal from the trial court's Orders and Judgments dismissing their claims against Defendants John M. Barth, Jr. ("Junior"), and John M. Barth ("Senior"), based on lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Plaintiffs argue that the trial court erred in determining they lacked standing to assert their claims and that their claims were barred by the applicable statutes of limitations. We agree, and we consequently reverse the trial court's Orders and Judgments.

Factual Background and Procedural History

This case arises from two separate class action lawsuits filed in Wake County Superior Court alleging claims for fraud, unfair and

deceptive trade practices ("UDTP"), civil conspiracy, and punitive damages against Junior and Senior by the customers, vendors, and suppliers of AmerLink, Ltd., a North Carolina corporation that engaged in the business of selling materials and contracts for the construction of log homes. The Newton Plaintiffs were customers of AmerLink, and the Diorio Plaintiffs were vendors and suppliers of AmerLink. Junior was AmerLink's president and CEO from 2006 to 2008. Senior is Junior's father, and although he never held any formal position with AmerLink, the Newton and Diorio Plaintiffs allege that beginning in 2007 and continuing until October 2009, Junior and Senior engaged in a fraudulent scheme to acquire control of AmerLink at a depreciated price by falsifying financial statements and other documents, secretly infusing over $2 million into AmerLink to prop up the corporation and conceal the falsified financial statements, and misrepresenting AmerLink's distressed financial condition.

The facts underlying the allegations of the Newton and Diorio Plaintiffs' complaints were previously discussed at length in this Court's opinion in a related action brought against Junior and Senior by AmerLink's founder, chairman, and former majority shareholder, Richard B. Spoor. *See Spoor v. Barth*, __ N.C. App. __, 781 S.E.2d 627, *disc. review and cert. denied*, __ N.C. __, __ S.E.2d __ (2016). As detailed therein, after becoming president and CEO of AmerLink in September 2006, Junior sought to purchase Spoor's controlling interest in the company using funds from Senior, who inspected AmerLink's facilities, inquired into the company's financial situation with its principal lender, and drafted terms for a potential purchase agreement in 2007. *Id.* at __, 781 S.E.2d at 629. No agreement was reached at that time, but Junior and Spoor eventually agreed to form a new corporation which would serve as a vehicle for Junior to purchase Spoor's majority interest in AmerLink using $8 million in funds from Senior in exchange for shares Spoor deposited into the new corporation. *Id.* at __, 781 S.E.2d at 629-30. Spoor alleged that by January 2008, "Junior became aware that based on his mismanagement, AmerLink was facing financial difficulty," and he thereafter took steps to conceal this from Spoor and others by falsifying sales and delivery reports. *Id.* at __, 781 S.E.2d at 629. In June 2008, "Junior became aware that AmerLink was insolvent and was unable to purchase materials to fulfill its contracts," but he nevertheless continued to falsify financial and delivery reports, "directed AmerLink staff to encourage customers to enter into sales agreements with AmerLink, to send deposits and additional funds to AmerLink, and to schedule deliveries," and infused funds in excess of $2 million to prop up the company, with half of those funds coming from Senior. *Id.* In October 2008, after Spoor discovered

Junior had been falsifying reports to conceal AmerLink's rapidly deteriorating financial situation, Junior was removed from his position as CEO but remained president, promised Senior would loan the corporation up to $3 million, and directed staff to continue to tell customers that new investment funds were on the way. *Id.* at __, 781 S.E.2d at 630. However, Senior provided only $300,000 in funding, and on 15 December 2008, Spoor shut down AmerLink after learning its financial situation was even worse than Junior had represented in October. *Id.* at __, 781 S.E.2d at 631.

On 12 February 2009, AmerLink filed for Chapter 11 bankruptcy. *Id.* In the months that followed, Junior continued to represent that additional investments of up to $8 million would be forthcoming from Senior, and at one point forged a bank statement to reflect that such loans had been deposited. *Id.* However, in August 2009, Senior informed AmerLink's bankruptcy attorney that he had no intention of providing any further financing for the company. *Id.* Thereafter, AmerLink's Chapter 11 bankruptcy proceeding was converted to a Chapter 7 bankruptcy proceeding, and, on 13 May 2010, Junior pleaded guilty to felony bankruptcy fraud. *Id.* at __, 781 S.E.2d at 631-32. On 23 April 2011, AmerLink's bankruptcy trustee filed an adversary proceeding against Junior, Senior, Spoor, and other AmerLink directors alleging claims for, *inter alia*, fraudulent conveyances, preferential transfers, breach of fiduciary duties, constructive trust, unjust enrichment, and civil conspiracy. *Id.* at __, 781 S.E.2d at 636. These charges were based on the trustee's allegations that Junior, Spoor, and other AmerLink directors

> engaged in the creation of new companies and transfer of assets to companies in an effort to sell a substantial portion of [Spoor's] ownership interest in AmerLink. The trustee also alleged that an employee stock option plan was adopted at the urging of [Spoor] and Junior effective 1 October 2005 and that [Spoor], Junior, and AmerLink's directors' actions were solely for the purpose of creating a means for [Spoor] to extract as much cash as possible from the business and for Junior to be in a position to take control of the company. This adversary proceeding was settled on 6 September 2011. The trustee dismissed with prejudice all claims and causes of action against Senior, Junior, and [Spoor] and released them from claims by the trustee or bankruptcy estate.

Id. Although the bankruptcy settlement included a waiver by Spoor releasing all claims against AmerLink's bankruptcy estate, on 5 October

2011, Spoor filed a complaint alleging claims against Junior in his individual capacity for, *inter alia*, breach of contract, breach of contract as third party beneficiary, breach of fiduciary duty, fraud, punitive damages, UDTP, and civil conspiracy. *Id.* at __, 781 S.E.2d at 632. On 14 February 2012, Spoor filed his first amended complaint adding Senior as a defendant. *Id.*

That same day, the Newton Plaintiffs filed a complaint in Wake County Superior Court alleging their claims for fraud, UDTP, civil conspiracy, and punitive damages against Junior and Senior in their individual capacities. The Newton Plaintiffs voluntarily dismissed their complaint without prejudice on 23 May 2013, refiled their complaint on 22 May 2014, and filed an amended complaint on 9 June 2014. The Diorio Plaintiffs filed a substantially similar complaint on 30 July 2014. In their complaints, the Newton and Diorio Plaintiffs alleged that by infusing funds into AmerLink, falsifying corporate financial statements, and directing AmerLink staff to assure customers, vendors, and suppliers that AmerLink would either comply with its contracts or receive funds that would allow it to comply with those contracts, Junior and Senior intentionally misrepresented and concealed AmerLink's financial distress in order to deceive and induce the Newton and Diorio Plaintiffs into entering into contracts with and providing funds, materials, and services to AmerLink, thus leaving them unable to protect themselves from the company's financial problems. The Newton and Diorio Plaintiffs also alleged that they could not have discovered the facts constituting Junior's and Senior's alleged fraud and UDTP through the exercise of reasonable diligence before 1 January 2012, given that much of the information supporting those facts was not produced until after Spoor filed his lawsuit against Junior and Senior.[1]

On 11 July and 19 August 2014, our Supreme Court's Chief Justice entered separate orders designating these cases as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. Junior and Senior subsequently filed motions to dismiss both complaints pursuant to Rules 12(b)(1) and 12(b)(6) of our State's Rules of Civil Procedure. Specifically, Junior and Senior contended that: (1) the Newton and Diorio Plaintiffs lacked standing to sue, thereby depriving the trial court of subject matter jurisdiction, because the claims they alleged in their complaints were wholly derivative of claims that

1. Although Spoor was included as a plaintiff in the initial complaints filed by both the Newton and Diorio Plaintiffs, the Newton and Diorio Plaintiffs voluntarily dismissed Spoor without prejudice from both actions on 15 October 2014.

properly belonged to the corporation and were already asserted, litigated, and settled by the adversary proceeding that had been brought by AmerLink's bankruptcy trustee; and (2) the claims were barred by the applicable statutes of limitations, failed to comply with the heightened pleading requirements for alleging fraud as required by N.C.R. Civ. P. 9(b), and otherwise failed to state any basis upon which relief could be granted.

After a hearing held in Wake County Superior Court on 2 March 2015, the Honorable Robert T. Sumner, Judge presiding, the trial court concluded that the Newton and Diorio Plaintiffs lacked standing and that their claims were barred by the applicable statutes of limitations, and consequently dismissed their claims with prejudice by written orders entered 8 and 18 June 2015. The Newton and Diorio Plaintiffs filed timely notice of appeal to this Court.

Analysis

A. Standing

[1] The Newton and Diorio Plaintiffs argue first that the trial court erred in dismissing their claims against Junior and Senior based on its conclusion that they lacked standing to sue. Specifically, the Newton and Diorio Plaintiffs contend that the adversary proceeding filed by the AmerLink bankruptcy trustee does not preclude their claims for fraud, UDTP, civil conspiracy, and punitive damages against Junior and Senior in their individual capacities because these claims were never asserted during the adversary proceeding and because these claims belong to the Newton and Diorio Plaintiffs, rather than the AmerLink bankruptcy estate. We agree.

"In order for a court to have subject matter jurisdiction to hear a claim, the party bringing the claim must have standing." *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 227 N.C. App. 102, 106, 744 S.E.2d 130, 133 (2013) (citation omitted). "[S]tanding to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer*, 209 N.C. App. 369, 379, 705 S.E.2d 757, 765 (citation and internal quotation marks omitted), *disc. review denied*, 365 N.C. 188, 707 S.E.2d 243 (2011). "[T]his Court's review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*." *Munger v. State*, 202 N.C. App. 404, 410, 689 S.E.2d 230, 235 (2010), *disc. review improvidently allowed*, 365 N.C. 3, 705 S.E.2d 734 (2011).

"When a corporation enters bankruptcy, any legal claims that could be maintained *by the corporation* against other parties become part of the bankruptcy estate, and claims that are part of the bankruptcy estate may only be brought by the trustee in the bankruptcy proceeding." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 25, 560 S.E.2d 817, 822 (citations omitted; emphasis in original), *disc. review denied and appeal dismissed*, 356 N.C. 164, 568 S.E.2d 196 (2002). Federal law authorizes the bankruptcy trustee to: (1) bring suit on behalf of the bankruptcy estate; and (2) avoid or recover fraudulent conveyances of property from the bankrupt debtor for the benefit of all creditors of the bankruptcy estate. *See* 11 U.S.C. §§ 541(a), 544, 548 (2012). However, as the United States Supreme Court recognized in *Caplin v. Marine Midland Grace Tr. Co.*, 406 U.S. 416, 433-34, 32 L. Ed. 2d 195, 206-07 (1972), the trustee's authority to bring suit on behalf of the bankruptcy estate does not extend to state law claims by the estate's creditors against third parties.[2] Thus, an action that is "personal" to a creditor is not property of the bankruptcy estate. *See, e.g.*, *In re Bostic Constr., Inc.*, 435 B.R. 46, 60 (M.D.N.C. 2010). The issue of whether a claim is personal to a creditor depends on state law. *See id.*; *see also Keener*, 149 N.C. App. at 26, 560 S.E.2d at 822.

The North Carolina Supreme Court has recognized that, as a general matter, a corporate officer "can be held personally liable for torts in which he actively participates," even when such torts were "committed when acting officially" and "regardless of whether the corporation is liable." *Wilson v. McLeod Oil Co., Inc.*, 327 N.C. 491, 518, 398 S.E.2d 586, 600 (1990) (citations omitted), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991). In the context of a bankruptcy proceeding,

> [s]hareholders, creditors, or guarantors of corporations generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation. Recovery is available, naturally, when the defendant owes an individual shareholder, creditor, or guarantor a special duty, or when the individual suffered an injury separate and distinct from that suffered by other shareholders, creditors, or guarantors.

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2. Although *Caplin* was decided prior to the enactment of the federal Bankruptcy Code, it remains good law, *see, e.g.*, *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 986 (11th Cir. 1990) ("*Caplin* has been held to remain the law under the revised bankruptcy statutes."), and was recently cited by the United States Court of Appeals for the Second Circuit to support its holding that the bankruptcy trustee in proceedings arising from the liquidation of Bernie Madoff's investment firm lacked standing to sue several third parties on behalf of individual customers defrauded by Madoff's Ponzi scheme. *See In re Bernard L. Madoff Inv. Secs. LLC*, 721 F.3d 54, 67 (2d Cir. 2013).

Barger v. McCoy Hillard & Parks, 346 N.C. 650, 660, 488 S.E.2d 215, 220-21 (1997) (citations and ellipsis omitted). Therefore, the creditors of a bankruptcy estate may prosecute individual actions against a third party if they "can show either (1) that the wrongdoer owed [them] a special duty, or (2) that the injury suffered by the [creditors] is personal to [them] and distinct from the injury sustained by the corporation itself." *Id.* at 661, 488 S.E.2d at 221.

In the present case, the Newton and Diorio Plaintiffs do not allege that Junior or Senior owed them any special duty, so our analysis on the standing issue focuses solely on whether the injuries they have alleged are personal and belong to them. During the hearing on their motion to dismiss and in their briefs and oral arguments to this Court, Junior and Senior argued that the Newton and Diorio Plaintiffs lacked standing to bring these claims because the harms they alleged were generalized injuries to AmerLink and had already been litigated by the bankruptcy estate trustee during the adversary proceeding. However, this Court rejected a strikingly similar argument in *Spoor v. Barth*, where we reversed the trial court's grant of summary judgment in favor of Junior and Senior, based in part on our conclusion that the court erred in concluding that Spoor lacked standing to bring suit. *See Spoor*, __ N.C. App. at __, 781 S.E.2d at 636. As demonstrated in *Spoor*, the adversary proceeding brought by the AmerLink bankruptcy trustee focused on allegations that by setting up an employee stock option plan and creating and transferring assets into new companies in order to facilitate the sale of Spoor's majority ownership interest in AmerLink, Junior, Senior, and Spoor improperly diverted corporate assets for their own benefit. *See id.* Because these claims for, *inter alia*, fraudulent conveyances and preferential transfers were rooted in conduct that depleted the AmerLink bankruptcy estate at the expense of all its creditors, they properly belonged to the trustee. However, there was no indication that the AmerLink bankruptcy trustee ever settled, brought, or even discovered, any claims based on the fraudulent acts that Spoor alleged in his complaint as the basis for his breach of contract, fraud, and UDTP claims against Junior and Senior. *See id.* Indeed, because Spoor's claims were based on Junior's and Senior's conduct in their individual capacities to mislead Spoor by concealing AmerLink's dire financial condition and induce Spoor, in his individual capacity, to invest his majority interest in AmerLink into a newly created company in exchange for $8 million Junior and Senior promised but never paid, we concluded that the injuries Spoor alleged were separate and distinct from any generalized harm suffered by AmerLink or its shareholders. *See id.* We therefore held that the claims belonged to Spoor alone, and we consequently rejected Junior's and Senior's argument that

AmerLink's bankruptcy trustee had any, let alone exclusive, standing to bring those claims. *See id.*

Here, the Newton and Diorio Plaintiffs' claims against Junior and Senior in their individual capacities arise from essentially the same set of facts as alleged in *Spoor*—namely, the cash infusions and falsified financial statements Junior and Senior engaged in throughout 2008 to conceal AmerLink's financial distress, as well as Junior's repeated assurances to Spoor and AmerLink's staff, customers, vendors, and suppliers that the company would receive additional funds and continue to perform its contractual obligations. As in *Spoor*, despite characterizations by Junior and Senior to the contrary, there is no indication in the record before us that the AmerLink bankruptcy trustee brought or settled any action related to, or ever discovered, the facts underlying these allegations.

Junior and Senior nevertheless contend that, unlike in *Spoor*, the injuries the Newton and Diorio Plaintiffs allege are injuries to AmerLink itself, shared by all its creditors, and therefore properly belonged to the bankruptcy trustee. In support of their argument, Junior and Senior rely on cases holding that bankruptcy estate creditors were barred from suing third parties for injuries arising from pre-bankruptcy conveyances of corporate assets because such fraudulent conveyances and preferential transfers resulted in injuries to the corporations themselves, and thus, were injuries shared in common by every creditor to the bankruptcy estate, for which federal law expressly vests the trustee with exclusive standing to bring suit. *See*, *e.g.*, *Nat'l Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999) (holding that sureties of bankrupt corporation lacked standing to sue third party to whom corporate property was conveyed prior to bankruptcy filing because their claim had the same underlying focus as the bankruptcy trustee's claim for avoiding the conveyance), *cert. denied*, 528 U.S. 1156, 145 L. Ed. 2d 1073 (2000); *In re Bridge Info. Sys.*, *Inc.*, 344 B.R. 587, 594 (E.D. Mo. 2006) (finding no standing for bankruptcy estate creditors to bring claims for fraud against corporate shareholders, who prior to bankruptcy caused the corporation to acquire a target company and then transferred the corporation's interest in that company to themselves, because their suit was no different from the bankruptcy trustee's claim for fraudulent conveyance).

We are not persuaded. To be sure, the allegations in the Newton and Diorio Plaintiffs' complaints do relate to conduct that undoubtedly harmed AmerLink itself. However, the gravamen of the Newton and Diorio Plaintiffs' fraud and UDTP claims is not merely that they were injured by AmerLink's collapse and the resulting breach of its

contractual obligations to them, but instead that they *never would have suffered any injury* if they had not been fraudulently induced into entering into contracts with AmerLink as a result of misrepresentations made by AmerLink staff acting at Junior's direction throughout 2008, when Junior was already aware of the company's financial distress. In their complaints, the Newton and Diorio Plaintiffs detail how each member of their respective classes of AmerLink's customers, vendors, and suppliers relied on the alleged misrepresentations when entering into their individual contracts with AmerLink on various dates and for varying amounts, thereby resulting in injuries to themselves in their individual capacities. Junior and Senior argue that these alleged injuries are not separate and distinct because nearly every creditor of AmerLink had a contract that AmerLink breached, and they complain that if the Newton and Diorio Plaintiffs have standing to pursue their claims, then so could every other creditor exposed to AmerLink's financial distress, which they insinuate would undermine the central purpose of bankruptcy to provide an orderly process for disposing of claims against the estate. But this argument ignores the fact that the United States Supreme Court expressly contemplated exactly this sort of creditor class action suit when it reasoned in *Caplin* that there was no need to empower a bankruptcy trustee to bring actions on behalf of creditors against third parties because "Rule 23 of the Federal Rules of Civil Procedure, which provides for class actions, avoids some of the[] difficulties" that would ensue from allowing individual creditors to sue separately. *Caplin*, 406 U.S. at 433, 32 L. Ed. 2d at 206. Moreover, Junior and Senior cite no authority to support their implicit premise that the AmerLink bankruptcy proceeding ought to somehow immunize them from liability for prior acts of fraud undertaken in their individual capacities. Because we conclude that the injuries arising from the alleged fraudulent misrepresentations that induced each class member's individual contract are separate and distinct from any injury to AmerLink or any other creditor of the bankruptcy estate, we hold that these claims belong to the Newton and Diorio Plaintiffs, rather than the AmerLink trustee. Consequently, we hold that the Newton and Diorio Plaintiffs have standing to sue, and that the trial court erred in granting Junior's and Senior's motion to dismiss for lack of subject matter jurisdiction.

B. Statute of limitations

[2] The Newton and Diorio Plaintiffs argue next that the trial court erred in granting Junior's and Senior's Rule 12(b)(6) motion to dismiss their claims because they failed to bring suit within the applicable statute of limitations. We agree.

This Court reviews *de novo* an order dismissing an action pursuant to N.C.R. Civ. P. 12(b)(6). *See State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210, 695 S.E.2d 91, 95 (2010). In doing so, we must "determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. In ruling upon such a motion, the complaint is to be liberally construed." *Id.* (citation, internal quotation marks, and ellipsis omitted). "Dismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim." *Id.* (citation omitted).

"In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises." *Pierson v. Buyher*, 330 N.C. 182, 186, 409 S.E.2d 903, 905 (1991) (citation and ellipsis omitted). An action alleging claims for fraud and related conspiracy must be brought within three years, and "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud . . . ." N.C. Gen. Stat. § 1-52(9) (2015). "For purposes of [section] 1-52(9), discovery means either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence under the circumstances." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (internal quotation marks omitted). "[W]here a person is aware of facts and circumstances which, in the exercise of due care, would enable him or her to learn of or discover the fraud, the fraud is discovered for purposes of the statute of limitations." *Jennings v. Lindsey*, 69 N.C. App. 710, 715, 318 S.E.2d 318, 321 (1984). "Ordinarily, a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances. This is particularly true when the evidence is inconclusive or conflicting." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 386. The statute of limitations for a UDTP claim is four years. N.C. Gen. Stat. § 75-16.2 (2015). "Under North Carolina law, an action [for UDTP] accrues at the time of the invasion of [the] plaintiff's right. For actions based on fraud, this occurs at the time the fraud is discovered or *should have been discovered* with the exercise of reasonable diligence." *Nash v. Motorola Commc'ns & Elecs., Inc.*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989) (citations and internal quotation marks omitted; emphasis in original), *affirmed per curiam*, 328 N.C. 267, 400 S.E.2d 36 (1991).

In the trial court, Junior and Senior argued that the Newton and Diorio Plaintiffs' actions were barred by the statute of limitations

since they should have discovered the conduct underlying their fraud and UDTP claims in December 2008 when AmerLink closed its doors, because it was clear at that point that AmerLink would breach its contractual obligations to them. We rejected a similar argument in *Spoor*. There, we reversed the trial court's grant of summary judgment in favor of Senior based on a lapse of the statute of limitations, reasoning based on our Supreme Court's holding in *Forbis* that because the evidentiary forecast presented a genuine issue of material fact as to when Spoor discovered or should have discovered the alleged fraudulent conduct, the issue was one for the jury's determination. __ N.C. App. at __, 781 S.E.2d at 635.

Here, we reach a similar result. The Newton and Diorio Plaintiffs are suing for fraud and UDTP based on a conspiratorial course of conduct by Junior and Senior that they allege began in 2007, continued until at least August 2009, and could not have been discovered until 1 January 2012. While the injuries the Newton and Diorio Plaintiffs suffered may have been apparent once they learned that AmerLink could not perform its contractual obligations in December 2008, our General Statues make clear that the statute of limitations is triggered not upon discovery of an injury, but upon "the discovery by the aggrieved party of the facts constituting the fraud . . . ." N.C. Gen. Stat. § 1-52(9). We find it difficult to discern how AmerLink's mere act of closing its doors somehow laid plain the existence of a fraudulent scheme that the Newton and Diorio Plaintiffs allege had not even been completed yet, especially in light of the fact that neither the AmerLink bankruptcy trustee, who brought the adverse proceeding, nor the United States Attorney, who prosecuted Junior for bankruptcy fraud, discovered the actions underlying these claims, either. In their complaints, the Newton and Diorio Plaintiffs allege that as corporate outsiders, they could not have discovered any of the facts underlying their claims before Spoor, a corporate insider, exposed them by filing his initial complaint against Junior in October 2011 and his first amended complaint adding Senior as a defendant in February 2012. Taking these allegations as true—as we must, given the procedural posture of this case, *see State Emps. Ass'n of N.C., Inc.*, 364 N.C. at 210, 695 S.E.2d at 95—we conclude that because they filed their respective complaints well within three years of Spoor's initial complaint, the Newton and Diorio Plaintiffs commenced their actions within the three-year statute of limitations for fraud claims and the four-year statute of limitations for UDTP claims. Consequently, we hold that the trial court erred in granting Junior's and Senior's motion to dismiss based on a lapse of the applicable statutes of limitations.

Junior and Senior present a series of related arguments as independent bases to uphold the trial court's dismissal pursuant to N.C.R. Civ. P. 12(b)(6), but they are unavailing. Specifically, Senior contends that dismissal of the fraud claims was proper as to him because the Newton and Diorio Plaintiffs' complaints failed to allege their claims for fraud with sufficient particularity as required by N.C.R. Civ. P. 9(b). "The elements of fraud are: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 609, 659 S.E.2d 442, 449 (2008) (citation omitted); *see also Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678 (1981) ("[I]n pleading actual fraud the particularity requirement [imposed by N.C.R. Civ. P 9(b)] is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations."). Senior argues that the Newton and Diorio Plaintiffs failed to state a claim for fraud against him because their complaints contain no specific allegations that Senior himself ever personally made any representations to, intended to deceive, deceived, or caused any injury to any member of the plaintiff classes in either action. Senior contends that the UDTP claims against him fail to state a UDTP claim "for the same reasons."

These two arguments both depend on the validity of Senior's argument that the Newton and Diorio Plaintiffs also failed to properly plead their claims for civil conspiracy. Our case law makes clear that "to state a claim for civil conspiracy, a complaint must allege a conspiracy, wrongful acts done by certain of the alleged conspirators, and injury." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 416, 537 S.E.2d 248, 265 (2000) (citations and internal quotation marks omitted), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 14, *appeal withdrawn*, 354 N.C. 219, 553 S.E.2d 684 (2001). Moreover, it is well established that "[i]f two or more persons conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design and the manner or means used in executing the common design; the fact that one conspirator is the instigator and dominant actor is immaterial on the question of the guilt of the other." *Curry v. Staley*, 6 N.C. App. 165, 169, 169 S.E.2d 522, 525 (1969) (citations omitted). Senior's argument on this point appears to be based on selective quotations from the subsections in both complaints that formally allege causes of action for civil conspiracy by stating:

> The acts and agreements of [Senior] and [Junior] constitute a civil conspiracy, which existed for wrongful acts to be committed, and which were actually committed, by said [Senior] and [Junior] for the purpose of said civil conspiracy.

Senior contends these allegations are conclusory and legally insufficient because they fail to allege any specific details of any conspiratorial agreement he made with Junior. This argument fails, however, because it ignores the fact that the relevant paragraphs in both complaints expressly incorporate all prior allegations made, including, *inter alia*, that Junior and Senior "acted in concert and each acted as the agent of the other in a plan or scheme" to acquire Spoor's majority stake in AmerLink. The complaints also provide dozens of paragraphs of allegations extensively detailing the specific actions both Junior and Senior took over a period of several years to further this scheme by concealing AmerLink's financial distress, as well as Junior's directions to AmerLink staff throughout 2008, when he knew the company was nearly insolvent, to continue entering into contracts with the Newton and Diorio Plaintiffs and to assure them that AmerLink had or would soon receive funds that would allow it to honor its contractual obligations to them. The allegations in both complaints further outline the specific dates when the Newton and Diorio Plaintiffs entered their contracts and the specific amounts of damages suffered by each member of the class when Junior's and Senior's scheme finally unraveled. Because the complaints are "replete with allegations of a conspiracy by and between the defendants, acts done by some or all of the defendants in furtherance of that alleged conspiracy, and injury" to the Newton and Diorio Plaintiffs, we reject Senior's argument that their complaints failed to state a claim for civil conspiracy. *Norman*, 140 N.C. App. at 416, 537 S.E.2d at 265. Further, given the extensive details provided in the complaints regarding the nature and circumstances surrounding Junior's misrepresentations and the injuries the Newton and Diorio Plaintiffs suffered as a result, we also reject Senior's argument that the complaints failed to state a claim for fraud with sufficient particularity, as well as Senior's argument that the Newton and Diorio Plaintiffs failed to state a claim for UDTP. *See*, *e.g.*, *Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991) ("The case law applying Chapter 75 holds that a plaintiff who proves fraud thereby establishes that unfair or deceptive acts have occurred. Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts.") (citation, internal quotation marks, and ellipsis omitted).

Finally, we reject Junior's and Senior's argument that the claims for civil conspiracy and punitive damages must be dismissed. Junior and Senior are correct that these cannot survive as separate causes of action. *See*, *e.g.*, *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) ("[T]here is not a separate civil action for civil conspiracy in North Carolina.") (citation omitted), *disc. review denied*, 360 N.C. 289, 628 S.E.2d 249 (2006); *Watson v. Dixon*, 352 N.C. 343, 348, 532 S.E.2d 175, 178 (2000) ("As a rule, you cannot have a cause of action for punitive damages by itself. If the complainant fails to plead or prove his cause of action, then he is not allowed an award of punitive damages because he must establish his cause of action as a prerequisite for a punitive damage award."). However, their argument on this point fails because it presumes the trial court was correct in determining that the Newton and Diorio Plaintiffs' complaints for fraud and UDTP should be dismissed.

Accordingly, we hold that the trial court erred in dismissing the Newton and Diorio Plaintiffs' complaints, and that its Orders and Judgments must be, and hereby are,

REVERSED.

Judges McCULLOUGH and ZACHARY concur.

IN THE MATTER OF E.R., E.R., I.L.

No. COA16-116

Filed 19 July 2016

Child Abuse, Dependency, and Neglect—permanency placement plan—non-relatives—grandmother not considered

The trial court erred in a child neglect proceeding by choosing guardianship with non-relatives as the permanent plan without making specific findings explaining why placement with the paternal grandmother was not in the children's best interest.

Appeal by respondent-father from order entered 12 November 2015 by Judge Roy Wijewickrama in Swain County District Court. Heard in the Court of Appeals 20 June 2016.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred for respondent-appellant father.

No brief filed by petitioner-appellee Swain County Department of Social Services.

No brief filed by guardian ad litem.

INMAN, Judge.

Respondent-father appeals from the trial court's "Review and Permanency Planning Review Order" placing his sons E.R. ("Elvin") and E.R. ("Ervin")[1] in the guardianship of non-relatives Mr. and Mrs. B. Petitioner-appellee Swain County Department of Social Services ("DSS") and the guardian *ad litem* ("GAL") concede that the court erred by failing to make findings of fact regarding a potential placement for the two boys with their paternal grandmother, as required by N.C. Gen. Stat. § 7B-903(a)(2)(c) (repealed effective Oct. 1, 2015) and N.C. Gen. Stat. § 7B-903(a1) (effective Oct. 1, 2015). *See* N.C. Sess. Laws 2015-136, §§ 10, 18 (July 2, 2015).[2] Because we concur with the parties, we reverse the order in pertinent part and remand for further proceedings.

Elvin and Ervin are the minor children of respondent-father and respondent-mother, who are unmarried. Respondent-mother has a third son I.L. ("Ivan") by another father. Ivan is an enrolled member of the Eastern Band of Cherokee Indians ("EBCI"). Elvin and Ervin are eligible for tribal membership but remained unenrolled at the time of these proceedings. Accordingly, the trial court has determined "[t]hat the Indian Child Welfare Act [('ICWA')] applies in this matter." *See* 25 U.S.C.S. § 1903(4) (2016) (defining "Indian child" for purposes of the ICWA as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe").

On 13 June 2014, DSS filed petitions alleging that Elvin, Ervin, and Ivan were neglected juveniles, in that they did not receive proper care, supervision, or discipline and lived in an environment injurious to their

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1. The parties stipulated to the use of these pseudonyms to protect the juveniles' privacy. In his brief to this Court, respondent-father refers to the younger of his two boys as Ervin.

2. The hearing that resulted in the order was held on 28 September 2015, prior to the effective date of N.C. Sess. Laws 2015-136, § 10. The court entered its order on 12 November 2015, after the law's effective date. Because the substance of the relevant provisions are identical, we will refer to the current version of the statute, N.C. Gen. Stat. § 7B-903(a1), for purposes of our discussion.

welfare.[3] The petitions described, *inter alia*, a history of domestic violence and drug use by respondents in the presence of the children, and noted that Ivan's father was incarcerated. Although respondent-mother had agreed to place the children in kinship care with Ivan's paternal cousin ("Mrs. B.")[4] and her husband ("Mr. B.") on 4 April 2014, DSS alleged that she and respondent-father subsequently failed to cooperate with in-home services offered by the department.

The trial court adjudicated the three children to be neglected juveniles on 2 March 2015. In its dispositional order entered 16 July 2015, the court continued the children's kinship placement with Mrs. B. and ordered respondents to submit to drug screens, work on their case plans, and cooperate with DSS in completing the application for Elvin and Ervin to enroll as members of the EBCI.

After a hearing on 28 September 2015, the trial court entered a "Review and Permanency Planning Review Order" on 12 November 2015, finding that respondent-mother and both fathers had failed to address their substance abuse issues or maintain regular contact with DSS. The court further found that respondent-father was incarcerated for failure to register as a sex offender, and Ivan's father was incarcerated for violating his parole. Citing the success of the kinship placement, the court determined that it was in the best interests of Elvin, Ervin, and Ivan to change their permanent plan from reunification to guardianship with Mr. and Mrs. B. The court relieved DSS of further reunification efforts and appointed Mr. and Mrs. B. as guardians of the three children.

Respondent-father filed timely notice of appeal from the order. He now contends that the trial court violated N.C. Gen. Stat. § 7B-903(a1) by awarding guardianship of Elvin and Ervin to non-relatives without properly considering a proposed relative placement with their paternal grandmother. DSS and the guardian *ad litem* have communicated to this Court their concession to the error assigned by respondent-father.

Section 7B-903 of the Juvenile Code prescribes the dispositional alternatives available to the trial court following an adjudication of juvenile abuse, neglect, or dependency. N.C. Gen. Stat. § 7B-903 (2015). Subsection (a1) of this statute provides, *inter alia*, as follows:

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3. Although the record on appeal lacks a copy of the petition filed in 14 JA 27 pertaining to Ivan, it appears DSS included the same factual allegations in all three petitions.

4. Mrs. B. "is a first-descendent of the Eastern Band of Cherokee Indians" but "not an enrolled member."

> In placing a juvenile in out-of-home care under this section, the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile. . . .

N.C. Gen. Stat. § 7B-903(a1). This Court has held that the priority accorded to an available relative placement under N.C. Gen. Stat. § 7B-903(a1) applies to all subsequent review and permanency planning hearings, not just the initial dispositional hearing. *See In re L.L.*, 172 N.C. App. 689, 700-03, 616 S.E.2d 392, 399-401 (2005) (construing earlier version of N.C. Gen. Stat. § 7B-903 and precursor statute to N.C. Gen. Stat. § 7B-906.1 (2015) governing permanency planning hearings, N.C. Gen. Stat. § 7B-906). We have further held that the trial court's "[f]ailure to make specific findings of fact explaining the placement with the relative is not in the juvenile's best interest will result in remand." *In re A.S.*, 203 N.C. App. 140, 141-42, 693 S.E.2d 659, 660 (2010) (citing *In re L.L.*, 172 N.C. App. at 704, 616 S.E.2d at 401).

The parties agree that Mr. and Mrs. B. are non-relatives of Elvin and Ervin. Mrs. B. is related to Ivan's father.[5] The GAL submitted a written report to the trial court at the 28 September 2015 hearing. Finding its contents "uncontroverted," the court adopted the entirety of the GAL report "by direct reference" as findings of fact in its written order. *Inter alia*, the GAL reported having met with the paternal grandmother on 24 July 2015 while she visited with Elvin and Ervin at their great-grandmother's house. The paternal grandmother informed the GAL "that she would like custody of the two . . . boys and felt it would be best for [Ivan] and [Elvin] not to be living together and competing all the time."[6] Mrs. B. testified that Elvin and Ervin's paternal grandmother assists her by babysitting the boys and speaks with Mrs. B. about them "[a] lot."

The DSS report admitted into evidence at the hearing further states that respondent-father "stated that he would like his children to go to his

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5. The "Review and Permanency Planning Review Order" includes a finding that Mrs. B. "is the paternal great-aunt of the minor child [Ivan]." As noted by respondent-father, the record indicates that Mrs. B. is a cousin of Ivan's father, not his aunt.

6. The GAL personally observed "competition between [Ivan] and [Elvin]" during a visit with Ivan's paternal grandmother on 27 July 2015.

mother" during a meeting with the social worker on 7 August 2015. The social worker confirmed when cross-examined by respondent-father's counsel at the 28 September 2015 hearing:

> Q. Has my client made you aware of his preference for there to be a kinship placement with his mother?
>
> A. Yes, sir.
>
> Q. And have you looked into whether she's suitable for that placement?
>
> A. Yes, sir. We did. We contacted the Centralized Department of Children and Families, I believe, in Tennessee to try and get a home study done and they said that we would have to submit an ICPC[7] in order to make that happen.
>
> Q. And is there a reason the ICPC has not been submitted?
>
> A. I was informed that it would be---- because the state does not have custody of the children, that the judge would have to sign off on that ICPC form making the judge financially responsible and so that was something that we weren't exactly sure how to proceed on.
>
> . . . .
>
> Q. Are you waiting for guidance as to how to fulfill that requirement?
>
> A. Yes, sir.

But cf. In re J.E., 182 N.C. App. 612, 616, 643 S.E.2d 70, 73 (2007) (holding that former permanency planning statute N.C. Gen. Stat. § 7B-907(c) (repealed effective Oct. 1, 2013)[8] and guardianship statute N.C. Gen. Stat. § 7B-600(c) (2015) make the ICPC inapplicable to an award of guardianship to an out-of-state relative in a permanency planning review order).

James Burch Sanders, ICWA coordinator for the EBCI, testified as an expert in Indian culture and child rearing. Mr. Sanders affirmed that the existing placement with Mr. and Mrs. B. met the requirements of

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7. Interstate Compact on the Placement of Children.

8. N.C. Sess. Law 2013-129, §§ 25, 41 (June 19, 2013). Current N.C. Gen. Stat. § 7B-906.1(i) (2015) contains substantially similar language to that found in former N.C. Gen. Stat. 7B-907(c).

the ICWA and that he believed awarding guardianship to Mr. and Mrs. B. was in the children's best interests. On cross-examination, however, Mr. Sanders acknowledged that he had lacked sufficient information to assess Elvin and Ervin's potential placement with their paternal grandmother.

Elvin and Ervin's paternal grandmother attended the hearing but did not testify. At the conclusion of the hearing, counsel for respondent-father explicitly argued that "[m]y client's children are entitled to have my client's mother considered for guardianship of [Ervin] and [Elvin]." After hearing from all parties' counsel, the trial court rebuffed an offer by respondent-father's counsel to present the paternal grandmother as a witness:

> MR. HASELKORN: Your Honor, to the degree –
>
> THE COURT: – in closing.
>
> MR. HASELKORN: – it would help you in making your decision, my client's mother, [the paternal grandmother] is here--- enough to call her to the stand.
>
> [DSS COUNSEL]: Objection, Your Honor.
>
> THE COURT: I think we're – with all due respect, Mr. Haselkorn, I gave your client an opportunity – not you, but I gave your client an opportunity to present evidence and your client at the time made the decision that he did not wish to put on any evidence, so we can't –
>
> [RESPONDENT-MOTHER'S COUNSEL]: Thank you, Your Honor.
>
> THE COURT: – go back on that.

The trial court then made the following written findings related to the guardianship award:

> 25. That the [B.] family provides a safe, stable home for the minor children. [Mr. and Mrs. B.] have 2 children of their own, ages 18 and 14.
>
> . . . .
>
> 27. That both Mr. and Mrs. [B.] can provide the necessary financial support for each of the minor children in this case.

. . . .

> 29. . . . Mr. Sanders is satisfied with the juveniles' placement at the [B.s'] home. He has opined that the three juveniles require permanency at this time.
>
> . . . .
>
> 31. That it is in the best interest of the minor children that the permanent plan be changed to guardianship with [Mr. and Mrs. B.]

The order's only reference to Elvin and Ervin's paternal grandmother appears in the following decretal provision: "the paternal grandmother of [Elvin and Ervin] may continue to be used as a resource for childcare of those minor children."

We now join the parties in concluding that the trial court's "[f]ailure to make specific findings of fact explaining [why] the placement with the [paternal grandmother] is not in [Elvin and Ervin's] best interest" requires this Court to reverse the order as to respondent-father's children and remand for a new hearing. *In re A.S.*, 203 N.C. App. at 141-42, 144, 693 S.E.2d at 660, 662. We recognize that the court was duly mindful of its responsibilities under the ICWA. *See*, *e.g.*, 25 U.S.C.S. § 1915(b) (2016). Indeed, because the court ended a voluntary kinship placement arranged by respondent-mother and DSS and placed the children in guardianship, "the proceeding qualifies as a 'foster care placement' and thus, a 'child custody proceeding' " subject to the ICWA. *In re E.G.M.*, 230 N.C. App. 196, 199, 750 S.E.2d 857, 860 (2013). Such concerns, however, do not obviate the need for findings of fact under N.C. Gen. Stat. § 7B-903(a1) if the court chooses a nonrelative placement for a juvenile.

REVERSED AND REMANDED IN PART.

Judges CALABRIA and DILLON concur.

IN RE K.J.B.

[248 N.C. App. 352 (2016)]

IN THE MATTER OF K.J.B.

No. COA16-159

Filed 19 July 2016

Child Abuse, Dependency, and Neglect—neglect—necessary findings—supporting evidence lacking

The trial court erred by adjudicating a child neglected. The trial court could not make the necessary findings of fact absent evidence that the child suffered physical, mental, or emotional impairment, or that he was at a substantial risk of such impairment.

Appeal by Respondent-mother from orders entered 5 November 2015 by Judge Christine Strader in Rockingham County District Court. Heard in the Court of Appeals 5 July 2016.

No brief filed for Petitioner-Appellee Rockingham County Department of Social Services.

Leslie Rawls for Respondent-Appellant mother.

Poyner Spruill LLP, by Caroline P. Mackie and Carrie V. McMillan, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondent-mother appeals from orders adjudicating her child K.J.B. ("Kenneth")[1] to be a neglected juvenile and placing him in the custody of Rockingham County Department of Social Services ("DSS"). We reverse the trial court.

Kenneth was born in November 2014. Shortly after Kenneth's birth through early December 2014, Respondent and Kenneth lived with Respondent's cousin, Ms. Reynolds.[2] On the night of 9 December 2014, Ms. Reynolds returned home from work to find Respondent and Respondent's boyfriend passed out nude on the couch. Empty beer bottles and cans were laying in the living room and kitchen, and a table

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

2. Respondent's cousin is referred to by a pseudonym to protect the identity of the juvenile.

was broken. Ms. Reynolds tried to awaken the couple for several minutes, and when the couple woke up, Ms. Reynolds made them leave the house for the night. When Ms. Reynolds asked them where Kenneth was, Respondent stated she knew where he was, but would not tell Ms. Reynolds with whom.

The following morning at 6:00 a.m., Kenneth's babysitter appeared at Ms. Reynolds's house with Kenneth. She stated she was looking for Respondent. Ms. Reynolds took Kenneth and went to her sister's house. At 7:00 a.m., Respondent went to Ms. Reynolds's sister's house with a friend, and demanded they give her Kenneth. Respondent's friend pried Kenneth from Ms. Reynolds's arms, and Respondent and her friend left the house with Kenneth.

On 10 December 2014, DSS filed a juvenile petition alleging Kenneth was neglected and dependent. The same day, a non-secure custody order was entered placing Kenneth in DSS's custody. Following a hearing, the trial court entered an order 5 November 2015 and adjudicated Kenneth as neglected, but did not conclude Kenneth was a dependent juvenile. On 5 November 2015, the trial court entered a separate dispositional order and gave DSS continual custody of Kenneth. Respondent timely appealed from the trial court's orders.

Respondent argues the trial court erred in concluding Kenneth was neglected. We agree.

On appeal, an adjudication order is reviewed to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citations, quotation marks, and brackets omitted), *modified and aff'd*, 362 N.C. 446, 665 S.E.2d 54 (2008). Findings supported by clear and convincing evidence "are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* at 343, 648 S.E.2d at 523. Unchallenged findings are binding on appeal. *In re A.R.*, 227 N.C. App. 518, 520, 742 S.E.2d 629, 631 (2013). Conclusions of law are reviewable *de novo*. *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (internal quotation marks and citation omitted).

North Carolina law defines a "neglected" juvenile as follows:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent . . . or who lives in an environment injurious to the juvenile's welfare . . . . In determining whether a juvenile is a neglected juvenile,

> it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2015).

"In order to adjudicate a child to be neglected, the failure to provide proper care, supervision, or discipline must result in some type of physical, mental, or emotional impairment or a substantial risk of such impairment." *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (citation omitted). Similarly, in order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). A trial court's failure to make specific findings regarding a child's impairment or risk of harm will not require reversal where the evidence supports such findings. *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003).

Respondent contends the evidence introduced at the hearing did not demonstrate Kenneth suffered harm or was at a substantial risk of suffering harm, and that, to the extent the trial court found harm or a substantial risk of harm to Kenneth, those findings lacked evidentiary support and could not support the conclusion that Kenneth is a neglected juvenile. To this end, Respondent contends findings of fact eleven and twelve are unsupported by clear and convincing evidence. The challenged findings state, in pertinent part:

> 11. . . . [Respondent] acknowledged that a child died of unknown causes while in her care in Rockingham County, North Carolina.
>
> 12. [Kenneth] is a neglected juvenile because his mother has not provided proper care and he has resided in an injurious environment with her. After substance abuse led to termination of her parental rights of two other children, [Respondent] has continued to drink alcohol to excess. [Respondent's] substance abuse problem prevents her from safely caring for [Kenneth] at this time.

As an initial matter, the provision in finding twelve that Kenneth "is a neglected juvenile" is actually a conclusion of law and will be treated

as such on appeal. *See In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675–76.

We agree the statement in finding eleven regarding the death of a child while in Respondent's care is not supported by clear and convincing evidence. First, no evidence was presented regarding where the child died. Second, the evidence at the hearing showed the child died of Sudden Infant Death Syndrome ("SIDS"), not from unknown causes. Third, Respondent did not stipulate that these statements were true. We disregard this unsupported finding for purposes of our review.[3]

The statements in finding of fact twelve that Respondent "has not provided proper care and [Kenneth] has resided in an injurious environment with her," and that Respondent's "substance abuse problem prevents her from safely caring for [Kenneth] at this time" are not supported by clear and convincing evidence. Assuming *arguendo* that the evidence supported the finding that Respondent continued to have a substance abuse problem, there was a lack of clear and convincing evidence that Respondent's substance abuse had an adverse impact on Kenneth's well-being.

In *In re E.P.*, 183 N.C. App. 301, 645 S.E.2d 772, *aff'd per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007), this Court held a parent's substance abuse problem alone could not support an adjudication of neglect. *Id.* at 304–05, 645 S.E.2d at 774. In so holding, the Court distinguished *In re Leftwich*, 135 N.C. App. 67, 73, 518 S.E.2d 799, 803 (1999), in which the evidence showed the mother's alcoholism resulted in her children lacking age-appropriate social skills and toilet training. *In re E.P.*, 183 N.C. App. at 306, 645 S.E.2d at 775. In *Leftwich*, "the adjudication of neglect was based upon *the harm to the children* as a result of respondent's substance abuse; it was not based solely upon respondent's substance abuse." *Id.* at 306, 645 S.E.2d at 775 (emphasis in original). By contrast, the trial court in *In re E.P.* could not adjudicate neglect where "there was no substantial evidence of any connection between the substance abuse and domestic violence and the welfare of [the] two children." *Id.* at 306, 645 S.E.2d at 775 (internal quotation marks omitted) (alteration in original).

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3. We note that while the death of another child in the home can be relevant to a determination that the juvenile is neglected, such is the case only where the child "died as a result of suspected abuse or neglect." N.C. Gen. Stat. § 7B-101(15). No evidence was presented in this case demonstrating that the child's death was suspected to be the result of abuse or neglect.

Here, as in *In re E.P.*, there is no substantial evidence to show Kenneth suffered any physical, mental, or emotional impairment, or that he was at a substantial risk of suffering such impairment, as the result of Respondent's substance abuse. *See In re C.M.*, 183 N.C. App. at 210, 644 S.E.2d at 592. While Respondent admitted to drinking alcohol on the evening of 9 December 2014, she left Kenneth in the care of another adult that evening. Respondent sought to retrieve Kenneth the following morning, and there is no evidence Respondent was intoxicated at that time. Without evidence showing Respondent cared for Kenneth while intoxicated, or showing the babysitter did not or could not properly care for Kenneth, the events of 9–10 December 2014 do not demonstrate harm or a substantial risk of harm to Kenneth.

The only evidence suggesting Respondent cared for Kenneth while under the influence is her statement to Ms. Reynolds on 5 December 2014, in which she stated she "almost dropped" Kenneth because she was "a little tipsy." While this evidence is not to be ignored, the strength of the evidence is undercut by Respondent's subsequent statement that she was "just playing" with Ms. Reynolds. Also, we note Ms. Reynolds testified the only time she saw Respondent intoxicated, during the time they lived together, was the night of 9 December 2014. Respondent's off-hand comment about "almost dropping" Kenneth is not sufficient to demonstrate a substantial risk of harm.

In adjudicating Kenneth neglected, the trial court relied upon its finding, "substance abuse led to termination of [Respondent's] parental rights to two other children." Under the statutory definition of "neglect," "it is relevant whether the juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15) (2015). Here, the trial court found "substance abuse" led to the termination of Respondent's parental rights to her two other children. However, there was no evidence presented to prove these children were in fact abused or neglected, or that the termination of Respondent's parental rights was due to abuse or neglect. Without such evidence, the trial court cannot not logically infer the previous termination cases support a conclusion that Kenneth is, or is likely to be, neglected in this case. *See In re J.C.B.*, ___ N.C. App. ___, ___, 757 S.E.2d 487, 489, *disc. review denied*, 367 N.C. 524, 762 S.E.2d 313 (2014) (holding that, when a trial court relies on instances of past abuse or neglect to other children in adjudicating a child neglected, the court is required to find "the presence of other factors to suggest that the neglect or abuse will be repeated").

Absent evidence Kenneth suffered physical, mental, or emotional impairment, or that he was at a substantial risk of such impairment, the trial court could not make the necessary findings of fact to adjudicate him neglected. Thus, the trial court committed error in adjudicating Kenneth neglected, and we reverse the adjudication order. Because we reverse the adjudication order, the disposition order must also be reversed. *In re S.C.R.*, 217 N.C. App. 166, 170, 718 S.E.2d 709, 713 (2011).

REVERSED.

Judges Elmore and McCullough concur.

IN THE MATTER OF ALEX SHACKLEFORD

No. COA15-1266

Filed 19 July 2016

1. Appeal and Error—mootness—involuntary commitment—commitment period expired

A respondent's appeal from an involuntary commitment order was not moot even though the commitment period had expired. This commitment might form the basis of a future commitment and there could be other collateral legal consequences.

2. Appeal and Error—record—involuntary commitment—verbatim transcript—not available

A respondent appealing an involuntary commitment was entitled by statute to receive a verbatim transcript of the involuntary commitment hearing, but the unavailability of the transcript does not automatically constitute reversible error in every case. Prejudice must be demonstrated, but general allegations of prejudice are not sufficient. There must be a determination of whether respondent made sufficient efforts to reconstruct the hearing. In this case that burden was carried in that respondent wrote to people present at the hearing.

3. Appeal and Error—record—involuntary commitment—hearing transcript—not available—adequate alternative

There was not an adequate alternative to a verbatim transcript of an involuntary commitment hearing where the entire transcript was

missing (rather than the transcript being partially unavailable) and the hearing was reconstructed from bare bone, partially legible notes taken by one person.

4. Appeal and Error—record—involuntary commitment—verbatim transcript not available—meaningful appellate review

Meaningful appellate review of an involuntary commitment proceeding was denied where the required verbatim transcript in its entirety was missing and could not be entirely reconstructed.

5. Appeal and Error—record—involuntary commitment—lack of required verbatim transcript—prejudice

The respondent in an appeal from an involuntary commitment was prejudiced by the lack of a verbatim transcript even though he did not identify any specific errors or defects. The transcript was missing in its entirety and could not be adequately reconstructed; the prejudice was the inability to determine whether an appeal was appropriate and which arguments should be raised.

Appeal by respondent from order entered 16 May 2015 by Judge V.A. Davidian, III in Wake County District Court. Heard in the Court of Appeals 30 March 2016.

Attorney General Roy Cooper, by Assistant Attorney General Charlene Richardson, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for respondent-appellant.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe and Varsha D. Gadani, for Holly Hill Hospital.

DAVIS, Judge.

Alex Shackleford ("Respondent") appeals from the trial court's order involuntarily committing him to Holly Hill Hospital ("Holly Hill") for a period of inpatient treatment. On appeal, Respondent argues that the lack of a verbatim transcript of his commitment hearing has deprived him of the opportunity for meaningful appellate review of the commitment order and entitles him to a new hearing. After careful review, we vacate the trial court's order and remand for a new hearing.

Factual Background

On 1 May 2015, Dr. Yi-Zhe Wang ("Dr. Wang") filed an affidavit and petition for involuntary commitment in which he alleged Respondent was mentally ill and dangerous to himself and others. A magistrate ordered Respondent to be held for examination at Holly Hill that same day. A hearing was held on 14 May 2015 before Judge V.A. Davidian III in Wake County District Court. On 16 May 2015, the trial court entered an order containing the following findings and conclusions:

> A. Respondent is a 22 year old male. Respondent was admitted to Holly Hill Hospital on April 25, 2014.
>
> B. Dr. Wang is Respondent's treating physician at Holly Hill Hospital. Dr. Wang has examined the patient six out of seven days per week, beginning on April 27, 2015. Respondent stipulated at the hearing that Dr. Wang is an expert in the field of psychiatry.
>
> C. Respondent has a mental illness and diagnosis of anti-social personality disorder. Respondent presents with impulsiveness, unlawfulness, deceitfulness, agitation, anger, and lack of remorse.
>
> D. Respondent has been prescribed Depakote for his illness. Dr. Wang testified that Respondent was initially compliant with medication but has refused medication in the two days prior to the hearing. Respondent's medication regimen is not stable at this point.
>
> E. Respondent's grandmother, whom he has lived with since birth, testified that one week prior to the hearing, Respondent threatened to kill her and her husband and burn their house down. Respondent's grandmother also testified about an instance in which Respondent wrestled with his grandmother in an attempt to get to her money. Respondent has also told his grandmother about a voice in his head. Respondent's grandmother also testified about a number of occasions in which Respondent has demonstrated deceitfulness, impulsiveness, and a lack of remorse regarding his grandmother's job and property. His grandmother is concerned that Respondent will injure himself or another person if he is discharged from the hospital.
>
> F. Dr. Wang testified that continued inpatient treatment is necessary. Treatment at a lower level of care would

> be inappropriate at this time since Respondent has not been cooperative with treatment and has no insight into his illness.
>
> G. Respondent presents a danger to himself and others. Respondent is in need of further treatment at a 24-hour facility for up to 90 days to stabilize his condition and to prepare him to ultimately step down to a lower level of care.

The trial court ordered that Respondent be committed to Holly Hill for a period of time not to exceed 90 days. Respondent entered written notice of appeal on 5 June 2015. Following the entry of notice of appeal, Respondent's appointed appellate counsel, who did not represent him at the commitment hearing, was informed by the court reporting manager for the Administrative Office of the Courts that no transcript of the hearing could be prepared because the recording equipment in the courtroom had failed to record the hearing and there had not been a court reporter present in the courtroom.

Analysis

[1] The only issue presented in this appeal is whether Respondent is entitled to a new involuntary commitment hearing because the lack of a verbatim transcript of the underlying hearing denied him his right to meaningful appellate review. Initially, we note that although Respondent's commitment period has expired, his appeal is not moot given the "possibility that [R]espondent's commitment in this case might . . . form the basis for a future commitment, along with other obvious collateral legal consequences[.]" *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977).

[2] An order of involuntary commitment is immediately appealable. N.C. Gen. Stat. § 122C-272 (2015). Pursuant to N.C. Gen. Stat. § 122C-268, the respondent is entitled on appeal to obtain a transcript of the involuntary commitment proceeding, which must be provided at the State's expense if the respondent is indigent. N.C. Gen. Stat. § 122C-268(j) (2015).

Our caselaw contemplates the possibility that the unavailability of a verbatim transcript may in certain cases deprive a party of its right to meaningful appellate review and that, in such cases, the absence of the transcript would itself constitute a basis for appeal. *See State v. Neely*, 21 N.C. App. 439, 441, 204 S.E.2d 531, 532 (1974) ("If the circumstances so justify, [the appellant] might . . . assert as an assignment of error that he is unable to obtain an effective appellate review of errors committed

during the trial proceeding because of the inability of the Reporter to prepare a transcript.").

However, the unavailability of a verbatim transcript does not *automatically* constitute reversible error in every case. Rather, to "prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006). General allegations of prejudice are insufficient to show reversible error. *Id.* Moreover, "the absence of a complete transcript does not prejudice the defendant where alternatives are available that would fulfill the same functions as a transcript and provide the [appellant] with a meaningful appeal." *State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000), *cert. denied*, 531 U.S. 1083, 148 L.Ed.2d 684 (2001); *see also In re Bradshaw*, 160 N.C. App. 677, 681, 587 S.E.2d 83, 86 (2003) (denying request for new trial where "respondent in this case has made no attempt to reconstruct the evidence . . . ."); *In re Clark*, 159 N.C. App. 75, 83, 582 S.E.2d 657, 662 (2003) (rejecting request for new hearing where "respondent has made no attempt to . . . provide a narration of the evidence . . . .").

Thus, in accordance with the legal framework set out above, we must first determine whether Respondent made sufficient efforts to reconstruct the hearing in the absence of a transcript. In this regard, Respondent's appellate counsel sent letters to the following persons present at the hearing: Judge Davidian; Dr. Wang; Lori Callaway ("Callaway"), the deputy clerk; Varsha Gadani ("Gadani"), counsel for Holly Hill; Kristen Todd ("Todd"), Respondent's counsel; and Respondent. In these letters, Respondent's appellate counsel requested that each of the recipients provide him with their recollections of the hearing and any notes they possessed regarding the proceeding.

Respondent's appellate counsel received a response from each recipient except for Respondent. Judge Davidian's reply stated as follows: "I do not have any additional memories of the case, other than presented in the order, nor did I retain any notes from the case." Callaway replied that she did not have any notes from the hearing. Appellate counsel for Holly Hill responded on behalf of both Dr. Wang and Gadani, stating that "they believe that the findings of fact accurately reflect their recollection of the evidence presented at the hearing" and that "[a]ny notes regarding the hearing would be protected under the work product doctrine. In any event, our notes from the hearing would not shed any light on the testimony presented at trial." The only recipient of the letter who made any attempt to help reconstruct the events of the hearing was Todd, who provided to Respondent's appellate counsel her notes from the hearing.

We find our decision in *State v. Hobbs*, 190 N.C. App. 183, 660 S.E.2d 168 (2008), to be particularly instructive on the question of whether Respondent has "satisfied his burden of attempting to reconstruct the record." *Id.* at 186, 660 S.E.2d at 170. In *Hobbs*, the court reporter's audiotapes and handwritten notes from the entire evidentiary stage of the defendant's criminal trial were lost in the mail. *Id.* at 184, 660 S.E.2d at 169-70. In an effort to reconstruct the proceedings, the defendant's appellate counsel sent letters to the defendant's trial counsel, the trial judge, and the prosecutor asking for their accounts of the missing testimony. The defendant's trial counsel stated that he had little memory of the charges or the trial, possessed no notes from the trial, and was unable to assist in reconstructing the proceedings. The trial judge stated that she had no notes from the case, and the prosecutor never responded to the inquiry. In light of these efforts, we determined that the appellant had satisfied his burden of attempting to reconstruct the record. *Id.* at 186-87, 660 S.E.2d at 170-71.

In the present case, Respondent's appellate counsel took essentially the same steps as the appellant's attorney in *Hobbs*. Therefore, we similarly conclude that Respondent has satisfied his burden of attempting to reconstruct the record.

[3] We next address whether Respondent's reconstruction efforts produced an adequate alternative to a verbatim transcript — that is, one that "would fulfill the same functions as a transcript . . . ." *Lawrence*, 352 N.C. at 16, 530 S.E.2d at 817. As discussed more fully below, we are unable to conclude that the limited reconstruction — consisting solely of Todd's notes — of the evidence presented at the hearing was sufficient to allow for meaningful appellate review.

We note that in virtually all of the cases in which we have held that an adequate alternative to a verbatim transcript existed, the transcript of the proceeding at issue was only *partially* incomplete, and any gaps therein were capable of being filled. *See, e.g.*, *Bradshaw*, 160 N.C. App. at 681, 587 S.E.2d at 86 ("[A] review of the transcript indicates that much of the missing testimony was clearly referenced and repeated by the witnesses, including respondent[.]"); *State v. Owens*, 160 N.C. App. 494, 499, 586 S.E.2d 519, 523 (2003) ("[A] review of the transcript reveals that all of the questions posed by counsel prior to and comments made immediately following the missing responses are included in the transcript and at no point was such a missing response followed by an objection from defense counsel. Because the context of the questioning and the likely responses that were elicited from the potential jurors are therefore ascertainable from the record, defendant was not denied

meaningful appellate review[.]"); *State v. Hammonds*, 141 N.C. App. 152, 167, 541 S.E.2d 166, 177 (2000) (holding that while trial "transcript is incomplete in places . . . . it is possible to reconstruct the substance of what was said, even if the precise words are lost"), *aff'd per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001).

While the State cites *Lawrence* in support of its argument that Respondent's appellate counsel was, in fact, able to compile an adequate substitute for a verbatim transcript, we believe the State's reliance on *Lawrence* is misplaced. In *Lawrence*, as a result of a mechanical malfunction, the trial transcript was missing the testimony of one of the State's witnesses in its entirety along with a portion of the testimony from another witness. *Lawrence*, 352 N.C. at 16, 530 S.E.2d at 817. On appeal, the State set out in narrative form the unrecorded testimony as permitted under N.C.R. App. P. 9(c)(1). During a hearing to settle the record, the witnesses whose testimony was missing from the transcript testified that the State's narrative was accurate. In addition, the court reporter from the trial responded that, according to her trial notes, no objections had been made during the omitted portions of testimony. Under these circumstances, our Supreme Court held that "[t]he State's narrative constitute[d] an available alternative that is 'substantially equivalent' to the complete transcript[.]" *Id.*

We find *Lawrence* to be materially distinguishable from the present case. In *Lawrence*, (1) the transcript was missing the complete testimony of only one witness and the partial testimony of another witness — neither of whose testimony was relevant to the focus of the defendant's defense[1]; (2) the State provided a narrative of the missing testimony, which the relevant witnesses confirmed was accurate; and (3) the court reporter confirmed that no objections had been made during the omitted portions of testimony.

Here, conversely, the transcript of the e*ntire* proceeding is unavailable, and the only independent account of what took place at the hearing consists of five pages of bare-bones handwritten notes that — in addition to not being wholly legible — clearly do not amount to a comprehensive account of what transpired at the hearing. While these notes could conceivably assist in recreating the hearing if supplemented by other sources providing greater detail, they are not in and of themselves "substantially equivalent to the complete transcript[.]" *Id.* at 16,

1. The Supreme Court explained that "[i]nasmuch as defendant admitted shooting the victim, the focus of his defense was his intent. The missing part of the transcript was not relevant to this issue." *Id.* at 17, 530 S.E.2d at 817.

530 S.E.2d at 817 (quotation marks omitted). Accordingly, we cannot conclude that these notes from Respondent's trial counsel constitute an adequate alternative to a verbatim hearing transcript "that would fulfill the same functions as a transcript . . . ." *Id.*

[4] Finally, we must determine whether the lack of an adequate alternative to a verbatim transcript of the hearing served to deny Respondent meaningful appellate review such that a new hearing is required. *See Hobbs*, 190 N.C. App. at 187, 660 S.E.2d at 171 ("Without an adequate alternative, this Court must determine whether the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review, in which case a new trial would be warranted." (citation and quotation marks omitted)).

We have previously recognized the importance of a transcript on appeal.

> [A]s any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law.

Id. at 185, 660 S.E.2d at 170 (quoting *Hardy v. United States*, 375 U.S. 277, 288, 11 L.Ed.2d 331, 339 (1964) (Goldberg, J., concurring)).

In *Hobbs*, the missing portion of the transcript encompassed the entire testimonial portion of the trial, which included an unknown number of witnesses over three days. *Id.* at 187, 660 S.E.2d at 171. We held that the appellant's ability to litigate the appeal was "hindered by the total unavailability of either a transcript or an acceptable alternative for a *majority* of [the] defendant's trial." *Id.* at 187-88, 660 S.E.2d at 171. Thus, we concluded that the appellant had been "unable to procure meaningful appellate review of his trial" and was entitled to a new trial. *Id.* at 188, 660 S.E.2d at 172.

Similarly, in *State v. King*, 218 N.C. App. 347, 721 S.E.2d 336 (2012), a transcript was unavailable for nearly the entire habitual felon phase of a criminal proceeding. We remanded for a new habitual felon hearing, holding that the "almost complete lack of a transcript or adequate alternative narration of the habitual felon phase of the proceedings in the lower court precludes our ability to review defendant's contentions on the habitual felon hearing and precludes any meaningful appellate review." *Id.* at 356, 721 S.E.2d at 343.

The present action provides an even clearer case of prejudice than that existing in either *King* or *Hobbs*. It bears repeating that here we are not called upon to determine how significant a missing *portion* of the transcript is to the appellant's ability to obtain meaningful review. Instead, we are dealing with a case in which the transcript *in its entirety* is missing and cannot be adequately reconstructed.

Holly Hill cites to *In re Wright*, 64 N.C. App. 135, 306 S.E.2d 825 (1983), in support of its argument that Respondent has failed to establish prejudice. In *Wright*, the respondents challenged the constitutionality of several statutory provisions providing for the termination of parental rights. On appeal, the respondents asserted that they were entitled to a new hearing due to an equipment malfunction that rendered unintelligible the entire recording of their termination hearing, thereby requiring the parties to reconstruct the record. We held that the respondents had failed to demonstrate that the lack of a hearing transcript prejudiced them given that it was "apparent from the pleadings and assignments of error that [the appellants'] reliance from the outset has been on the unconstitutionality of the statutes proceeded under, rather than on any evidence of their's or any weakness in the petitioner's evidence." *Id.* at 138, 306 S.E.2d at 827.

Thus, the issues raised by the appellants in *Wright* were unrelated to the substance of the evidence actually presented at the hearing. Here, conversely, Respondent is expressly contending that the unavailability of a transcript prejudiced him by depriving him of the ability to determine whether any potentially meritorious issues exist for appellate review.

[5] Finally, we reject Holly Hill's argument that Respondent has failed to demonstrate prejudice because he did not identify any specific errors or defects in the involuntary commitment order. In its brief, Holly Hill makes the following assertions in support of this proposition: "The purpose of a verbatim transcript is to be able to review the entire proceeding and determine whether there was error during the trial. Without an allegation of error in [the] trial or in the order, there is no need for a transcript." (Internal citation omitted).

Under this circular logic, an appellant would never be able to show prejudice in cases where — as here —the absence of a transcript renders the appellant unable to determine whether any errors occurred in the trial court that would necessitate an appeal in the first place. In such cases, the prejudice is the inability of the litigant to determine whether an appeal is even appropriate and, if so, what arguments should be raised. *See Neely*, 21 N.C. App. at 441, 204 S.E.2d at 532.

Accordingly, we conclude that Respondent has demonstrated that he was prejudiced by the lack of a verbatim transcript from the 14 May 2015 hearing and, as a result, is unable to obtain meaningful appellate review of his involuntary commitment. Therefore, he is entitled to a new hearing.

Conclusion

For the reasons stated above, we vacate the trial court's 16 May 2015 order and remand for a new commitment hearing.

VACATED AND REMANDED.

Judges ELMORE and HUNTER, JR. concur.

IN THE MATTER OF T.D. AND J.D.

No. COA 15-1393

Filed 19 July 2016

Constitutional Law—ineffective assistance of counsel—termination of parental rights—remanded to trial court for hearing

Because it could not be discerned from the record on appeal whether respondent mother received ineffective assistance of counsel at trial during the proceedings to terminate her parental rights, the case was remanded to the trial court for a hearing on this issue.

Appeal by respondent-mother from orders entered 9 September 2015 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 27 June 2016.

Holcomb & Cabe, LLP, by Samantha H. Cabe, for petitioner-appellee Orange County Department of Social Services.

Assistant Appellate Defender J. Lee Gilliam for respondent-appellant mother.

Hutchison, PLLC, by Brandon J. Huffman, for guardian ad litem.

HUNTER, JR., Robert N., Judge.

Respondent appeals from orders terminating her parental rights to her minor children, T.D. ("Thomas") and J.D. ("Jackson").[1] Because we cannot discern from the record on appeal whether respondent received ineffective assistance from her trial counsel during the proceedings to terminate her parental rights, we remand to the trial court for a hearing on this issue.

Respondent has a long history of abusing controlled substances, entering and completing substance abuse programs, but then relapsing. Orange County Department of Social Services ("DSS") initiated the underlying juvenile case on 17 September 2012 by filing a petition alleging Thomas and Jackson were neglected and dependent juveniles. Respondent had been arrested for driving while impaired by cocaine and failing to properly restrain the children in her car. DSS did not seek to obtain non-secure custody of the juveniles, as respondent voluntarily placed them with a friend ("Ms. Gomez"). The trial court heard the petitions on 1 November 2012 and entered an order adjudicating the children to be dependent juveniles. The court continued custody of the juveniles with respondent, subject to their placement with Ms. Gomez, and ordered respondent to participate in drug treatment therapy and in the Family Drug Treatment Court if accepted into the program.

Respondent successfully engaged in her drug treatment therapy, and the juveniles returned to her home in August 2013. Respondent graduated from Family Drug Treatment Court in February 2014, and she continued working with DSS to monitor her ability to abstain from illicit substances with less formal support. By order entered after a permanency planning hearing on 15 May 2014, the trial court closed the case for further review and relieved DSS and the guardian ad litem of further responsibility.

However, in the spring of 2014, respondent showed signs she misused prescribed pain medication. In July 2014, she began using marijuana. Although respondent re-engaged with her substance abuse therapy providers, she relapsed in September 2014 and used crack cocaine. On 10 September 2014, DSS obtained non-secure custody of the juveniles and filed new juvenile petitions alleging Thomas and Jackson were neglected and dependent juveniles. The trial court entered an adjudication and disposition order on 22 December 2014, adjudicating the children to be dependent juveniles. Respondent entered and left multiple inpatient drug treatment programs between October 2014 and January 2015. Doctors diagnosed respondent with depression and

1. We use pseudonyms throughout for ease of reading and to protect the juveniles' privacy.

post-traumatic stress disorder. Doctors admitted her to an adult psychiatric unit at the University of North Carolina, where she began experiencing suicidal ideation and auditory hallucinations, which were treated by adjusting some of her medications.

After a permanency planning hearing on 15 January 2015, the trial court entered orders setting the permanent plan for the juveniles as adoption with a concurrent plan of custody with a parent. The court directed respondent to attend a residential substance abuse treatment program and comply with all recommended treatments. The court ordered DSS to prepare and file motions to terminate respondent's parental rights if she failed to commit to the residential treatment program or if she produced a positive drug screen prior to entering the program.

Respondent did not enter any inpatient treatment program and failed to contact DSS regarding her case or her children. On 20 February 2015, DSS filed motions to terminate respondent's parental rights to Thomas and Jackson on the grounds of neglect and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (6) (2015). After a hearing on 20 August 2015, the trial court entered orders on 9 September 2015 terminating respondent's parental rights based on the grounds alleged in the motions. Respondent filed timely written notices of appeal.

Respondent's sole argument on appeal is she received a fundamentally unfair hearing because her trial counsel failed to assist her in defending against the termination of her parental rights to the juveniles. Respondent contends she received ineffective assistance of counsel when her appointed counsel did not advocate on her behalf during the hearing to terminate her parental rights. We remand for further findings of fact regarding counsel's representation in this matter.

" 'When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.' " *In re K.N.*, 181 N.C. App. 736, 741, 640 S.E.2d 813, 817 (2007) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54, 71 L. Ed.2d 599, 606 (1982)). The procedures established by the North Carolina Juvenile Code for terminating parental rights provide "[p]arents have a statutory right to counsel in all proceedings dedicated to the termination of parental rights. This statutory right includes the right to effective assistance of counsel." *In re Dj.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007) (internal citations and quotation marks omitted); *see also* N.C. Gen. Stat. §§ 7B-1101.1, 1109(b) (2015). "A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was deficient and the deficiency was so serious as to deprive the represented party of a fair

hearing." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996).

Respondent argues her counsel's total failure to advocate on her behalf is evident in that her counsel: (1) uttered fewer than fifty words during the entire termination hearing, most of which were irrelevant to the proceeding; (2) did not introduce any evidence at either the adjudication or the disposition stage of the hearing; and (3) never objected to the trial court finding termination of parental rights in the juveniles' best interests. Respondent contends her counsel made absolutely no contribution to the proceedings and in no way advocated on her behalf at the hearing. *See In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010) ("It is well established that attorneys have a responsibility to advocate on the behalf of their clients.").

Respondent's characterizations of her trial counsel's actions, or lack thereof, over the course of the nineteen-minute hearing to terminate her parental rights are fully supported by the record before us. The record raises serious questions as to whether respondent was afforded the proper procedures to ensure her rights were protected during the hearing. We note this is not a case where respondent was absent from the hearing; indeed, counsel's longest statement to the trial court during the hearing was when she stated respondent would like to address the court. Counsel also did not state he was unable to contact respondent while trying to prepare for the hearing. As a result, he may not have known how respondent wished to proceed at the hearing. Nonetheless, we are hesitant to hold that counsel's relative silence during the hearing constitutes *per se* ineffective assistance of counsel. *Cf. State v. Taylor*, 79 N.C. App. 635, 637, 339 S.E.2d 859, 861 (1986) ("While we find the absence of positive advocacy at the sentencing hearing troublesome, we do not believe we can hold, on this record, that it constituted deficient performance prejudicial to the defendant."). Accordingly, we remand for a determination by the trial court whether counsel's representation of respondent at the termination of parental rights hearing constitutes deficient performance, and if so, whether the deficient performance prejudiced respondent such that she is entitled to a new termination of parental rights hearing.

REMANDED.

Judges ELMORE and McCULLOUGH concur.

JOHN H. SESSIONS, PLAINTIFF
v.
MICHAEL SLOANE, TRACEY KELLY, SUSAN EDWARDS & PHILLIP SLOANE, AS INDIVIDUALS, AND CRUISE CONNECTIONS CHARTER MANAGEMENT 1, LP, A NORTH CAROLINA LIMITED PARTNERSHIP, AND CRUISE CONNECTIONS CHARTER MANAGEMENT GP, INC., DEFENDANTS

No. COA 15-1095

Filed 19 July 2016

1. Appeal and Error—interlocutory orders and appeals—substantial right—privilege

The trial court did not err by denying defendant's motion to dismiss an appeal from a discovery order. Defendants provided a document privilege log describing the privilege relating to each withheld document, and thus, their assertion of privilege affected a substantial right allowing for an immediate appeal.

2. Discovery—compelling production—burden of proof—documents under seal not provided for review

The trial court did not abuse its discretion by compelling the production of documents withheld by defendants based on a failure to meet the burden of proof. There was no evidence to determine if the claims of privilege were bona fide. The documents were not provided under seal to the Court of Appeals for review, and thus, appellants ran the risk of providing insufficient evidence for the Court to make the necessary inquiry.

3. Discovery—compelling production—joint defense privilege—work product doctrine—emails

The trial court did not abuse its discretion by failing to make findings of fact regarding whether pertinent documents withheld by defendants were prepared in anticipation of litigation. The burden rested on defendants to demonstrate the emails fell within the shield of the work product or joint defense doctrines.

4. Discovery—compelling production—attorney-client privilege—subject line of email

The trial court did not abuse its discretion by requiring defendants to produce the subject lines of the pertinent emails. The same five-part test applies for the subject line of an email as it does for any communication allegedly protected under attorney-client privilege. There was no evidence defendants met their burden.

5. Discovery—compelling production—in camera review

The trial court did not abuse its discretion by failing to conduct an in camera review prior to issuing its order compelling discovery. There was no evidence defendants made a request for an in camera inspection of the documents at trial or submitted the documents for inspection.

Appeal by Defendants from order entered 2 June 2015 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 30 March 2016.

Hendrick Bryant Nerhood Sanders & Otis, LLP, by Matthew H. Bryant and Wyche, P.A., by Henry L. Parr, Jr. (admitted pro hac vice) and Sarah Sloan Batson, for plaintiff-appellee.

Wilson, Helms & Cartledge, LLP, by G. Gray Wilson and Lorin J. Lapidus and Strauch Green & Mistretta, P.C., by Jack M. Strauch and Stanley B. Green, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Defendants appeal from an order compelling discovery. The trial court ordered Defendants to produce documents withheld by the Defendants based on their assertions that the documents were prepared in anticipation of litigation and were therefore subject to confidentiality based on application of the attorney-client privilege, the work product doctrine or the joint defense privilege. After careful examination of the record and the procedures which the Defendants used to assert these privileges, we hold the trial court did not abuse its discretion in compelling the production of the withheld communications.

I. Factual and Procedural Background

Defendants Cruise Connections Charter Management GP, Inc. ("Cruise Corporation") and Cruise Connections Charter Management 1 LP ("Cruise Limited Partnership") planned to bid $50,575,000 on a government contract with the Royal Canadian Mounted Police (the "Mounties") to supply three cruise ships to house security police forces during the 2010 Winter Olympic Games. In order to show financial strength to perform this task, bidders to the government contract had to provide a letter of credit for ten percent (10%) of their total bid amount with their proposal. Proposals were due on 23 May 2008. If they won, Defendants Cruise Corporation and Cruise Limited Partnership expected to make a net profit of at least $14,000,000.

As of 17 May 2008, Defendants had not secured a letter of credit for ten percent (10%) of their overall bid. Defendants asked Plaintiff Sessions to provide a letter of credit for their bid in the amount of $5,057,500 in order to meet this bid requirement. On 22 May 2008, Sessions agreed to provide Defendants a letter of credit in consideration for $5,057,500 from contract proceeds should Defendants be awarded the contract. Defendants signed a letter of intent agreeing to Sessions' terms. The letter of intent reads in part:

> In exchange for providing an unredeemable, nonpayable Letter of Credit in the amount of $5,057,500, Mr. Sessions shall be granted assignable rights to receive Warrants at no cost to him for special limited partnership interest in the Partnership which he or his assignee solely at their election may either cause the Partnership to redeem or convert to special limited partnership interests.
>
> If the Partnership is the successful bidder and enters into a contract providing services for the Royal Canadian Mounted Police (the "RCMP Contract"), and if Sessions or his assignee elects to exercise his right to receive a special limited partnership interest in the Partnership or demand that the Partnership redeem the Warrants, Sessions or his assignee shall receive allocations and distributions from the Partnership in an amount equal to the sum of (i) $5,057,500.00 plus (ii) two (2) times the amount of additional capital advanced, loaned, or provided by Mr. Sessions or his nominee together with the principal amount so advanced, loaned, or provided with his assistance. For example, if Sessions or his assignee provides $275,000 for working capital, then the original $275,000 is paid back plus an additional $275,000, prior to any distributions to the other partners of the Partnership or payments of any kind to the other parties to this agreement or to any entity in which they are associated.
>
> If the Partnership is the successful bidder and enters into the contract contemplated herein, the Partnership shall pay Sessions' choice of either the redemption for special limited partnership interest or if the Warrants are exercised allocations and distributions of the amounts described above within 10 days after the Partnership receives its initial payment from the Royal Canadian Mounted Police or Government of Canada or the contracting authority

whomever that should be (currently expected to be 75% of the total project fee) (the "Initial Fee Installment").

Sessions, through his company Carolina Shores Leasing LLC,[1] obtained a letter of credit from Southern Community Bank & Trust on 22 May 2008. The letter of credit dated 22 May 2008 in the amount of $5,057,500 lists Cruise Connections Charter as the applicant with Carolina Shores Leasing as the co-applicant, and Her Majesty the Queen in Right of Canada as the beneficiary. Sessions transferred $5,057,500 to the bank as security for the letter of credit and paid a fee of $25,000 to obtain the letter of credit.

The same day, Sloane, a partner and chief financial officer of Cruise Connections Charter Management, hand delivered the letter of credit from Winston-Salem, North Carolina to Seattle, Washington. Sloane gave the letter to Kelly, who then delivered the letter of credit to Edwards in Canada. Defendant Cruise Limited Partnership was awarded the contract on or about 30 May 2008. Subsequently, Defendants attempted to renegotiate the agreement with Sessions, but the agreement was not amended.

On 26 November 2008, Cruise Limited Partnership and Cruise Corporation filed suit against the Attorney General of Canada, representing the Mounties in United States District Court for the District of Columbia for breach of contract (hereinafter the "Canadian lawsuit"). On 9 September 2013, the Court granted summary judgment in favor of Cruise Limited Partnership and Cruise Corporation. On 21 July 2014, the Court entered an order for monetary damages against the Canadian government in the amount of $19,001,077. Defendants then entered into a settlement agreement with Canada on 12 December 2014 for the payment of $16,900,000 by 12 January 2015.

In the Canadian lawsuit, Defendants alleged they have no obligation to pay Sessions. Sessions was not a party to the Canadian lawsuit. After filing the Canadian lawsuit, all of the parties in this case entered into a forbearance and escrow agreement. The agreement recognizes a dispute between Sessions and Cruise Connections, but states the parties to the agreement are "willing to forbear from enforcing or taking other action on the Claims until the Canada Lawsuit is resolved . . . ." The parties also agreed to deposit all proceeds arising out of the Canadian lawsuit into the trust account of Strauch Fitzgerald & Green. Thereafter, Strauch

1. Although Carolina Shores Leasing was named as the co-applicant on the letter of credit, they are not a party to this action.

Fitzgerald & Green would pay itself litigations costs and attorneys fees, and then deposit thirteen percent (13%) of the net proceeds up to a maximum of $5,000,000 into an escrow account. Since the settlement agreement, Defendants have not paid or agreed to pay Sessions.

On 31 December 2014, Sessions filed a verified complaint and writ of attachment seeking damages for breach of contract and injunctive relief preventing the parties or their agents from disbursing the escrow funds *pende lite*. This complaint named the following as parties: Michael Sloane, Tracy Kelly, Susan Edwards, and Phillip Sloane in their individual capacities as well as Cruise Connections Charter Management 1, LP and Cruise Corporation as Defendants. The complaint also named as parties Strauch Green & Mistretta, a North Carolina law firm, as the settlement and escrow agent. Kelly, Sloane, and Edwards are partners in Cruise Limited Partnership, and Sloane is Cruise Limited Partnership's chief financial officer. In his complaint, Sessions claims the Defendants anticipatorily repudiated the contract and sought damages in excess of $25,000.

Sessions sought a writ of attachment alleging some Defendants are out of state residents and would likely remove the escrow money from North Carolina upon payment by the Canadian government. Sessions sought the writ to prohibit Strauch, Green, & Mistretta, Defendants' counsel, from disbursing the funds in an amount that would leave less than $5,457,500 in its trust account. Attached to the complaint, Sessions provided a copy of P. Sloane's affidavit dated 15 January 2013 from the Canadian lawsuit. The affidavit stated the following:

> 5. When Cruise Connections approached Mr. Sessions, another individual who was supposed to provide a letter of credit for the bid had just backed out, and the deadline for submitting the bid was fast approaching. Mr. Sessions knew that Cruise Connections was in a bad bargaining position, since Cruise Connections had no other viable alternatives for getting a letter of credit before its bid was due. Mr. Sessions took advantage of the situation, repeatedly raising the price for providing the letter of credit until he eventually demanded a price equal to the amount of the letter of credit ($5,057,500). Since we were out of time and out of options, Cruise Connections acceded to Mr. Sessions' demand. Given the fact that Mr. Sessions used his vastly superior bargaining position to force these unfair terms upon Cruise Connections, I have serious doubts as to the enforceability of the Letter of Intent.

> 6. Even if it is ultimately enforceable, the Letter of Intent does not create a debt obligation on the part of Cruise Connections. Instead, if Cruise Connections' bid was successful, Mr. Sessions was to be granted an option to receive a limited partnership interest, pursuant to which he would be able to receive funds in the form of partnership distributions. Cruise Connections did not intend to make distributions to partners until such time as it had confirmed that there was sufficient cash available to cover any current or future costs or other financial obligations related to the Vancouver Olympic project, so any partnership distributions would have only been distributions of profits. If Cruise Connections' bid was not accepted, or Cruise Connections ultimately did not realize a profit, then Mr. Sessions would have recovered nothing.
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> 7. Aside from providing the letter of credit that Cruise Connections submitted to the RCMP in conjunction with its bid, John Sessions provided no other capital or other financing to Cruise Connections, including working capital, so Cruise Connections owed Mr. Sessions no debt whatsoever.

On 27 January 2015, Sessions filed a Rule 41 voluntary dismissal with prejudice as to all claims against Strauch Green & Mistretta. On 13 March 2015, Defendants M. Sloane, Cruise Limited Partnership, and Cruise Corporation filed an unverified answer generally denying Sessions is entitled to any relief. Additionally, Defendants raised fifteen affirmative defenses including failure of consideration, indefiniteness, unconscionability, mutual mistake, duress, and estoppel.

On 19 March 2015, Sessions served identical sets of written discovery requests on each defendant. As an example, Sessions requested all "documents sent to, received from, or concerning John Sessions." Defendants objected, stating:

> Defendant objects to this request to the extent it calls for documents containing information protected from disclosure pursuant to the work product doctrine or the attorney opinion work product doctrine. Defendant further objects to this request to the extent it calls for documents containing information protected from disclosure pursuant to the attorney-client privilege or joint defense privilege. Without waiving any of its objections, Defendant will produce non-privileged documents responsive to this request.

Defendants responded with similar objections to Sessions' other discovery requests.

On 30 March 2015, Defendants M. Sloane, Cruise Limited Partnership, and Cruise Corporation filed an amended answer and motion to dismiss alleging three additional defenses: Sessions' claims are barred by the doctrine of accord and satisfaction, novation, and the statute of limitations. On 1 April 2015, Defendants Kelly, Edwards, and P. Sloane filed an unverified answer generally denying they owe Sessions money.

Cathy Holleman, a paralegal at Strauch Green & Mistretta, mailed a privilege log to Sessions' counsel on 16 April 2015. The privilege log listed documents requested in discovery and the associated privilege Defendants invoked in response to the request to produce that document. Below is a representative sample of the privilege log.

Document Number	Document Date	Author	Recipient	Description	Privilege
CCPRIV000016	6-09-08	Tracey Kelly	Defendants	Email created in anticipation of litigation and legal advice	Work Product Doctrine; Joint Defense Privilege
CCPRIV000019	6-09-08	Tracey Kelly	Defendants	Email created in anticipation of litigation and legal advice	Work Product Doctrine; Joint Defense Privilege
CCPRIV000020	5-15-08	Phillip Sloane	Defendants and Jack Strauch	Email seeking or containing legal advice	Attorney-Client Privilege
CCPRIV000021	5-18-08	Phillip Sloane	Jack Strauch	Email seeking or containing legal advice	Attorney-Client Privilege

On 15 May 2015, Sessions filed a motion to compel Defendants to provide full and complete responses to Sessions' discovery requests pursuant to Rules 34 and 37 of the North Carolina Rules of Civil Procedure. In his motion, Sessions requested the trial court to order Defendants to produce the following:

> (1) To produce all the documents or portions thereof withheld from production solely based on a claim of "work product/joint defense privilege" where the items are communications solely among the defendants themselves without the participation of counsel.
>
> (2) In the alternative to item one, to provide the Court for in camera review [of] the documents, or portions thereof, that Defendants have withheld based on a claim of privilege under the "work product doctrine," even though (a) no attorney was involved in creating the information withheld and (b) the documents were created long before there was any hint of litigation between Plaintiff Sessions and the defendants. The in camera review would allow the Court to determine whether these documents or portions thereof may properly be withheld from plaintiff . . . .
>
> (3) Produce to plaintiff the "To, From, CC, BCC, and Subject" lines of the documents or portions thereof that Defendants have withheld based on attorney client privilege, so that the Plaintiff may make his own independent assessment as to the validity of the claim of privilege . . . .
>
> (4) Pay plaintiff his reasonable expenses incurred in obtaining these orders, including attorney's fees, as provided in Rule 37(a)(4) of the North Carolina Rules of Civil Procedure.

Attached to the motion to compel, Sessions attached eight emails or email chains partially withheld under the work product doctrine as examples of illegitimate use of the work product doctrine. For example, in an email from Edwards to Kelly dated 16 July 2008, the email provided to Sessions read:

> Subject: Tried Calling
>
> HI
> Back from the Tribunal and have tried calling, no luck.
>
> 1. So I would not send the email I just sent – but it needs to be said. We need support on this team and to not question performance.
>
> 2. How was the Bank mtg. Very keen to hear.
>
> [Redacted]
>
> Cheers, Sue

Another email to Edwards from Kelly dated 22 September 2008 read:

> Subject: Throwing it out there….
>
> Hi Tracey/Mike:
> I suspect that we can prioritize the #'s so that the Partners and all Subcontractor needs can be met.
>
> Priorities:
> [Redacted]
> 493,125 RBC
> Partner Lump Sum
> [Redacted]
> 1,200. Cardinal Law
> 6,450. Insurance
> 8,000. Port Agent
> 30,000 Partner draw per month
>
> 574,025 as opposed to: 670,575
>
> [Redacted] At that time, all other Sub-Contractors can be deposited with.
>
> Therefore, I see the opportunity to allow the Partners a lump sum draw immediately.
> Amount??
>
> Sue

In response to Sessions' motion to compel, Defendants provided an affidavit of Kelly dated 27 May 2015. In his affidavit, Kelly stated he and his partners exchanged "several" drafts of a potential agreement with Sessions. Kelly and his partners "hired Will Joyner and Jack Strauch of Womble Carlyle Sandridge & Rice, PLLC to represent [them] with regard to, among other things, potential litigation related to the third party who had reneged on the financing deal as well as the negotiations with Mr. Sessions." The parties exchanged emails with red-lined changes to the document until, at approximately 1:35 p.m. on 21 May 2008, Sessions emailed Kelly and his partners a version of the document with no added red-lined changes. Sessions indicated the agreement needed to be signed "immediately" in order to obtain a letter of credit the same day. Kelly signed the agreement. Upon review of the document, Kelly found "wholesale changes to the material terms of the proposed agreement from the version that had been circulated earlier." As a result, Kelly believed litigation over the document was possible. Kelly and his

partners "began to focus on the Sessions' dispute as well as legal strategy regarding the dispute in or around June 9, 2008."

The trial court held a hearing on the motion 1 June 2015. Because there was no court reporter present at the hearing, a transcript is not included in the record. Instead, the parties provide a summary of the hearing in the record on appeal. On 2 June 2015, the trial court granted in part and denied in part Sessions' motion to compel. The court ordered Defendants produce the following on or before 9 June 2015:

> (1) Produce to plaintiff all the documents or portions thereof withheld from production based on a claim of "work product doctrine, joint defense privilege" where the items are communications involving the defendants themselves without the participation of counsel.
>
> (2) Produce to plaintiff the "To, From, CC, BCC, and Subject" lines of the documents or portions thereof that Defendants have withheld based on attorney client privilege, so that the Plaintiff may make his own independent assessment as to the validity of the claim of privilege.

On 11 June 2015, Sessions' counsel emailed Cecilia Gordon, the trial court administrator, asking for a meeting with Judge Burke and asking about a motion for reconsideration filed by Defendants. In response, Gordon wrote: "Pursuant to conversation with Judge Burke, will not hear Mr. Greene's motion for reconsideration and advise that he comply with the court's ruling. Should Mr. Greene not comply he may be subject to the contempt power of the court. Judge Burke is not available to meet with parties."

Defendants timely filed a Notice of Appeal from the order granting in part and denying in part Sessions' motion to compel. Pursuant to Rule 62 of the North Carolina Rules of Civil Procedure, Defendants filed a motion to stay the enforcement of the order granting in part and denying in part the motion to compel. On 29 June 2015, the trial court granted the stay pending disposition of the appeal of that order.

On 15 July 2015, Defendants filed a motion for a protective order with the trial court pursuant to Rule 26 of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 1-294, requesting the court enter a protective order staying the noticed depositions of Defendants. Defendants argued the subject matter of the depositions would be tangled with matters involved in the order on appeal to this Court. The trial court allowed Defendant's motion for a protective order, staying depositions pending

disposition of the appeal. The court ordered Defendants to pay any cancellation fees, including air fare, related to the stay of the depositions.

In this Court, on 21 December 2015, Sessions filed a motion to dismiss the appeal for lack of jurisdiction alleging the order appealed is interlocutory and does not affect a substantial right. Defendants filed a response to the motion to which Sessions filed a reply brief on the motion. Defendants filed a motion to strike Sessions' reply brief. Both the motion to dismiss and the motion to strike were referred to this panel.

II. Jurisdiction

[1] An interlocutory order is an order made "during the pendency of an action" which does not dispose of the entire case, but instead requires further action by the trial court. *Duquesne Energy, Inc. v. Shiloh Indus. Contractors*, 149 N.C. App. 227, 229, 560 S.E.2d 388, 389 (2002). Generally, interlocutory orders are not immediately appealable. *Id.* The purpose behind preventing interlocutory appeals is to prevent undue delay in the administration of justice by allowing fragmented and premature appeals. *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578–579 (1999) (citing *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980)).

However, an interlocutory order is immediately appealable "(1) if the trial court has certified the case for appeal under Rule 54(b) of the Rules of Civil Procedure; and (2) when the challenged order affects a substantial right of the appellant that would be lost without immediate review." *Campbell v. Campbell*, __ N.C. App. __, __, 764 S.E.2d 630, 632 (2014) (citations and quotations omitted). An order compelling discovery is interlocutory in nature and is usually not immediately appealable because such orders generally do not affect a substantial right. *Sharpe*, 351 N.C. at 163, 522 S.E.2d at 579 (citing *Mack v. Moore*, 91 N.C. App. 478, 480, 372 S.E.2d 314, 316 (1988)). When "a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right." *Id.* at 162, 522 S.E.2d at 579. This Court has applied the reasoning of *Sharpe* to include attorney-client privilege, the work product doctrine, and the common interest or joint defense doctrine. *See K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 446, 717 S.E.2d 1, 4 (2011); *Cf. Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 44 (2005) (denying defendant's motion to dismiss as interlocutory and reviewing order compelling discovery involving claims of attorney-client privilege and a tripartite attorney-client relationship).

Here, Defendants asserted attorney-client privilege, the work product doctrine, and the joint defense privilege at the hearing in response to the motion to compel discovery. If the assertion of privilege is not "frivolous or insubstantial" then a substantial right is affected and the order compelling discovery is immediately appealable. A blanket, general objection is considered to be frivolous or insubstantial, but objections "made and established on a document-by-document basis" are sufficient to assert a privilege. *See K2 Asia Ventures*, 215 N.C. App. at 447–48, 717 S.E.2d at 4–5. Defendants provided a document privilege log describing the privilege relating to each withheld document. As a result, their assertion of privilege is not frivolous or insubstantial and a substantial right is affected. We therefore hold this interlocutory order is immediately appealable. We deny Sessions' motion to dismiss the appeal based on its interlocutory nature.

Sessions submitted to this Court a reply brief in support of his motion to dismiss Defendants' appeal, and Defendants thereafter filed a motion to strike Sessions' reply brief. Defendants contend, pursuant to Rule 37(b) of the North Carolina Rules of Appellate Procedure, a motion may "be acted upon at any time, despite the absence of notice to all parties." However, the Rule refers to this Court's ability to act upon a motion at any time, not the ability of a party to do so. Although Rule 28(h) of the North Carolina Rules of Appellate Procedure permits a party to file reply briefs in certain circumstances, Rule 37, which governs motions, does not expressly allow reply briefs. Sessions provides no additional authority to support his ability to file a reply brief to a motion and therefore we decline to consider his reply brief to the motion to dismiss.

III. Standard of Review

"Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Patrick v. Wake Cnty. Dep't of Human Servs.*, 188 N.C. App. 592, 595, 655 S.E.2d 920, 923 (2008). We also review the trial courts' application of the work product doctrine and of attorney-client privilege under an abuse of discretion standard. *Hammond v Saini*, 229 N.C. App. 359, 370, 748 S.E.2d 585, 592 (2013); *Evans v. United Services. Auto. Ass'n*, 142 N.C. App 18, 27, 541 S.E.2d 782, 788 (2001). Under an abuse of discretion standard, this Court may only disturb a trial court's ruling if it was "manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Hammond*, 229 N.C. App. at 370, 748 S.E.2d at 592 (quoting *K2 Asia Ventures*, 215 N.C. App. at 453, 717 S.E.2d at 8).

IV. Analysis

Generally, parties may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2015). If a party claims a document is privileged, the burden lies with that party to "(i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected will enable other parties to assess the claim." *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(5)(a) (2015).

A. Determination of Validity

[2] When this motion came on for hearing, Judge Burke had Defendants' privilege log and the Kelly affidavit before him. According to Defendants, at the hearing on the motion, Defendants orally requested an *in camera* review but did not tender to Judge Burke the documents to be examined. Lacking the documents, the only evidence before Judge Burke was the privilege log which on its face lacked sufficient evidence for the trial court to assess their claim of privilege. In their brief, Defendants argue the trial court failed to make necessary determinations as required by *Hall v. Cumberland County Hospital System, Inc.* 121 N.C. App. 425, 466 S.E.2d 317 (1996). They contend a finding of validity of their Rule 26 claim is mandatory and should have been included in the order for the order to be legally enforceable. Appellants read *Hall* to say the motion, affidavit, and privilege log alone are sufficient to support a finding of validity of their Rule 26 claim. Defendants contend an *in camera* review should occur following a determination of validity. We disagree.

The Rules of Civil Procedure are not so clear. The better practice in privilege controversies would be to submit a motion, affidavit, privilege log, request for findings of fact and an *in camera* review together with a sealed record of the documents to be reviewed. Defendants concede they made no formal request for *in camera* review. Using the method followed by Defendants, if the trial court has questions regarding the factual basis of the alleged privileged documents, the court would not have a basis to resolve its questions. Lacking the documents, there is no evidence to determine if the claims of privilege are *bona fide*. Moreover, if the documents are not provided under seal to this Court for our review, appellants run the risk of providing insufficient evidence for this Court to make the necessary inquiry. It is therefore problematic for the Defendants to meet their burden of proof at trial or on appeal.

B. Joint Defense Privilege and Work Product Doctrine

[3] Defendants argue the trial court did not make a finding whether the documents withheld under the work product doctrine or joint defense privilege were prepared in anticipation of litigation. Instead, the trial court summarily ordered the production of all documents where the communications involve the Defendants themselves without participation of counsel. Citing *Evans v. United Servs. Auto Ass'n*, 142 N.C. App. 18, 541 S.E.2d 782 (2011), Defendants contend the work product doctrine does not require "direct involvement of an attorney" to apply.

The joint defense privilege, also known as the common interest doctrine, takes the attorney-client privilege and extends it to other parties that "(1) share a common interest; (2) agree to exchange information for the purpose of facilitating legal representation of the parties; and (3) the information must otherwise be confidential." *Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc.*, __ N.C. App. __, __, __ S.E.2d __, __ (2016). Thus, the joint defense privilege is not actually a separate privilege, but is instead an exception to the general rule that the attorney-client privilege is waived when the client discloses privileged information to a third party. *Id.* It is generally recognized when parties communicate to form a joint legal strategy. *Id.*

The work product doctrine protects materials prepared in anticipation of litigation from discovery. *In re Ernst & Young*, 191 N.C. App. 668, 678, 663 S.E.2d 921, 928 (2008). Materials prepared in the regular course of business are, however, not protected. *Cook v. Wake Cnty. Hosp. Sys., Inc.*, 125 N.C. App. 618, 623, 482 S.E.2d 546, 550 (1997). The test for whether a document was prepared in anticipation of litigation or in the regular course of business is:

> whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.

Id. at 624, 482 S.E.2d at 551 (emphasis removed).

Pursuant to Rule 52 of the North Carolina Rules of Civil Procedure "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order *ex mero motu* only when requested by a party

and as provided by Rule 41(b)." N.C. Gen. Stat. § 1A-1, Rule 52 (a)(2) (2015). Rule 41, governing dismissal of claims, does not apply to this case. *See* N.C. Gen. Stat. § 1A-1, Rule 41 (2015). If the trial court is not required to make findings of fact and conclusions of law and does not do so, then we presume the trial court found facts sufficient to support its judgment. *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 542 (1986) (citations omitted). Although findings of fact and conclusions of law are helpful for meaningful review by our appellate courts, if a party did not request the court to make findings of fact, then it is within the discretion of the trial court whether to make findings. *Evans*, 142 N.C. App. at 26–27, 541 S.E.2d at 788; *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987).

The burden at trial rests on the party claiming privilege under the work product doctrine to show the emails were prepared in anticipation of litigation instead of in the regular course of business. *Evans*, 142 N.C. App. at 28–29, 541 S.E.2d at 789–90. And, "[b]ecause work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose." *Id.* at 29, 541 S.E.2d at 789.

The record on appeal lacks a transcript from the hearing on the motion to compel. The parties included a summary of the hearing, but the summary does not mention a request for factual findings. Additionally, the record contains no response to the motion to compel other than Kelly's affidavit. As a result, there is no evidence in the record that indicates Defendants requested the trial court make findings of fact. Accordingly, the trial court was not required to make findings of fact, and we presume the trial court found facts sufficient to support its judgment. The trial court did not abuse its discretion by failing to make findings of fact regarding whether the documents at issue were prepared in anticipation of litigation.

While we agree with Defendants that the work product doctrine does not require the direct involvement of an attorney to apply, the work product doctrine does require documents be prepared in anticipation of litigation instead of in the regular course of business. The burden rested on Defendants in the trial court to demonstrate the documents in question fell within the shield of the work product or joint defense doctrines. To meet their burden, Defendants needed to show the documents were prepared in anticipation of litigation. In opposition to the motion to compel, Defendants produced only Kelly's affidavit. The affidavit established Defendants' anticipated litigation as of the dates of the emails at issue. However, Defendants did not meet their burden to show

the specific emails at issue were actually prepared or obtained because of the prospect of litigation. Defendants did not demonstrate the emails were exchanged for the purpose of pending litigation instead of during the regular course of business. Although Defendants provided evidence to show litigation was anticipated at the time of the email exchanges, any business-related communication during that time is not protected. Defendants did not meet their burden to show the communications "can fairly be said to have been prepared or obtained because of the prospect of litigation." *See Cook*, 125 N.C. at 624, 482 S.E.3d at 551.

Defendants could have met their burden by showing the documents were prepared in anticipation of litigation. Defendants should have given the trial court more information about the nature of the withheld documents and the factual situation surrounding them instead of a broad claim of privilege. The best practice would have been for Defendants to turn over the documents to the trial court for an *in camera* review. On the facts before us, we hold the trial court did not abuse its discretion by ordering Defendants to produce the emails at issue under the work product and joint defense doctrines.

C. Attorney-Client Privilege

[4] Attorney-client privilege is based upon the reasoning that "full and frank" communications between a client and his attorney allow the attorney to best represent his client. *In re Miller*, 357 N.C. 316, 329, 584 S.E.2d 772, 782 (2003) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L.Ed.2d 584, 591 (1981)). The privilege is rooted in the English common law, with its earliest recorded instance in 1577. *See generally Berd v. Lovelace*, 21 Eng. Rep. 33 (1577). Today, the attorney-client privilege protects "all confidential communications made by the client to his attorney." *Dickson v. Rucho*, 366 N.C. 332, 737 S.E.2d 362 (2013) (citations omitted). "When the relationship of attorney and client exists, all confidential communications made by the client to his attorney on the faith of such relationship are privileged and may not be disclosed." *In re Miller*, 357 N.C. at 328, 584 S.E.2d 782 (citations omitted). The burden lies with the party claiming attorney-client privilege to establish each essential element of the privilege. *Id.* at 336, 584 S.E.2d at 787. The Supreme Court of North Carolina recognizes a five-part test to determine whether the privilege applies to a certain communication:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally

> consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

Id. at 335, 584 S.E.2d at 786.

Defendants challenge the trial court's order as it relates to 80 emails between Defendants and their attorneys. The trial court ordered Defendants to produce the "To, From, CC, BCC, and Subject lines" of the emails withheld by Defendants on the basis of attorney-client privilege. Defendants contend revealing the subject lines of the emails will reveal protected information. Quoting a case from Illinois, Defendants state: "Header information may contain information subject to the attorney-client privilege or the work product doctrine." *Shuler v. Invensys Bldg. Sys. Inc.*, 2009 U.S. Dist. LEXIS 13067 (N.D. Ill. 2009).

After reviewing the relevant case law, we believe the question of whether subject lines of emails must be protected from discovery under attorney-client privilege is a question of first impression in North Carolina. However, just because the form of the document or communication is new or different does not mean we must look outside our jurisdiction for authority. We hold the same five-part test applies for the subject line of an email as it does for any communication allegedly protected under attorney-client privilege.

Defendants bear the burden of establishing each essential element of the privilege pursuant to the five-part test recognized by our Supreme Court. To support their claim of privilege, Defendants produced a privilege log containing the document dates, authors, recipients, a description, and the privilege asserted. Descriptions of the withheld emails include the following: "email created in anticipation of litigation" and "email seeking or containing legal advice." The record provides no evidence Defendants met their burden at trial to show the subject lines of the emails contained privileged information by meeting the test. The record only reflects Defendants claimed the emails, including their subject lines, are protected by attorney-client privilege. Accordingly, the trial court did not abuse its discretion by requiring Defendants to produce the subject lines of the emails.

D. *In Camera* Review

[5] Finally, Defendants contend the trial court should have conducted an *in camera* review prior to issuing its order compelling discovery. However, the decision whether to conduct an *in camera* review to

determine whether documents are shielded from discovery by the assertion of a privilege is within the sound discretion of the trial court. *See Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 736, 294 S.E.2d 386, 387 (1982).

Based on the record before us, we see no evidence Defendants made a request for an *in camera* inspection of the documents at trial or submitted the documents for inspection. We note that Plaintiff Sessions did make a request for an *in camera* inspection but this was only requested in the alternative in the event that the court did not rule that the documents were privileged. The decision to conduct an *in camera* inspection, without a request for such inspection, lies within the discretion of the trial court, and we have no record evidence Defendants requested an *in camera* inspection. Unless the court is given the documents to inspect, Defendants will have difficulty meeting their burden to show any specific emails were prepared or obtained because of the prospect of litigation. Defendants took a strategic risk in not submitting the documents to be sealed for *in camera* review.

V. Conclusion

For the foregoing reasons, we hold the trial court did not abuse its discretion by ordering Defendants to produce documents or portions thereof. We therefore affirm the trial court's order.

AFFIRMED.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
RICO LAMAR BARNES, DEFENDANT

No. COA15-1173

Filed 19 July 2016

Confessions and Incriminating Statements—probationer—motion to suppress—Miranda warnings—handcuffs—totality of circumstances

The trial court did not err in a possession with intent to manufacture, sell, and deliver cocaine case by denying defendant probationer's motion to suppress his statements to a parole officer based on its conclusion that defendant was not "in custody" for *Miranda* purposes. Based on the totality of circumstances, a reasonable person in defendant's situation, although in handcuffs, would not believe his restraint rose to a level associated with a formal arrest. This decision does mean that a person on probation is never entitled to the protections of *Miranda*.

Appeal by Defendant from judgment entered 1 June 2015 by Judge Robert T. Sumner in Gaston County Superior Court. Heard in the Court of Appeals 30 March 2016.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Yvonne B. Ricci, for the State.

Linda B. Weisel for the Defendant.

DILLON, Judge.

Rico Lamar Barnes ("Defendant") entered an *Alford* plea to the offense of possession with intent to manufacture, sell, and deliver cocaine and received a suspended sentence. Defendant reserved the right to appeal the trial court's denial of his motion to suppress.

I. Background

In January 2013, Defendant visited his cousin Territon Lewis at Mr. Lewis' home. At the time, both men were on supervised probation. During Defendant's visit, Mr. Lewis' parole officer arrived to conduct a search of the residence. City police officers accompanied the parole officer to provide security during the search. Upon entering the residence,

the parole officer found Defendant and recognized him as a probationer, which Defendant confirmed. The officer advised Defendant that he was also subject to the warrantless search because of his probation status, and then placed Defendant in handcuffs "for officer safety." Both Defendant and Mr. Lewis were placed in chairs on the front porch of the residence while officers conducted a search of the residence. Defendant and Mr. Lewis were kept on the porch of the residence, in handcuffs, for approximately forty-five (45) minutes to one hour.

During the search of Mr. Lewis' residence, the parole officer discovered a black leather jacket with what appeared to be crack cocaine concealed in a cigarette pack inside a pocket. After removing the substance from the jacket, the officer stepped onto the porch and asked Defendant and Mr. Lewis who the jacket belonged to. Defendant responded that the jacket was his. The officer then advised Defendant of what she had found inside the jacket, and Defendant stated that he had borrowed the jacket from someone else.

Defendant was charged with possession with intent to manufacture, sell, and deliver cocaine. Defendant filed a motion to suppress his statements made to the parole officer, arguing that the officer failed to advise him of his *Miranda* rights. The trial court denied Defendant's motion to suppress, concluding that although Defendant was handcuffed during the questioning, he was not "in custody" for purposes of *Miranda*. Defendant entered an *Alford* plea, reserving his right to appeal the trial court's denial of his motion to suppress.

II. Analysis

The sole issue on appeal is whether the trial court properly denied Defendant's motion to suppress his statements to the parole officer by concluding that Defendant was not "in custody" for *Miranda* purposes. Although Defendant was in handcuffs, we hold that, based on the totality of the circumstances, the trial court correctly concluded that Defendant was not "in custody" for purposes of *Miranda* when he made the statements. Therefore, we affirm.[1]

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1. Whether someone is "in custody" for purposes of *Miranda* is a "mixed question of law and fact." *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004). Defendant acknowledges in his brief that "virtually all of the operative facts in this case are uncontested." As a result, these facts are binding on appeal, *State v. Brown*, 199 N.C. App. 253, 256-57, 681 S.E.2d 460, 463 (2009), and our review is limited to whether the trial court's conclusions of law are legally accurate and "reflect a correct application of law to the facts found." *Garcia*, 358 N.C. at 391, 597 S.E.2d at 733.

Both the United States Constitution and the North Carolina Constitution protect a person's privilege against compulsory self-incrimination. *See* U.S. Const. amend. V; N.C. Const. art. 1 § 23. Regarding this privilege, in its landmark *Miranda* decision, the United States Supreme Court established the rule that statements obtained from a defendant through interrogation *while the defendant is in custody* are inadmissible when the defendant has not first been informed of his constitutional rights. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (emphasis added). As our own Supreme Court has explained, "the initial inquiry in determining whether *Miranda* warnings were required is whether an individual was 'in custody.' " *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 826 (2001). Therefore, our inquiry, here, is whether Defendant was "in custody" for purposes of *Miranda*.

Whether an individual is "in custody" depends on the context. "Not all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Howes v. Fields*, 132 S. Ct. 1181, 1189 (2012). For instance, a prisoner is certainly "in custody" in a general sense; however, a prisoner serving his term is not always "in custody" for *Miranda* purposes. *Id.* at 1191 (stating that "service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody"). In sum, the term "in custody" for *Miranda* purposes, "is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Id.* at 1189.

Our Supreme Court has explained that a person is "in custody" for purposes of *Miranda* "when it is apparent from the totality of the circumstances that there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *Garcia*, 358 N.C. at 396, 597 S.E.2d at 736. *See California v. Beheler*, 463 U.S. 1121, 1125 (1983) (citing *State v. Buchanan*, 353 N.C. 332, 340, 543 S.E.2d 823, 828 (2001)) (internal marks and citations omitted). And this determination must be made from the point of view of an objectionably reasonable person in the suspect's position, described by our Supreme Court as follows:

> [T]he United States Supreme Court has stressed that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. Unless they are communicated or otherwise manifested to the person being questioned, an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or

> interview, and thus cannot affect the *Miranda* custody inquiry . . . . [An officer's] unarticulated plan has no bearing on the question [of] whether a suspect was in custody at a particular time; *the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.*

Buchanan, 353 N.C. at 341-42, 543 S.E.2d at 829 (emphasis added).

In the present case, Defendant was clearly restrained when questioned about the jacket. He was seated on his cousin's front porch in handcuffs. And our Supreme Court has recognized that being handcuffed is a circumstance "supporting an objective showing that one is 'in custody[.]' " *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. Although, as the United States Supreme Court has explained, "[d]etermining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last. Not all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Howes*, 132 S. Ct. at 1189.

Based on the totality of the circumstances, we conclude that a reasonable person in Defendant's situation, though in handcuffs, would *not* believe his restraint rose to a level of restraint associated with a formal arrest. *See Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828. The regular conditions of probation in North Carolina include the requirement that a probationer "[s]ubmit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision." N.C. Gen. Stat. § 15A-1343(b)(13) (2015). During the search of Mr. Lewis' residence, Defendant was informed by law enforcement officers that he would be placed in handcuffs for the purpose of officer safety. He was never informed, at any point, that his detention would not be temporary. Further, as a probationer subject to random searches as a condition of probation, Defendant would objectively understand the purpose of the restraints and the fact that the period of restraint was for a temporary duration. Indeed, at the hearing on his motion to dismiss, Defendant testified that at the time of the search of Mr. Lewis' residence, he had been on probation for about two years. Defendant also testified that at the time he was placed on probation, the court explained to him the conditions of probation, including the possibility that he or his residence could be subject to warrantless searches. *See Minnesota v. Murphy*, 465 U.S. 420, 430 (1984) (holding that a probationer who is required to meet with his parole officer and answer questions is not "in custody" for

Miranda purposes even though his freedom of movement is curtailed during the questioning).

We believe this case is distinguishable from *State v. Johnston*, cited by Defendant, in which we held that a defendant was "in custody" for purposes of *Miranda* where the defendant was handcuffed. *State v. Johnston*, 154 N.C. App. 500, 503, 572 S.E.2d 438, 441 (2002). In that case, the officers told the defendant that he was in "secure custody" rather than under arrest. Our Court, however, concluded that "a reasonable person [in the defendant's] circumstances would believe that he was under arrest." *Id.* Specifically, in that case, not only was the defendant handcuffed, he was also ordered out of the vehicle at gunpoint and placed in the back of a police car where he was interrogated. In the present case, though, Defendant was not ordered at gunpoint to submit to handcuffs and he was allowed to remain on the front porch of his cousin's residence rather than forced into the back of a police vehicle.

Defendant argues that the *purpose* of Defendant's custody changed after officers discovered the jacket and suspected contraband, as evidenced by the testimony of an officer that "the purpose of [her conduct] was to determine who [the jacket] and the contraband belonged to." Defendant contends that this entitled him to *Miranda* protections. However, *Miranda* is limited to *custodial* interrogations. Where the indicia of formal arrest are absent, the fact that "police have identified the person interviewed as a suspect and that the interview was designed to produce incriminating responses from the person are not relevant in assessing whether that person was in custody for *Miranda* purposes." *In re W.R.*, 363 N.C. 244, 248, 675 S.E.2d 342, 344 (2009).

III. Conclusion

Based on the totality of the circumstances, including the fact that Defendant was on probation during the search of Mr. Lewis' residence, we conclude that Defendant was not subjected to a formal arrest or a restraint on his freedom of movement of the degree associated with formal arrest. Therefore, we agree with the trial court that Defendant was not "in custody" for purposes of *Miranda*. Accordingly, the trial court properly denied Defendant's motion to suppress. We note that our decision does *not* stand for the proposition that a person on probation is *never* entitled to the protections of *Miranda*. *See Murphy*, 465 U.S. at 426.

AFFIRMED.

Judges CALABRIA and DIETZ concur.

STATE OF NORTH CAROLINA
v.
LUIS ALBERTO VILLA CAMPOS

No. COA16-49

Filed 19 July 2016

1. Criminal Law—jury instructions—flight—intentional assault

The trial court erred in a child abuse case by giving a flight instruction to the jury. There existed no evidence upon which a reasonable theory of flight could be based. Because intentional assault was required for a felony child abuse conviction, it was reasonably possible that the jury returned a felony conviction based on the erroneous instruction. A new trial was warranted.

2. Criminal Law—jury instructions—intentional assault—handling—child abuse

The trial court did not err or commit plain error in a child abuse case by its use of the term "handling" to describe for the jury the element of intentional assault, which was required for his felony conviction. The trial court's decision was appropriate as it adequately explained the law as it applied to the evidence. Further, defendant failed to object to the proffered language and characterized the trial court's language of "handling" in describing the assault as the most reasonable proposal defendant has heard.

Appeal by defendant from judgment entered 24 August 2015 by Judge Jeffrey P. Hunt in Catawba County Superior Court. Heard in the Court of Appeals 9 June 2016.

Attorney General Roy A. Cooper, by Assistant Attorney General Caroline Farmer, for the State.

Glover & Petersen, P.A. by Ann B. Petersen, for defendant-appellant.

McCULLOUGH, Judge.

Luis Alberto Villa Campos ("defendant") appeals from judgment entered upon his conviction of one count of intentional child abuse resulting in serious physical injury to a child. For the reasons stated herein, we grant a new trial.

I. Background

At the time of the incident giving rise to this case, the victim ("infant") was a three-month-old infant. She lived primarily with defendant's mother, Maria Campos Jimenez ("Jimenez"), who cared for the infant and defendant's two children, a two-year-old boy and a six-year-old girl. Although defendant did not live at Jimenez's home on a regular basis, he did help care for the children.

Defendant was in a relationship with Ruby Hoard ("Hoard"), the mother of his children. Hoard was also the mother of the infant, who was not biologically related to defendant despite his belief otherwise at the time of the incident.

On 1 April 2014, defendant returned the infant to Jimenez's home after she spent a few days with defendant and Hoard at Hoard's residence. Upon her arrival to Jimenez's home, the infant was asleep in her car seat. As Jimenez stood in the kitchen preparing dinner, she heard the infant begin to cry persistently. In checking the infant, Jimenez took her out of the car seat, placed her on the sofa, and gently undressed her, causing the crying to intensify. After removing the infant's clothing, Jimenez noticed swelling on the infant's leg. The infant continued crying to a degree that convinced Jimenez to take the infant to the Emergency Department at Catawba Valley Medical Center ("CVMC"). Jimenez spoke with defendant en route to the hospital and inquired about the cause of the infant's swollen leg. Defendant said he was not sure what caused the swelling.

Dustin Otterberg ("Otterberg"), a physician assistant at CVMC trained in patient examination, evaluated the infant when she was admitted to the Emergency Department. Otterberg confirmed the significant swelling on the infant's lower right leg and found further swelling on both of the infant's forearms. Anytime Otterberg handled these areas, the infant would grimace in pain and cry, leading Otterberg to order a full-body X-ray of the infant. The results of the X-ray showed a fracture to the infant's right tibia, fractures to both the ulna and radius bones in her left forearm, and a slight bend in the bone of her right forearm, known as a plastic deformity.

CVMC transferred the infant to Wake Forest Baptist Medical Center ("WFBMC"), where Dr. Stacy Briggs ("Dr. Briggs"), a pediatrician and member of the Child Protection Team, which evaluates children in cases of non-accidental trauma, reviewed the X-ray of the infant with a pediatric radiologist and confirmed the injuries. Dr. Briggs testified that the injuries were non-accidental due to the infant's inability as a

three-month-old baby to walk, roll over, or move in a manner that could conceivably cause multiple fractures to her arms and leg. The infant remained at WFBMC from 1 April until 3 April, when she was discharged to the Catawba County Department of Social Services ("DSS").

While the infant was evaluated at CVMC on the evening of 1 April, Investigator Jason Reynolds ("Reynolds") traveled to Jimenez's home for photo documentation and subsequently met defendant around 10:00 p.m. after passing him in his vehicle. Reynolds asked defendant if he would voluntarily come to the Sheriff's Office that night to discuss the events surrounding the infant's admission to CVMC. After initially agreeing, defendant later chose not to appear at the Sheriff's Office.

Between 1 April and 11 April, the record indicates no attempt in which Reynolds tried to locate defendant. According to defendant, Hoard had a criminal court date on 12 April and both Hoard and he reserved a hotel room in Catawba County for 11 April to better facilitate Hoard's arrival at the courthouse the following day. The Catawba County Sheriff's Office learned that defendant and Hoard were located at the hotel, and police officers arrested both that day. The record on appeal indicates that an arrest warrant for child abuse was not issued until 17 April 2014.

While in jail, defendant spoke with Jennifer Owen ("Owen"), a forensic investigator with DSS, and recounted what he thought could have caused the injuries to the infant. According to defendant, he was arguing with Hoard over her apathy and refusal to help with the children at some point during the last few days of March 2014. Defendant told Hoard he was taking the infant and the children back to Jimenez's home. After defendant placed the infant into her car seat, he turned to pick up the diaper bag, when Hoard suddenly gripped the infant's arms around the bicep area and attempted to pull her out of the car seat. Defendant swung back around and struggled with Hoard over the infant. Defendant and Hoard continued pulling and pushing on the infant for approximately twenty seconds. Defendant admitted that Hoard's and his contact with the infant during their argument could have resulted in the infant's injuries.

On 7 July 2014, a Catawba County Grand Jury indicted defendant on one count of intentional child abuse resulting in serious physical injury. On 18 May 2015, the case came on for trial in Catawba County Superior Court before the Honorable Jeffrey P. Hunt.

At the close of evidence, the trial court instructed the jury on the elements of felony child abuse and the lesser-included offense of

misdemeanor child abuse. The pattern instruction for felony child abuse required an intentional assault, but failed to include a definition for assault. The court, therefore, instructed on assault and stated in part:

> Ladies and gentlemen, I instruct you that as to assault which is mentioned in the earlier instruction I just gave, there are two elements to an assault under North Carolina law.
>
> First, . . . the State would have to prove beyond a reasonable doubt that the defendant assaulted the victim by handling the alleged victim in such a manner as to cause or result in the various injuries, including broken bones, testified to in this case.
>
> And second, the State would have to prove as a second element beyond a reasonable doubt that the defendant acted intentionally.

The second element of the assault instruction prompted the court to deliver an explanation of intent to the jury as follows:

> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw . . . .

Over defendant's objections, the court then instructed on flight, which it deemed a "close call":

> Now, the State contends and the defendant denies, that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show of a consciousness of guilt. However, proof of this circumstance is not sufficient, in and of itself, to establish the defendant's guilt.

The jury proceeded to deliberate, and shortly thereafter asked the court for a definition of "intentionally" - the second of the two elements of assault required to convict defendant on felony child abuse. In response, the court read its original instruction on intent.

On 20 May 2015, the jury returned a verdict finding defendant guilty of intentional child abuse resulting in serious physical injury. On 24 August 2015, the trial court entered judgment sentencing defendant

to a term of 64 months to 89 months imprisonment. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant only raises issues regarding the trial court's instructions to the jury. Specifically, defendant argues that the trial court (1) erred in using the term "handling" to describe the required element of assault for intentional child abuse, and (2) erred in giving an instruction on flight. We address defendant's arguments in reverse order.

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *Id.* "Where jury instructions are given without supporting evidence, a new trial is required." *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995).

A. Flight Instruction

[1] Defendant contends that the trial court erred in giving a flight instruction to the jury. We agree with defendant and find the flight instruction erroneous and prejudicial.

"A trial court may properly instruct on flight where there is 'some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged.' " *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625 (2001) (quoting *State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997)) (internal quotation marks omitted); *see also State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). However, the evidence must show that the defendant took steps to avoid apprehension. *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991). Importantly, "[e]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so . . . should not be left to the jury." *State v. Lee*, 287 N.C. 536, 540, 215 S.E.2d 146, 149 (1975) (quoting *State v. Vinson*, 63 N.C. 335, 338 (1869)) (deciding that a poorly conducted search for defendant resulted in mere speculation of flight and did not warrant a flight instruction at trial); *see also State v. Duncan*, 264 N.C. 123, 127, 141 S.E.2d 23, 27 (1965) ("[I]t is an established rule of trial procedure . . . that an abstract

proposition of law not pointing to the facts of the case at hand and not pertinent thereto should not be given to the jury.").

In the present case, there exists no evidence upon which a reasonable theory of flight could be based. Shortly after 10:00 p.m. on the night of 1 April 2014, Reynolds briefly spoke with defendant and asked if he would voluntarily meet Reynolds at the Sheriff's Office to discuss the infant's injuries. Defendant initially agreed, but later chose not to meet Reynolds. Defendant, who remained in Catawba County throughout the time leading up to his arrest, was not required to meet Reynolds and was entirely within his rights to decline the offer at any time.

Additionally, nothing in the record shows Reynolds or the Catawba County Sheriff's Office engaged in any search for defendant between 1 April and 11 April, when defendant was arrested. There is no indication in the record of any inquiries made regarding defendant's whereabouts, and the State did not obtain an arrest warrant for defendant on intentional child abuse until 17 April 2014, six days after defendant was arrested. Based on these facts, no evidence exists in the record that could "reasonably support[ ] the theory that the defendant fled after the commission of the crime charged." *State v. Allen*, 346 N.C. 731, 741, 488 S.E.2d 188, 193 (1997) (internal citation omitted). What the trial court deemed a "close call" in terms of defendant's alleged flight amounted to mere conjecture. Therefore, the instruction on flight was erroneous.

The State improperly relies on *State v. Abraham*, 338 N.C. 315, 451 S.E.2d 131 (1994), in contending that a failure to communicate with law enforcement is sufficient for an instruction on flight. In *Abraham*, a patrol officer heard gunshots near his location, observed the defendant moving away from the murder scene shortly after the fatal shooting occurred, and approached the defendant, who then took a detour away from the officer. 338 N.C. at 362, 451 S.E.2d at 156. Upon confronting the defendant, the officer asked about the shooting, and the defendant denied hearing any gunshots while continuing to walk away. *Id.* The defendant was discovered three weeks later at an apartment complex hiding in a closet under a pile of clothes and was arrested. *Id.* at 362, 451 S.E.2d 156-57. The evidence in *Abraham* was fully present in the record and taken together to support a flight instruction. In this case, the State failed to enter into evidence any fact reasonably supporting a theory of flight, but instead relied on defendant's decision not to speak with Reynolds on the night of 1 April as exemplary of flight. However, simply refusing to speak with law enforcement on a voluntary, pre-arrest basis cannot be used as evidence supporting defendant's guilt. *State v. Mendoza*, 206 N.C. App. 391, 397, 698 S.E.2d 170, 175 (2010). Moreover,

defendant spoke with Reynolds on the night of 1 April, and no evidence in the record details any other attempt by the State to obtain information from defendant prior to his arrest. Reynolds had every opportunity to continue his conversation with defendant where they originally met on 1 April. In fact, Reynolds testified that he concluded the conversation with defendant and then asked defendant to voluntarily meet at the Sheriff's Office to further discuss the infant's injuries. Hence, the State's reliance on *Abraham* is unfounded.

The State also argues that defendant deviated from his normal pattern of behavior and cites that deviation to indicate defendant's avoidance of apprehension. However, the record is less than sparse with facts supporting the State's contention. Reynolds testified that officers arrested defendant and Hoard at a hotel in Catawba County, the same county in which they were residing, on 11 April. Defendant confirmed this in his interview after waiving his *Miranda* rights and voluntarily speaking with Reynolds after his arrest. The State, however, put forward no further evidence relating to the length of the hotel reservation, and the lack of such evidence from 1 April until defendant presumably arrived at the hotel with Hoard on the day of his arrest does not support an inference of flight. Thus, defendant's case is distinguishable from *State v. Hope*, 189 N.C. App. 309, 657 S.E.2d 909 (2008), which the State uses to strengthen its argument in this instance. In *Hope*, trial testimony established that the defendant hurriedly left the murder scene, had a taxi drive him to Durham from a Raleigh hotel less than an hour later, and was found and arrested in a city ninety miles from Raleigh thirty-four days later. *Id.* at 319-20, 657 S.E.2d at 915. Clearly the facts in *Hope* could be, and were, used to support a theory of flight. Contrarily, the record in this case leads only to weak "conjecture, speculation and surmise" regarding defendant's flight and "should not [have been] left to the jury." *Lee*, 287 N.C. at 539-40, 215 S.E.2d at 149 (internal quotation marks omitted).

If a trial court erroneously proffers a flight instruction to the jury, the instruction must also sufficiently prejudice the defendant before a new trial can be granted on appeal. *State v. Weaver*, 123 N.C. App. 276, 286, 473 S.E.2d 362, 368 (1996). To demonstrate prejudice, a defendant must show that "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." N.C. Gen. Stat. § 15A-1443(a) (2015). Furthermore, when an erroneous and prejudicial instruction allows a jury to reach a verdict upon a state of facts not supported by the evidence contained in the record, a defendant is entitled to a new trial. *Lee*, 287 N.C. at 541, 215 S.E.2d at 149.

In this case, there exists a reasonable possibility that the flight instruction caused the jury to reach a felony conviction. Thus, the erroneous instruction was prejudicial. In order to obtain a conviction for intentional child abuse, the State must prove - and the jury must find - an intentional assault on the child. During its deliberation, the jury members asked for a definition of "intentional," to which the court responded with no explanation apart from its original instruction. This decision certainly left the jury's confusion unassuaged and conceivably vulnerable to the inclusion of the ill fated flight instruction. Permitting the jury to consider defendant's flight "together with all other facts and circumstances . . . to . . . show . . . a consciousness of guilt" created a reasonable possibility that the jury deemed "consciousness of guilt" synonymous with "intentional," thereby allowing it to insert the former as proof of the latter. Because intentional assault is required for a felony child abuse conviction, it is reasonably possible that the jury returned a felony conviction based on the erroneous instruction. Thus, had the jury *not* received the instruction on flight, it is reasonably possible that it would have reached an alternative verdict.

B. Assault Instruction

[2] Although a new trial is warranted due to the erroneous flight instruction, we briefly address defendant's argument on the assault instruction.

Defendant contends that the trial court erred in its use of the term "handling" to describe for the jury the element of intentional assault, which was required for his felony conviction. We do not agree. We have reviewed the trial court's instructions regarding assault and find that the court fairly and adequately explained the law in its relation to intentional assault. We further note that defendant failed to object to the proffered language, and in fact characterized the trial court's language of "handling" in describing the assault as "the most reasonable [proposal defendant has] heard."

When a defendant fails to object to a jury instruction at trial, that instruction is subject to plain error review. N.C. R. App. P. 10(a)(4) (2015); *see also State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice - that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is

> to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks and citations omitted). Notably, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977).

Trial courts are given discretion regarding choice of jury instructions. *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152 (2002). After proffering general instructions pertaining to the charges against a defendant, a trial court may choose to supplement those instructions with additional, explanatory instructions. *State v. Bartlett*, 153 N.C. App. 680, 685, 571 S.E.2d 28, 31 (2002) (stating that those explanatory instructions "will not be overturned absent abuse of [the trial court's] discretion"); *see also State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986) ("[T]he trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations[.]").

Defendant relies on *State v. Lineberger*, 115 N.C. App. 687, 446 S.E.2d 375 (1994), to support his contention that the trial court erred in defining assault using the term "handling." In *Lineberger*, the defendant was convicted for assaulting a police officer. 115 N.C. App. at 687, 446 S.E.2d at 376. At the close of evidence, the trial court gave the following assault instruction: "that the defendant assaulted [the officer] by intentionally and without justification or excuse, *striking or bumping* against him with his shoulder." *Id.* at 689, 446 S.E.2d at 377 (emphasis added). Before reaching a verdict, the jury asked the trial court for a definition of assault, but was instead given an instruction identical to the original instruction. *Id.* at 690, 446 S.E.2d at 377-78. Because the jury required a definition of assault in order to reach a verdict, "the omission of the definition of assault was prejudicial error" resulting in a new trial for the defendant. *Id.* at 692, 446 S.E.2d at 379.

The case at bar is distinguishable. First, the jury in this case did not inquire as to the definition of assault and, therefore, did not need a definition in order to return a verdict upon completion of deliberations. Second, the court's instruction was sufficient to "otherwise explain" the term of assault as it relates to this case. To "otherwise explain" the meaning of assault, the trial court may describe the victim's injuries and their genesis if the description leaves the jury with enough information so that it has no question regarding the meaning of assault.

State v. Springs, 33 N.C. App. 61, 64, 234 S.E.2d 193, 195 (1977) (deciding that the trial court did not err in defining assault as "shooting [the victim] in the . . . chest with a shotgun"). Here, after receiving the assault instruction in which the court said, "the State would have to prove beyond a reasonable doubt that the defendant assaulted the victim by handling the alleged victim in such a manner as to cause or result in the various injuries, including broken bones," the jury did not ask the court for further information or instruction regarding the force element of assault. Therefore, the court "otherwise explain[ed]" this particular element and committed no error in instructing on assault using the term "handling."

Moreover, the trial court's decision to instruct using "handling" to characterize assault was appropriate as it adequately explained the law as it applied to the evidence. "The primary purpose of a jury charge is to inform the jury of the law as it applies to the evidence 'in such manner as to assist the jury in understanding the case and in reaching a correct verdict.' " *State v. Holmes*, 120 N.C. App. 54, 71, 460 S.E.2d 915, 925 (1995) (quoting *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971)). "[T]he manner in which it chooses to do so is within its discretion." *Id.* To avoid potential jury confusion regarding the general assault element of consent - since a three-month-old infant is incapable of withholding consent - the trial court chose to forego the general instruction and, instead, provided the pattern jury instruction for simple assault after instructing the jury on both intentional child abuse and the lesser-included offense of misdemeanor child abuse. The trial court was well within its discretion to do so. *State v. Daniels*, 38 N.C. App. 382, 384, 247 S.E.2d 770, 772 (1978) (defining assault as defendant "[striking victim] over the head with a blackjack" was "sufficient to define and explain the law arising on the evidence"); *see also State v. Hewitt*, 34 N.C. App. 152, 153, 237 S.E.2d 338, 339 (1977) (emphasis in original) (instructing the jury that assault occurred "by intentionally shooting [the victim] with a pistol . . . explained the term assault and applied the law to the evidence"). Therefore, the trial court's use of "handling" in its description of assault was not error, much less plain error.

III. Conclusion

For the reasons stated, we hold that the trial court erred in offering a flight instruction to the jury, but did not commit plain error in instructing the jury on assault. Defendant is awarded a new trial.

NEW TRIAL.

Judges STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
BOBBY LEE GORDON, JR., DEFENDANT

No. COA15-820

Filed 19 July 2016

1. Kidnapping—first-degree—victim not released in safe place

Where defendant took the victim by gunpoint to a secluded area in the woods off of Interstate 85, sexually assaulted her, and then abandoned her in the place of the assault, there was sufficient evidence to permit a reasonable juror to infer that the victim was not released by defendant in a safe place and therefore the trial court did not err by denying defendant's motion to dismiss the first-degree kidnapping charge.

2. Criminal Law—prosecutor's arguments—credibility of witness

In defendant's trial for charges related to sexual assault and kidnapping, the trial court did not err when it did not give the jury a curative instruction after sustaining defense counsel's objection to the prosecutor's allegedly improper statement during closing argument or when it did not intervene ex mero motu to a subsequent allegedly improper statement. Defendant did not request a curative instruction, and the trial court had issued proper general instructions to the jury at the outset of the trial; further, the additional statement by the prosecutor provided clarification as to the prosecutor's prior statement asking jurors to use their common sense and experience in determining a witness's credibility.

Appeal by Defendant from judgment entered 17 December 2014 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 16 December 2015.

Attorney General Roy Cooper, by Special Deputy Attorney General David N. Kirkman, for the State.

Parish & Cooke, by James R. Parish, for Defendant-Appellant.

INMAN, Judge.

Bobby Lee Gordon, Jr. ("Defendant") appeals from a judgment after a jury found him guilty of attempted first-degree rape, first-degree

kidnapping, and first-degree sexual offense. On appeal, Defendant argues that the trial court erred by failing to dismiss the charge of first-degree kidnapping based upon insufficient evidence that the victim was not released in a safe place, failing to give the jury a curative instruction after sustaining defense counsel's objection to the prosecutor's allegedly improper statement during closing argument, and failing to intervene *ex mero motu* to an additional allegedly improper statement. After a thorough review of the record, relevant law, and arguments of the parties, we hold that Defendant received a trial free from error; as such, we affirm the judgment against him.

Factual & Procedural History

The State's evidence tended to show:

On 27 April 2009, Sue[1] was walking on Main Street in High Point, filling out job applications at various businesses. Defendant stopped the white truck he was driving a couple of times to ask Sue if she wanted a ride. She responded that she did not need a ride.

When Sue started walking home, she observed the white truck pass her and turn around. Defendant pulled up beside her, pointed a gun at her head, and said, "Get into the truck and do what I tell you to do and I won't kill you." Sue got in the truck and Defendant said, "We are going to go see my girlfriend. I just want to make her jealous." While he drove, Defendant kept the gun pointed at Sue. She begged him to let her go. After about six or seven minutes of driving, Defendant turned onto an access ramp off Interstate 85. He eventually stopped the truck in "a little

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1. To preserve the privacy of the victim, we hereinafter refer to her by the pseudonym "Sue." In his brief on appeal, Defendant refers to the victim as "Sue" in an effort to follow the preferred policy of this Court. The State, however, chose to use the victim's full name throughout.

Traditionally, the practice of employing pseudonyms for victims of sexual offenses has been limited to instances involving minors, in accordance with N.C. R. App. P. 4(e) (2009). Although it has never been officially ruled or codified by any court in this State, we find it good practice to preserve the privacy of victims, regardless of age, in appeals from sexual offense cases. *See State v. Henderson*, 233 N.C. App. 538, 538, 756 S.E.2d 860, 861 (2014) ("[I]t is the policy of the North Carolina Indigent Defense Services 'to shield the identities of victims of sexual crimes in appellate filings' regardless of age. . . . We recommend that the State also observe such a policy.") (brackets omitted).

The victim, although often a key witness in a criminal action, is not a named party. Furthermore, the identity of the victim may be protected on appellate review at no critical risk to a defendant's case. Criminal cases based upon sexual assault are worthy of the State's attention and concern matters of a sensitive and highly personal nature for which there may be a risk of retaliatory physical or mental harm to the victim.

dirt patch area" in a "very wooded area" that was "almost impossible to see from the highway." Defendant told Sue to take her clothes off.

Sue opened the door to Defendant's truck, whereupon he grabbed her throat. The two then wrestled to the ground. Defendant placed his hands around Sue's neck and strangled her for a couple of minutes. While they were on the ground, Defendant fired his gun near Sue's left ear. Sue testified that the gun was about one foot away from her head when it fired. She stopped fighting because she "thought he was going to kill [her] at that point." Sue noticed that Defendant's gun had a white or pearl handle.

Defendant asked Sue for her belt. She refused to give it to him and said that she was not going to take off her clothes. Defendant then tried to rip off her pants and Sue took off her belt. Defendant continued his efforts to remove Sue's clothes and told her that he would let her go if he saw her private parts. When she refused, the struggle resumed. Defendant inserted his fingers into Sue's vagina. Defendant's pants were down and he attempted to penetrate Sue with his penis; however, Sue, who was on her back, continued to kick and push him. Sue testified that the struggle lasted fifteen to twenty minutes.

Defendant stopped struggling with Sue and allowed her to put her clothes on. He took her belt and driver's license and said, "I know where you live. If you tell anybody I will come back and I will kill you." He asked Sue whether she had made any calls on her cell phone. She showed Defendant her recent call history. Defendant got in his truck. Sue ran into the wooded area and watched Defendant's truck drive away. She then ran across the four-lane highway into her back yard. Sue immediately called her roommate and explained what had just transpired. He called the police, who arrived at Sue's apartment in about ten minutes. Sue gave the officer a statement of the events.

Because she was afraid to stay in High Point, Sue moved to Jacksonville, Florida a couple of months after the incident. Sue testified that she had never met Defendant before the day he assaulted her, and did not know his name until she was contacted two years later by Detective Melanie Leonard. Detective Leonard, the detective handling the case, asked Sue to view a photo lineup, which officers in Florida administered. Sue selected Defendant's photograph. Subsequently, Detective Leonard called Sue and asked her to rate on a scale of one to ten her certainty that the photo she selected was that of her assailant. Sue responded that it was a "seven." At trial, Sue testified that Defendant "is the man that held [her] at gunpoint in 2009."

Detective Mark Barnes of the Davidson County Sheriff's Office testified that on 28 December 2012, he assisted the High Point Police Department in executing a search warrant at Defendant's address. Defendant asked what the search was about, and Detective Barnes responded that he did not know. Defendant then explained that he knew what it was about, that it involved a girl who was walking down the street in High Point about two years earlier. He said that he had stopped and picked her up, that they bought some drugs, and then went back to his place and partied. He said that he gave her $30.00 and "took her down the road and put her out."

Officers searched a Buick LeSabre parked in Defendant's yard. They found a silver handgun with a pearl grip handle. While the officers were searching Defendant's residence, Defendant's mother pulled up in a white pickup truck.

Defendant's evidence tended to show:

Defendant's sister, Julie Ann Gordon Quick, testified that Defendant brought Sue into her place of work in January or February 2009. After Defendant's arrest in 2013, Ms. Quick was able to identify Sue as her brother's date back in 2009 by searching her name on Facebook. The prosecutor elicited from Ms. Quick that she never told law enforcement that her brother had dated Sue in early 2009. She further testified that her mother owned a GMC Sonoma truck in April 2009.

Defendant's mother, Gloria Elaine Gordon, testified that around Easter of 2009, her son brought Sue by her house. She did not see Sue again until she testified at Defendant's trial. She further testified that she owned a 1995 GMC Sonoma pickup truck in April of 2009, but it had been in Deborah Wright's transmission shop on 22 April 2009. She explained that she paid Ms. Wright by check for the repairs on 5 May 2009. She testified that she had located the work ticket that Deborah Wright had produced when the clutch job on the truck was paid for. The work ticket, Defendant's Exhibit 7, identified the vehicle as a Chevrolet S-10 and bore no date. Deborah Wright testified that she had no way of knowing when she worked on Ms. Gordon's truck because it had been "several years."

On 27 December 2012, Defendant was charged with first-degree kidnapping, attempted first-degree rape, assault by strangulation, and first-degree sexual offense against a female. On 11 March 2013, he was indicted on the same charges. On 15 December 2014, the charges were joined for trial before Judge R. Stuart Albright. Defendant pled not guilty and was tried before a jury. On 17 December 2014, the jury found

Defendant guilty of attempted first-degree rape, first-degree kidnapping, and first-degree sexual offense. Defendant was acquitted of assault by strangulation. The trial court sentenced Defendant to consecutive terms of 288 to 355 months imprisonment for the first-degree sexual offense conviction, 189 to 236 months for the attempted first-degree rape conviction, and 100 to 129 months for the first-degree kidnapping conviction. Defendant gave timely notice of appeal.

Analysis

I. First-Degree Kidnapping

[1] Defendant argues that the trial court erred in failing to dismiss the charge of first-degree kidnapping because there was insufficient evidence that Sue was not released in a safe place. Defendant asserts that because the State failed to show that Sue was not released in a safe place, this Court should vacate his conviction for first-degree kidnapping and send the case back to the trial court with instructions to enter a judgment of second-degree kidnapping. We disagree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "In deciding whether sufficient evidence was presented from which the jury could reasonably infer that the victim was not released in a safe place, we consider the evidence in the light most favorable to the State, giving the State every reasonable inference to be drawn therefrom." *State v. White*, 127 N.C. App. 565, 572, 492 S.E.2d 48, 52 (1997).

B. Analysis

North Carolina General Statute § 14-39(b) creates two degrees of kidnapping:

> If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person

> kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39(b) (2015).

The indictment for first-degree kidnapping alleged that Sue was not released in a safe place and was sexually assaulted; however, during the instruction conference, the State indicated that it would not proceed on the allegation that Sue was sexually assaulted as a predicate for first-degree kidnapping. The trial court submitted to the jury the charge of first-degree kidnapping based on the allegation that Sue was not released in a safe place.

"[T]he General Assembly has neither defined nor given guidance as to the meaning of the term 'safe place' in relation to the offense of first-degree kidnapping." *State v. Sakobie*, 157 N.C. App. 275, 282, 579 S.E.2d 125, 130 (2003). "Further, the cases that have focused on whether or not the release of a victim was in a safe place have been decided by our Courts on a case-by-case approach, relying on the particular facts of each case." *Id.* at 280, 579 S.E.2d at 129. "Releasing a person in a safe place implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety." *State v. Karshia Bliamy Ly*, 189 N.C. App. 422, 428, 658 S.E.2d 300, 305 (2008) (internal quotation marks and citations omitted). "Mere relinquishment of dominion or control over the person is not sufficient to effectuate a release in a safe place." *Id.*

Defendant argues Sue was "released" in a safe place because she was "released in daylight hours; in an area she was familiar with; with her clothes, and her cell phone; and was able to walk from the wooded area she was familiar with across a highway into her back yard to her apartment." However, Defendant left Sue in a clearing in the woods located near, but not easily visible from, a service road that extended off an exit ramp for Business Interstate 85. Deputies described the area as "very, very remote" and "very, very secluded . . . at that time of the year, it was a very, very wooded area, it's almost impossible to see from the highway[.]" After the assault concluded, Sue, in a traumatized state, had to walk out of the clearing, down an embankment, and across a four-lane highway to get to her apartment. Defendant did not take any affirmative steps to release Sue in a location where she was no longer exposed to harm. He chose to abandon Sue in the same secluded location he had chosen to assault her.

We hold that this evidence is sufficient to permit a reasonable juror to infer that the victim was not "released by the defendant in a safe place" within the meaning and intent of that phrase as used in N.C. Gen. Stat. § 14-39(b). Therefore, the trial court did not err by denying Defendant's motions to dismiss the first-degree kidnapping charge.

II. Curative Jury Instruction/ *Ex Mero Motu* Intervention

[2] Defendant contends that the trial court erred in: (1) failing to give the jury a curative instruction after sustaining defense counsel's objection to the prosecutor's allegedly improper statement, and (2) failing to intervene *ex mero motu* to remedy the statement.

A. Standard of Review

The North Carolina Supreme Court "has firmly established that 'trial counsel are granted wide latitude in the scope of jury argument, and control of closing arguments is in the discretion of the trial court.' " *State v. Thomas*, 350 N.C. 315, 360, 514 S.E.2d 486, 513 (1999) (quoting *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487 (1992)). "The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. If the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu*." *State v. Monk*, 286 N.C. 509, 516, 212 S.E.2d 125, 131 (1975).

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. 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) (internal citations omitted).

B. Analysis

Section 15A-1230 of the North Carolina General Statutes provides in pertinent part:

> (a) During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230 (2015).

Defendant contends that the prosecutor interjected his personal opinions in violation of N.C. Gen. Stat. § 15A-1230 and the trial court erred in its inactions, first, to give a curative instruction and, second, to intervene *ex mero motu* to an additional improper statement. Specifically, Defendant argues that the prosecutor's statement was improper because he expressed his personal belief as to the truthfulness or falsity of the evidence. The statement Defendant contends was improper, however, is one portion of a sentence, quoted outside the context of the entire sentence. The North Carolina Supreme Court has held that "[i]n determining possible prejudice arising from improper arguments, we consider an allegedly improper statement in its broader context, as particular prosecutorial arguments are not viewed in an isolated vacuum." *State v. Peterson*, 361 N.C. 587, 603, 652 S.E.2d 216, 227 (2007) (internal quotation marks and citations omitted); *see also State v. Cummings*, 352 N.C. 600, 621, 536 S.E.2d 36, 52 (2000) ("To determine the propriety of the prosecution's argument, the Court must review the argument in context and analyze the import of the argument within the trial context, including the evidence and all arguments of counsel."). We therefore review the challenged portion of the prosecutor's closing argument in this broad context.

Early in the argument, the prosecutor stated:

> Now, I asked everybody a question during jury selection, do you have common sense. Everybody always says yes. No shocker. I've never had a no answer to that. But that's what we're looking for here today. Use your common sense. And it's not just about these items. It's about your everyday interactions with people. It's about what you have learned and picked up through your development

> and maturity as a human being. It's about what you know about people that makes you think they're telling the truth.

The prosecutor went on to discuss the relevant facts of the case and asked the jury whether it made sense that Sue would contrive the facts that she reported to her roommate and the police in April of 2009 to assist the State in charging and convicting her unknown assailant years later. He then discussed how Sue may have appeared during her testimony:

> And you know, maybe she could have done a little bit better. Maybe she would have presented better. Maybe she could have taken some drama classes or some speech therapy or whatever it would take to make her present better. But you know, she's genuine. She's absolutely genuine. And when you sit there and you watch her testify, and you watch the fear in her eyes when she sits over there and looks at him, even though he has changed his appearance since then, apparently for you-all, you're entitled to go, based on my reason, my common sense and my interactions with people as I have grown to be as old as I am, I think she is telling the truth.

The defense attorney objected and the trial court sustained his objection. The prosecutor then clarified that, "I'm just arguing they should think she's telling the truth. I'm sorry, Judge, I misstated. You should be able to say, after watching her testify, that you think she is telling the truth."

At the outset, we consider the propriety of the prosecutor's statement that, "based on my reason, my common sense and my interactions with people as I have grown to be as old as I am, I think she is telling the truth." Because the defense counsel objected to this statement, we must determine whether the remark was "not warranted by either the evidence or the law, or . . . [was] calculated to mislead or prejudice the jury." *Monk*, 286 N.C. at 516, 212 S.E.2d at 131. A review of the transcript reveals that one theme of the prosecutor's closing argument was about employing one's common sense and experience to determine the credibility of the witnesses. Taken in context, the sentence follows a second person narrative:

> And when you sit there and you watch her testify, and you watch the fear in her eyes when she sits over there and looks at him, even though he has changed his appearance since then, apparently for you-all, you're entitled to go,

> based on my reason, my common sense and my interactions with people as I have grown to be as old as I am, I think she is telling the truth.

Viewed in a broader context, the prosecutor's statement refers to the jurors' perspective on the testimony. The prosecutor's use of the introductory phrase "you're entitled to go," demonstrates that the prosecutor was urging jurors to weigh Sue's testimony for themselves. Additionally, the prosecutor clarified the issue instantaneously by stating, "I am just arguing they should think she's telling the truth. I'm sorry, Judge. I misstated." Under these circumstances, we hold that the prosecutor's statement, which was further clarified, was not in violation of the law or calculated to mislead or prejudice the jury.

Exercising an abundance of caution, the trial court sustained defense counsel's objection and the prosecutor clarified what he meant. Defendant contends that the trial court erred in failing to give a curative instruction to the jury after sustaining defense counsel's objection. We reject this argument because the North Carolina Supreme Court and this Court have held "it is not error for the trial court to fail to give a curative jury instruction after sustaining an objection, when defendant does not request such an instruction." *State v. Williams*, 350 N.C. 1, 24, 510 S.E.2d 626, 642, *cert. denied*, 528 U.S. 880, 145 L.Ed.2d 162 (1999); *see also State v. Hunter*, 208 N.C. App. 506, 517, 703 S.E.2d 776, 784 (2010); *State v. Williamson*, 333 N.C. 128, 423 S.E.2d 766 (1992). Moreover, we note that that the trial court issued general instructions to the jury at the outset of the trial:

> It is the right of the attorneys to object when testimony or other evidence is offered that the attorney believes is not admissible. When the Court sustains an objection to a question, you must disregard the question and the answer, if one has been given, and draw no inference from the question or answer or guess as to what the witness would have said if permitted to answer.

This Court has held that such "instructions are sufficient to cure any prejudicial effect suffered by defendant regarding evidence to which an objection was raised and sustained." *State v. Vines*, 105 N.C. App. 147, 153, 412 S.E.2d 156, 161 (1992). For these reasons, the trial court did not err by failing to give a curative instruction.

Defendant next contends that the trial court erred by not intervening *ex mero motu* to the prosecutor's clarifying statement that, "I'm just arguing they should think she's telling the truth. I'm sorry, Judge, I

misstated. You should be able to say, after watching her testify, that you think she is telling the truth." Because defense counsel did not object to this statement, we review "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107. This statement did not interject the prosecutor's personal belief but instead provided further clarification as to the prosecutor's prior statement asking jurors to use their own common sense and experience in determining a witness's credibility. Furthermore, Defendant has failed to show that he was prejudiced by the prosecutor's statements. *See State v. Brown*, 182 N.C. App. 277, 285, 641 S.E.2d 850, 855 (2007) ("[The] defendant has failed to show this Court how the prosecutor's statements prejudiced him and resulted in a jury verdict which would not have been reached absent the statements. Therefore, we hold the trial court did not abuse its discretion in denying defendant's motion."). We hold that the prosecutor's jury argument was not so grossly improper as to require the trial court's intervention *ex mero motu*.

Conclusion

For the aforementioned reasons, we hold that Defendant received a fair trial, free from error.

NO ERROR.

Judges STEPHENS and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
ARVIN ROSCOE HAYES, DEFENDANT

No. COA16-207

Filed 19 July 2016

Indecent Exposure—misdemeanor statute—precluded from guilt for both misdemeanor and felony

Although there was no error in finding defendant guilty of felony indecent exposure in the presence of a female victim under the age of sixteen, the trial court erred by convicting defendant of misdemeanor indecent exposure. The misdemeanor statute precluded him from being found guilty of both misdemeanor and felonious indecent exposure even though there were multiple witnesses for actions stemming from the same conduct. The case was remanded to the trial court for resentencing.

Appeal by Defendant from judgments entered 17 September 2015 by Judge R. Stuart Albright in Wilkes County Superior Court. Heard in the Court of Appeals 6 June 2016.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Daniel Snipes Johnson, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for the Defendant.

DILLON, Judge.

Arvin Roscoe Hayes ("Defendant") appeals from a jury verdict finding him guilty of felony indecent exposure in the presence of a female victim under the age of sixteen (16) and misdemeanor indecent exposure in the presence of an adult female victim. We find no error in Defendant's conviction for felony indecent exposure. However, for the following reasons, we arrest judgment on the conviction of misdemeanor indecent exposure and remand this case to the trial court for resentencing.

I. Background

The evidence tended to show the following: In July 2014, S.C. ("Mother") and her three daughters were shopping at a retail store in Wilkesboro. Mother and her thirteen-year-old daughter, D.C.

("Daughter"), noticed that Defendant was following them from aisle to aisle and that he was staring at them. At one point, while Defendant was standing two feet away from Mother and Daughter, Mother saw him grabbing and rubbing his penis, part of which was sticking out of his pants. Mother and her daughters went to the store clerk and asked the clerk to call the police. Defendant was later apprehended in a nearby store and identified by Mother.

Defendant was charged and convicted of felony indecent exposure (for exposing himself to Daughter) and misdemeanor indecent exposure (for exposing himself to Mother). The jury returned guilty verdicts for all charges, and Defendant was sentenced accordingly. Defendant timely appealed.

II. Standard of Review

If a trial court enters judgment on multiple charges, in violation of a statutory mandate, that issue is automatically preserved for appeal. *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000). Issues of statutory construction are questions of law which we review *de novo* on appeal, "consider[ing] the matter anew and freely substitut[ing] our judgment for the judgment of the lower court." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014).

III. Analysis

The central question to this appeal is whether Defendant's one instance of exposing himself to multiple people, one of which was a minor, may result in both a felony and a misdemeanor charge. Defendant argues that the misdemeanor statute precludes him from being found guilty of both misdemeanor and felonious indecent exposure. We agree.

This question is one of statutory interpretation. "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature . . . is accomplished. Legislative purpose is first ascertained from the plain words of the statute." *State v. Anthony*, 351 N.C. 611, 614, 528 S.E.2d 321, 322 (2000). A statute's words carry their "natural and ordinary meaning" when an alternative meaning is not provided within the statute and those words are "clear and unambiguous." *Lunsford*, 367 N.C. at 623, 766 S.E.2d at 301 (citing *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978)).

Defendant was convicted of misdemeanor indecent exposure pursuant to N.C. Gen. Stat. § 14-190.9(a) (the "Misdemeanor Statute"), which provides as follows:

> (a) *Unless the conduct is punishable under subsection (a1) of this section*, any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons . . . shall be guilty of a Class 2 misdemeanor.

N.C. Gen. Stat § 14-190.9(a) (2013) (emphasis added). Under the plain words of the statute, Defendant's conduct in the present case subjects him to criminal liability for a single misdemeanor count, even though multiple "persons" may have witnessed his behavior, *unless* his conduct is otherwise punishable as a felony under subsection (a1) of that statute (the "Felony Statute"). The Felony Statute provides as follows:

> (a1) Unless the conduct is prohibited by another law providing greater punishment, any person at least 18 years of age who shall willfully expose the private parts of his or her person in any public place in the presence of any other person less than 16 years of age for the purpose of arousing or gratifying sexual desire shall be guilty of a Class H felony.

N.C. Gen. Stat § 14-190.9(a1) (2013). And here, Defendant was, in fact, convicted of a felony under subsection (a1) since one of the witnesses (Daughter) was under 16 years of age.[1]

The State argues that well-established North Carolina law permits a defendant to be punished for multiple crimes resulting from conduct that had multiple victims. For common law crimes such as assault and armed robbery, we have upheld the constitutionality of pursuing multiple charges resulting from the same conduct. *State v. Nash*, 86 N.C. 650, 652 (1882); *State v. Johnson*, 23 N.C. App. 52, 55-56, 208 S.E.2d 206, 208-09 (1974). Using the "same evidence" doctrine, we allow multiple indictments for the same general course of conduct if the State would require different evidence to prove each offense. *State v. Hicks*, 233 N.C. 511, 516, 64 S.E.2d 871, 875 (1951). For example, an assault on multiple people would require separate showings that each person in the crowd was, in fact, assaulted. *See State v. Church*, 231 N.C. 39, 43, 55 S.E.2d 792, 796 (1949).

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1. In fact, the statute does not even require the victim to see the defendant's exposed body part; it only requires for the defendant to be "in the presence" of a victim. Our Court recently considered this issue in *State v. Waddell*, in which the defendant was convicted of felony indecent exposure for exposing himself to a woman, her mother, and her fourteen-month-old son. *See State v. Waddell*, ___ N.C. App. ___, ___, 767 S.E.2d 921, 924 (2015) (noting that "[i]n order to convict a defendant of indecent exposure in public, the exposure need only be in the *presence* of another person; it need not be seen by, let alone directed at, another person").

We recognize that under the "same evidence" doctrine, both Defendant's felony and misdemeanor convictions would likely stand. The State would have to prove that Daughter was present when Defendant exposed himself in order to support the felony charge, and would have to prove that Mother was present when Defendant exposed himself in order to support the misdemeanor charge. These two crimes would require different evidence to prove each count. However, we are faced with a question of statutory interpretation, not a double jeopardy challenge. *See State v. Mansfield*, 207 N.C. 233, 176 S.E. 761 (1934). The Misdemeanor Statute plainly forbids conduct from being the basis of a misdemeanor conviction if it is also punishable as felony indecent exposure.

If a trial court improperly convicts a defendant under two statutes for actions stemming from the same conduct, the proper relief is arrestment of the judgment and remand for resentencing. *See State v. Coakley*, ___ N.C. App. ___, ___, 767 S.E.2d 418, 426 (2014). Accordingly, we arrest judgment on Defendant's conviction of misdemeanor indecent exposure and remand this matter for resentencing.

JUDGMENT ARRESTED AND REMANDED IN PART, NO ERROR IN PART.

Chief Judge McGEE and Judge HUNTER, JR., concur.

STATE OF NORTH CAROLINA
v.
CLAYTON MICHAEL JONES

No. COA15-1239

Filed 19 July 2016

1. Constitutional Law—right to trial by jury—waiver—date of arraignment

The trial court was constitutionally authorized to accept defendant's waiver of his right to a jury trial where his arraignment occurred after the effective date of the constitutional amendment and session law that allowed criminal defendants to waive their right to a trial by jury in non-capital cases.

2. Criminal Law—bench trial—confession suppressed before trial—judge aware of confession

Defendant could not argue that he had been prejudiced in a non-jury trial where the same judge that had suppressed his confession before trial conducted the trial, so that the judge as fact finder was aware of the confession. Defendant chose to waive his right to a trial by jury with the knowledge that the same judge who had suppressed the confession had would serve as the judge in the bench trial.

3. Criminal Law—bench trial—inadmissible—presumed ignored

Defendant did not rebut the presumption that the judge in a bench trial ignores inadmissible evidence in a prosecution in which the trial judge had suppressed defendant's confession before trial and was thus aware of the confession. No prejudice exists by virtue of the simple fact that evidence was made known to the judge.

4. Indictment and Information—variance between indictment and evidence—time of offense—not fatal

There was not a fatal variance between the indictment and the evidence in a prosecution for second-degree sexual exploitation of a minor where the indictment and the evidence did not list the same date for the receipt of pornographic images. Time is an element of second-degree sexual exploitation of a minor, and defendant did not attempt to advance a time-based defense.

5. Sexual Offenses—sexual exploitation of minor—second-degree—evidence of knowledge—sufficient

There was sufficient circumstantial evidence of defendant's knowledge of the contents of computer files in a prosecution for second-degree sexual exploitation of a minor.

Appeal by defendant from judgment entered 15 May 2015 by Judge John O. Craig, III in Randolph County Superior Court. Heard in the Court of Appeals 30 March 2016.

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

Clifford Clendenin & O'Hale, LLP, by Daniel A. Harris and Locke T. Clifford, for defendant-appellant.

DAVIS, Judge.

Clayton Michael Jones ("Defendant") appeals from his convictions for two counts of second-degree sexual exploitation of a minor. On appeal, he contends that the trial court (1) lacked the authority to grant his request for a waiver of his right to a trial by jury; (2) improperly considered inadmissible evidence that had been suppressed before trial; (3) erred in denying his motion to dismiss the charges against him due to a fatal variance between the date of the offenses listed on the indictments and the date established by the evidence at trial; and (4) improperly denied his motions to dismiss. After careful review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On 18 October 2009, images of child pornography were downloaded to a computer later established as belonging to Defendant. The street address associated with the IP address for the computer was the home of Defendant's parents on Osborn Mill Road in Randolph County, North Carolina.

The images were downloaded via a "peer-to-peer" file sharing software program known as "Gnutella," which — by means of a download engine — allows its users to download image files from other users of the program. Gnutella utilizes a search function where users type in a description of the image file for which they are searching using descriptive terms and language. A list of results is then displayed from which

users may select the files they want to download. Those files are then downloaded directly onto their computer.

Detective Bernie Maness ("Detective Maness") with the Randolph County Sheriff's Office detected the images being downloaded to the computer's IP address through a software program used by law enforcement officials called "Peer Spectre," which monitors downloads occurring on various peer-to-peer software platforms, including Gnutella. The images downloaded to the IP address were flagged as known child pornography, and Detective Maness procured a search warrant for the Osborn Mill Road address.

On 17 December 2009, Detective Maness, along with Detective Jason Chabot ("Detective Chabot") and several deputies, went to the Osborn Mill Road address to execute the search warrant. Defendant was not present when the detectives arrived, but his parents were at home and let the detectives inside.

Upon entering Defendant's bedroom, Detectives Maness and Chabot observed a white Apple MacBook laptop (the "MacBook") partially concealed underneath Defendant's mattress. The detectives seized the MacBook and continued their search.

While the search was still ongoing, Defendant returned home and encountered the detectives. Detective Maness identified himself to Defendant and informed him that he and Detective Chabot were executing a search warrant for child pornography. After hearing Detective Maness make this statement, Defendant "hung his head."

Detective Maness subsequently conducted a forensic examination of the MacBook using specialized software that allows law enforcement officers to view, but not alter, the contents of computers. During his examination of the MacBook, Detective Maness noted that there was only one user — "Clay" — listed on the laptop login screen. Contained in the MacBook's "trash bin" — where deleted files are stored prior to their permanent deletion — were two image files depicting child pornography that had been downloaded from the Gnutella software program.

On 12 July 2010, Defendant was indicted on two counts of second-degree sexual exploitation of a minor. On 7 March 2011, Defendant moved to suppress certain statements he had made to Detective Maness outside his parents' house during the execution of the search warrant in which he confessed that he had, in fact, downloaded the child pornography to his MacBook from the Gnutella program. A hearing on Defendant's motion to suppress was held on 21 March 2011 before the Honorable

John O. Craig, III. At the hearing, Defendant argued that the statements he provided to Detective Maness had been coerced and were therefore involuntary. On 18 January 2012, the trial court entered an order granting Defendant's motion and suppressing the challenged statements.

On 11 May 2015, a jury trial was scheduled before Judge Craig in Randolph County Superior Court. Shortly after the case was called for trial, Defendant informed the court that he was voluntarily waiving his right to a jury trial pursuant to Article I, § 24 of the North Carolina Constitution and N.C. Gen. Stat. § 15A-1201. A bench trial then took place with Judge Craig presiding. At the conclusion of the trial, Judge Craig found Defendant guilty of both charges. The trial court sentenced Defendant to 19-32 months imprisonment, suspended the sentence, and placed Defendant on 36 months of supervised probation. Defendant gave oral notice of appeal in open court.

Analysis

I. Waiver of Right to Jury Trial

[1] Defendant first argues that the trial court lacked the authority to allow him to waive his right to a trial by jury. We disagree.

Effective 1 December 2014, the North Carolina Constitution was amended by the citizens of North Carolina to allow criminal defendants to waive their right to a trial by jury in non-capital cases. Article I, Section 24 of the North Carolina Constitution now reads as follows:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

N.C. Const. art. I, § 24.

This provision of our Constitution was ratified as a result of legislation passed by the General Assembly calling for the amendment to be submitted to North Carolina voters for approval. Chapter 300 of the 2013 North Carolina Session Laws, which authorized the ballot measure, provided that "[i]f the constitutional amendment proposed in Section 1 is approved by the voters, Section 4 of this act *becomes effective December*

1, 2014, and applies to criminal cases *arraigned in superior court on or after that date*." 2013 N.C. Sess. Laws 821, 822, ch. 300, § 5 (emphasis added). Section 4 reads, in pertinent part, as follows:

> (b) A defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact shall be heard and judgment given by the court.

2013 N.C. Sess. Laws 821, 822, ch. 300, § 4(b). This provision was subsequently codified in N.C. Gen. Stat. § 15A-1201.

Defendant contends that because he should have been arraigned shortly after he was indicted on 12 July 2010 — well before the 1 December 2014 effective date of the constitutional amendment and the accompanying session law — the trial court lacked the authority to grant his request for a waiver of his right to a trial by jury.

N.C. Gen. Stat. § 15A-941 provides, in pertinent part, as follows:

> (a) Arraignment consists of bringing a defendant in open court or as provided in subsection (b) of this section before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead. The prosecutor must read the charges or fairly summarize them to the defendant. If the defendant fails to plead, the court must record that fact, and the defendant must be tried as if he had pleaded not guilty.
>
> . . . .
>
> (d) A defendant will be arraigned in accordance with this section *only* if the defendant files a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment. If a bill of indictment is not required to be served pursuant to G.S. 15A-630, then the written request for arraignment must be filed not later than 21 days from the date of the return of the indictment as a true bill. Upon the return of the indictment as a true bill, the court must immediately cause notice of the 21-day time limit within which

> the defendant may request an arraignment to be mailed or otherwise given to the defendant and to the defendant's counsel of record, if any. If the defendant does not file a written request for arraignment, then the court shall enter a not guilty plea on behalf of the defendant.

N.C. Gen. Stat. § 15A-941(a), (d) (2015) (emphasis added).

Thus, N.C. Gen. Stat. § 15A-941 provides a formal mechanism for arraignments that a criminal defendant may elect to invoke. However, it is not uncommon for a defendant to forego the procedure set out in § 15A-941 and for his arraignment to take place more informally.

Such was the case here. Defendant never requested a formal arraignment pursuant to N.C. Gen. Stat. § 15A-941. Thus, his right to be formally arraigned by means of this statutory procedure was deemed waived on or about 2 August 2010 — 21 days after he was indicted. Defendant's arraignment did not occur until the first day of his trial on 11 May 2015.

> MR. ROSENTRATER: Nothing further as far as pretrial motions. Just for the sake of the record, let's go ahead and identify where we are.
>
> This is page 2 of the trial section of the calendar, Mr. Clayton Jones, charged with three [sic] counts of second-degree exploitation of a minor. I suppose technically I would move to join those.
>
> MR. ROOSE: No objection.
>
> THE COURT: Motion granted.
>
> MR. ROSENTRATER: And to those charges, Mr. Roose, how does your client plead?
>
> MR. ROOSE: The Defendant pleads not guilty.

At no time did Defendant object in the trial court to the absence of a more formal or earlier arraignment. Instead, he simply pled not guilty at which point the trial proceeded. Moreover, at oral argument in this Court counsel for Defendant conceded that Defendant was, in fact, arraigned on 11 May 2015 and has not raised in this appeal any argument suggesting that the 11 May 2015 arraignment was in any way legally deficient. Therefore, because Defendant's arraignment occurred after the effective date of the constitutional amendment and accompanying session law, the trial court was constitutionally authorized to accept Defendant's waiver of his right to a jury trial.

II. Consideration by Trial Court of Inadmissible Evidence

[2] Defendant next asserts that because Judge Craig served both as the factfinder at trial and as the judge who ruled on Defendant's pre-trial motion *in limine*, he was necessarily aware of Defendant's involuntary confession to downloading the images at issue. Therefore, Defendant argues, Judge Craig's ability to serve as a fair and impartial factfinder at Defendant's trial was "tainted" by his knowledge of Defendant's suppressed statements.

It is important to note that Defendant *chose* to waive his right to a trial by jury and proceed with a bench trial. He did so with full knowledge that the same trial judge who had ruled on his motion *in limine* would also serve as the judge at his bench trial. Therefore, Defendant cannot now argue on appeal that he was prejudiced as a result of his own strategic decision to waive his right to a trial by jury and allow Judge Craig to serve as the factfinder at his bench trial. *See State v. Cook*, 218 N.C. App. 245, 249, 721 S.E.2d 741, 745 ("[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." (citation and quotation marks omitted)), *appeal dismissed and disc. review denied*, __ N.C. __, 724 S.E.2d 917 (2012).[1]

[3] Furthermore, Defendant's argument ignores the well-established principle that "the trial court is presumed to disregard incompetent evidence in making its decisions as a finder of fact." *State v. Jones*, 186 N.C. App. 405, 411, 651 S.E.2d 589, 593 (2007); *see also In re Cline*, 230 N.C. App. 11, 14, 749 S.E.2d 91, 94 (2013) ("Where the matter was heard without a jury, it is presumed that the trial court considered only admissible evidence[.]"), *disc. review denied*, 367 N.C. 293, 753 S.E.2d 781, *cert. denied*, __ U.S. __, 190 L.Ed.2d 100 (2014).

Because trial judges are presumed to ignore inadmissible evidence when they serve as the finder of fact in a bench trial, no prejudice exists simply by virtue of the fact that such evidence was made known to them absent a showing by the defendant of facts tending to rebut this presumption. Here, Defendant has failed to make any such showing. Therefore, Defendant's argument on this issue is meritless.

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1. We note that the record is devoid of any indication that Defendant expressed concern in the trial court over Judge Craig serving as his trial judge after having also ruled on Defendant's motion *in limine*.

III. Fatal Variance

[4] Defendant next argues that a fatal variance existed between his indictments and the evidence presented at trial. Specifically, he contends that while the indictments stated that he received the pornographic images on 17 December 2009, the evidence at trial established the date of receipt as 18 October 2009. As a result, he asserts he was prejudiced.

> Pursuant to N.C. Gen. Stat. § 14-190.17, a person commits second-degree sexual exploitation of a minor when, knowing the nature or content of the material, he
>
> > (1) Records, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or
> >
> > (2) Distributes, transports, exhibits, *receives*, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity.

State v. Williams, 232 N.C. App. 152, 156, 754 S.E.2d 418, 421 (citation omitted and emphasis added), *appeal dismissed and disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014).

Defendant argues that the inconsistency between the date of his purported receipt of the images as listed in the indictments and the date established by the evidence at trial constitutes a fatal variance, contending that time is an essential element of the offense of second-degree sexual exploitation of a minor.

> An indictment must include a designated date or period of time within which the alleged offense occurred. However, this Court has recognized that a judgment should not be reversed when the indictment lists an incorrect date or time if time was not of the essence of the offense, and the error or omission did not mislead the defendant to his prejudice. Generally, the time listed in the indictment is not an essential element of the crime charged. This general rule, which is intended to prevent a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense.

> We have held that a variance as to time becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense.

State v. Stewart, 353 N.C. 516, 517-18, 546 S.E.2d 568, 569 (2001) (internal citations, quotation marks, brackets, and ellipses omitted).

In support of his position, Defendant relies upon *State v. Riffe*, 191 N.C. App. 86, 661 S.E.2d 899 (2008) — a case involving multiple counts of *third*-degree sexual exploitation of a minor.[2] In *Riffe*, the date of the offenses contained in the indictments was inconsistent with the date of the offenses established at trial. *Id.* at 93, 661 S.E.2d at 904-05. The defendant's computer had already been seized and was in the possession of the Sheriff's Office on 30 August 2004 — the day that the indictments stated he was in possession of child pornography found on his computer. The evidence at trial, however, showed that the files were saved on the computer's hard drive and last accessed by the defendant on 11 February 2004. During the second day of trial, the State moved to amend the indictments in order to reflect the proper date of the offenses, and the trial court allowed the amendment over the defendant's objection. *Id.* at 93, 661 S.E.2d at 905.

On appeal, we stated the following on this issue:

> In order to prevail, defendant must show a fatal variance between the offense charged and the proof as to an essential element of the offense. In the instant case, the amendment was made regarding the time of the alleged criminal conduct. Thus, if time is not an essential element of N.C. Gen. Stat. § 14-190.17A(a), an amendment relating to the date of the offense is permissible since the amendment would not substantially alter the charge set forth in the indictment. As we have set out above, the elements of N.C. Gen. Stat. § 14-190.17A(a) include only the elements of knowledge and possession.

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2. We have held that third-degree sexual exploitation of a minor and second-degree sexual exploitation of a minor are separate and distinct offenses. *See State v. Williams*, 232 N.C. App. 152, 159-60, 754 S.E.2d 418, 424 ("[W]e believe that the Legislature's criminalization of both receiving and possessing such images was not intended merely to provide for the State a position to which to recede when it cannot establish the elements of the greater offense, but rather to prevent or limit two separate harms to the victims of child pornography." (internal citation and quotation marks omitted)), *appeal dismissed and disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014).

> A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense.

Id. at 93-94, 661 S.E.2d at 905 (internal citations, quotation marks, brackets, ellipses, and emphasis omitted). We concluded that because "defendant did not present an alibi defense and time is not an element of the offense, we therefore find no error as to this issue." *Id.* at 94, 661 S.E.2d at 905.

Thus, *Riffe* establishes that time is *not* an element of third-degree sexual exploitation of a minor. We decline Defendant's invitation to read into *Riffe* any sort of implicit holding that — unlike the case with *third*-degree sexual exploitation of a minor — time is, in fact, an element of *second*-degree sexual exploitation of a minor.

While *Riffe* reiterates the general rule that a variance as to time becomes material if it deprives the defendant of his ability to prepare a defense, Defendant did not attempt to advance an alibi defense or any other time-based defense at trial. Nor has he argued on appeal that he would have done so had the indictment listed the date of the offense as 18 October 2009. *See State v. Hensley*, 120 N.C. App. 313, 324-25, 462 S.E.2d 550, 556-57 (1995) ("Defendant asserts the presence of a fatal variance between the indictment and the proof offered at trial with respect to the date of the alleged offense. This argument cannot be sustained. . . . [W]e note defendant suffered no prejudice as his defense was based upon complete denial of the charge rather than upon alibi for the date set out in the indictment."). Accordingly, Defendant's argument on this issue is overruled.

IV. Motions to Dismiss

[5] Defendant's final argument on appeal is that the trial court erred by denying his motions to dismiss at the close of the State's evidence and at the close of all the evidence. Specifically, Defendant contends that the State failed to establish the knowledge element of the offense of second-degree sexual exploitation of a minor. We disagree.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L.Ed.2d 150 (2000). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.

State v. Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In reviewing challenges to the sufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992).

"Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation, quotation marks, ellipses, and emphasis omitted). When ruling on a motion to dismiss, the trial court should only be concerned with whether "the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982).

Defendant contends that the only evidence presented at trial tending to show that he was aware of the contents of the pornographic files found on his computer was the fact that he "hung his head" when Detective Maness informed him that he and Detective Chabot were executing a search warrant of his parents' home for child pornography.

However, even putting aside the question of whether — and to what extent — body language can in appropriate circumstances serve as admissible evidence of a person's state of mind, other competent evidence was presented by the State at Defendant's trial on the knowledge element of the offense. The State's evidence showed that (1) the files in question had been manually downloaded directly to Defendant's computer using the Gnutella software file-sharing program; (2) the files downloaded had titles clearly indicating that they contained pornographic images of children; (3) the only user listed on the computer login screen was "Clay"; (4) the files were manually transferred from the Gnutella program to the computer's trash bin; and (5) the MacBook was found in Defendant's room partially concealed under his mattress.

It is well established that "[k]nowledge and intent, as processes of the mind, are often not susceptible of direct proof and in most cases can be proved only by inference from circumstantial evidence." *State v. Sink*, 178 N.C. App. 217, 221, 631 S.E.2d 16, 19, *disc. review denied*, 360 N.C. 581, 636 S.E.2d 195 (2006). We believe the above-referenced evidence

constitutes sufficient circumstantial evidence of Defendant's knowledge of the contents of the files discovered on his computer. Consequently, the trial court did not err in denying Defendant's motions to dismiss.[3]

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges ELMORE and HUNTER, JR. concur.

HARSHA TANKALA, Plaintiff
v.
SHAKUNTHALA S. PITHAVADIAN, Defendant

No. COA15-755

Filed 19 July 2016

Child Custody and Support—order requiring weekend visitation or family therapy camp—additional dates and locations for visitation—within scope of existing comprehensive custody order

Where the trial court entered an order requiring weekend visitation between a father and his minor son and requiring the divorced parents and the son to attend a family therapy camp if they failed to comply, the Court of Appeals affirmed the order. By requiring the parties to participate in a specific method of treatment within the scope of an existing comprehensive child custody order, the trial court's order did not modify the terms of custody and therefore did not require a finding of changed circumstances or a motion to modify the governing order. The provision of additional dates and locations for custodial visitation also was not inconsistent with the governing order.

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3. Because Defendant only challenges the sufficiency of the evidence to support the knowledge element of the second-degree sexual exploitation of a minor charges, we need not address the remaining elements of this offense.

Appeal by Defendant from Order entered 12 March 2015 by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 2 December 2015.

Montgomery Family Law, by Charles H. Montgomery and Laura Esseesse, for Defendant-appellant.

No brief filed on behalf of Plaintiff-appellee.

INMAN, Judge.

In this case we hold that a trial court's order requiring the parties to participate in a specific method of treatment within the scope of an existing comprehensive child custody order does not modify the terms of custody and therefore does not require a finding of changed circumstances or a motion to modify the governing order. We also hold that a trial court's order providing additional dates and locations for custodial visitation not inconsistent with the governing child custody order is not a modification of the terms of custody.

Shakunthala S. Pithavadian (Defendant, "Mother") appeals an Order requiring weekend visitation between her minor child and his father, Harsha Tankala (Plaintiff, "Father") and ordering the parties and their child to attend a family therapy camp if the parties and their son fail to comply with the ordered visitation. After careful review, we affirm the trial court's Order.

I. Factual and Procedural Background

Father and Mother were married on 6 March 1998 and divorced on 27 October 2003. They had one child together, Peter,[1] a son born 26 July 1999, who is now sixteen years old. The Judgment of Divorce, entered 31 October 2003 by the New York Supreme Court, Kings County, included a stipulation of settlement covering, among other things, child custody and child support. At the time of the stipulation, Mother resided in New York and Father resided in Delaware. A few weeks after entry of the divorce judgment, Mother notified Father that she was moving with Peter to North Carolina.

On 22 July 2004, a few days before Peter's fifth birthday, the New York Supreme Court, Kings County, entered an order ("the New York Custody Order") modifying the child custody settlement. The New

1. A pseudonym is used to protect the identity of the minor child.

York Custody Order allowed Mother to move with Peter to Morrisville, North Carolina and granted Father visitation with Peter on alternate weekends. The New York Custody Order also required Mother, at her sole cost and expense, to bring Peter to meet Father at the airport in Baltimore, Maryland or Hartford, Connecticut, as specified by Father, and for Father to bring Peter home, or to the homes of Father's brothers.

On 23 June 2010, Father filed in Wake County District Court an Amended Petition for and Notice of Registration of Foreign Child Custody Order. The petition asserted that Father resided in Dover, Delaware and Mother resided in Cary, North Carolina. On 26 July 2010, which coincidentally was Peter's eleventh birthday, the trial court entered an order confirming registration of the New York Custody Order. The order was served on Mother at her home address in Cary. On that same date, Father filed motions to modify child custody, for appointment of a parenting coordinator, and for an Order to Show Cause why Mother should not be held in contempt for violating the New York Custody Order. On 30 July 2010, Father filed a motion seeking a custody evaluation. Father's motions alleged that he had not been allowed any visitation for nearly four months and that Peter refused to visit with him or even speak to him by phone; that Mother was "actively alienating" Peter from Father; and that a custody evaluation was necessary to assess "the mental health status of the parties and child."

On 30 July 2010, the trial court entered an Order to Appear and Show Cause, finding probable cause that Mother had violated the terms of the New York Custody Order and requiring Mother to appear in October 2010 regarding the contempt allegations. Before any further hearing, however, on 26 October 2010, the parties, their respective counsel, and Judge Debra Sasser signed consent orders for a custody evaluation and the appointment of a guardian *ad litem* to protect Peter's interests. An evaluation report that recommended individual mental health treatment for Peter and each of his parents and reunification therapy for Peter and Father was issued on 18 January 2011. The other pending motions were scheduled for hearing in March 2011.

Following a three-day hearing, the trial court entered a twenty-one-page order ("the North Carolina Custody Order") on 6 June 2011, finding that a substantial change of circumstances affecting the welfare of Peter had occurred since the entry of the New York Custody Order. The court made specific findings of fact regarding Mother's interference with Father's visitation, Father's physical and verbal aggression toward Peter, and Peter's anxiety and emotional distress. The court found, *inter*

alia, that as of March 2011, Peter "did not appreciate the need to have a relationship with his father" and that Mother had "overly nurtured" Peter and had "stunted [Peter]'s social and emotional development" in the years since relocating with Peter to North Carolina. The court also found that the appointment of a parenting coordinator was appropriate because "this is a high-conflict case."

On the same date as it entered the North Carolina Custody Order, the trial court entered an order ("the Contempt Order") finding that Mother had willfully violated the New York Custody Order by depriving Father of weekend and holiday custody and excluding Father from information and decisions about Peter's education and health care. The court concluded that Mother was in willful contempt but stayed a sentence of imprisonment on the condition that Mother comply with all orders of the trial court including the North Carolina Custody Order.

The North Carolina Custody Order granted the parties joint custody, granting Mother primary physical custody and granting Father periodic weekend and holiday visitation, contingent upon approval by a psychologist whom the trial court designated as a reunification therapist and also designated to treat Peter in individual therapy. The trial court specifically ordered as follows:

> [Father] and [Peter] shall engage in reunification therapy, with Eli Jerchower as the reunification therapist. The reunification therapy shall begin at the time recommended by Dr. Jerchower, and *the timing and methods of this reunification therapy (including whether and to what extent [Mother] takes part) shall be at the discretion of the therapist*. [Father] and [Mother] shall both follow all of the recommendations of Dr. Jerchower regarding the reunification therapy, and this reunification therapy shall continue for so long as the therapist continues to recommend it.

(Emphasis added.) The trial court also ordered that the parties equally divide all of the costs of the reunification therapy not covered by insurance. The trial court required that Mother and Father each participate in individual counseling with different therapists, providing that therapists for each of the parents and Peter be authorized to communicate with one another, with the parenting coordinator, and with the guardian *ad litem* for Peter. The trial court further directed all therapists to read a particular paragraph of the custody evaluation report regarding therapy services recommended for Peter and his parents.

Neither party appealed the North Carolina Custody Order.

The reunification therapist, Dr. Jerchower, worked with Peter individually and in joint sessions with Peter and Father, but observed in a report to the parties, the parenting coordinator, and the trial court that Peter "maintained a defiant oppositional stance when it came to his father and engaging with him in any way." By the spring of 2012, in the view of the reunification therapist, "it was clear that [Peter] was no longer making progress in reunification with seeing his father" and the therapist believed that a "more intensive treatment approach" was necessary.

On or about 16 May 2012, nearly a year after entry of the North Carolina Custody Order, the reunification therapist recommended that Peter and both of his parents attend a four-day high-conflict divorce camp called "Overcoming Barriers" in California beginning six weeks later, on 29 June 2012. The camp cost $9,000 per family. The court-appointed parenting coordinator at the time, V.A. Davidian, agreed with the therapist's recommendation and on 4 June 2012 he instructed Mother and Father to apply for the camp and make arrangements to attend with Peter. In response, Mother asked the parenting coordinator to reconsider his recommendation, and when that request was denied, Mother filed a Motion for Expedited Review of Parenting Coordinator's Decision. The motion argued that requiring the parties to attend the camp was not consistent with the terms of the North Carolina Custody Order; exceeded the authority of the parenting coordinator; was not an appropriate fit for the parties; was not in Peter's best interest; and that the one-month time frame between the recommendation and the camp dates was too short for the parties and Peter to prepare and make travel arrangements. The motion also asserted that Mother could lose her job if she missed work for the camp. It appears from the record, however, that Mother did not seek to have her motion calendared for hearing, that neither Father nor the parenting coordinator sought to have the motion calendared for hearing, and that the motion was never heard by the trial court. The parties did not attend the camp.

A little over a year later, in an order dated 16 July 2013, shortly before Peter's fourteenth birthday, the trial court appointed a new parenting coordinator, Genevieve Sims ("Ms. Sims"). On 23 September 2014, Ms. Sims filed a Notice of Determination that Requires a Court Hearing pursuant to N.C. Gen. Stat. § 50-97, attaching a report recommending, *inter alia*, that Peter and his parents attend the out-of-state camp for families dealing with high-conflict divorce. The report stated that Ms. Sims agreed with the reunification therapist's assessment that Mother

"has engaged in behaviors demonstrating a lack of commitment to the reunification process and those behaviors have been communicated to Peter in thought and actions." Ms. Sims asked the trial court to accept the reunification therapist's recommendations, which were attached to and incorporated within her report. The recommendations included the "Overcoming Barriers" camp that the reunification therapist had recommended two years earlier. Ms. Sims advised the trial court that, consistent with the recommendation of her predecessor and the reunification therapist, she "strongly recommend[ed] that . . . the parties and child attend a minimum of a four-day intensive reunification camp."

Ms. Sims also filed on 23 September 2014 a Notice of Hearing and Calendar Request for three hours on 13 February 2015 for the trial court to consider her recommendations. Counsel for both parties and Ms. Sims attended the hearing and, after reviewing Ms. Sims' report and attached materials, and considering the arguments of counsel, the trial court agreed with Ms. Sims' recommendation, including specifically the camp, and asked for recommendations from counsel for each of the parties as an alternative to the camp. Father's counsel proposed requiring Peter to visit with his paternal cousins in Delaware on weekends beginning in March 2015, providing Father the opportunity to see Peter for brief periods during those visits. Mother's counsel agreed with the proposed visitation schedule. The court instructed counsel to confer with the reunification therapist as well as the therapists for Father and Mother, all of whom were on telephone standby to testify at the hearing, to discuss the proposed alternative. However, the trial court admonished the parties that if they could not agree on an alternative, "you're going to camp."

The hearing resumed that same day, after counsel for the parties conferred with the therapists. Ms. Sims reported to the trial court that the plan approved by all therapists was for Peter to visit Father's family in the Washington, D.C./Maryland area, and to see Father over gradually increasing segments of time during those family visits, and that "if that does not go well, then the parties will immediately attend the first available four-day intensive camp." To prepare for that contingency, the reunification therapist would assist Mother and Father in immediately applying for the camp, including sharing the cost of a $100 application fee for the next available camp session, scheduled for April 2015 in Arizona. Counsel for Mother confirmed Ms. Sims' report of the plan approved by all therapists and asked the trial court if the camp would take priority over all of Peter's other plans, including attending school. The trial court responded that "camp is number one on the priority list if

things don't . . . work out." The trial court elaborated that "if we have an issue where weekends go well and there's no camp in April and then for some reason things go downhill and decline, we're going back to camp." The trial court reiterated that if the scheduled visits "don't progress according to the likes of the health care providers with those weekends in the manner in which they're going to set them out, then the first time that there's any resistance and everything comes off the track, everybody's going to camp."

On 10 March 2015, Ms. Sims submitted a proposed order. The trial court judge made modifications and entered an Order on 12 March 2015 ("the Order"). The Order, which is the basis for this appeal, provided for Peter to visit on weekends with paternal family members and Father on a recurring basis, with visitations beginning in March 2015 in locations alternating between the D.C./Maryland area and the Cary, North Carolina area. If the court-ordered visits were "not progressing," the trial court ordered the parties and Peter to attend the Overcoming Barriers Family Camp. The trial court concluded that "[t]he Parenting Coordinator has the authority to order the parents to attend the Overcoming Barriers Family Camp or any similar therapeutic 'camp' or intensive weekend experience offered by Overcoming Barriers." Further, the trial court added, "[a]ttendance for the weekend visits and/or [camp] shall take priority over any other activity in which Peter is scheduled to be involved."

Mother filed a Notice of Appeal and a Motion for Stay of Proceedings. In her motion for a stay of proceedings, Mother alleged, *inter alia*, that the findings of fact were unsupported by sufficient evidence because no evidence was presented at the hearing, there was no motion to modify the existing custody order, Mother was entitled to (and did not receive) ten-day notice prior to a hearing to modify custody per N.C. Gen. Stat. § 50-13.5, and the trial court did not find that there had been a substantial change in circumstances. The trial court denied the motion.

II. Analysis

A. Appellate Jurisdiction.

Before addressing the merits of the appeal, we must first address the issue of appellate jurisdiction. The Order is a permanent order and thus fully reviewable on appeal.

"A judgment is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. § 1A-1, 54(a) (2015).

> A final judgment is one which disposes of the case as to all the parties, leaving nothing to be judicially determined

> between them in the trial court. An interlocutory order does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Washington v. Washington, 148 N.C. App. 206, 207, 557 S.E.2d 648, 649 (2001) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950)) (editing marks omitted). "In general, there is no right to appeal from an interlocutory order." *Mills Pointe Homeowner's Ass'n v. Whitmire*, 146 N.C. App. 297, 298–99, 551 S.E.2d 924, 926 (2001) (citations and editing marks omitted).

In the context of child custody orders, "a distinction is drawn in our statutes and in our case law between 'temporary' or 'interim' custody orders and 'permanent' or 'final' custody orders." *Regan v. Smith*, 131 N.C. App. 851, 852, 509 S.E.2d 452, 454 (1998) (citation omitted). "Temporary custody orders resolve the issue of a party's right to custody pending the resolution of a claim for permanent custody." *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000). "Normally, a temporary child custody order is interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition on the merits." *Brewer*, 139 N.C. App. at 227, 533 S.E.2d at 546 (internal quotation marks and citation omitted). "[A]n order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003). "If the order does not meet any of these criteria, it is permanent." *Peters v. Pennington*, 210 N.C. App. 1, 14, 707 S.E.2d 724, 734 (2011).

The Order does not meet any of the three requirements of a temporary order. The Order was entered with prejudice to both parties and did not state a clear and specific reconvening time. It only states that "[t]he Court retains jurisdiction for the entry of further Orders[,]" which does not satisfy the "clear and specific" requirement or the "reasonably brief" interval requirement. *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677. Finally, the Order determined all the issues before the trial court at the hearing. The issue of child custody had already been resolved per the North Carolina Custody Order entered 6 June 2011. The Order addresses all the issues presented by the parenting coordinator and leaves none unresolved. Accordingly, this Court has jurisdiction to review Mother's appeal from the Order.

During the hearing resulting in the Order, counsel for Mother did not raise objections based on any of the issues she raises in this appeal, including modification of the visitation schedule or the requirement of the parties and Peter to attend the out-of-state reunification camp on the ground that it constituted a modification of the governing custody terms. For issues other than the camp, Defendant's attorney stated: "For the record, I do not object to the recommendations of the plaintiff. I accept Your Honor's recommendations and agree that that seems to be a prudent way to proceed." Regarding the camp, Defendant made no objection for lack of a motion to modify, notice of a motion to modify, or finding of substantial change in circumstances necessary to modify the North Carolina Custody Order. However, these issues concern subject matter jurisdiction and can be raised for the first time on appeal. *Hart v. Thomasville Motors*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956). Accordingly, Mother's appeal is properly before us.

1. Standard of review.

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision.").

B. The Order did not modify the North Carolina Custody Order and is not procedurally defective.

Mother argues that the Order requiring the parties and Peter to attend the high-conflict divorce camp and requiring additional visitation was invalid because it modified a prior custody order without the required motion to modify and findings and conclusions regarding a change in circumstances to justify such modification. We disagree.

Disputes over variations in custody arrangements including timing, location, and treatment often lead to costly and time-consuming litigation that can hinder progress in child custody cases and cause delays which are detrimental to the best interests of the children involved. To avoid such delays, trial courts prepare comprehensive child custody

orders, like the North Carolina Custody Order governing the parties in this case, and appoint parenting coordinators authorized to facilitate the parties' compliance with court orders without having to seek additional orders from the court in every instance. In cases involving minor children requiring mental health treatment, trial courts often delegate to therapists control over treatment and visitation, but remain available to assert the court's authority if needed. *See Peters*, 210 N.C. App at 18–20, 707 S.E.2d at 737–38 (affirming the trial court's delegation to the custodial parent, in conjunction with the minor children's therapist, control over the non-custodial parent's supervised visitation: "Because a neutral third party is vested with authority to control therapeutic visitation, the visitation arrangement does not present the problems inherent in custodian-controlled visitation."); *Cox v. Cox*, 133 N.C. App. 221, 230, 515 S.E.2d 61, 67–68 (1999) (upholding the trial court's order that a physician could "suspend or terminate counseling, treatment, and supervised visitation if he determine[d] that [one parent] [was] not progressing or working honestly toward improvement").

The Order does not modify the terms of custody, but rather provides specific requirements within the scope of the North Carolina Custody Order. The Order does not modify the earlier award of primary custody to Mother and visitation to Father. The requirement that the parties and Peter attend the high-conflict divorce camp as recommended by the reunification therapist and the parenting coordinator is consistent with the requirement in the earlier order that the parties abide by those professionals' recommendations for treatment and visitation scheduling. Although the North Carolina Custody Order did not mention an out-of-state therapeutic camp for the family, it specifically ordered reunification therapy and provided that the timing and methods of therapy were left to the reunification therapist to decide. Similarly, specific provisions for Peter's visitation with Father and Father's family in the Order do not conflict with provisions in the North Carolina Custody Order. Accordingly, no motion for custody modification was required, and the trial court was not required to find or conclude that circumstances affecting the welfare of Peter had substantially changed since the entry of the North Carolina Custody Order.

Furthermore, Mother's argument that she received inadequate notice of a hearing concerning the out-of-state camp rings hollow in light of the record in this case. Nearly five months before the hearing which resulted in the Order, the court-appointed parenting coordinator filed a notice that a court hearing was required to review her determination that the parties and Peter should be required to attend the camp recommended

by the reunification therapist within the scope of authority delegated in the North Carolina Custody Order. As a practical matter, Mother had more than two years' notice of the reunification therapist's recommendation and the parenting coordinator's determination that Peter and his parents attend the camp, but she successfully avoided that treatment method by opposing the initial notice in 2012 and failing to seek a hearing. The record does not indicate that Father or the parenting coordinator sought court intervention following Mother's objection and refusal to participate in the camp.

1. Parenting coordinators.

North Carolina's parenting coordinator statutes were first adopted in 2005 as Article 5 of Chapter 50 of our General Statutes. *See* Act of July 27, 2005, 2005 N.C. Sess. Laws 228 ("An Act to Establish the Appointment of Parenting Coordinators in Domestic Child Custody Actions"). N.C. Gen. Stat. § 50-91(a)–(b) (2015) provides that a "court may appoint a parenting coordinator at any time during the proceedings of a child custody action . . . if all parties consent to the appointment[,]" or "if the court also makes specific findings that the action is a high-conflict case, that the appointment . . . is in the best interests of any minor child in the case, and that the parties are able to pay for the cost . . . ." A parenting coordinator has the limited authority to engage in matters that will help the parties:

> (1) Identify disputed issues.
>
> (2) Reduce misunderstandings.
>
> (3) Clarify priorities.
>
> (4) Explore possibilities for compromise.
>
> (5) Develop methods of collaboration in parenting.
>
> (6) Comply with the court's order of custody, visitation, or guardianship.

N.C. Gen. Stat. § 50-92(a)(1)–(6) (2015). A trial 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. The parties must comply with the parenting coordinator's decision until the court reviews the decision." N.C. Gen. Stat. § 50-92(b) (2015).

North Carolina's parenting coordinator statutes have been largely unexplored by the appellate courts. This case demonstrates the potential

utility of parenting coordinators as well as the procedural safeguards that, if the parties assume the responsibility of seeking the court's intervention, ensure the trial court remains involved in resolving disputes between the parenting coordinator and one or both parents. However, the failure of the trial court and the parenting coordinator in this case to obtain the parties' compliance with the North Carolina Custody Order for a period of nearly four years demonstrates the shortcomings of family court proceedings in which fundamental disputes languish while the child approaches adulthood. As a result of inaction, this high-conflict child custody dispute was not resolved any more quickly than it likely could have been without a parenting coordinator.

2. The Order is not a child support order.

In her final challenge to the Order, Mother contends that because the Order compels her and Peter to participate in the camp at some financial expense, and because the Order compels her to facilitate Peter's travel to visit Father, it is an invalid modification of the parties' child *support* obligations, which are beyond the scope of the trial court's jurisdiction. This argument is unsupported by the record and the law.

Mother correctly notes that although Father registered the New York Custody Order with the trial court in this case, neither party registered the initial judgment of divorce filed in New York in 2003, so that the trial court has no jurisdiction over the terms of that order. However, Mother erroneously contends that because uninsured mental health expenses and travel expenses may, in the trial court's discretion, be allocated as "extraordinary expenses" for the purpose of determining child support, the trial court here had no authority to require Mother to pay these expenses as part of the Order. The New York Custody Order, which was registered by the trial court below, required Mother to pay all travel expenses incurred by Peter and by Father for visitation. The North Carolina Custody Order found that neither Father nor Mother remained living in New York, that Mother and Peter had resided in North Carolina for more than six months preceding Father's motion to modify custody, that North Carolina had become Peter's home state, that the trial court had jurisdiction to modify child custody, and that no other state had sought to modify the custody arrangements. The North Carolina Custody Order, which included findings of a substantial change in circumstances, provided that "[e]ach party shall bear the costs of his or her own travel related to custody exchanges, and the parties shall equally divide the cost of [Peter]'s travel related to custody exchanges." The North Carolina Custody Order made similar provisions for all costs of individual and reunification therapy not covered by insurance. The decisions by this

Court cited by Mother as requiring that travel and mental health treatment costs be determined within a child support order do not so hold. *See Peters*, 210 N.C. App. at 23, 707 S.E.2d at 739; *Mackins v. Mackins*, 114 N.C. App. 538, 548, 442 S.E.2d 352, 358 (1994); *Lawrence v. Tise*, 107 N.C. App. 140, 149–50, 419 S.E.2d 176, 182–83 (1992).

III. Conclusion

We conclude that the trial court had jurisdiction to enter the Order from which this appeal arises and that the trial court did not abuse its discretion. The order of the trial court is

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

MASIVI TUWAMO, Plaintiff
v.
SITA R. TUWAMO, Defendant

No. COA15-356

Filed 19 July 2016

Trusts—resulting trust—home titled in brother-in-law's name—dismissal of claims

Where plaintiff learned upon her husband's death that her home with her husband was titled in the name of her husband's brother (defendant), and plaintiff subsequently commenced an action against defendant for the claims of resulting trust, specific performance, injunctive relief, and declaratory relief, the Court of Appeals affirmed the trial court's sua sponte dismissal of her complaint for failure to state a claim upon which relief may be granted. Whether the Court of Appeals considered only the face of plaintiff's complaint to support the dismissal, or whether it also considered the forecast of evidence as would be proper upon summary judgment motions, there was no genuine issue of material fact and plaintiff's claims failed as a matter of law.

Appeal by plaintiff and cross-appeal by defendant from order entered 21 August 2014 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County. Heard in the Court of Appeals 4 November 2015.

Pamela A. Hunter for plaintiff-appellant/cross-appellee.

Cowley Law Firm, by Jorge Cowley, for defendant-appellee/cross-appellant.

STROUD, Judge.

Plaintiff Masivi Tuwamo appeals from the superior court's order denying her motion for summary judgment and dismissing all of the claims in her complaint, arguing that a "constructive/resulting" trust was created. Defendant Sita R. Tuwamo cross-appeals from the same order denying his motion for summary judgment, arguing that plaintiff's summary judgment motion was properly denied, but his motion should have been granted. Defendant also argues that the trial court properly dismissed plaintiff's claims *sua sponte*. Because plaintiff's complaint fails to state any legally cognizable claim, we find that the trial court properly dismissed plaintiff's claims with prejudice *sua sponte*. Accordingly, we affirm the superior court's order dismissing her claims.

Facts

Plaintiff's complaint tended to show the following facts. Plaintiff relocated to North Carolina from her native country, Zaire, formerly the Congo, in 1989. She married her now deceased husband, Tuwamo Mengika, on 23 March 1991 in Charlotte, North Carolina. Plaintiff and her husband operated a convenience store in Mecklenburg County. In 1993, plaintiff's husband began engaging in acts of domestic violence toward her and "law enforcement became involved." Plaintiff and her husband subsequently reconciled, and they purchased a house located in Charlotte, North Carolina in 1997 ("the Property"). Plaintiff and her husband made all mortgage payments on the Property and paid off the mortgage in 2009. Plaintiff's husband died intestate on 13 March 2010.[1]

Plaintiff lived in the house on the Property from 1997 through the time of her husband's death. On 18 September 2013, plaintiff received notice that defendant, the natural brother of her deceased husband, had commenced a proceeding in Summary Ejectment against her. After

1. While plaintiff's complaint initially states that her husband died intestate on 13 March 2012, it later references "the untimely death of her deceased husband in 2010." During her deposition, plaintiff clarified that he died in 2010. Moreover, the trial court made a finding, in the order being appealed, that her husband died on 13 March 2010. Accordingly, we refer to 13 March 2010, rather than 2012, as his date of death.

receiving the notice, plaintiff discovered that the Property was legally titled in defendant's name.

Plaintiff commenced this action by filing a complaint against defendant on 8 October 2013. Plaintiff's complaint alleged that a resulting trust of the Property was established in favor of plaintiff and her deceased husband. Plaintiff asked for specific performance, injunctive relief, and declaratory relief, all based upon a theory of resulting trust. In his answer to plaintiff's complaint, defendant denied that the trial court had jurisdiction over the matter, alleging that "[t]he consideration must be advanced prior to the acquisition of the title by the alleged trustee for a resulting trust to arise. Payment of a consideration after title is acquired by the asserted trustee does not give rise to a resulting trust."

The parties conducted discovery and depositions, and on 7 May 2014, plaintiff moved for summary judgment, arguing that no genuine issues of material fact or law exist and that she was entitled to summary judgment in her favor. On 30 May 2014, defendant also filed a motion for summary judgment. At the end of his summary judgment motion, defendant requested "that the Court enter summary judgment in its favor as to the Plaintiff's claims against him and that Plaintiff's Complaint be dismissed with prejudice." Plaintiff subsequently filed another motion for summary judgment on 21 July 2014. The case was scheduled for a jury trial on 4 August 2014, but both parties agreed that the trial court should first consider their summary judgment motions. At the conclusion of the hearing, the trial court noted that "[b]oth parties brought forward motions for summary judgments. The defense also had in their prayer motion to dismiss the plaintiff's cause of action." The trial court announced this rationale for its ruling and that plaintiff's case was dismissed, and thus no trial occurred.

On 25 August 2014, the court entered an order denying both plaintiff's and defendant's motions for summary judgment and dismissing all of plaintiff's claims. In its order, the trial court found as fact that plaintiff's husband died on 13 March 2010 and that they both had lived on the Property. The court also found that the deed of trust for the Property was filed in the Mecklenburg County Register of Deed's office on 6 January 1997 between defendant, as the grantor, and Integrity Mortgage Corporation as the beneficiary. The trial court attached the deed as an exhibit and incorporated it by reference into the order. The court noted further that the general warranty deed between Don Galloway Homes of North Carolina, LLC, and defendant for the same Property was also filed on 6 January 1997 with the Mecklenburg County Register of Deeds, once again attaching it as an exhibit and incorporating it by reference. The

trial court found no other written documents relating to the ownership of the Property.

The trial court then concluded that the general warranty deed established *prima facie* title to the Property. The court once again noted that the only documents presented were the general warranty deed and the deed of trust, and the court concluded that any discussions relating to individuals whose interests are barred by North Carolina's Dead Man's Statute would have been inadmissible at trial.[2] Ultimately, the trial court concluded that the findings of fact listed in its order were "the only facts . . . present and undisputed" in the case and then proceeded to deny summary judgment for both parties and dismiss all of plaintiff's claims with prejudice.

Plaintiff filed timely notice of appeal to this Court on 19 September 2014. On 24 October 2014, defendant filed his notice of appeal for a cross-appeal based on plaintiff's notice, while also indicating that he never received proper service of plaintiff's notice.[3] Both plaintiff and defendant were granted an extension of time to file their briefs with this Court.

Discussion

I. Overview and Appropriate Standard of Review

We have had some difficulty determining the correct standard of review for this case, thanks to the odd procedural posture of this case and the rather unusual order which denies both motions for summary judgment, makes findings of fact, and *sua sponte* dismisses plaintiff's claims. On appeal, plaintiff argues that the trial court committed reversible error when it denied her motion for summary judgment and when it dismissed her complaint *sua sponte*. Defendant also cross-appeals and argues that the trial court erred in denying his motion for summary

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2. Plaintiff raises no argument on appeal regarding the Dead Man's statute so we do not address the trial court's ruling on this issue.

3. The record does not indicate that plaintiff served her notice of appeal on defendant, but since defendant filed his own notice of appeal and filed multiple briefs on appeal, plaintiff's failure to provide service is deemed waived. *See Hale v. Afro-American Arts Int'l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993) (per curiam) ("[A] party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal, as did the plaintiff here."). Moreover, since defendant was never served a notice of appeal from plaintiff, the time restraints in Rule 3 of the Rules of Civil Procedure do not apply and defendant's notice is deemed timely.

judgment, although of course he does not challenge the trial court's denial of plaintiff's motion or the dismissal of plaintiff's claims.

While the hearing started out as a summary judgment hearing and the trial court's order does deny the summary judgment motions, the order on appeal is not really a summary judgment order. Typically, "[t]he denial of a motion for summary judgment is an interlocutory order which ordinarily would not be subject to immediate appellate review." *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008). Since, however, the trial court also ultimately dismissed plaintiff's claims for failing to state a legally cognizable claim, rendering its order a final judgment on the merits, the appeal is not interlocutory.

The order does not specify the legal basis for the trial court's dismissal of all of plaintiff's claims, although the hearing transcript shows that the trial judge had noted that "[t]he defense also had in their prayer motion to dismiss the plaintiff's cause of action." Defendant argues that the trial court's *sua sponte* order was a ruling under Rule 41(b) of the Rules of Civil Procedure, noting that the rule provides in part that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits." Although the trial court did not refer to any particular rule in ordering dismissal, we believe it is clear from the entire transcript and order that the trial court dismissed the complaint under Rule 12(b)(6) of the Rules of Civil Procedure for "[f]ailure to state a claim upon which relief can be granted[.]"

This Court has found that "[c]ourts have continuing power to supervise their jurisdiction over the subject matter before them, including the power to dismiss *ex mero motu*." *Narron v. Union Camp Corp.*, 81 N.C. App. 263, 267, 344 S.E.2d 64, 67 (1986). *See also Amazon Cotton Mills Co. v. Duplan Corp.*, 246 N.C. 88, 89, 97 S.E.2d 449, 449 (1957) (" 'If the cause of action, as stated by the plaintiff, is inherently bad, why permit him to proceed further in the case, for if he proves everything that he alleges he must eventually fail in the action.' " (quoting *Maola Ice Cream Co. of N.C., Inc., v. Maola Milk & Ice Cream Co.*, 238 N.C. 317, 324, 77 S.E.2d 910, 916 (1957))). Furthermore, our Supreme Court has noted that "[w]hen the complaint fails to state a cause of action, a defect appears upon the face of the record proper. On appeal, the Supreme Court will take notice of it and will *ex mero motu* dismiss the action." *May v. S. Ry. Co.*, 259 N.C. 43, 49, 129 S.E.2d 624, 628-29 (1963). "When

the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint must be dismissed." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001).

We conclude, therefore, that the trial court in this case similarly concluded that the complaint failed to state a cause of action and then decided to dismiss the action *ex mero motu*. For this reason, we review the order as a dismissal under Rule 12(b)(6).

> "The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim."

Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A., 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (quoting *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (2007)). "On appeal from an order granting or denying a motion filed pursuant to N.C. Gen. Stat. § 1A–1, Rule 12(b)(6), we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Glynne v. Wilson Med. Ctr.*, 236 N.C. App. 42, 47, 762 S.E.2d 645, 649 (2014) (internal quotation marks omitted), *review dismissed by agreement*, 367 N.C. 811, 768 S.E.2d 115 (2015).

II. Analysis

a. Uncontested Findings

On appeal, plaintiff focuses primarily on why the trial court erred in denying her summary judgment motion and simply argues that the trial court had "no authority" to dismiss her complaint sua sponte. Thus, plaintiff makes no challenges to the trial court's factual findings or legal conclusions. Of course, neither an order for dismissal under Rule 12(b)(6) nor a summary judgment order should include findings of fact. *See, e.g.*, *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 63, 730 S.E.2d 254, 258 (2012) ("[F]indings of fact are generally not binding

on appeal from a trial court's ruling on motion to dismiss under Rule 12. The purpose of a motion to dismiss is to test law of a claim, not to resolve evidentiary conflicts. As resolution of evidentiary conflicts is not within the scope of Rule 12, we are not bound by the trial court's findings." (citation, quotation marks, brackets, and ellipses omitted)); *Winston v. Livingstone College, Inc.*, 210 N.C. App. 486, 487, 707 S.E.2d 768, 769 (2011) ("The appellate courts of this state have on numerous occasions held that it is not proper to include findings of fact in an order granting summary judgment.").

In this case, however, it seems that the trial court was simply setting out a summary of the uncontested facts as a basis for its determination that plaintiff had not stated a claim upon which relief could be granted. In any event, the findings are not what we would typically consider to be "findings of fact" and no evidence was presented upon which findings could be based. Furthermore, it is clear from the pleadings, discovery responses, depositions, and arguments before the trial court that there was no real dispute about the facts but only a legal question was presented. The undisputed facts show that defendant was the title owner of the Property from the date of its purchase in 1997. Plaintiff does not know why defendant is the title owner. Neither plaintiff nor her deceased husband ever held title to the Property.

b. Resulting Trust

Although defendant holds legal title to the Property, plaintiff contends that the trial court erred in denying her motion for summary judgment because a resulting trust exists in favor of plaintiff, creating equitable ownership of the Property. This Court has previously explained:

> "[a] resulting trust arises when a person becomes invested with the title to real property under circumstances which in equity obligate him to hold the title and to exercise his ownership for the benefit of another. . . . A trust of this sort does not arise from or depend upon any sort of agreement between the parties. It results from the fact that one man's money has been invested in land and the conveyance taken in the name of another.
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> The classic example of a resulting trust is the purchase-money resulting trust. In such a situation, when one person furnishes the consideration to pay for the land, title to which is taken in the name of another, a resulting trust commensurate with his interest arises in favor of the one furnishing the consideration. The general rule is that the

> trust is created, if at all, in the same transaction in which the legal title passes, and by virtue of the consideration advanced before or at the same time the legal title passes."

Bissette v. Harrod, 226 N.C. App. 1, 12, 738 S.E.2d 792, 800 (2013) (quoting *Cury v. Mitchell*, 202 N.C. App. 558, 562-63, 688 S.E.2d 825, 828-29 (2010)).

Here, although plaintiff alleged generally that she and her deceased husband "subsequently reconciled and purchased property in 1997[,]" her forecast of evidence was that her deceased husband actually made all of the mortgage payments on the Property. Other than the allegation that her husband died intestate, plaintiff's complaint contains no further information regarding his estate and his estate is not a party to this action. In addition, plaintiff and her deceased husband are not the same person, even if he did make all of the payments, including the down payment.

Plaintiff's arguments focus largely on the fact that defendant did not make any mortgage payments, a fact which is not disputed. At issue with a resulting trust, however, is whether consideration was given at or before the trust was created. *See, e.g.*, *Anderson v. Anderson*, 101 N.C. App. 682, 685, 400 S.E.2d 764, 766 (1991) ("While an agreement is not necessary to create a resulting trust, the resulting trust must arise *in the same transaction in which legal title passes*. Consideration to support the resulting trust must have been paid *before or at the time legal title passes*, and not after legal title has passed." (quotation marks omitted)). Here, plaintiff's complaint lacks any allegations regarding the actual purchase transaction while also indicating that plaintiff has no idea how defendant's name came to be on the deed and deed of trust. Plaintiff's complaint does not allege who paid the down payment on the Property and just generally alleges that she and her husband made all of the mortgage payments.[4] In any event, it is obvious that plaintiff did not give any consideration "before or at the time legal title passes" -- even if her deceased husband did -- since she does not know how the defendant ended up as the title owner. Plaintiff has failed to meet the necessary requirements to state a claim for relief as a resulting trust and has failed to demonstrate under *Cline* that a resulting trust was created.

Plaintiff argues that "[t]he indisputable evidence of record is that plaintiff's husband was attempting to circumvent the laws of equitable

4. And even if we look beyond the complaint to her deposition testimony, plaintiff testified that her husband made all of the payments; she did not make any payments.

distribution in accordance with the State of North Carolina in case plaintiff and her deceased husband became divorced." But neither her complaint nor the court's order address this issue. Plaintiff made no allegations and offered no evidence supporting such statement, and any motive of this sort would only have existed in the mind of her deceased husband. In addition, plaintiff's complaint does not even go so far as to allege that she and her husband ever legally separated or that equitable distribution was an issue between them. Her only allegation was that her husband engaged in unspecified "domestic acts of violence" against her in 1993 and that "law enforcement" was involved. This would imply that plaintiff's husband may have been criminally prosecuted for domestic violence, but the complaint does not allege that either plaintiff or her deceased husband ever filed or even contemplated filing any equitable distribution action. In any event, plaintiff's complaint does not specify when she and her husband "reconciled," but rather it indicates that the purchase of the Property was four years after the domestic violence issue and that they continued to live together until his death 13 years later.

We also note that although plaintiff refers to the Property as "marital property," marital property is a legal term used in equitable distribution proceedings which is not applicable unless or until married parties separate. *See* N.C. Gen. Stat. § 50-20(b)(1) (2015) (" 'Marital property' means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection."). It does not apply to property owned while the parties are married and not separated. Plaintiff and her deceased husband were married at the time he died and neither plaintiff's complaint nor the record as a whole contains any allegations of separation at any relevant time. Liberally construed, we understand plaintiff's allegations to mean that she now believes that her husband had arranged to put title to the home in his brother's name to circumvent any claim she may ever have to the home in equitable distribution, if and when they had separated. Yet, as noted above, plaintiff alleges that she did not know how or why the home was actually titled to defendant and she and her husband never separated after the Property was purchased. Accordingly, the trial court correctly concluded that plaintiff's complaint failed to state a valid claim for resulting trust.

We understand that plaintiff was apparently treated unfairly by both her deceased husband and her brother-in-law, defendant. Furthermore,

we recognize the hardship and distress which she and her children have likely suffered from both her husband's death and the loss of their home, in which they had lived since 1997. We also realize that in plaintiff's homeland of Zaire, the laws, mores, and customs regarding ownership of property and family obligations relating to property are likely very different from those in the United States. Nevertheless, although we sympathize with plaintiff's position, we must agree with the trial court that her claims are not legally cognizable.

c. Constructive Trust

Plaintiff also argues that the trial court should not have dismissed her complaint because she has a claim for imposition of a constructive trust. Plaintiff's brief conflates the issues by arguing that "[b]ased upon all of the facts that we have in this situation, there exists a constructive/resulting trust regarding the equitable ownership of this property in favor of the plaintiff[,]" but actually these are two different types of trusts and they are created in different ways. "A constructive trust . . . arises when one obtains the legal title to property in violation of a duty he owes to another. Constructive trusts ordinarily arise from actual or presumptive fraud and usually involve the breach of a confidential relationship." *Fulp v. Fulp*, 264 N.C. 20, 22, 140 S.E.2d 708, 711 (1965).

We first note that plaintiff's complaint did not include any claim for constructive trust. It included four titled claims: (1) Resulting trust; (2) Specific performance; (3) Injunctive relief; and (4) Declaratory relief. All four of the claims are premised upon a resulting trust theory, and the complaint makes no mention of a constructive trust. Even if we look beyond the titles of the claims, the complaint makes no allegations of any fraud or misrepresentation by defendant and no allegation of any sort of legal duty owed to plaintiff by defendant that could create a constructive trust. Plaintiff's complaint does not state any claim for constructive trust and the trial court did not err by dismissing it.

d. Denial of Summary Judgment

Plaintiff asserts that since the trial court denied both parties' motions for summary judgment, it must have found genuine issues of material fact for both sides and argues that she is entitled to a jury trial to determine those factual issues. As noted above, we are treating this appeal as a ruling upon a motion to dismiss and not a summary judgment motion, but we will address plaintiff's argument briefly. Unlike a motion to dismiss, however, a motion for summary judgment is properly

granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). Thus, when ruling on the summary judgment motions in the case at hand, the trial court could consider, in addition to plaintiff's complaint, the depositions and any additional discovery information.

As noted above, the procedural posture of this case is confusing, but ultimately the trial court's ruling was legally correct. Perhaps it would have been less confusing and procedurally more appropriate if the trial court had instead denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment, dismissing plaintiff's complaint as requested by defendant, on the basis that even after considering all of the discovery and depositions, there was no genuine issue of material fact and plaintiff's claims fail as a matter of law. The effect would be the same but the wording of the court's order would be slightly different.

Here, the trial court's order notes that it "reviewed and considered all the evidence presented[.]" As a general rule, a court can only consider the face of the complaint when considering a motion to dismiss for failure to state a claim. Because the parties were proceeding upon their competing summary judgment motions, the court considered discovery documents and depositions in addition to the pleadings. Yet to the extent that the court based its ruling upon any matter outside of the pleadings, it is obvious that the court properly considered all evidence in the light most favorable to plaintiff.

Even after reviewing that evidence, the trial court concluded that plaintiff's complaint should be dismissed with prejudice. In other words, whether we consider only the face of plaintiff's complaint to support the dismissal, or if we also consider the forecast of evidence as would be proper upon summary judgment motions, there truly was no genuine issue of material fact and plaintiff's claims fail as a matter of law. Therefore, we affirm the trial court's *sua sponte* dismissal of the complaint for failure to state a claim upon which relief may be granted. *See also Shoffner Industries, Inc. v. W.B. Lloyd Const. Co.*, 42 N.C. App. 259, 263, 257 S.E.2d 50, 54 (1979) ("When a court decides to dismiss an action pursuant to Rule 12(b)(6), any pending motion for summary judgment against the claimant may be treated as moot and therefore not be decided.").

Conclusion

In conclusion, the trial court had authority to dismiss plaintiff's complaint *sua sponte* since the complaint failed to state a claim upon which relief could be granted. And even looking beyond the complaint and taking the plaintiff's forecast of evidence in the light most favorable to her, plaintiff failed to show any genuine issue of material fact as to her claim for resulting trust or any legal basis for the imposition of a resulting trust. Accordingly, we conclude that the court's dismissal was proper.

AFFRIMED.

Judges STEPHENS and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JULY 2016)

AIR ACCURACY, INC. v. CLARK No. 15-1206	Guilford (14CVS3631)	Affirmed
GRAHAM v. GULLETTE No. 15-1327	Durham (14CVS2230)	Affirmed
HARVELL v. NORRIS No. 16-115	Brunswick (15CVD485)	Dismissed
IN RE A.O.A. No. 15-802	Wayne (14JB126)	Vacated
IN RE A.S. No. 15-604	Orange (14JB95)	Affirmed
IN RE B.L.C. No. 16-135	Forsyth (15JT20)	Affirmed
IN RE D.L.F. No. 16-18	Harnett (13JT189-191)	Affirmed
IN RE E.R.D. No. 16-79	Chatham (13JT21)	Affirmed
IN RE G.R. No. 15-658	Orange (14JB92)	Dismissed
IN RE J.A. No. 15-1255	Madison (12JT27) (12JT28)	Affirmed
IN RE J.D.C. No. 15-1395	Forsyth (15JT61)	Affirmed
IN RE K.B. No. 16-66	Durham (13JT199)	Affirmed
IN RE N.J. No. 15-1241-2	Johnston (15JA25-26)	Affirmed in Part and Reversed in Part
IN RE O.D.S. No. 15-1213	Orange (14JT14)	Affirmed
IN RE S.L.C. No. 15-1174	Buncombe (13JT396)	Affirmed

IN RE S.S.L.B. No. 16-41	Wilkes (15JT139)	Affirmed
IN RE:J.K.L. No. 16-127	Robeson (15JT89)	Affirmed
IN RE M.K-M.K No. 16-25	Cumberland (12JT492)	Affirmed
LYTLE v. N.C. DEP'T OF PUB. SAFETY No. 15-1117	N.C. Industrial Commission (TA-23470)	Affirmed
OSMAN v. AL JAHER No. 15-1170	Guilford (15CVD5113)	Affirmed
PITTSBORO MATTERS, INC. v. TOWN OF PITTSBORO No. 16-28	Chatham (14CVS914)	Affirmed
SAWYER v. SAWYER No. 15-1142 a	Swain (13CVS102)	Affirmed in Part and Reversed in Part
STATE v. ARCHIE No. 16-90	Guilford (14CRS67802) (14CRS67804) (14CRS703666)	Dismissed as moot in part; vacated in part and remanded
STATE v. CAIN No. 15-1208	Guilford (13CRS100207) (14CRS24555)	No Error
STATE v. CLAPP No. 15-1079	Guilford (13CRS97697) (13CRS97700-02) (14CRS24044)	No prejudicial error.
STATE v. DAWSON No. 15-1399	Scotland (12CRS50540) (12CRS909)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. DAYE No. 16-74	Mecklenburg (12CRS243622)	No Error
STATE v. FLAKE No. 15-1361	Madison (11CRS50106) (11CRS50107) (12CRS491-492)	NO PREJUDICIAL ERROR IN PART, NO ERROR IN PART, REMANDED IN PART
STATE v. FOX No. 15-1392	Haywood (13CRS933) (13CRS937)	No Error in part; No Plain Error in part.

STATE v. GIBSON No. 16-36	Forsyth (13CRS50970) (13CRS5895)	No Error
STATE v. HOLLAND No. 16-13	Rowan (14CRS2493) (14CRS51790) (14CRS51791)	No Error
STATE v. LAMPKINS No. 15-1009	Forsyth (12CRS17241) (12CRS54990)	No Error in part; Dismissed in part.
STATE v. LUTZ No. 15-1081	Watauga (13CRS50843) (14CRS1382)	No Error
STATE v. RICH No. 15-1204	Sampson (13CRS50372)	No Error
STATE v. SABBAGHRABAIOTTI No. 15-1028	Forsyth (14CRS51869)	New Trial
STATE v. STYERS No. 15-1345	Surry (10CRS51987) (10CRS51994-96) (10CRS51999) (10CRS52268)	Affirmed in part, vacated in part, reversed and remanded in part.
STATE v. WINSLOW No. 15-1181	Mecklenburg (09CRS19490) (09CRS37207)	Affirmed
STATE v. YAW No. 16-32	Pitt (13CRS61011) (14CRS1158)	No Error
TURCHIN v. ENBE, INC. No. 15-1236	Avery (14CVS213)	Affirmed
WILSON v. WILSON No. 15-1141	Durham (10CVD720)	Dismissed

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