249 N.C. App.—No. 1 Pages 1-235

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 16, 2019

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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
[5]Retired 31 December 2016 [6]Retired 24 April 2017

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COURT OF APPEALS

CASES REPORTED

FILED 16 AUGUST 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Appeal and Error—interlocutory orders and appeals—change of venue—statutory right—Plaintiff was allowed to appeal from an interlocutory order where the judge sua sponte changed venue. Plaintiff had a statutory right for the action to remain in Durham County, unless and until defendant filed a motion for change of venue to a proper county. **Zetino-Cruz v. Benitez-Zetino, 218.**

Appeal and Error—juvenile order—terms of legal custody changed—appeal proper—A juvenile order was properly before the Court of Appeals where there were multiple orders but the order from which the respondent-mother appealed changed the terms of the juvenile's legal custody. **In re M.M., 58.**

Appeal and Error—meaningful opportunity for appellate review—lack of verbatim transcript—adequate alternative—Respondent was not deprived of the opportunity for meaningful appellate review of an involuntary commitment

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Defendant therefore received ineffective assistance of counsel in his first appeal and the trial court erred by denying his motion for appropriate relief. **State v. Todd, 170.**

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DIVORCE

Divorce—alimony—retroactive—The trial court did not abuse its discretion in an equitable distribution, child support, and alimony case by awarding defendant husband retroactive alimony effective 1 January 2011 even though plaintiff wife claimed she should not have an alimony obligation for the period of 1 January 2011 through 1 February 2015. **Burger v. Burger, 1.**

Divorce—equitable distribution—savings plan—current value—passive changes—passive gains and losses—The trial court did not abuse its discretion in an equitable distribution, child support, and alimony case by its distribution of plaintiff wife's Wachovia/Wells Fargo Savings Plan. Because no evidence was presented

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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

TAMMY BURGER, PLAINTIFF-APPELLANT
v.
JEFFERY C. BURGER, DEFENDANT-APPELLEE

No. COA16-113

Filed 16 August 2016

1. Divorce—income—expenses

The trial court did not abuse its discretion in an equitable distribution, child support, and alimony case by its determination of defendant husband's income and expenses, and plaintiff wife's income.

2. Divorce—alimony—retroactive

The trial court did not abuse its discretion in an equitable distribution, child support, and alimony case by awarding defendant husband retroactive alimony effective 1 January 2011 even though plaintiff wife claimed she should not have an alimony obligation for the period of 1 January 2011 through 1 February 2015.

3. Divorce—equitable distribution—savings plan—current value—passive changes—passive gains and losses

The trial court did not abuse its discretion in an equitable distribution, child support, and alimony case by its distribution of plaintiff wife's Wachovia/Wells Fargo Savings Plan. Because no evidence was presented on the plan's current value and no evidence was presented on any passive changes in the plan's value, the trial court erred in distributing the passive gains and losses without additional findings of fact.

Appeal by plaintiff from Order entered 12 August 2015 by Judge Jena P. Culler in Mecklenburg County District Court. Heard in the Court of Appeals 8 June 2016.

CHURCH WATSON LAW, PLLC, by Kary C. Watson, for plaintiff-appellant.

The Law Office of Stephen Corby, PLLC, by Stephen M. Corby, for defendant-appellee.

ELMORE, Judge.

Tammy Burger (Wife) appeals from the trial court's order entered 12 August 2015 on the issues of equitable distribution, child support, and alimony. We affirm in part and reverse and remand in part.

I. Background

Jeffery C. Burger (Husband) and Wife were married on 3 October 1987, separated on 30 December 2009, and divorced on 16 December 2011. They have two children, born in 1997 and 2001. On 30 September 2010, Wife filed a complaint for equitable distribution, alleging that she was entitled to an unequal distribution of the marital and divisible property in her favor and an equitable distribution of the marital and divisible debt. Husband filed an answer and counterclaims on 17 December 2010, seeking child custody, child support, post-separation support, alimony, equitable distribution, and attorney's fees. Husband alleged that he was a dependent spouse within the meaning of N.C. Gen. Stat. § 50-16.1A(2) and that Wife was a supporting spouse within the meaning of N.C. Gen. Stat. § 50-16.1A(5).

Following a number of continuances, the Honorable Jena P. Culler held a bench trial from 11 February 2015 through 13 February 2015 on the issues of equitable distribution, child support, and alimony. In the trial court's 12 August 2015 Order, it found the following pertinent facts:

> 48. The Court has considered the financial needs of the parties, the accustomed standard of living of the parties prior to their separation, the present employment income and other recurring earnings of each party from any source, the income earning abilities of the parties, the separate and marital debt service obligation of the parties, those expenses reasonably necessary to support each of the parties, and each parties' respective legal obligation to support any other person.

. . . .

51. The Court finds that Wife is employed by Wells Fargo, and has a gross monthly income of $15,098.00 and a net monthly income of $10,230.09.

. . . .

55. The Court finds that Husband is unemployed and has been unemployed for several years. Husband has no current monthly income. Husband has cancer of the eye and has to regularly apply pressure to his eye with his hand to relieve pain. While Husband is at a disadvantage for employment prospects due to his condition, the Court finds that he is capable of working and earning minimum wage and that he has a naive indifference to his self support. Therefore, the Court imputes a gross monthly income of $1,247.00, which is based on minimum hourly working forty (40) hours per week.

. . . .

61. The Court finds that Husband is a dependent spouse as that term is defined in N.C.G.S. § 50-16.1A(2), is actually and substantially dependent upon Wife for his maintenance and support, and is substantially in need of maintenance and support from Wife. Husband's resources are inadequate to meet his needs, and Husband is entitled to alimony.

62. The Court finds that Wife is a supporting spouse as that term is defined in N.C.G.S. § 50-16.1A(5). Wife is an able-bodied person who has the means and ability to provide reasonable and adequate support to maintain Husband in the standard of living to which Husband was accustomed before the separation of the parties.

. . . .

64. The Court finds that the appropriate alimony award is $1,750.00 per month.

65. The Court finds that Wife has been consistently employed with Wells Fargo (or its predecessor banks) during all times for which this court is entering an award of alimony and Wife has [the] ability to pay the alimony award set forth herein.

> 66. [Husband] filed his claim for alimony in December 2010 and the Court finds it is appropriate to make this Order effective January 1, 2011.

After concluding that an unequal distribution in favor of Husband would be equitable, the trial court distributed the marital property, marital debt, and divisible debt and ordered both parties to pay child support. Wife timely appeals.

II. Analysis

A. Income and Expenses

[1] On appeal, Wife argues that the trial court erred in determining Husband's income, Husband's expenses, and her income. Wife asserts that while the trial court properly imputed income to Husband for purposes of alimony and child support, Husband has an earning capacity greater than minimum wage and "the evidence at trial support[ed] at a minimum, an imputation of $5,000 gross income per month." Wife also claims that the trial court should have imputed income to Husband based on income he could receive from his mother's trust, arguing that Husband incorrectly thinks the trust is discretionary. Husband contends that the trial court properly imputed only minimum wage income due to his lack of recent work history and his medical condition.[1]

N.C. Gen. Stat. § 50-16.3A(b) (2015) provides, "The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors . . . ."

Wife first argues that the trial court should have imputed gross monthly income of $5,000 to Husband because he has an undergraduate, master's, and law degree, is capable of performing home repair, and in 2010, when Husband was still employed by Strategic Legal Solutions, he listed on a credit card application that his annual income was $60,000. Wife further argues that Husband voluntarily left his employment at Strategic Legal Solutions shortly after the parties separated.

" 'Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order.' " *Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (citations omitted) (quoting *Kowalick*

1. Although Husband initially argues that the trial court erred in finding he was unemployed due to bad faith, Husband did not file a notice of appeal in this case. N.C. R. App. P. 3 (2016).

v. Kowalick, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998)). Similarly, in general, "a party's ability to pay child support is determined by that party's actual income at the time the award is made." *McKyer v. McKyer*, 179 N.C. App. 132, 146, 632 S.E.2d 828, 836 (2006) (citing *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985)). To base an alimony or child support obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith. *Works*, 217 N.C. App. at 347, 719 S.E.2d at 219; *McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836. "[T]his showing may be met by a sufficient degree of indifference to the needs of a parent's children." *McKyer*, 179 N.C. App. at 146, 632 S.E.2d at 836.

Here, the trial court found that Husband was unemployed at the time of the hearing and had been unemployed for several years. Noting that he would be at a disadvantage for employment prospects due to his health, the trial court nonetheless found that Husband is capable of working and earning minimum wage. The court further found that Husband has a naive indifference toward his self-support as well as toward his duty of support for his children, and it imputed gross monthly income of $1,247 based on working forty hours per week earning minimum wage.

While the record evidence shows that Husband is well-educated, it also shows that he has no eyesight in one eye, "has cancer of the eye[,] and has to regularly apply pressure to his eye with his hand to relieve pain." The trial court found that Husband "would have a difficult time finding a job given his presentation of himself[.]" Wife's only attempt to present evidence on Husband's earning potential was based on a credit card application that he had completed, and a job he had maintained, five years prior. Moreover, regarding the trust, the trial court found that "there is no evidence that Husband received any income from the discretionary trust during the marriage or otherwise. While there is evidence that Husband could do more than just call and try to acquire money from the trust, there is no evidence that he received any benefit from the discretionary trust." The trial court stated that it "consider[ed] the fact that Husband did not take steps to further explore possibility of obtaining funds from the trust." Accordingly, the trial court did not abuse its discretion in imputing minimum wage income to Husband.

Wife also argues that the trial court's calculation of Husband's expenses is unsupported by the evidence presented at trial, claiming that his expenses are speculative and hypothetical.

"This Court has long recognized that '[t]he determination of what constitutes the reasonable needs and expenses of a party in an alimony

action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves.' " *Nicks v. Nicks*, ___ N.C. App. ___, ___, 774 S.E.2d 365, 376 (June 16, 2015) (COA14-848) (quoting *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32 (1982)). "[T]he parties' needs and expenses for purposes of computing alimony should be measured in light of their accustomed standard of living during the marriage." *Barrett v. Barrett*, 140 N.C. App. 369, 372, 536 S.E.2d 642, 645 (2000).

Here, the trial court found that "Husband's monthly-shared family reasonable needs and expenses total $4,142.00 and Husband's monthly individual reasonable needs and expenses total $1,305.00. The specific findings as to these total expenses are attached hereto and incorporated herein by reference as Exhibit 5." Exhibit 5 details and confirms the total expenses listed above. Husband's financial affidavit filed 30 January 2015 supports the expenses contained in Exhibit 5 and the trial court's findings. While Wife argues that the expenses in the financial affidavit are "completely made up," Wife's "argument simply goes to the credibility and weight to be given to the affidavit. [Wife] was free to attack [Husband's] affidavit at trial by cross-examination . . . . Such determinations of credibility are for the trial court, not this Court." *Parsons v. Parsons*, 231 N.C. App. 397, 400, 752 S.E.2d 530, 533 (2013) (citation omitted). The trial court acted within its discretion in calculating Husband's total reasonable needs and expenses based on the record evidence.

Additionally, Wife argues that the trial court's calculation of her income is unsupported by the evidence. Wife claims that the trial court erred in adding her bonus from 2014 to the gross monthly income amount that she submitted to the trial court in her financial affidavit, which raised her gross monthly income from $11,566.08 to $15,098.00. Wife relies on *Williamson v. Williamson*, 217 N.C. App. 388, 391, 719 S.E.2d 625, 627 (2011), in which this Court held that the trial court improperly included the defendant's tax refund as part of her regular income.

"A supporting spouse's ability to pay an alimony award is generally determined by the supporting spouse's income at the time of the award." *Rhew v. Felton*, 178 N.C. App. 475, 484–85, 631 S.E.2d 859, 866 (2006) (citation omitted). "[I]t is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994).

Wife testified that she received a bonus in 2011, 2012, 2013, and 2014. In Wife's November 2011 financial affidavit, she listed her gross monthly

income as $15,618.55, which included $3,524.33 under "Bonuses." Wife also filed financial affidavits in April 2012 and July 2012, in which she listed on both that her gross monthly income was $15,218.50, which included $3,844.67 under "Bonuses."

Wife filed a revised financial affidavit in January 2015, just prior to trial, in which she listed that her gross monthly income was $11,566.08 and she left the "Bonuses" section blank. Wife attached her last two pay stubs to the financial affidavit, which covered the 14 December 2014 to 10 January 2015 pay periods. When asked why she did not include her bonus in her gross monthly income, Wife testified, "I don't know until I get my bonus what it will be this year."

The evidence established that Wife had consistently received bonuses for the past four years. Wife based her most recent financial affidavit in part on her gross monthly income from December 2014. Wife admitted that her 2014 bonus totaled around $41,000. And in November 2014, when completing a loan application for a new home, Wife listed her total gross monthly income as $15,097, which included $3,478 under "Bonuses."

Unlike in *Williamson* where there was no evidence that the tax refund constituted regular income, 217 N.C. App. at 390–91, 719 S.E.2d at 627, here, the trial court properly determined Wife's income in accordance with the record evidence. Based on the facts presented in this case, the trial court acted within its discretion in including Wife's December 2014 bonus in her average gross monthly income.

As a related issue, Wife makes a blanket assertion that the trial court's findings of fact concerning the parties' income and expenses are unsupported by the evidence and, absent proper findings, the trial court's conclusions of law relating to the support obligations must also fail.

"The review of the trial court's findings are limited to 'whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.' " *Dodson v. Dodson*, 190 N.C. App. 412, 415, 660 S.E.2d 93, 96 (2008) (quotation omitted). For the numerous reasons stated above, the trial court's findings regarding the parties' income and expenses were supported by competent evidence. Likewise, the trial court's conclusions of law, based on those findings, were proper.

B. Effective Date of Alimony Award

[2] Wife next argues that the trial court erred in awarding Husband alimony effective 1 January 2011, claiming that she should not have an alimony obligation for the period of 1 January 2011 through 1 February 2015.

"Our Court reviews a trial court's decision regarding the manner of payment of an alimony award for abuse of discretion." *Rhew*, 178 N.C. App. at 479–80, 631 S.E.2d at 863 (citing *Whitesell v. Whitesell*, 59 N.C. App. 552, 553, 297 S.E.2d 172, 173 (1982)).

In *Smallwood v. Smallwood*, ___ N.C. App. ___, ___, 742 S.E.2d 814, 824 (May 21, 2013) (COA12-1229), the defendant, relying on our holding in *Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999), argued that N.C. Gen. Stat. § 50-16.3A did not permit the trial court to award alimony "retroactively." This Court rejected the defendant's argument, stating that "while *Brannock* does discuss the changes in North Carolina law regarding alimony, nothing in the opinion references any intent by the General Assembly to eliminate retroactive alimony or to abrogate our rulings in *Austin*[2] and its progeny." *Smallwood*, ___ N.C. App. at ___, 742 S.E.2d at 824. Accordingly, we upheld the award. *Id.* at ___, 742 S.E.2d at 824.

Here, the trial court awarded Husband alimony in the amount of $1,750.00 per month for ten years, effective 1 January 2011. Wife does not challenge the ten-year duration of the payments but only argues that the trial court erred in making the award retroactive to 1 January 2011. Wife's argument, however, has already been rejected by this Court. *See id.* at ___, 742 S.E.2d at 824. Accordingly, Wife cannot establish that the trial court abused its discretion in making the alimony award effective 1 January 2011.

Wife also argues that the trial court erred because it failed to make findings about the parties' income and expenses for the intervening years between 2011 and 2015. Alimony, however, "is ordinarily determined by a party's actual income, from all sources, at the time of the order." *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675. In the trial court's findings of fact, it found that Wife's current net monthly income was $10,230.90 and her total monthly reasonable financial needs and expenses were $8,240. Based on the evidence presented and consideration of the statutory factors, the trial court awarded Husband $1,750 per month in alimony. The trial court did not abuse its discretion in considering Wife's current net monthly income in determining the alimony award.

C. Equitable Distribution

[3] Finally, Wife argues that the trial court erred in distributing Wife's Wachovia/Wells Fargo Savings Plan (the Plan) because the trial court

2. *Austin v. Austin*, 12 N.C. App. 390, 393, 183 S.E.2d 428, 430 (1971).

failed to value the divisible component of the Plan as of the date of distribution. Wife does not otherwise contest the trial court's distribution.

> Our standard of review for alleged errors in a trial court's classification and valuation of divisible and marital property is well-settled:
>
> [w]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*. We review the trial court's distribution of property for an abuse of discretion.

Nicks, ___ N.C. App. at ___, 774 S.E.2d at 380 (quoting *Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011)).

In making an equitable distribution of the marital assets, the trial court is required to undertake a three-step process: "(1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner." *Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350 (1988) (citation omitted). Under our General Statutes, marital property is defined as "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 . . . ." N.C. Gen. Stat. § 50-20(b)(1) (2015). Divisible property includes "[p]assive income from marital property received after the date of separation, including, but not limited to, interest and dividends." N.C. Gen. Stat. § 50-20(b)(4) (2015). "For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties, and . . . [d]ivisible property and divisible debt shall be valued as of the date of distribution." N.C. Gen. Stat. § 50-21(b) (2015).

Here, the trial court found that the " 'Wachovia/Wells Fargo 401(k)' listed on the Final Pretrial Order is a duplicate entry of the 'Wachovia/Wells Fargo Savings Plan.' " The trial court did not issue any other findings regarding the Plan but listed it as marital property and ordered the following:

> Wife's Wachovia/Wells Fargo Savings Plan shall be divided equally between the parties as of the date of separation.

> Each party is hereby awarded fifty percent (50%) of the balance of the said account as of the date of separation, which was $498,672.00, together with all passive gains and losses accruing on his or her respective share from the date of separation through the date of the division of the said account. . . .

On the Equitable Distribution Pretrial Order, both parties contended that the Plan was marital property and the date of separation value was $498,672.13. Neither party submitted a current value. Similarly, at trial, no testimony concerned the current value of the Plan. Because no evidence was presented on the Plan's current value and no evidence was presented on any passive changes in the Plan's value, the trial court erred in distributing the passive gains and losses without additional findings of fact. *See Cunningham v. Cunningham*, 171 N.C. App. 550, 556, 615 S.E.2d 675, 680 (2005) ("[W]hen no finding is made regarding the value of an item of distributable property, a trial court's findings are insufficient even if a determination is made with respect to the percentage of a distributable property's value to which each party is entitled."). Accordingly, we reverse that portion of the order on equitable distribution and we remand to the trial court for entry of additional findings.

III. Conclusion

The trial court did not err in its award of alimony, and the trial court's findings of fact support its conclusions of law. The trial court did err in distributing the passive gains and losses from the Plan. We reverse this portion of the equitable distribution award and remand to the trial court.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges DAVIS and DIETZ concur.

CAPE HATTERAS ELECTRIC MEMBERSHIP CORPORATION, AN ELECTRIC MEMBERSHIP CORPORATION ORGANIZED AND EXISTING PURSUANT TO N.C. GEN. STAT. CHAPTER 117, PLAINTIFF
v.
GINA L. STEVENSON AND JOSEPH F. NOCE, DEFENDANTS

No. COA15-1102

Filed 16 August 2016

1. Wrongful Interference—civil conspiracy—intentional interference with contract—electric cooperative bylaws—reasonable term or condition required

The business court did not err by granting summary judgment against plaintiff electric cooperative on its claims for civil conspiracy and intentional interference with contract. The cooperative's demand for a 44-foot-wide easement across defendant Stevenson's property in exchange for one dollar was not a reasonable term or condition. Thus, the bylaws did not require Stevenson to agree to that request. Because there was no breach of contract, the cooperative's claims fail as a matter of law.

2. Declaratory Judgments—electric cooperative bylaws—limited to facts of case

The business court did not err by entering a declaratory judgment that plaintiff electric cooperative's bylaws were unenforceable, but clarifying that the declaration was limited to the facts of this case where the request for an easement was not accompanied by reasonable terms and conditions.

Appeal by plaintiff from order entered 9 April 2015 by Judge Gregory P. McGuire in the North Carolina Business Court. Heard in the Court of Appeals 30 March 2016.

Vandeventer Black LLP, by Norman W. Shearin and Ashley P. Holmes, for plaintiff-appellant.

Brooks, Pierce, McClendon, Humphrey & Leonard, LLP, by Julia C. Ambrose and Daniel F. E. Smith, for defendants-appellees.

Patrick Buffkin, for amicus curiae North Carolina Association of Electric Cooperatives, Inc.

DIETZ, Judge.

At its heart, this is a case of straightforward contract interpretation. The plaintiff is an electric cooperative whose bylaws require all members to grant an easement across their land for power lines and other electric services upon request by the cooperative with "reasonable terms and conditions."

Recent storms caused severe erosion near the cooperative's existing transmission lines. So the cooperative sent a letter to Defendant Gina Stevenson, a cooperative member, instructing her to grant a 44-foot-wide easement across her property for the rerouted lines. The letter attached a proposed right-of-way agreement offering her one dollar in consideration for the easement.

Stevenson refused to sign. Then, in what the cooperative alleges was an effort to frustrate the terms of the bylaws, Stevenson conveyed one of her lots to her boyfriend, who was not a member of the cooperative. This forced the cooperative to pursue a condemnation action to secure the easement. The cooperative sued Stevenson and her boyfriend for intentional interference with contract and civil conspiracy, and sought accompanying declaratory relief. The business court entered summary judgment against the cooperative and it then appealed.

We affirm. As explained below, the cooperative's demand for a 44-foot-wide easement across Stevenson's property in exchange for one dollar was not a reasonable term or condition. Thus, the bylaws did not require Stevenson to agree to that request. Because there was no breach of contract, the cooperative's claims fail as a matter of law. We also affirm the business court's entry of declaratory relief, but clarify that the declaration is limited to the facts of this case, where the request for an easement was not accompanied by reasonable terms and conditions.

Facts and Procedural History

Gina Stevenson owns property on Hatteras Island. Electric power to Stevenson's property is provided by the Cape Hatteras Electric Membership Corporation (CHEMC), an electric cooperative chartered by State law. Stevenson is a member of the cooperative.

When members join the cooperative, they agree to be bound by the cooperative's bylaws. The bylaws contain two provisions at issue in this case.

First, the bylaws provide that a member shall grant an easement to the cooperative when necessary to provide electric service to cooperative members, in accordance with reasonable terms and conditions:

> **SECTION 1.08. Member to Grant Easements to Cooperative and to Participate in Required Cooperative Load Management Programs.** Each member shall, upon being requested to do so by the Cooperative, execute and deliver to the Cooperative grants of easement or right-of-way over, on and under such lands owned or leased by or mortgaged to the member, and in accordance with such reasonable terms and conditions, as the Cooperative shall require for the furnishing of electric service to him or other members or for the construction, operation, maintenance or relocation of the Cooperative's electric facilities.

Second, the bylaws provide that the cooperative may shut off a member's electricity when that member fails to comply with her membership obligations:

> **SECTION 2.01. Suspension; Reinstatement.** Upon his failure, after the expiration of the initial time limit prescribed either in a specific notice to him or in the Cooperative's generally publicized applicable rules and regulations, to pay any amounts due the Cooperative or to cease any other noncompliance with his membership obligations, a person's membership shall automatically be suspended; and he shall not during such suspension be entitled to receive electric service from the Cooperative or to cast a vote.

On 21 December 2012, CHEMC sent Stevenson a letter explaining that it needed to reroute its transmission line across Stevenson's property because recent storms had severely eroded the ground near existing lines.

At some point in the month after receiving this letter, Stevenson had an informal discussion with a CHEMC manager about rerouting the transmission lines. Stevenson proposed that the cooperative pay to relocate one of Stevenson's rental homes to a nearby undeveloped lot that she owned. CHEMC did not agree to this proposal.

The following month, on 13 February 2013, CHEMC sent a demand letter to Stevenson attaching a proposed right-of-way agreement. The letter informed Stevenson that "[r]elocation of the transmission line necessitates the granting by you of an easement or right-of-way to the Cooperative." It also stated that "as a member of the Cooperative, you are obligated by its bylaws to grant the easement." The right-of-way

agreement attached to this letter granted a 44-foot-wide easement across Stevenson's property, appearing to come just feet from the front door of one of her rental homes. The agreement stated that Stevenson would grant this easement in exchange for "the sum of One Dollar ($1.00) and other valuable consideration."

The relocation of the transmission lines affected a number of properties, not just those owned by Stevenson, and many residents talked about the cooperative's demands both in person and by email. At some point after Stevenson received the demand letter, CHEMC told the local homeowner's association that it was willing to negotiate with homeowners impacted by the rerouted lines for additional compensation. The record does not contain any direct communications between CHEMC and Stevenson.

On 20 February 2013, Stevenson informed CHEMC by phone that she would not grant the requested easement. A month later, on 26 March 2013, Stevenson deeded her undeveloped lot to her boyfriend, Joseph Noce, who was not a member of the cooperative and thus not a party to the bylaws. At the time he received the property, Noce was aware that the cooperative had demanded that Stevenson grant an easement across that property.

On 10 April 2013, CHEMC sued Stevenson, seeking a declaration of the parties' rights and obligations under Section 1.08 of the bylaws. The Chief Justice designated the action as a mandatory complex business case the following day.

On 15 April 2013, CHEMC petitioned for condemnation of Stevenson's and Noce's property to obtain the necessary easements. Three days after filing these condemnation petitions, CHEMC sent another letter to Stevenson demanding that she grant the requested easement. CHEMC warned Stevenson that if she did not grant the easement, it could shut off her electricity. Then, on 15 May 2013, CHEMC informed Stevenson that it planned to cut off her power before the upcoming Memorial Day weekend if she did not "communicate with [CHEMC] as soon as possible about the powerline easement sought from her."

Two days later, faced with the possibility of having electricity to her rental properties shut off during one of the busiest vacation weekends of the year, Stevenson consented to an order in the condemnation proceeding conveying the requested easements. The only remaining issue in the condemnation action was the amount of compensation to be paid to Stevenson.

On 10 June 2013, CHEMC filed an amended complaint seeking a declaration of the parties' rights and obligations under both Section 1.08 and Section 2.01 of CHEMC's bylaws. CHEMC also added an intentional interference with contract claim against Noce and a civil conspiracy claim against both Stevenson and Noce.

On cross-motions for summary judgment, the North Carolina Business Court entered summary judgment for Stevenson and Noce on all claims. CHEMC timely appealed. Because this case was designated as a complex business case and assigned to the business court on 11 April 2013, this Court has appellate jurisdiction. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, __ N.C. App. __, __, 783 S.E.2d 264, 265–66 (2016).

Analysis

On appeal, CHEMC challenges the business court's entry of summary judgment against it on its two tort claims and also challenges a portion of the court's corresponding declaratory judgment. We review an appeal from summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper when "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. Rule 56(c). When considering a summary judgment motion, a trial court must view the evidence in the light most favorable to the non-movant. *Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

I. Summary Judgment on Tort Claims

[1] CHEMC first argues that the business court erred in granting summary judgment against it on its claims for civil conspiracy and intentional interference with contract. As explained below, we reject CHEMC's arguments and affirm the business court.

The theory underlying CHEMC's intentional tort claims is straightforward: the cooperative contends that Stevenson was contractually obligated to immediately grant the requested easement and that, by working together to avoid that contractual obligation, both Stevenson and Noce are liable to the cooperative. The flaw in this theory is that Stevenson was not contractually obligated to grant the easement in the first place.

As CHEMC conceded in the business court (and does not challenge on appeal), Section 1.08 of the bylaws requires a cooperative member to

grant an easement only upon "reasonable terms and conditions." Thus, if the cooperative's demand for an easement is made on *unreasonable* terms and conditions, the member has no obligation to grant the easement. And if there was no obligation to grant the easement, CHEMC's tort claims fail because those claims require CHEMC to prove some improper inducement not to perform a contractual obligation. *See Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 212, 646 S.E.2d 550, 555 (2007) ("An essential element of a claim for tortious interference with a contract is that 'the defendant intentionally induces the third person not to perform the contract.' "); *see also New Bar P'ship v. Martin*, 221 N.C. App. 302, 310, 729 S.E.2d 675, 682 (2012) ("[W]here a plaintiff's underlying claims fail, its claim for civil conspiracy must also fail."). Simply put, the determinative issue in this appeal is whether CHEMC's request for the easement was made on reasonable terms and conditions. We hold that it was not.

In February 2013, CHEMC approached Stevenson and demanded that she immediately grant the cooperative a 44-foot-wide easement across her property on scenic Hatteras Island in exchange for one dollar. The demand letter from CHEMC accompanying the proposed right-of-way agreement was wholly unilateral; it stated that "[r]elocation of the transmission line necessitates the granting by you of an easement or right of way to the Cooperative" and that Stevenson was "obligated" to grant the easement. Neither the letter nor the attached right-of-way agreement indicated that the cooperative intended to provide additional compensation to Stevenson in the future or even that the cooperative would examine the impact of the easement to determine if compensation was appropriate.

We hold, as the business court did, that this unilateral demand was not made in accordance with "reasonable terms and conditions." The amicus asks us to delineate the sort of terms and conditions that are reasonable, and thus might satisfy this contract language in future cases. Amicus contends that these bylaws are "common" among electric cooperatives and guidance is needed. But the parties have not briefed this issue, and we are unwilling to delve into this sort of advisory dicta without an appropriate record and argument from the parties. *See Poore v. Poore*, 201 N.C. 791, 792, 161 S.E. 532, 533 (1931). Moreover, this situation is quite different from one in which parties or amici seek guidance on the meaning of a statute. This is contract language in corporate bylaws. If parties not before the Court want more detail on the meaning of the phrase "reasonable terms and conditions" in those bylaws, they can amend the documents to provide that clarity without waiting on help from the courts.

In sum, we limit this opinion to the facts before us and hold only that a unilateral demand to grant an easement in exchange for one dollar, with no assurances of future compensation or review, is not one made "in accordance with reasonable terms and conditions." As a result, Stevenson was not contractually obligated to grant the easement and CHEMC's tort claims for intentional interference with contract and civil conspiracy fail as a matter of law.

II. Section 2.01 of CHEMC's Bylaws

[2] CHEMC next challenges the business court's declaratory judgment that, as applied to the parties in this case, Section 2.01 of the cooperative's bylaws is unenforceable. For the reasons explained above, we affirm the business court's declaratory judgment with respect to the parties in this case, on the facts of this case. Because CHEMC did not seek an easement from Stevenson on reasonable terms and conditions, Stevenson's refusal to grant the easement was not a breach of the bylaws. We agree with the business court that the cooperative cannot threaten to shut off a member's electricity under Section 2.01 of the bylaws as a means to force that member to grant an easement on unreasonable terms and conditions.

The amicus argues that the business court's declaratory judgment could prevent other electric cooperatives from using similar language in their own bylaws to disconnect power from members who breach the bylaws and refuse to grant an easement even upon reasonable terms and conditions. CHEMC's complaint in this action expressly requested a declaration only with respect to the rights of the parties in this action, and that declaratory judgment is limited to the facts of this case. We interpret the business court's declaratory judgment as limited to circumstances in which the request for the easement is not made in accordance with reasonable terms and conditions—as was the case here—and we affirm it on that basis.

Conclusion

We affirm the judgment of the North Carolina Business Court.

AFFIRMED.

Judges HUNTER, JR. and INMAN concur.

RODNEY MICHAEL DABBONDANZA, JR. &
ANGELLA LYNN DABBONDANZA, PLAINTIFFS
v.
ANNE J. HANSLEY, DEFENDANT

No. COA16-117

Filed 16 August 2016

Real Property—quieting title—improper conveyance of interest in property

The trial court erred in its summary judgment order by quieting title to property in favor of plaintiffs who acquired the property from defendant wife. Although the trial court correctly concluded that, as a matter of law, the property was not encumbered by the 2013 judgment, the 2008 oral directive was not enforceable and the clerk, as a result, lacked authority to convey the husband's interest in the property to the wife pursuant to the 2009 deed. Further, the 2007 equitable distribution order did not affect the priority of the 2013 judgment. The case was remanded with instructions that the trial court enter summary judgment for the husband on the issue that he still owned an interest in the property when the 2013 judgment was docketed.

Appeal by Defendant from judgment entered 2 November 2015 by Judge Alan Z. Thornburg in Rutherford County Superior Court. Heard in the Court of Appeals 6 June 2016.

Law Offices of Kenneth W. Fromknecht, II PA, by Kenneth W. Fromknecht, II, for Plaintiffs-Appellees.

Prince, Youngblood & Massagee, PLLC, by B. B. Massagee, III and Sharon B. Alexander, for Defendant-Appellant.

DILLON, Judge.

Defendant Anne J. Hansley ("Defendant") appeals the trial court's summary judgment order quieting title to property in favor of Plaintiffs Rodney Michael Dabbondanza, Jr., and Angella Lynn Dabbondanza (collectively referred to as "Plaintiffs"). For the following reasons, we reverse.

I. Background

This appeal concerns certain real property in Rutherford County purchased by Plaintiffs in 2015 (the "Property") and whether Defendant's 2013 judgment against a *prior owner* of the Property attached as a lien against the Property.

The Property was acquired by Johnny Ray Watkins ("Husband") prior to 2000. Husband was married to Linda F. Watkins ("Wife") until their divorce sometime thereafter.

In 2007, Judge Laura A. Powell ("Judge Powell") entered an equitable distribution order, pursuant to which Husband was directed to convey his interest in the Property to Wife (the "2007 ED Order"). However, Husband refused to execute a deed conveying his interest in the Property.

In December 2008, Husband and Wife appeared before Judge Powell on a motion hearing in the equitable distribution matter. During the hearing, Judge Powell *orally* directed Robynn Spence, the Clerk of the Superior Court in Rutherford County, (hereinafter the "Clerk"), to execute a deed conveying Husband's interest in the Property to Wife, pursuant to Rule 70 of the North Carolina Rules of Civil Procedure (the "2008 Oral Directive"). Accordingly, the Clerk executed and delivered a deed to Wife (the "2009 Deed"), which was duly recorded in 2009.

In 2013, Defendant obtained a money judgment against Husband, which was docketed in Rutherford County Superior Court (the "2013 Judgment").

In 2014, Judge Powell entered a *written* order, which purported to reduce the 2008 Oral Directive to writing (the "2014 Order"). The 2014 Order was entered *nunc pro tunc*, relating back to the entry of the 2007 ED Order.

In 2015, Wife conveyed the Property to Plaintiffs. Around that same time, Defendant, who had since obtained the 2013 Judgment, directed the Rutherford County Sheriff's Office to execute on the Property. Defendant contended that at the time the 2013 Judgment was docketed, Husband still possessed an interest in the Property, notwithstanding the 2009 Deed.

Plaintiffs commenced this action to quiet title and obtained a temporary injunction staying the execution on the Property. Plaintiffs filed a motion for summary judgment, which the trial court granted, holding

that the 2013 Judgment had not attached to the Property. Defendant filed a timely appeal.

II. Standard of Review

We review a grant of summary judgment *de novo*. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). Summary judgment is appropriate when "there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law." *Builders Mut. Ins. Co. v. N. Main Const., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citation omitted) (internal quotation marks omitted).

III. Analysis

The issue on appeal is whether the trial court correctly concluded that, as a matter of law, the Property is not encumbered by the 2013 Judgment. We conclude that the 2008 Oral Directive was not enforceable and that the Clerk, as a result, lacked authority to convey Husband's interest in the Property to Wife pursuant to the 2009 Deed. We further conclude that the 2007 ED Order does not affect the priority of the 2013 Judgment as the 2007 ED Order was not properly recorded. Accordingly, Husband still owned an interest in the Property when the 2013 Judgment was docketed. As such, we reverse the trial court's summary judgment order.

A. Rule 70 Appointment Must Be Entered To Take Effect.

Rule 70 provides that if a judgment directs a party to execute a conveyance of real estate and that party fails to comply, the trial court is then authorized "to direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the [disobedient] party." N.C. Gen. Stat. § 1A-1, Rule 70 (2013). Put simply, if the trial court orders a party to convey property and that party refuses, the trial court may appoint *another person* to convey that property. In the present case, the parties do not dispute that the 2007 ED Order required Husband to convey his interest in the Property to Wife. However, at the time of the 2008 hearing before Judge Powell, Husband had not done so, and his whereabouts were unknown. Judge Powell attempted to direct the conveyance of Husband's interest in the Property to Wife pursuant to Rule 70.

We conclude that a Rule 70 appointment whereby a party executes a deed on behalf of a disobedient party is an "order," as the disobedient party is affected by his or her divestment of ownership in the property. Rule 58 of the North Carolina Rules of Civil Procedure provides that "a *judgment* is entered when it is reduced to writing, signed by a judge,

and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2013) (emphasis added). Our Court has consistently held that Rule 58 applies to *orders* as well as judgments in civil cases, *see*, *e.g.*, *Onslow v. Moore*, 129 N.C. App. 376, 388, 499 S.E.2d 780, 788 (1998) (explaining that "Rule 58 applies to judgments and orders, and therefore, an order is entered when the requirements of . . . Rule 58 are satisfied"), and that "an order rendered in open court is not enforceable until it is 'entered,' i.e., until it is reduced to writing, signed by the judge, and filed with the clerk of court," *In re Foreclosure of Goddard & Peterson*, PLLC, No. COA15-591, 2016 N.C. App. LEXIS 711, at *8 (July 5, 2016) (internal quotation marks omitted) (quoting *West v. Marko*, 130 N.C. App. 751, 756, 504 S.E.2d 571, 574 (1998)).

As our Court recently explained, prior to 1994, Rule 58 did not require that an order be in writing, signed, and filed to be deemed "entered"; indeed, orally rendered judgments were considered "entered." *In re O.D.S.*, ___ N.C. App. ___, ___, 786 S.E.2d 410, 413 (2016). However, Rule 58 was amended in 1994 to clarify when a judgment or order was entered and therefore enforceable. *Id.*

The 2008 Oral Directive was not enforceable as it was not written, signed, or filed with the clerk of court, and was therefore not effective to authorize the Clerk to convey Husband's interest in the Property. The 2008 Oral Directive is comparable to an oral incompetency order, which we recently held does not authorize the appointment of a guardian. *In re Thompson*, ___ N.C. App. ___, ___, 754 S.E.2d 168, 172 (2016) (holding that a clerk of court can only appoint a guardian after an incompetency order has been "entered" pursuant to Rule 58).

We note that the 2009 Deed indicates that the Clerk's purported authority to convey Husband's interest derives from the divorce action between Husband and Wife. Rule 58 required the appointment order to be entered before the Clerk was authorized to convey Husband's interest. There was no entered appointment order in Husband and Wife's divorce action. Given the 2009 Deed's reference to the divorce action, a prudent title examiner would conclude that the 2009 Deed was invalid as the referenced divorce action file does not contain an entered appointment order. The 2008 Oral Directive was not enforceable.

B. The 2014 Order Has No Effect on the 2013 Judgment.

We conclude that the 2014 Order did not extinguish the lien created by the 2013 Judgment.

A *nunc pro tunc* order is an entered order with retroactive effect. "*Nunc pro tunc* is defined as *now for then*. . . . It signifies a thing is now done which should have been done on the specified date." *Whitworth v. Whitworth*, 222 N.C. App. 771, 777, 731 S.E.2d 707, 712 (2012) (emphasis added) (citation and internal marks omitted).

Our Supreme Court has held that "in consequence of accident or mistake or the neglect of the clerk, the court has power to order that the judgment be entered up *nunc pro tunc*, provided that the fact of its rendition is satisfactorily established and no intervening rights are prejudiced." *Creed v. Marshall*, 160 N.C. 394, 394, 76 S.E. 270, 271 (1912) (emphasis added). Our Supreme Court also has held that *orders* may be entered *nunc pro tunc* in the same manner as judgments. *See State Trust Co. v. Toms*, 244 N.C. 645, 651, 94 S.E.2d 806, 811 (1956). However, these decisions predate the General Assembly's 1994 amendment to Rule 58. Prior to 1994, a trial judge's role in creating a valid order, generally, was *to render* (that is, orally pronounce) the order from the bench, after which the order would then be noted on the record by the clerk of court. *See generally Morris v. Bailey*, 86 N.C. App. 378, 388, 358 S.E.2d 120, 126 (1987) (detailing the obligations of trial courts when issuing orders under the pre-1994 version of Rule 58). However, prior to 1994, a trial judge could not enter a *nunc pro tunc* order if an order had never been rendered in the first place. *Long v. Long*, 102 N.C. App. 18, 21-22, 401 S.E.2d 401, 403 (1991) (concluding that a trial court's *nunc pro tunc* order granting a motion to dismiss was ineffective as the trial court did not render its order in open court).

In 1994, the General Assembly amended Rule 58 by requiring trial judges to sign written orders as a precondition to enforcement. In the present case, Judge Powell never signed a written order in 2008 when she rendered her order directing the Clerk to sign the 2009 Deed. We hold that after the 1994 amendment to Rule 58, a judge does not have the authority to enter an order *nunc pro tunc* if that judge did not previously sign a written order. *See Rockingham County DSS ex rel. Walker v. Tate*, 202 N.C. App. 747, 752, 689 S.E.2d 913, 917 (2010) (stating that "a nunc pro tunc entry may not be used to accomplish something which ought to have been done but was not done"). Accordingly, we hold that Judge Powell did not have the authority to enter a *nunc pro tunc* order in this case.[1]

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1. Prior to 1994, a trial judge could enter a *nunc pro tunc* order if he or she rendered an order and the clerk of court neglected to note the original order in the record. By analogy, an argument could be made that after 1994, a trial court judge has the authority to

Assuming, *arguendo*, that Judge Powell had the authority to enter a *nunc pro tunc* order even without a signed written order, the 2014 Order did not extinguish the 2013 Judgment lien. First, as our Supreme Court held, a *nunc pro tunc* order may not be entered if it would prejudice third parties. *Creed*, 160 N.C. at 394, 76 S.E. at 271. Here, Defendant would be prejudiced by a *nunc pro tunc* order. At the time the 2013 Judgment was docketed, Husband still owned an interest in the Property, as the 2009 Deed was invalid. Our Supreme Court has long recognized that a deed is conveyed when it is delivered. *E.g.*, *Williams v. N.C. State Bd. of Ed.*, 284 N.C. 588, 598, 201 S.E.2d 889, 895 (1974). When the 2009 Deed was delivered, the Clerk had no authority to convey Husband's interest; therefore, nothing was conveyed by the 2009 Deed.[2] Validating the 2014 Order would ultimately eliminate the valid 2013 Judgment lien.

C. The 2007 ED Order Does Not Affect the Priority of the 2013 Judgment Lien.

In the 2014 Order, Judge Powell stated that the 2007 ED Order was sufficient *in and of itself* to divest Husband's title in the Property, even without her subsequent order oral directive. Specifically, Rule 70, the source of Judge Powell's authority to direct the Clerk to convey Husband's interest in the Property, also preserves the right of a judge pursuant to N.C. Gen. Stat. § 1-228 to enter a judgment which *itself* serves as the deed of conveyance. *See generally Morris v. White*, 96 N.C. 91, 2 S.E. 254 (1887) (describing the statutory precursor to N.C. Gen Stat. Stat. § 1-228, which permitted a judge to convey property by written decree without having to appoint a third party to do so). N.C. Gen. Stat. § 1-228 provides in part that "[e]very judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance." N.C. Gen. Stat. § 1-228 (2013). This authority extends to judges in equitable distribution matters. N.C. Gen. Stat. § 50-20(g) ("If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228").

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enter a *nunc pro tunc* order if he or she signed a written order, but, due to mistake, accident or neglect of the clerk, the original written order was not filed. However, this issue is not before us.

2. We note that in 2014, Husband executed a deed conveying his interest in the Property to Wife, which was prior to her conveyance of the Property to Plaintiffs. However, when Husband executed this deed, the 2013 Judgment was already docketed and, therefore, attached as a lien on his interest in the Property.

In the present case, Judge Powell did *enter* an equitable distribution order that contained language awarding the Property to Wife in 2007, six years before the 2013 Judgment was docketed. However, even if the 2007 ED Order was sufficient to constitute a conveyance under N.C. Gen. Stat. § 1-228, the 2007 ED Order does not affect the priority of the 2013 Judgment lien because the 2007 ED Order was never recorded. Indeed, N.C. Gen. Stat. § 1-228 states that a judgment "shall be regarded as a deed of conveyance" and, like any other deed, must "be registered in the proper county, under the rules and regulations prescribed for conveyances of similar property executed by the party." N.C. Gen. Stat. § 1-228. Therefore, we conclude that the entry of the 2007 ED Order has no effect on the priority of the 2013 Judgment lien.

IV. Conclusion

For the foregoing reasons, we reverse the trial court's grant of summary judgment for Plaintiffs. We remand with instructions that the trial court enter summary judgment for Defendant on the issue that Husband still owned an interest in the Property when the 2013 Judgment was docketed.

REVERSED.

Chief Judge McGEE concurs.

Judge HUNTER, JR., concurs in a separate opinion.

HUNTER, JR., Robert N., Judge, concurring in a separate opinion.

I concur in favor of reversing and remanding the trial court's summary judgment as the record discloses Defendant is entitled to judgment as a matter of law.

North Carolina became an equitable distribution jurisdiction in 1981. *See* S.L. 1981, Ch. 815, An Act for Equitable Distribution of Marital Property. It is clear the Legislature intended for equitable distribution to serve as a basis for property conveyance, making an equitable distribution order an effective means to convey property, much like a deed of conveyance. *See Id.*; N.C. Gen. Stat. § 50-20(g) (1984) ("If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in [N.C. Gen. Stat. §] 1a-1, Rule 70 and [N.C. Gen. Stat. §] 1-228."); *see also Morris v. White*, 96 N.C. 91, 2 S.E. 254 (1887). The comment to Rule 70 makes clear that "a judgment divesting title and vesting it in

other 'has the effect of a conveyance' without further words being added to the effect that the judgment 'shall be regarded as a deed of conveyance.' " N.C. Gen. Stat. § 1A-1, Rule 70, Comment (citing *Morris*, 96 N.C. 91, 2 S.E. 254; *Evans v. Brendle*, 173 N.C. 149, 91 S.E. 723 (1917)).

Like an unrecorded deed of conveyance, an equitable distribution order in itself does not establish lien priority against creditors. The Rules of North Carolina Civil Procedure, Article 11, "Lis Pendens," section 1-116, "Filing of notice of suit" provides the following in relevant part:

> (a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in all of the following cases:
>
> (1) Actions affecting title to real property. . . .
>
> (b) Notice of pending litigation shall contain:
>
> (1) The name of the court in which the action has been commenced or is pending;
>
> (2) The names of the parties to the action;
>
> (3) The nature and purpose of the action; and
>
> (4) A description of the property to be affected thereby. . . .
>
> (d) Notice of pending litigation must be filed with the clerk of the superior court of each county in which any part of the real estate is located, not excepting the county in which the action is pending, in order to be effective against bona fide purchasers or lien creditors with respect to the real property located in such county.

N.C. Gen. Stat. § 1-116 (2015).

In light of these rules of procedure, prudent practices dictate when marital realty is held solely in an adverse party's name at the time litigation begins one should file a lis pendens with the clerk of court to notify others of the party's claim and establish priority over subsequent lien holders. After judgment conveys property like any deed, one should record the equitable distribution order with the register of deeds. Here, the 2007 equitable distribution order effectively conveyed the property from Husband to Wife, but left unrecorded, it did not establish lien priority over subsequent judgment creditors. Therefore, intervening lien holders had the opportunity to establish their interests through recordation in the race within the courthouse, to the register of deeds office.

GURNEY B. HARRIS, Employee, Plaintiff
v.
SOUTHERN COMMERCIAL GLASS, Employer, AUTO OWNERS INSURANCE, Carrier, Defendants-Appellees
and
SOUTHEASTERN INSTALLATION INC., Employer, CINCINNATI INSURANCE COMPANY, Carrier, Defendants-Appellants

No. COA15-1363

Filed 16 August 2016

1. Workers' Compensation—resolution of factual issues—determination of credibility and weight

The Industrial Commission did not err in a workers' compensation by its resolution of factual issues in the case. The Commission is charged with determination of the credibility and weight to be given to conflicting testimony. The full Commission's findings and conclusions were based largely upon Dr. Cohen's testimony rather than upon plaintiff's testimony regarding his recollection of the degree to which the incident on 1 April 2014 differed from earlier episodes.

2. Workers' Compensation—apportionment of liability—current and previous employers

The Industrial Commission did not err in a workers' compensation case by failing to apportion liability for plaintiff's benefits between defendants and plaintiff's previous employer. *Newcomb* did not hold that, as a matter of law, the Commission is required to apportion liability in every case in which the percentage of contribution of injuries that a claimant suffers while working for two different employers may be determined. Further, the Commission did not make a finding on this issue, but simply noted Dr. Cohen's testimony in response to defendants' hypothetical question.

3. Workers' Compensation—causation and material aggravation—legal standard

Although defendant contended that the Industrial Commission erred in a workers' compensation case by applying an erroneous legal standard regarding material aggravation and causation, defendant's argument lacked merit. *Moore* does not address the distinction posited by defendants, and did not state that its holding applied only to, or was based on the assumption of, a pre-existing non-work-related condition.. Further, defendants inaccurately characterized Dr. Cohen's testimony and his expert opinion as mere speculation.

4. Workers' Compensation—sufficiency of conclusions of law—alternative results

The Commission did not err in a workers' compensation case by its conclusion of law No. 7. Even assuming that this conclusion was erroneous, it did not require reversal, given that the Commission also stated in the alternative the results of its application of the *Parsons* presumption.

Appeal by defendants-appellants from Opinion and Award entered 3 September 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 June 2016.

Law Office of Michael A. Swann, P.A., by Michael A. Swann, for plaintiff-appellee.

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ZACHARY, Judge.

Southeastern Installation, Inc. (defendant, with Cincinnati Insurance Company, defendants) appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission"), finding defendants solely liable for workers' compensation medical and disability payments to Gurney Harris (plaintiff) that arose after 1 April 2014, as a result of plaintiff's injury on that date. On appeal, defendants argue that the Commission erred by failing to apportion liability for plaintiff's workers' compensation benefits between defendants and plaintiff's previous employer, Southern Commercial Glass, Inc. (appellee, with Auto Owners Insurance Company, appellees). We conclude that the Commission did not err in its Opinion and Award.

I. Background

The parties agree that plaintiff is entitled to workers' compensation medical and disability benefits for injury to his back arising from and occurring in the course of his employment. The controversy between the parties concerns the question of whether the Commission properly determined the liability for plaintiff's workers' compensation benefits.

On 13 July 2010, plaintiff suffered a back injury while working for appellee at a job site in Georgia. Appellees accepted plaintiff's claim as compensable, and plaintiff received workers' compensation medical and disability benefits. After this injury, plaintiff returned to his home in Lexington, North Carolina, and on 30 November 2011, plaintiff and appellees agreed to a change of jurisdiction from Georgia to North Carolina. Upon his return to Lexington, plaintiff consulted his family physician for treatment of low back pain radiating into his left leg. Plaintiff's family doctor recommended an MRI, which showed a disc protrusion on the left at L4-L5. Plaintiff's family doctor referred plaintiff to Dr. Tadhg O'Gara, an orthopedist at Wake Forest Baptist Medical Center, for treatment of back pain. Plaintiff treated conservatively with Dr. O'Gara, undergoing physical therapy and an epidural steroid injection. However, plaintiff continued to experience low back pain and on 7 October 2010, Dr. Ishaq Syed performed a left L4-L5 microdiscectomy surgery on plaintiff.

Dr. Syed reviewed an MRI conducted on 1 February 2011, and after finding no recurrent disc herniation, he referred plaintiff back to Dr. O'Gara. Plaintiff's last appointment with Dr. O'Gara was on 28 June 2011, at which time plaintiff reported having symptoms that "come and go" and that decreased with the use of anti-inflammatory medications. At this visit, Dr. O'Gara assessed plaintiff at maximum medical improvement with a fifteen percent (15%) permanent partial impairment rating to the back and permanent restrictions of lifting up to seventy-five (75) pounds.

At some point after plaintiff's accident in July 2010, appellee terminated plaintiff's employment, although appellees continued to pay plaintiff workers' compensation benefits. In January 2012, plaintiff began working for defendant, at which time plaintiff informed defendant about his July 2010 work-related injury and his resultant workers' compensation claim. Plaintiff told defendant that he had undergone back surgery, that he might need another surgery, and that appellees were paying for all medical treatment related to his July 2010 injury. As of 17 July 2014, the date of the hearing on this matter, plaintiff was still employed by defendant, and appellee was no longer in business.

Dr. Max Cohen, an orthopedic surgeon in Greensboro, North Carolina, has been plaintiff's authorized treating physician since 4 May 2012. When plaintiff first consulted Dr. Cohen, he told Dr. Cohen about his prior injury and surgery, and reported that his post-operative pain, which he rated as a five on a scale of one to ten, was improving. At that meeting, Dr. Cohen noted that plaintiff's symptoms were "fairly mild" and that plaintiff could continue working full time. Plaintiff returned to

Dr. Cohen on 25 July 2012, with complaints of back pain radiating into his left leg. Dr. Cohen ordered an MRI but continued plaintiff's release to work full time. A third MRI, obtained on 13 August 2012, showed evidence of the prior surgery at L4-L5 with recurrent/residual disc material protrusion abutting the traversing left L5 nerve root. Between September 2012 and April 2014, plaintiff was treated with pain medication, steroid injections, and medication patches. During this time, plaintiff experienced several instances of back pain that lasted for a day or more. However, plaintiff continued to work full time, sometimes as much as 70 hours a week, and continued to reject the suggestion of further surgery.

On 1 April 2014, while plaintiff was working in New York City on a job for defendant, he bent over slightly and then was unable to straighten his back. Plaintiff experienced acute pain, and testified that the severity of the pain was such that it was all he could do to walk to his hotel shower and back to bed. Plaintiff remained in bed for several days until he returned to North Carolina. Upon returning to North Carolina, plaintiff consulted with Dr. Cohen on 11 April 2014. Following this visit, Dr. Cohen placed plaintiff out of work, effective 1 April 2014. Plaintiff did not work from 1 April 2014 until the date of the hearing on this matter.

On 30 April 2014, Dr. Cohen requested authorization for plaintiff to undergo L4-L5 fusion surgery. On 5 May 2014, appellees confirmed that the surgery was authorized and that indemnity compensation would be paid from 1 April 2014. The surgery was scheduled for 19 May 2014; however, on 13 May 2014, appellees revoked their authorization and denied payment of compensation on the grounds that plaintiff had suffered a new injury on 1 April 2014, for which appellees were not liable. On 15 May 2014, plaintiff filed a motion seeking an order requiring appellees to pay for plaintiff's surgery. On 28 May 2014, former Deputy Commissioner Victoria Homick denied plaintiff's medical motion, and on 29 May 2014, former Deputy Commissioner Homick ordered that defendants be added as parties.

Appellees and defendants each filed an Industrial Commission Form 61 denying plaintiff's claim for workers' compensation medical benefits related to his surgery. Defendants contended that plaintiff's need for surgery arose from the preexisting medical condition caused by his compensable injury in July 2010, and that appellees should be responsible for plaintiff's workers' compensation benefits. Appellees asserted that plaintiff suffered a new injury on 1 April 2014, and that defendants were liable for workers' compensation benefits related to the new injury. The case was heard on 17 July 2014 before Deputy Commissioner Chrystal Redding Stanback. On 18 March 2015, Deputy Commissioner Stanback issued a

second amended opinion and award, holding that plaintiff did not suffer a compensable injury on 1 April 2014, that plaintiff's need for surgery was caused by his 13 July 2010 injury, and that appellees were solely liable for plaintiff's workers' compensation medical and disability benefits.

Appellees appealed to the Full Commission, which heard the case on 5 August 2015. On 3 September 2015, the Commission, in an opinion and award issued by Commissioner Danny L. McDonald with the concurrence of Industrial Commission Chairman Andrew T. Heath and Commissioner Charlton L. Allen, reversed Deputy Commissioner Stanback's opinion and award. The Commission found that plaintiff suffered an injury by accident as a result of a specific traumatic incident occurring on 1 April 2014; that this accident materially aggravated his back condition; and that defendants were solely liable for plaintiff's workers' compensation benefits. Defendants noted a timely appeal from the Commission's opinion and award to this Court.

II. Standard of Review

It is long established that this Court reviews the opinions and awards of the Industrial Commission in order to determine "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citation omitted). The " '[Industrial] Commission is the sole judge of the credibility of the witnesses and the [evidentiary] weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "The Full Commission may refuse to believe certain evidence and may accept or reject the testimony of any witness. Furthermore, '[t]he Commission's findings of fact are conclusive on appeal if supported by competent evidence . . . even if there is evidence which would support a finding to the contrary.' " *Freeman v. Rothrock*, 202 N.C. App. 273, 275-76, 689 S.E.2d 569, 572 (2010) (citing *Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 216, 360 S.E.2d 696, 700 (1987), and quoting *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392, 394 (1985)). We review the Commission's conclusions of law *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

III. The Full Commission's Resolution of Factual Disputes in this Case

[1] The parties are in agreement on the general factual and procedural history of this case, including the fact that on 1 April 2014, plaintiff experienced back pain after bending slightly in the course of performing his

job duties. The parties disagree sharply, however, as to the proper characterization and legal significance of this incident. The evidence offered by the parties at the hearing and relied upon in support of their appellate arguments reflects this dispute. Therefore, the legal issues raised on appeal are best understood in the context of the Commission's resolution of the evidentiary inconsistencies on this issue, in addition to its interpretation of the applicable legal principles.

Defendants assert that during the years following plaintiff's July 2010 injury, he suffered from recurring episodes of back pain, some of which required him to miss work, and that the incident on 1 April 2014 was no different in nature or degree from the earlier instances of back pain that plaintiff had experienced. Defendants' argument that they are not liable for plaintiff's workers' compensation benefits is premised upon their contention that the competent record evidence does not support a finding or conclusion that plaintiff suffered a new compensable injury by accident on 1 April 2014. In support of their position, defendants cite excerpts from plaintiff's testimony in which plaintiff minimized the significance of the back injury he experienced on 1 April 2014, and on testimony from Dr. Cohen acknowledging that plaintiff had experienced back pain prior to 1 April 2014.

Defendants also place great emphasis on testimony elicited from Dr. Cohen in response to a hypothetical question posed by defense counsel "based on [plaintiff's] testimony." Defendants asked Dr. Cohen to assume, hypothetically, that the Commission found the facts to be as defendants contended, based on plaintiff's testimony that the incident on 1 April 2014 was simply another instance of the "exact same pain" he had previously experienced. Given those facts, defendants asked Dr. Cohen to assign percentages to the relative contribution to plaintiff's need for surgery arising from plaintiff's prior injury and from the injury on 1 April 2014. In response, Dr. Cohen testified that under that hypothetical set of facts, plaintiff's 2010 injury contributed 70% to his condition in 2014, while plaintiff's 1 April 2014 incident contributed 30% to his need for surgery. However, as discussed below, the Commission did not adopt defendants' position in its findings of fact, rendering defendants' hypothetical question of little relevance to our analysis.

In contrast, the appellees' position is that plaintiff experienced an injury by accident as a result of a specific traumatic incident occurring on 1 April 2014. Appellees' argument is supported by Dr. Cohen's testimony, which was based upon his examination of plaintiff on 11 April 2014, his review of an MRI conducted shortly thereafter, and his

experience in reviewing "thousands" of MRIs. Dr. Cohen testified to the following observations:

> 1. When Dr. Cohen saw plaintiff on 11 April 2014, plaintiff presented with a "significant change" in his symptoms. Compared to plaintiff's prior physical examinations, plaintiff now had a "profound weakness" in his left leg.
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> 2. Prior to 1 April 2014, plaintiff had never needed or asked to be written out of work. Dr. Cohen had no knowledge that plaintiff had ever missed work due to back pain and, if he had, Dr. Cohen had not authorized it.
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> 3. Dr. Cohen reviewed four MRIs performed in July 2010, February 2011, August 2012, and April 2014. The first three showed the expected results of his back surgery. However, the April 2014 MRI *for the first time* showed a left foraminal and left lateral disc herniation at L4-L5. Dr. Cohen testified that "there has certainly been an injury to cause this."
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> 4. Although plaintiff's health care providers had discussed the possibility of further surgery with plaintiff several times after July 2010, it was only after the 1 April 2014 incident that plaintiff wanted the surgery. In this regard, plaintiff testified that "after that moment, I was through. I was done. I needed the surgery after that."

Dr. Cohen then testified that his opinion, to a reasonable degree of medical certainty, was that the incident on 1 April 2014 caused "further injury to the L4-5 disc, resulting in a large recurrent disc hernia on the left at L4-5, which ultimately resulted in the need for repeat surgery" and that he could "say with medical certainty that the herniated discs likely resulted from" the 1 April 2014 incident.

The Commission was thus presented with conflicting evidence as to whether, on 1 April 2014, plaintiff suffered a new compensable injury by accident resulting from a specific traumatic incident. The Commission resolved this question in favor of appellees, as evidenced by the following findings of fact:

> 22. While working at a job site for [defendants] in New York on April 1, 2014, plaintiff bent over slightly to slide a door panel[.] . . . Plaintiff testified that he could not get back up once he bent over. Plaintiff informed his supervisor of the occurrence and some co-workers helped plaintiff back to the hotel where they were staying. Plaintiff

testified that he could not work after this event but remained in his hotel for four or five days until the job was completed. Plaintiff testified that the severity of the pain was such that it was all he could do to get to his hotel shower and back to the room.

23. Upon returning to North Carolina, plaintiff contacted Dr. Cohen's office and obtained an appointment for April 11, 2014. At that appointment, plaintiff informed Dr. Cohen that he aggravated his back ten days earlier such that he could not move his back. As noted by Dr. Cohen in his clinical assessment, plaintiff "was bent over and slid a box on the ground and felt his back 'catch.' " Since that event, plaintiff had been unable to return to work. Plaintiff relayed an interest in surgery to Dr. Cohen for the first time, and Dr. Cohen ordered an updated MRI to assess surgical options. Dr. Cohen also excused plaintiff from work pending reevaluation.

24. Compared to the February 2011 MRI, the MRI of April 27, 2014 showed the development of a left L4-L5 foraminal to lateral disc protrusion effacing the left lateral recess, deflecting the traversing nerve roots, and narrowing the left foramen. Dr. Cohen noted plaintiff's pain severely affected his quality of life such that he was unable to work. Dr. Cohen further noted that plaintiff recently developed profound left lower extremity weakness and wanted to pursue surgical options. Dr. Cohen wrote plaintiff out of work pending surgery.

. . .

26. Plaintiff testified that it was his understanding he was out of work due to the pending surgery with Dr. Cohen, not because he could not work. However, Dr. Cohen's medical note of April 30, 2014 states, "presently, [plaintiff] remains disabled from gainful employment."

. . .

28. In a post-hearing deposition, [appellees] tendered Dr. Cohen as a medical expert in the field of orthopedic surgery without objection from the other parties. Dr. Cohen testified that the changes seen on plaintiff's lumbar spine MRI obtained in August 2012 were typical of what he

would expect to see in someone who had undergone a discectomy. Dr. Cohen testified that from the time he began treating plaintiff in 2012 until he presented on April 11, 2014, plaintiff maintained a diagnosis of radiculitis and post-laminectomy syndrome representing the previous microdiscectomy. However, Dr. Cohen testified that when plaintiff returned on April 11, 2014, "there had been a significant change in his symptoms" and "[h]e was in such bad shape that he wanted to entertain pursuing surgery, which was something that he in the past had wanted to avoid." Dr. Cohen testified that plaintiff related his significant symptomatic change to an event at work that aggravated his underlying back condition.

29. Dr. Cohen testified that the updated MRI obtained in April 2014 showed a large, recurrent disc herniation on the left at L4-L5, which he described as "a significant change compared to the previous studies." Dr. Cohen testified that, while there is some degree of speculation as to causation, it was his opinion, to a reasonable degree of medical certainty, that plaintiff suffered further injury to the L4-L5 lumbar spine on April 1, 2014, which resulted in his need for a repeat surgery. He based this opinion on plaintiff's profound increase in symptoms that came on suddenly as a result of the work event of April 1, 2014, along with the material change in plaintiff's lumbar spine seen on the April 2014 MRI as compared to prior studies.

30. Dr. Cohen testified that plaintiff already had an unhealthy disc from his 2010 injury and prior surgery and that medical history set plaintiff up for the subsequent injury he sustained on April 1, 2014. Dr. Cohen testified that he did not envision the work event of April 1, 2014 to have been an extremely strenuous activity, but that it didn't have to be in order to cause the disc herniation plaintiff suffered.

31. Dr. Cohen rendered an opinion, to a reasonable degree of medical certainty, and the Commission so finds, that the work event of April 1, 2014 caused injury to plaintiff's L4-L5 disc and materially aggravated his pre-existing back condition. Dr. Cohen clarified that, although plaintiff was a surgical candidate for a lumbar fusion as early as September 14, 2012, plaintiff's symptoms were still tolerable to him

> at that time and he electively deferred surgery. However, there was a clear difference in plaintiff's symptoms subsequent to April 1, 2014, such that plaintiff could no longer work and wanted to promptly pursue surgery. Dr. Cohen opined that, considering plaintiff's back condition, he would relate seventy percent (70%) of plaintiff's need for back surgery to his July 2010 injury and thirty percent (30%) to the aggravation of that original injury during the April 1, 2014 work event. Dr. Cohen further testified that plaintiff was zero percent (0%) disabled prior to April 1, 2014, as far as wage earning capacity, but plaintiff was one hundred percent (100%) disabled after April 1, 2014.
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> 32. The preponderance of the evidence in view of the entire record establishes that, on April 1, 2014, plaintiff suffered a "specific traumatic incident" . . . during a judicially cognizable time period, and that specific traumatic incident qualifies as a compensable injury by accident as defined by the North Carolina Workers' Compensation Act and applicable case law. The Commission further finds that plaintiff sustained a material aggravation of his July 2010 back condition as a result of the specific traumatic incident that arose out of and in the course of his employment with [defendants] on April 1, 2014.
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> . . .
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> 34. The preponderance of the evidence in view of the entire record establishes that plaintiff became temporarily and totally disabled from work as of April 1, 2014 as a result of his aggravation injury to the back.

As discussed above, the Commission is charged with determination of the credibility and weight to be given to conflicting testimony. In this case, the Full Commission's findings and conclusions were based largely upon Dr. Cohen's testimony rather than upon plaintiff's testimony regarding his recollection of the degree to which the incident on 1 April 2014 differed from earlier episodes.

IV. Apportionment of Liability

[2] Defendants argue first that the Commission erred by failing to apportion liability for plaintiff's workers' compensation benefits between defendants and appellees. Defendants contend that the Commission was required to apportion liability, based upon (1) Dr. Cohen's response

to defendants' hypothetical question and (2) this Court's opinion in *Newcomb v. Greensboro Pipe Co.*, 196 N.C. App. 675, 677 S.E.2d 167 (2009). We do not find either of these arguments persuasive.

In *Newcomb*, as in the present case, the plaintiff suffered successive back injuries while working for two different employers. The Commission found that the medical evidence did not establish the degree to which the plaintiff's injuries and disability arose from each accident, and held that the two employers were jointly and severally liable. On appeal, this Court held that the Commission had not abused its discretion based upon the facts of the case, and stated that:

> [H]ad the Full Commission been able to determine what percentage of plaintiff's disability stemmed from his 2003 compensable injury and what percentage stemmed from his 2006 compensable injury, then the Full Commission would have apportioned responsibility for the disability benefits accordingly. Because the Full Commission could not so determine, both employers became responsible for the full amount, resulting in joint and several liability. The Full Commission's opinion and award is supported by reason and shows the exercise of good judgment and consideration of equitable principles.

Newcomb, 196 N.C. App. at 682, 677 S.E.2d at 171. Defendants assert that this statement constitutes a definitive ruling that the Commission "is required" to apportion liability whenever it is possible to determine the respective percentages of causation. However, this Court's holding in *Newcomb* was that the Commission did not abuse its discretion by ruling that the employers were jointly and severally liable where the percentages were not apparent. *Newcomb* did not hold that the Commission would have erred as a matter of law if, in a hypothetical case with different facts, the Commission had failed to apportion liability. Moreover, such a statement would be *dicta*, given that it was not necessary for resolution of the issues presented in *Newcomb*.

Secondly, contrary to defendants' arguments, in the present case the Commission did not assign numerical or percentage values to the relative contributions of plaintiff's 2010 and 2014 injuries to plaintiff's need for surgery or his temporary total disability. The Commission noted Dr. Cohen's testimony, which was given in response to defendants' hypothetical question, that 70% of plaintiff's need for surgery was due to his 2010 injury and only 30% was caused by the incident on 1 April 2014. However, the Commission did not make a finding adopting this testimony as a

fact. "This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence[.]" *Lane v. American Nat'l Can Co.*, 181 N.C. App. 527, 531, 640 S.E.2d 732, 735 (2007) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109 (1981)), *disc. review denied*, 362 N.C. 236, 659 S.E.2d 735 (2008). " '[R]ecitations of the testimony of each witness *do not* constitute findings of *fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented.' " *Winders v. Edgecombe Cty. Home Health Care*, 187 N.C. App. 668, 673, 653 S.E.2d 575, 579 (2007) (emphasis in original) (quoting *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195, n.1 (1984)). Thus, the Commission's statement that Dr. Cohen had "opined" that he could relate 70% of plaintiff's need for back surgery to his 2010 injury does not constitute a finding by the Commission that it was adopting these percentages as fact.

Moreover, Dr. Cohen's testimony was elicited in response to a question asking Dr. Cohen to assume that the Commission would find the facts to be in accord with plaintiff's testimony. However, the Commission did not find, as defendants contended, that the incident on 1 April 2014 was essentially identical to many prior instances of back pain experienced by plaintiff. Instead, the Commission adopted Dr. Cohen's opinion, which was offered to a reasonable degree of medical certainty, that plaintiff's need for surgery in 2014 arose from a specific injury on 1 April 2014. Defendants never asked Dr. Cohen what percentages he would assign based on Dr. Cohen's own testimony and medical records. Nor did defendants ask for Dr. Cohen's opinion based on the assumption that the Commission would resolve the factual inconsistencies in favor of appellees. Because Dr. Cohen's testimony was premised on an assumption that did not come to pass -- that the Commission would resolve the parties' factual dispute in favor of defendants -- the percentages to which Dr. Cohen testified cannot be applied to the facts as found by the Commission.

We conclude that *Newcomb* did not hold that, as a matter of law, the Commission is required to apportion liability in every case in which the percentage of contribution of injuries that a claimant suffers while working for two different employers may be determined. Further, in this case the Commission did not make a finding on this issue, but simply noted Dr. Cohen's testimony in response to defendants' hypothetical question. Finally, Dr. Cohen's testimony was predicated on the hypothetical assumption that the Commission would find that the 1 April 2014 incident was no different from plaintiff's earlier episodes of back pain.

Given that the Commission found to the contrary, Dr. Cohen's testimony would not support a finding as to the percentages of causation based on plaintiff's having suffered a new injury on 1 April 2014.

V. The Commission's Analysis of Causation and Material Aggravation

[3] Defendants argue next that the Commission "applied erroneous legal standards regarding material aggravation and causation." Specifically, defendants contend that (1) the Commission erred by citing *Moore v. Federal Express*, 162 N.C. App. 292, 590 S.E.2d 461 (2004), in support of its conclusion that the incident on 1 April 2014 materially aggravated plaintiff's prior back injury; (2) the Commission's conclusion that plaintiff's condition was causally related to a new injury was "based on legally incompetent medical testimony"; and (3) the Commission erred in its application of the *Parsons* presumption to the facts of this case. We conclude that defendants' arguments lack merit.

A. Commission's Conclusion on Material Aggravation of Plaintiff's Condition

In Conclusion of Law No. 6, the Commission stated in relevant part that:

> The Commission concludes that plaintiff suffered a specific traumatic incident on April 1, 2014 as a result of the work assigned by [defendants], which aggravated his pre-existing back condition and is, therefore, compensable. N.C. Gen. Stat. § 97-2(6); *Moore v. Fed Express*, 162 N.C. App. at 297, 590 S.E.2d at 465; *Click* [*v. Pilot Freight Carriers*,] 300 N.C. [164,] 167-68, 265 S.E.2d [389,] 391 [(1980)].

Defendants argue that the Commission erred by citing *Moore* in support of this conclusion of law, on the grounds that *Moore* "does not apply to pre-existing, work-related conditions" and that the analysis in *Moore* "assumes that the underlying condition is not related to a compensable event[.]" *Moore*, however, addressed the material aggravation of a prior *work-related* condition. *Moore* does not address the distinction posited by defendants, and did not state that its holding applied only to, or was based on the assumption of, a pre-existing non-work-related condition. Defendants' argument on this issue is without merit.

B. Commission's Conclusions Regarding the 1 April 2014 Incident

Defendants argue next that the Commission "improperly concluded that Plaintiff's condition arose from a new specific traumatic incident or accident on 1 April 2014[.]" We disagree.

Defendants contend that the Commission "erred as a matter of law by using only findings of onset of pain to conclude that a specific traumatic incident occurred." However, as set out above, the Commission's conclusion that plaintiff suffered a specific traumatic incident on 1 April 2014 was based on more than the fact that the incident caused plaintiff to experience pain. The Commission found that "Dr. Cohen rendered an opinion, to a reasonable degree of medical certainty, and the Commission so finds, that the work event of April 1, 2014 caused injury to plaintiff's L4-L5 disc and materially aggravated his pre-existing back condition." Thus, the Commission's conclusion was based on expert medical testimony, and not merely the temporal connection between the incident on 1 April 2014 and the "onset of pain."

Defendants also argue that the Commission improperly relied upon Dr. Cohen's testimony, on the grounds that it was based on speculation. Defendants correctly note that "[a]lthough medical certainty is not required, an expert's 'speculation' is insufficient to establish causation." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). We conclude, however, that defendants have inaccurately characterized Dr. Cohen's testimony and his expert opinion as mere speculation.

Defendants' argument is based primarily upon selected excerpts from Dr. Cohen's testimony. Defendants contend that Dr. Cohen "actually agree[d] that his testimony was speculative[.]" Our review of Dr. Cohen's deposition, however, indicates that Dr. Cohen testified that, notwithstanding the degree of speculation inherent in any medical diagnosis, he believed to a reasonable degree of medical certainty that plaintiff's condition arose from a new injury on 1 April 2014 as opposed to simply the gradual progression of his back condition arising from his July 2010 injury. The testimony cited by defendants was elicited during defendants' cross-examination of Dr. Cohen, during which defendants pressed Dr. Cohen to concede that it was impossible to state with absolute certainty whether plaintiff's condition arose from the incident on 1 April 2014. As demonstrated in the following excerpt, Dr. Cohen acknowledged that certainty was impossible, but testified that, based on his experience with many patients and having reviewed "thousands" of MRIs, he had reached the conclusion that plaintiff's condition was not simply the result of a gradual deterioration:

> DEFENDANTS' COUNSEL: Now, there was no MRI of the lumbar spine taken between August of 2012 and April of 2014.
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> DR. COHEN: Correct.

DEFENDANTS' COUNSEL: And the MRI doesn't tell us when the disc further herniated. Correct?

DR. COHEN: Correct.

. . .

DEFENDANTS' COUNSEL: I mean, it doesn't tell us whether there was some acute event or whether it was all progression.

DR. COHEN: Correct.

. . .

DEFENDANTS' COUNSEL: But it's still your testimony that -- well, let me put it this way: Is it your opinion that the disc was completely stable, in the exact same condition from August of 2012 until April 1st of 2014, when it burst out due to this incident, or that there was probably progression in the meantime?

DR. COHEN: Well, I don't know. I'm speculating here, but just from seeing thousands and thousands of patients and MRI scans, . . . I would not expect that degree of herniation that we were seeing on that 2014 MRI scan to be asymptomatic. But again, it possibly could be, but I would not expect it[.] . . . It appears to me that it's more than just a slow progression, but, again, you are correct in saying that I can't say that with certainty, but just my previous experience tells me that there was some acute change in the disc.

On redirect examination, Dr. Cohen reiterated his opinion, to a reasonable degree of medical certainty, that plaintiff's need for surgery arose from a specific incident on 1 April 2014:

APPELLEES' COUNSEL: Now, certainly I believe -- please correct me, but I heard you saying that there's -- on cross-examination, there is a degree of speculation involved in this. Is that correct?

DR. COHEN: Yes.

APPELLEES' COUNSEL: That you certainly aren't with [plaintiff] or any of your patients on a day-to-day basis. Is that correct?

DR. COHEN: Yes.

APPELLEES' COUNSEL: You have to go by what they're telling you on these medical records.

DR. COHEN: Correct.

APPELLEES' COUNSEL: And in this case, we can also go by what [plaintiff] is telling the Court at [the] hearing . . . (Reading) "I couldn't work, couldn't work. It was all I could do to get to the shower and back." Based on this testimony, based on your medical records, based on your recollection, did the April 1, 2014, incident make him surgical (sic)?

DR. COHEN: Yes.

APPELLEES' COUNSEL: Did it materially aggravate his condition?

DR. COHEN: Yes.

APPELLEES' COUNSEL: Did it materially increase his pain complaints?

DR. COHEN: Yes.

APPELLEES' COUNSEL: Did it decrease his range of motion?

DR. COHEN: Yes.

APPELLEES' COUNSEL: Did the MRI taken after that April 1, 2014, [incident] have new objective findings?

DR. COHEN: Yes.

APPELLEES' COUNSEL: And were those the nerve impingement you described earlier?

DR. COHEN: The enlargement of the disc, herniation, and the nerve root impingement.

APPELLEES' COUNSEL: These are all your opinions to a reasonable degree of medical certainty?

DR. COHEN: Yes.

We conclude that although Dr. Cohen candidly acknowledged that he could not offer a medical opinion to a degree of absolute certainty

that entirely removed all speculation, Dr. Cohen's opinion, to a *reasonable* degree of medical certainty, was that plaintiff had experienced a new injury on 1 April 2014 that materially aggravated plaintiff's prior back condition. In this regard, we note the Commission's Finding of Fact No. 29, which states that:

> 29. Dr. Cohen testified that the updated MRI obtained in April 2014 showed a large, recurrent disc herniation on the left at L4-L5, which he described as "a significant change compared to the previous studies." Dr. Cohen testified that, while there is some degree of speculation as to causation, it was his opinion, to a reasonable degree of medical certainty, that plaintiff suffered further injury to the L4-L5 lumbar spine on April 1, 2014, which resulted in his need for a repeat surgery. He based this opinion on plaintiff's profound increase in symptoms that came on suddenly as a result of the work event of April 1, 2014, along with the material change in plaintiff's lumbar spine seen on the April 2014 MRI as compared to prior studies.

Based upon our review of the entire transcript of Dr. Cohen's deposition, we conclude that Dr. Cohen's opinion was not based on mere speculation, and that the Commission did not err by relying in part upon Dr. Cohen's testimony for its findings and conclusions.

C. The *Parsons* Presumption

[4] Finally, defendants argue that the Commission erred by stating in Conclusion of Law No. 7 that because plaintiff "sustained a new work-related injury by accident as the result of a specific traumatic incident on April 2, 2014, arising out of his employment with [defendant], application of the *Parsons* presumption is not applicable in this case." We conclude that even assuming that this conclusion was erroneous, it does not require reversal, given that the Commission also stated in the alternative the results of its application of the *Parsons* presumption.

In *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997), this Court held that after a workers' compensation claimant meets the initial burden of proving the compensability of an injury, there arises a presumption that further medical treatment is directly related to the compensable injury. " 'The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury.' " *Miller v. Mission Hosp., Inc.*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014) (quoting *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005)). Thus, the issue to

which *Parsons* is generally applied is the compensability of a claimant's injury. In this case, the parties agree that plaintiff is entitled to workers' compensation benefits, and disagree only as to how the liability for these benefits should be determined.

In Conclusion of Law No. 7, the Commission also stated that:

> Assuming *arguendo* that *Parsons* is applicable, the Commission concludes that [appellees] successfully rebutted the *Parsons* presumption based upon the expert medical opinion of Dr. Cohen, and that plaintiff failed to satisfy his burden of proof once it shifted back to him.

Defendants concede that because the Commission applied the *Parsons* presumption despite its conclusion that *Parsons* was not applicable to this case, "a reversal on this issue may not change the outcome for [defendants]." Defendants nonetheless ask this Court to address this issue "to provide clarity for future matters." However, "[a]s this Court has previously pointed out, it is not a proper function of courts 'to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter.' " *Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, 382 (1994) (quoting *Adams v. North Carolina Department of Natural and Economic Resources*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978)). Because the Commission stated its ruling applying the *Parsons* presumption, we are not required to determine the merits of its conclusion that *Parsons* did not apply on the facts of this case, and we decline to entertain it as a hypothetical question.

For the reasons discussed above, we conclude that the Industrial Commission did not err and that its Opinion and Award should be

AFFIRMED.

Judge STEPHENS and Judge McCULLOUGH concur.

IN RE E.M.

[249 N.C. App. 44 (2016)]

IN THE MATTER OF E.M.

No. COA16-30

Filed 16 August 2016

Child Abuse, Dependency, and Neglect—permanency planning review—sufficiency of findings of fact

The trial court erred in part in a permanency planning review (PPR) by entering its findings of fact. The court improperly required respondent to pay for supervised visits without making necessary findings, waived further review hearings without making all necessary findings of fact, awarded legal custody to a non-parent without evidence to support its findings that the potential custodians understood the legal significance of the relationship, and awarded custody to a non-parent without stating that it had applied the proper standard of proof. These portions of permanency plan order were vacated.

Appeal by Respondent from order entered 8 October 2015 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 25 July 2016.

Jane Thompson for Petitioner Rowan County Department of Social Services.

Miller & Audino, LLP, by Jeffrey L. Miller, for Respondent-mother.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for Guardian ad Litem.

STEPHENS, Judge.

Respondent, the mother of E.M. ("Eddie"),[1] appeals from a permanency planning review order (1) changing the permanent plan for her son from a concurrent plan of reunification, or custody or guardianship with a relative, to a sole plan of custody or guardianship with a relative and (2) awarding legal custody of Eddie to a paternal cousin and his wife. Because we agree with some of Respondent's arguments and conclude that the order appealed from is flawed in

1. We use pseudonyms to refer to the minors discussed in this opinion in order to protect their privacy and for ease of reading. *See* N.C.R. App. P. 3.1(b).

certain respects, we vacate the permanency planning review order in part and remand for further proceedings.

Factual and Procedural History

On 7 April 2014, the Rowan County Department of Social Services ("DSS") took Eddie and his half-sister, A.M. ("Abby"), into nonsecure custody and filed a petition alleging that Eddie was a dependent and neglected juvenile and that Abby was an abused, dependent, and neglected juvenile.[2] The petition alleged that Eddie's father sexually molested Abby in the home he shared with Respondent and the two children and that Respondent knew of the sexual abuse, but failed to report it to law enforcement or DSS.

At the adjudication hearing on 31 July 2014, the parties entered several stipulations, including that the district court could consider evidence of statements made by Abby regarding the sexual abuse and that the court could adjudicate Abby as an abused juvenile and Eddie as a neglected juvenile. Respondent's stipulations included the following: In mid-February 2014 when Respondent returned from the hospital after giving birth to Eddie, Abby told Respondent that Eddie's father had come into her bedroom at night, made her take off her clothes, have her put on a robe but leave it untied, and "ma[d]e her hump a doll." Abby reported that on another occasion Eddie's father pulled her pants down and "tried sticking [his penis] in [her]." Respondent did not believe Abby's statements and did not report her daughter's abuse at that time. Abby's abuse at the hands of Eddie's father was subsequently revealed in statements Abby gave to a social worker on 3 March 2014. Respondent also stipulated that although she had previously entered into a safety assessment with DSS that Eddie's father not be around her children, Eddie's father was in the home with Abby throughout the early months of 2014 and up until at least 1 April 2014.

Respondent subsequently separated from Eddie's father and, on 29 April 2014, moved into a two-bedroom home which she shared with Eddie's paternal uncle ("Mike"). Respondent denied having a romantic relationship with Mike despite reports from several people that they were involved in such a relationship. On 26 July 2014, police were dispatched to the home to investigate a purported domestic dispute between Mike and Respondent, but no report was filed. However, Respondent's

2. Eddie and Abby are Respondent's children by different fathers. Eddie's father has not appealed, and Abby is not a subject of this appeal. In addition, Respondent has three other children, also not subjects of this appeal. Their father, Respondent's estranged husband, was awarded custody of his children on 31 March 2014.

estranged husband reported to a DSS social worker that, during a visit his three children made to Respondent's home, Mike became upset with Respondent and punched his hand through a glass window, requiring stitches. Respondent told the social worker that she and Mike do not drink alcoholic beverages in the home, but when the social worker and a co-worker visited the home on 9 July 2014, Mike was intoxicated. Although Respondent attempted to intervene, Mike stated he was getting another drink and "as long as he is drunk at home his drinking isn't a problem." Mike did acknowledge that he was on probation for driving while impaired.

On 27 August 2014, the court entered a written order adjudicating Abby as an abused and neglected juvenile and adjudicating Eddie as a neglected juvenile. The court awarded custody of Abby to her father and custody of Eddie to DSS, who placed him in the home of his paternal cousins. The order included the stipulations discussed *supra*, as well as findings of fact that Respondent, *inter alia*, (1) began working through Select Staffing on 29 April 2014 at a boutique earning $7.75 per hour, working nine to forty hours per week; and (2) completed the Women's Empowerment Program for victims of domestic violence at Genesis on 21 July 2014 and attended two individual mental health counseling sessions on 30 July 2014; but (3) "typically [appeared] disheveled" during visits with the social worker and Eddie. The order directed Respondent to maintain safe, sanitary, and stable housing; maintain employment to support herself and Eddie and to provide proof of income; complete parenting classes and show skills learned; submit to random drug screens; and re-engage in mental health treatment if her depression and/or anxiety worsened. The court postponed establishment of a permanent plan to the first permanency planning review ("PPR") hearing.

On 13 November 2014, the court held a PPR hearing and, on 19 December 2014, filed an order establishing a permanent plan of reunification of Eddie with Respondent. The court's findings of fact indicated that, at the time of the hearing, Eddie was living with his paternal cousins, in whose care he was doing extremely well. At the time of the PPR hearing, Respondent had completed all of her treatment recommendations through Genesis, shown initiative by continuing to participate in mental health treatment, and attempted to enroll in various parenting classes. She continued to work through Select Staffing and started a new job on 26 August 2014 earning $9.00 per hour. However, Respondent could not afford to pay her bills based solely on her income. Her highest bi-weekly paycheck was $259.60, representing 40 hours of work plus a half hour of overtime. Pay records from Select Staffing indicated that

Respondent earned approximately $600 per month in income, which the court noted was less than the total required for her to meet all of her household expenses. In addition, Respondent reported continuing to drive her car without insurance since 15 August 2014 because she was unable to pay the premium.

Social workers visited Respondent's home on 14 August, 27 August, and 4 September 2014. Although the social workers advised Respondent and Mike that they could not recommend placement of Eddie with Respondent as long as Mike resided in the home, Mike continued to live there. Upon being informed of this recommendation, Mike became very aggressive and cursed the social workers. He also spoke very aggressively toward Respondent, "telling her to shut up and let him talk." Although Respondent "verbalized her realization that her living arrangements will continue to present a hostile environment" for herself and Eddie, she refused to live separately from Mike. The court found as fact that Respondent's continued willingness to accept disrespectful behavior from Mike also indicated her inability to effectively implement the relationship skills she had learned at Genesis. Respondent had not attempted to obtain more affordable housing for herself and Eddie, but had disposed of unrelated pending criminal charges, completed negative drug screens, and visited with Eddie weekly for a minimum of two hours each visit.

On 12 February 2015, the district court held another PPR hearing and filed an order on 17 March 2015 changing the permanent plan for Eddie to a concurrent plan of reunification and custody or guardianship with a relative or court-approved caretaker. The court's findings of fact indicated that Eddie was continuing to do well in his foster home. Respondent still lived in the same residence and worked through Select Staffing, earning between $131.89 and $487.77 per paycheck. Although Mike reportedly moved out of the residence on 10 December 2014 to an undisclosed address, Respondent continued to care for his three dogs and their two cats. Mike also continued to have weekly visitations with his own child in Respondent's home. Respondent spent a lot of time with Mike and his family during the holidays, even though she had begun dating another man in September 2014. She brought Mike, who was intoxicated, to a visit with Eddie at his foster home on 12 January 2015. Respondent continued to submit negative drug screens, and she completed all of her treatment recommendations.

On 27 August 2015, the court conducted another custody and PPR hearing, and, on 8 October 2015, filed the order under review ("the PPR order"). The findings in this order indicated that Eddie continued

to do well in the home of his paternal cousins. Respondent obtained employment with Pactiv on 14 July 2015 and produced a pay stub stating she earned $998.53 for the period from 2 August to 15 August 2015. Respondent was dating a fellow employee at Pactiv. Although Respondent's new boyfriend told social workers that he did not smoke or drink, a check of criminal records disclosed that he was convicted in 2009 of driving while impaired and driving after consuming alcohol. Respondent also continued to maintain a relationship with Mike. Further findings of fact will be discussed later in this opinion as pertinent to the issues raised by Respondent in her appeal. The court granted legal custody of Eddie to his paternal cousins, granted weekly supervised visitation to Respondent at her expense, and ordered that no further review hearings were necessary. From the PPR order, Respondent filed a written notice of appeal on 30 October 2015.

Discussion

On appeal, Respondent argues that the district court erred in: (1) making numerous findings of fact in the PPR order not supported by clear, cogent, and competent evidence; (2) failing to make the findings of fact required by the provisions of various statutes; (3) requiring her to pay the costs of services for her supervised visits without making the necessary findings of fact; and (4) failing to apply the required standard of proof when finding that Respondent acted inconsistently with her constitutional rights as a parent. We affirm in part, and vacate and remand in part.

Standard of Review

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

I. Evidentiary support for findings of fact

Respondent first argues that many of the district court's findings of fact are not supported by clear, cogent, and competent evidence

presented at the custody and PPR hearing. We dismiss Respondent's argument regarding a majority of the challenged factual findings as not preserved for our review, and we conclude that any error in the remaining findings of fact challenged by Respondent was not prejudicial to her.

Respondent contends that a majority of the findings of fact are based upon court reports and documents that were never offered or received into evidence. However, the record indicates that Respondent failed to preserve this issue for appellate review by presenting to the district court "a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." *See* N.C.R. App. P. 10(a). The hearing transcript shows that the challenged reports and documents were referred to several times, but that Respondent made no objection or motion to strike or exclude the evidence. Further, even if Respondent had preserved this issue for appellate review, she could not show error because a court holding a PPR hearing is free to consider written reports or other documentary evidence without a formal proffer or admission of the documents into evidence as exhibits.[3] *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 239 (2015).

Here, as Respondent acknowledges, the majority of the findings of fact she challenges are based upon court reports and other documentary exhibits. We hold the district court properly considered the reports and attachments and that they, supplemented by testimony of witnesses, support challenged findings of fact 2, 8-11, 12-17, 19-21, 24, 26-28, 34, 43-44, and 48.

Respondent also challenges portions of finding of fact 49, in which the district court found that Respondent appeared to be active on several internet "adult dating sites." Respondent argues this matter was not relevant to her ability to parent her child. We agree, but note that the inclusion of an erroneous finding of fact is not reversible error where the court's other factual findings support its determination. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (holding that "[w]hen . . . ample other findings of fact support an adjudication of

3. In the preamble to its findings of fact, the district court stated that it considered the sworn testimony of a named social worker, the foster mother, Respondent, and the social worker's written court report dated 15 July 2015 and supplemented on 27 August 2015, "copies of which are attached hereto, the factual statements in the reports are hereby adopted and incorporated, except as modified by reference herein . . . ." The reports were omitted from the record on appeal, but have been attached as appendices to the joint brief filed by DSS and the Guardian *ad Litem*. On our own motion pursuant to N.C.R. App. P. 9(b)(5)(b), we add these reports to the record on appeal.

neglect, erroneous findings unnecessary to the determination do not constitute reversible error") (citation omitted). For the same reason, Respondent cannot show reversible error in finding of fact 52—that DSS had contended reunification was not in Eddie's best interest—which she characterizes as a "mere recitation of a contention or statement of DSS." Respondent does not explain how this recitation, which she does not contend is inaccurate, was in any way necessary to the court's determination given the other factual findings in support of the court's permanent plan, as discussed *infra*.

II. Compliance with statutory provisions

Respondent argues that the PPR order failed to comply with the requirements imposed by several of our State's General Statutes. We address each argument individually below.

A. Compliance with section 7B-906.1(d)(3)

Respondent contends that the district court erred in ceasing reunification efforts because its findings of fact failed to comply with the provisions of section 7B-906.2(b), which became effective 1 October 2015 and "applies to actions filed or pending on or after that date." *See* 2015 N.C. Sess. Laws c. 135, §§ 14, 18. This subsection provides that reunification shall be the primary or secondary permanent plan unless the court makes findings under N.C. Gen. Stat. § 7B-901(c)—which the district court here did not do—or "makes written findings that reunification efforts clearly would be *unsuccessful or would be inconsistent with the juvenile's health or safety*." N.C. Gen. Stat. § 7B-906.2(b) (2015). Prior to 1 October 2015, the provisions of section 7B-906.1(d)(3) applied to PPR orders and required a factual finding that "efforts to reunite the juvenile . . . clearly would be *futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time*." N.C. Gen. Stat. § 7B-906.1(d)(3) (2013).

The PPR order here uses the language from section 7B-906.1(d)(3), but Respondent asserts that the amended statute applies because the PPR order was not filed until 8 October 2015. Alternatively, Respondent argues that even if section7B-906.1(d)(3) applies to the PPR order, the district court's findings of fact do not establish clear futility or an unsafe environment. We conclude that section 7B-906.1(d)(3) applies in this matter and further that the PPR order complies with the requirements of that statute.

We first note that, although the written PPR order was signed and filed on 8 October 2015, after the effective date of section 7B-906.2, the

PPR hearing was conducted and concluded on 27 August 2015, and that the court's ruling—that reunification efforts would be ceased and Eddie's permanent plan would be changed to custody with his paternal cousins—was announced in open court on that date. The question, then, is whether the "action" was still "pending" after the hearing concluded. "Pending" is defined as "[r]emaining undecided [or] awaiting decision[,]" *see Pending*, Black's Law Dictionary (9th ed. 2009), and the district court certainly could, upon reflection, have elected to alter some aspect of the ruling it announced in open court when reducing its ruling to writing in the PPR order. However, the PPR order did not vary in any way from the ruling announced in open court.

Critically, both subsection 7B-906.1(d) and subsection 7B-906.2(b) provide guidance for the district court's action *at a PPR* "hearing[.]" See N.C. Gen. Stat. § 7B-906.1(d) ("At each hearing . . . ."); s*ee also* N.C. Gen. Stat. § 7B-906.2(b) ("At any permanency planning hearing . . . ."). Here, *at the time of the PPR hearing*, the criteria the court was directed to consider were those enumerated in subsection 7B-906.1(d). Respondent's interpretation of the effective date of section 7B-906.2(b) would require us to hold that, in deciding a child's permanent plan, the district court should have considered criteria listed in a statute which was not in effect at the time of the proceeding at which the court heard evidence regarding the permanent plan. Such a holding would be nonsensical. In matters of statutory construction, we are guided by the directive to "effectuate legislative intent . . . while avoiding absurd or illogical interpretations . . . ." *Fort v. Cty. of Cumberland*, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355 (2012) (citations and internal quotation marks omitted), *disc. review denied*, 366 N.C. 401, 735 S.E.2d 180 (2012).

In turn, the "finding" of futility "is in the nature of a conclusion of law that must be supported by adequate findings of fact." *In re J.H.*, __ N.C. App. at __, 780 S.E.2d at 243 (citation and internal quotation marks omitted). The district court's conclusion of law 4 states that continuation of a plan of reunification with Respondent "would be futile and is inconsistent with the juvenile's need for a safe, stable home within a reasonable period of time." This conclusion of law is supported by the court's findings of fact that: (1) Respondent stipulated that she was aware of the sexual abuse of another of her children by Eddie's father but failed to report it to law enforcement; (2) although Respondent had been participating in a parenting program since March 2015, the parent-educator who worked with her wrote a letter on 10 August 2015 expressing concern about Respondent's ability to protect her child against abuse; (3) the same parent-educator noted that when she and Respondent

discussed the topic of child abuse prevention on 6 August 2015, just days before the PPR hearing, Respondent "slumped down in her chair and appeared agitated"; (4) Respondent told the parent-educator that if she suspected abuse of a child she would "just leave" and stated emphatically that she would not call law enforcement or DSS "because nothing would be done about it"; (5) Respondent knew that placement of Eddie in her home would not be recommended if there were still concerns about her living, parenting, and financial situation and, at the February 2015 review hearing, Respondent was ordered to explore affordable housing options separate from the man with whom she was living at the time, attend visitation with Eddie, maintain employment, submit to random drug screens, and demonstrate skills learned from parenting class, but at the time of the hearing in August 2015, Respondent had moved in with another man upon whom she is dependent for housing and from whom she receives financial support; and (6) Respondent was often observed using her cell phone to text or make calls and watching television instead of interacting with Eddie during visits. In addition, the court found as fact that (7) Eddie often looked to Respondent for comfort during visits but Respondent seldom gave her son comfort; (8) Eddie attempted to talk to Respondent but she did not listen to her son; and (9) Respondent did not follow the parent-educator's recommendations to bring toys and prepare activities for visits with Eddie, to greet Eddie at the beginning of visits, and to end visits with a hug or kiss. These findings of fact support the conclusion of law that continuation of a plan of reunification with Respondent "would be futile and is inconsistent with the juvenile's need for a safe, stable home within a reasonable period of time."

B. Compliance with section 7B-906.1(j)

Respondent next contends that the district court erred by granting custody to a non-parent without verifying that the person receiving custody understood the legal significance of the placement and will have adequate resources to care appropriately for the juvenile as required by N.C. Gen. Stat. § 7B-906.1(j). Specifically, while Respondent acknowledges that the court did find that the paternal cousins who received custody of Eddie "understand the legal significance of custody and have sufficient resources to care appropriately for the juvenile," this finding is not supported by evidence presented at the hearing. We agree in part and disagree in part.

Although a district court is not required to make specific findings of fact, "the statute does require the . . . court to make a determination that the guardian has adequate resources and some evidence of

the guardian's resources is necessary as a practical matter, since the . . . court cannot make any determination of adequacy without evidence . . . ." *In re J.H.*, __ N.C. App. at __, 780 S.E.2d at 240 (citation and internal quotation marks omitted). For example, in *In re P.A.*, we found the utter lack of actual evidence regarding the guardian's resources insufficient to support the district court's determination:

> [The guardian's] unsworn affirmative answer to the . . . court's inquiry as to whether she had the financial and emotional ability to support this child and provide for its need alone is not sufficient evidence, as this is [the guardian's] own opinion of her abilities. No doubt, had the . . . court asked [the] respondent the same question, she also would have said yes, but her answer alone would not have been sufficient evidence of her actual resources or abilities to care for [the child] either. The . . . court has the responsibility to make an independent determination, based upon facts in the particular case, that the resources available to the potential guardian are in fact adequate[]. In this case, there is no evidence at all of what [the guardian] considered to be adequate resources or what her resources were, other than the fact that she had been providing a residence for [the child]. And the evidence indicated that, even in providing a residence, [the guardian] had moved several times and had lived with friends or roommates. The . . . court even seemed to recognize that [the guardian] may at some point lack resources to care for [the child] on her own, as indicated by the question: And do you have the willingness to reach out when your resources are running [out], so that you could make sure that they have whatever is in their best interest?

In re P.A., __ N.C. App. __, __, 772 S.E.2d 240, 248 (2015) (citation and internal quotation marks omitted).

Likewise, in *In re J.H.*, we found insufficient the district court's finding of fact

> that the grandparents [with whom the child had been in placement for 10 months] had met "[a]ll of his well-being needs[,]" and [a] DSS report stated that they had been "meeting [the child's] medical needs as well, making sure that he has his yearly well-checkups." The GAL's . . . report

> stated that [the child] had "no current financial or material needs[.]"

__ N.C. App. at __, 780 S.E.2d at 240. In both cases, evidence of the guardian's resources was conclusory, indirect, and inferential.

In contrast, here, direct, specific evidence supports the court's finding that the paternal cousins have adequate resources to care appropriately for Eddie. Competent evidence supports the findings of fact that (1) the paternal cousins have their own home, a double-wide mobile home with a yard, where Eddie has been residing for the past sixteen months; (2) Eddie has his own bedroom and play area in the home and a playset and outside toys in the yard; and (3) all of Eddie's medical, dental, vision, and developmental needs are being met such that "Eddie lacks for nothing, as it seems as if he has every riding, educational and interactive toy imaginable." There was detailed evidence regarding Eddie's life with the paternal cousins, including the husband's employment with three employers, namely as a detention officer for the Rowan County Sheriff's Office, as a military policeman on inactive reserve in the National Guard, and as a forklift operator for another entity. His wife cares for Eddie during the week, and, when she works at a retail store on weekends, her mother or mother-in-law cares for Eddie. The paternal cousins have taken Eddie to Disney World in Florida and camping at Stone Mountain in Georgia, and had a future family trip planned to Myrtle Beach. The paternal cousins also gave Eddie a party on his first birthday. This evidence is sufficient to support the district court's determination that the paternal cousins have adequate resources to care for Eddie.

However, no evidence in the record supports the court's finding that either of the custodians understand the legal significance of the placement. As we noted in *J.H.*, a "court cannot make a determination that a potential guardian understands the legal significance of the guardianship unless the . . . court receives evidence to that effect." *Id.* at __, 780 S.E.2d at 240 (citation omitted). Evidence sufficient to support a factual finding that a potential guardian understands the legal significance of guardianship can include, *inter alia*, testimony from the potential guardian of a desire to take guardianship of the child, the signing of a guardianship agreement acknowledging an understanding of the legal relationship, and testimony from a social worker that the potential guardian was willing to assume legal guardianship. *See In re L.M.*, __ N.C. App. __, __, 767 S.E.2d 430, 433 (2014) (affirming a guardianship order as to one guardian in light of his testimony and that of a social worker). Further, this requirement of sufficient evidence applies to *all* potential guardians. *Id.* For example, in *In re L.M.*, we concluded that the evidence did not support a finding that the other

potential guardian in that matter understood the legal significance of guardianship where she did not testify, sign a guardianship agreement, or otherwise demonstrate that she had accepted responsibility for the child. *Id.*

Here, the husband in the custodial couple did not testify, and there is no evidence to indicate that he understood the legal significance of taking custody of Eddie. Further, although his wife testified at the hearing, she never testified regarding her understanding of the legal relationship, and the court never examined her to determine whether she understands the legal significance of the relationship. The report submitted by DSS contains no statement that either of the custodians understood the legal significance of guardianship. Accordingly, we must vacate the award of legal custody and remand for further proceedings consistent with this opinion.

C. Compliance with section 7B-906.1(n)

Respondent next contends that the district court erred by releasing the parties and waiving further review hearings without making the findings of fact mandated by N.C. Gen. Stat. § 7B-906.1(n). This statute provides that

> the court may waive the holding of hearings required by this section, may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every six months if the court finds by clear, cogent, and convincing evidence each of the following:
>
> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n). Respondent argues the PPR order fails to state the standard of proof it applied in its order or to include findings on each of the factors required by this subsection. We agree.

Although the best practice is for a court to affirmatively state the standard of proof that it applied in making factual determinations, the failure to do so is not prejudicial error if the "record when viewed in its entirety clearly reveals that the court applied the proper evidentiary standard" or where the appellant does not challenge those factual findings as lacking evidentiary support. *In re M.D.*, 200 N.C. App. 35, 39, 682 S.E.2d 780, 783 (2009). Further, the failure to state the burden of proof in the written order is not reversible error if the court states the appropriate standard of proof in open court. *Id.* In addition, the failure to make "written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B-906.1(n) . . . constitutes reversible error." *In re P.A.*, __ N.C. App. at __, 772 S.E.2d at 249.

Here, the district court failed to state the standard of proof it applied in making the factual determinations required under this subsection in the PPR order or in open court, and we cannot say that the "record when viewed in its entirety clearly reveals that the court applied the proper evidentiary standard . . . ." *In re M.D.*, 200 N.C. App. at 39, 682 S.E.2d at 783. Further, while the court found as fact that "[f]urther review hearings are not necessary, as the juvenile has resided with [his paternal cousins] for over one year, and no party is requesting review[,]" the PPR order does not include factual findings on the remaining enumerated criteria. For these reasons, the portion of the order waiving future review hearings must be vacated. *See id.*; *see also In re P.A.*, __ N.C. App. at __, 772 S.E.2d at 249.

D. Compliance with section 7B-906.1(e)(2)

Respondent further contends that the court failed to comply with section 7B-906.1(e)(2) by not establishing rights and responsibilities that remain with Respondent, other than to establish visitation rights. She argues that since the General Assembly provided for visitation privileges in a separate statute—N.C. Gen. Stat. § 7B-905.1—it must have intended for the district court to establish *other* rights and responsibilities in its order.

We do not read the court's order so narrowly. The order provides that the paternal cousins shall "have the care, custody, and control of the juvenile" and "have the authority to consent to any necessary remedial, psychological, medical or surgical treatment for the juvenile." The order further specifies the actions required for Respondent to regain custody

in the future. With regard to visitation, the order specifies that if she wants visitation in addition to weekly visitation supervised by the custodians, she must pay for it. We conclude the order adequately established the rights and responsibilities of the parties.

III. Order to pay costs of supervised visits

Respondent next argues the court erred by requiring her to pay the costs of services for her supervised visits without making any findings of fact regarding the cost and her ability to pay it. We agree. "Without [finding whether a parent is able to pay for supervised visitation once ordered], our appellate courts are unable to determine if the . . . court abused its discretion by requiring as a condition of visitation that visits with the children be at [a] respondent['s] expense." *In re J.C.*, 368 N.C. 89, 89, 772 S.E.2d 465, 465 (2015) (per curiam) (citations omitted). Failure to make this finding requires this Court to vacate the portion of the order requiring that the visitation be at Respondent's expense and to remand for entry of a new order containing the required findings of fact. *Id.* Accordingly, the portion of the PPR order requiring Respondent to pay the cost of visitation is vacated and remanded for further proceedings consistent with this opinion.

IV. Finding of fact regarding actions inconsistent with constitutional rights as parent

Finally, Respondent argues the court erred in that its finding of fact that she acted inconsistently with her constitutional rights as a parent was not based on the required standard of proof, to wit, clear and convincing evidence. We agree.

"[T]he government may take a child away from his or her natural parent *only* upon a showing that the parent is unfit to have custody . . . or where the parent's conduct is inconsistent with her constitutionally-protected status." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (citations omitted; emphasis added). Because the decision to remove a child from a natural parent's custody "must not be lightly undertaken[,] . . . [the] determination that a parent's conduct is inconsistent with . . . her constitutionally protected status must be supported by clear and convincing evidence." *Id.* at 63, 550 S.E.2d at 503 (citation omitted). "While this analysis is often applied in civil custody cases under Chapter 50 of the North Carolina General Statutes, it also applies to custody awards arising out of juvenile petitions filed under Chapter 7B." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (citation omitted). "Clear and convincing" evidence is an intermediate standard of proof, greater than the preponderance of the

evidence standard applied in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in most criminal cases. *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984). "Absent an indication that the [district] court applied the clear and convincing standard," we must vacate this portion of the PPR order and remand for entry of a new finding of fact that makes clear the standard of proof applied by the district court in determining whether Respondent's actions have been inconsistent with her constitutionally-protected status as Eddie's parent. *See Bennett v. Hawks*, 170 N.C. App. 426, 429, 613 S.E.2d 40, 42 (2005).

Conclusion

In sum, we hold the court erred by (1) requiring Respondent to pay for supervised visits without making necessary findings, (2) waiving further review hearings without making all necessary findings of fact, (3) awarding legal custody to a non-parent without evidence to support its findings that the potential custodians understand the legal significance of the relationship, and (4) awarding custody to a non-parent without stating that it has applied the proper standard of proof. We vacate those portions of the order and remand for further proceedings consistent with this opinion. The PPR order is otherwise affirmed.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges DAVIS and DIETZ concur.

IN THE MATTER OF M.M., JUVENILE

No. COA16-77

Filed 16 August 2016

1. Appeal and Error—juvenile order—terms of legal custody changed—appeal proper

A juvenile order was properly before the Court of Appeals where there were multiple orders but the order from which the respondent-mother appealed changed the terms of the juvenile's legal custody.

2. Juveniles—multiple orders—no contact order—no new findings

There was no basis in a juvenile order for a "no contact" provision regarding the maternal grandmother where there were no new

findings to support the ruling. The trial court may have mistakenly thought that a provision from a prior order remained in effect.

Appeal by respondent from order entered 14 October 2015 by Judge Toni S. King in Cumberland County District Court. Heard in the Court of Appeals 25 July 2016.

Christopher L. Carr, Staff Attorney, for Cumberland County Department of Social Services, petitioner-appellee.

Mary McCullers Reece for respondent-mother.

No brief filed for guardian ad litem.

DAVIS, Judge.

A.M. ("Respondent-mother") appeals from the trial court's permanency planning order prohibiting contact between her child, M.M. ("Margo"),[1] and Margo's maternal grandfather (the "maternal grandfather"). After careful review, we vacate in part and remand for further proceedings.

Factual Background

This is Respondent-mother's third appeal in this matter. Margo was first removed from the custody of Respondent-mother and Margo's father[2] on 8 August 2007 based on confirmed drug use by the parents and following multiple incidents of domestic violence in their home. *In re M.M.*, 212 N.C. App. 420, 713 S.E.2d 790, 2011 WL 2206655 (2011) (unpublished). Margo was adjudicated dependent on 17 January 2008 and taken into the custody of the Cumberland County Department of Social Services ("DSS"). Margo was returned to her parents' custody several months later but was removed again in 2010.

On 16 April 2010, the trial court entered a review order in which it ordered that Margo be returned from Michigan, where she had been living with her paternal grandparents, and placed back into DSS custody. After review hearings conducted on 1 July 2010 and 22 July 2010, the trial court entered a permanency planning order on 21 September 2010

1. Pseudonyms and initials are used throughout the opinion to protect the identity of the juvenile and for ease of reading. N.C.R. App. P. 3.1(b).

2. Margo's father is not a party to the present appeal.

granting custody of Margo to her paternal grandparents and allowing visitation and telephone calls with her parents.

Respondent-mother appealed the 21 September 2010 order. This Court reversed, concluding that "the trial court entered its order based solely on the written reports of [DSS] and the guardian ad litem, prior court orders, and documentary evidence." *M.M.*, 2011 WL 2206655 at *3. The trial court did not hear testimony from either Respondent-mother or Margo's father, and DSS did not offer any competent witness testimony. As a result, we held that the trial court's findings of fact were not adequately supported by the evidence. *Id.* On remand, the trial court entered a "corrected" permanency planning order on 11 July 2012 continuing legal and physical custody of Margo with her paternal grandparents.

On 18 December 2012, the trial court entered a permanency planning order granting joint legal and physical custody of Margo to her parents with her father having primary physical custody and Respondent-mother exercising secondary physical custody.[3] However, following another review hearing, the trial court entered a new permanency planning order on 11 February 2013 and a "corrected" order on 24 April 2013 (collectively the "2013 Orders"), which returned custody and guardianship of Margo to the paternal grandparents and purported to transfer jurisdiction over the case to the state of Michigan. Respondent-mother once again appealed.

On 5 November 2013, this Court reversed the 2013 Orders in their entirety. In addition to rejecting the trial court's attempt to transfer jurisdiction, we held that the trial court's findings were inadequate under N.C. Gen. Stat. § 7B-907(b) to support its determination that a permanent plan of guardianship with Margo's paternal grandparents — rather than the previously ordered custody with her parents — would serve Margo's best interests. *See In re M.M.*, 230 N.C. App. 225, 230, 750 S.E.2d 50, 53-54 (2013).

The matter came on for a remand hearing on 10-11 September 2015. Before receiving testimony from Respondent-mother and Margo's paternal grandfather,[4] the trial court ruled that because the 2013 Orders had been reversed, the 18 December 2012 order, which gave joint physical and legal custody of Margo to her parents, remained in effect. The trial

3. The 18 December 2012 order did not expressly contain any "no contact" provisions.

4. Margo's father was not present at the hearing due to illness but was represented by counsel.

court further determined, and the parties agreed, that the only remaining issue before the court was the task of setting a visitation schedule. The trial court proceeded to enter an order on 14 October 2015 reinstating joint legal and physical custody of Margo to her parents and setting out a visitation schedule. The order also directed that there be no contact between Margo and her maternal grandfather. Respondent-mother filed a notice of appeal on 13 November 2015.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must address whether Respondent-mother's appeal is properly before us. In her statement of grounds for appellate review, *see* N.C.R. App. P. 28(b)(4), Respondent-mother asserts a right of appeal under N.C. Gen. Stat. § 7B–1001(a)(4), arguing that the 14 October 2015 order "changes custody of the minor child." We agree.

Section 7B-1001(a) of our General Statutes provides that only certain juvenile matters may be appealed. Pursuant to N.C. Gen. Stat. § 7B-1001(a)(4), "[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile" is appealable. N.C. Gen. Stat. § 7B–1001(a)(4) (2015); *see In re N.T.S.*, 209 N.C. App. 731, 734, 707 S.E.2d 651, 654 (2011) (noting that "[even] a temporary order [that] change[s] legal custody . . . [is] immediately appealable under subsection (a)(4)."). "Legal custody refers generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Peters v. Pennington*, 210 N.C. App. 1, 17, 707 S.E.2d 724, 736 (2011) (citation and quotation marks omitted). Furthermore, our Supreme Court has noted that "lawful custody . . . [includes a parent's] prerogative to determine with whom their children shall associate." *Petersen v. Rogers*, 337 N.C. 397, 403, 445 S.E.2d 901, 905 (1994) (citation omitted).

The 14 October 2015 order from which Respondent-mother appeals changed the terms of Margo's legal custody as previously established by the 18 December 2012 order. As noted above, the 18 December 2012 order provided that the legal and physical joint custody of Margo was to remain with her parents with her father having primary custody and Respondent-mother having secondary custody. That order did not specifically prohibit contact between Margo and any other individual.

The 14 October 2015 order, however, included among its directives that "the Maternal Grandfather . . . shall not be in the presence of or have ANY contact with [Margo] at any time." Thus, because (1) the

18 December 2012 order did not prohibit contact between Margo and her maternal grandfather; and (2) legal custody includes "the right to control [one's] children's associations," *Petersen*, 337 N.C. at 403, 445 S.E.2d at 904-05, the 14 October 2015 order's prohibition on contact between Margo and her maternal grandfather "change[d Respondent-mother's] legal custody of" Margo. Accordingly, this appeal is properly before us pursuant to N.C. Gen. Stat. § 7B-1001(a)(4).

II. "No Contact" Provision

[2] "Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the [trial court's] findings and the findings support the conclusions of law." *In re P.A.*, __ N.C. App. __, __, 772 S.E.2d 240, 245 (2015) (citation omitted). "The trial court's findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 238 (2015) (citation and internal quotation marks omitted). "Whether those findings of fact support the trial court's conclusions of law is reviewable *de novo*." *Carpenter v. Carpenter*, 225 N.C. App. 269, 270, 737 S.E.2d 783, 785 (2013) (citation omitted).

On appeal, the only portion of the trial court's 14 October 2015 order Respondent-mother challenges is the "no contact" provision regarding Margo's maternal grandfather. Specifically, Respondent-mother argues there was no competent evidence before the trial court that Margo's maternal grandfather posed a risk to her and that the trial court failed to make any findings regarding why it was in Margo's best interests to prohibit contact with him. We agree.

At the beginning of the 11 September 2015 hearing, the trial court determined that the 18 December 2012 order remained in effect in light of this Court's reversal of the 2013 Orders. At the hearing, the court stated that "the only thing left . . . to do is to grant a proper visitation schedule. . . . I'm not here to look at whether or not there's [been] a change in circumstances but just to hear evidence in regard to a proper visitation schedule." At one point during the hearing, counsel for Margo's father attempted to offer into evidence a letter from Margo's therapist dated 2 September 2015 in which the therapist discussed, among other things, "[Margo's] relationship with her mom and what areas need to be worked on . . . and . . . a history of things[.]" However, the trial court responded that "[the letter] gets into areas or issues that are not concerning the parents, or things of that nature; I'm not inclined to review it because there's already an order that joint custody is established. Right now, [the

hearing is] just based on visitation." Nevertheless, at the conclusion of the hearing, the trial court ordered that Margo's maternal grandfather was "not to be in [her] presence . . . at any time or have any contact with [her]."

However, the trial court's 14 October 2015 order lacks any indication as to the basis upon which the court rested its determination that prohibiting contact with the maternal grandfather was necessary to protect Margo's welfare. There is no mention of the maternal grandfather in either the trial court's findings of fact or conclusions of law, much less any findings that would support the imposition of a "no contact" provision. There was also no competent evidence presented at the hearing tending to show that contact with Margo's maternal grandfather would pose a threat to her well-being or otherwise be contrary to her best interests.

Indeed, DSS concedes that "[Respondent-mother] does correctly point out that there were no findings of fact in the [14 October 2015 order] about the maternal grandfather." Moreover, it acknowledges that "it is true that there was no extensive testimony about the maternal grandfather by any party at the 11 September 2015 hearing."

The trial court may have mistakenly believed that a "no contact" provision from an earlier order remained in effect with regard to Margo's maternal grandfather. However, because that was not, in fact, the case and because the trial court made no new findings of fact that would support such a ruling, we are unable to discern any basis for the "no contact" provision contained in the trial court's 14 October 2015 order.

Conclusion

For the reasons stated above, the portion of the trial court's 14 October 2015 order prohibiting contact between Margo and her maternal grandfather is vacated, and we remand this matter for further proceedings not inconsistent with this opinion.

VACATED IN PART AND REMANDED.

Judges STEPHENS and DIETZ concur.

IN THE MATTER OF DERRICK WOODARD

No. COA15-1116

Filed 16 August 2016

Appeal and Error—meaningful opportunity for appellate review—lack of verbatim transcript—adequate alternative

Respondent was not deprived of the opportunity for meaningful appellate review of an involuntary commitment order and was not entitled to a new hearing based on lack of a verbatim transcript. Respondent was able to obtain an adequate alternative to a verbatim transcript of his involuntary commitment hearing and thus could not show that he was prejudiced by the absence of an actual transcript.

Appeal by respondent from order entered 12 February 2015 by Judge Louis Meyer in Wake County District Court. Heard in the Court of Appeals 30 March 2016.

Roy Cooper, *Attorney General*, *by Andrew L. Hayes*, *Assistant Attorney General*, *for the State.*

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

DAVIS, Judge.

Derrick Woodard ("Respondent") appeals from the trial court's order involuntarily committing him to UNC Wakebrook Inpatient Treatment Facility ("UNC Wakebrook") for a period of inpatient treatment. On appeal, Respondent argues that the lack of a verbatim transcript from 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 affirm the trial court's order.

Factual Background

On 2 February 2015, Dr. Edith Gettes filed an affidavit and petition for involuntary commitment in which she alleged Respondent was mentally ill and dangerous to himself and others. A magistrate ordered Respondent to be held for examination that same day. A hearing was held on 12 February 2015 before the Honorable Louis Meyer in Wake County District Court. Following the hearing, the trial court concluded that Respondent was mentally ill and presented a danger to himself and

others. That same day, the trial court entered an order containing the following findings:

> Respondent ('R.') had prior 10-day inpatient admission at UNC Wakebrook in Nov. 2013 after presenting with symptoms of paranoia and delusions. During this admission, R. punched a wall and had his hand X-rayed; however, R. improved with treatment and medication. R. agreed to voluntary 90-day outpatient treatment and medication thereafter, but refused to take medication after initial supply ran out and refused to do follow up outpatient treatment.
>
> During 1st 2 months of 2015, R. made false Facebook postings asserting gang membership that caused 2 males to come to R's home seeking retribution, and R. had physical altercations with his step-sisters and father, and R. was admitted for inpatient treatment at UNC Wakebrook upon petition and magistrate's custody order for involuntary commitment.
>
> During present admission to UNC Wakebrook, R. has been treated by Dr. Br[i]an Robbins, who gave expert psychiatric testimony at 2-12-15 district court hearing that R. is diagnosed as being schizophrenic based on R. having multiple delusions and paranoia (e.g., R. asserted he's a Navy Seal, is being followed by Black Panthers and Secret Service, is Pres. Obama's nephew, has a microchip planted in his head, is a 6-time Olympic gold medalist) and R. having disorganized thinking and disconnect as to why treatment and medication are necessary and helpful for him.
>
> During present admission at UNC Wakebrook, R. threatened physical harm to Dr. Robbins and a nurse for requiring R. to take medication; however, R. has improved with treatment and medication during present inpatient admission. R. is unable, without care, supervision and assistance of others to exercise self-control, judgment and discretion to satisfy his need for medical/psychiatric care, and has exhibited severely impaired insight as to his need for medical/psychiatric care, and there is reas[onable] probab[ility] of R. suffering serious physical debilitation in near future unless he gets adequate inpatient and outpatient treatments. Within relevant past, R. has threatened to inflict serious bodily harm on other persons (including

> threatening serious bodily harm to UNC law enforcement officers on 2/3/15) and there is reasonable probability this conduct would be repeated unless R. gets adequate inpatient and outpatient treatment.

The trial court ordered that Respondent be committed to UNC Wakebrook for a period of inpatient treatment not to exceed 30 days and to Alliance Behavioral Health for a period of outpatient treatment not to exceed 60 days. Respondent entered written notice of appeal on 9 March 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

The sole issue presented in this appeal is whether Respondent is entitled to a new involuntary commitment hearing because the lack of a verbatim transcript from the underlying hearing denied him his right to meaningful appellate review.[1] 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).

This Court has very recently dealt with this same issue. *See In re Shackleford*, __ N.C. App. __, __ S.E.2d __ (filed July 19, 2016) (No. COA15-1266). As we explained in *Shackleford*, "the unavailability of a verbatim transcript may in certain cases deprive a party of its right to meaningful appellate review and . . . in such cases, the absence of the transcript would itself constitute a basis for appeal." *See id.* at __, __ S.E.2d at __, slip op. at 4. The unavailability of a verbatim transcript does not, however, automatically constitute reversible error. *Id.* at __,

1. 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).

__ S.E.2d at __, slip op. at 4. Rather, in order to show that the absence of a verbatim transcript entitles an appellant to a new hearing, he "must demonstrate that the missing recorded evidence resulted in prejudice." *Id.* at __, __ S.E.2d at __, slip op. at 4-5 (citation and quotation marks omitted). Moreover, "[g]eneral allegations of prejudice are insufficient to show reversible error." *Id.* at __, __ S.E.2d at __, slip op. at 5. "[T]he absence of a complete transcript does not prejudice the [appellant] 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 Shackleford*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 5.

Applying this legal framework, 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 who were present at the hearing: Judge Meyer; Dr. Brian Robbins ("Dr. Robbins"), Respondent's treating physician at UNC Wakebrook; Lori Callaway ("Callaway"), the deputy clerk; Andrew Hayes ("Hayes"), counsel for the State; 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.

Guided by our decision in *Shackleford*, we believe that Respondent has "satisfied his burden of attempting to reconstruct the record." *Shackleford*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 7 (citations and quotation marks omitted). In *Shackleford*, as here, there was no transcript available from the involuntary commitment hearing because the recording equipment failed to record the proceeding and there had not been a court reporter present. *Id.* at __, __ S.E.2d at __, slip op. at 3. In his effort to reconstruct the record, the respondent's appellate counsel similarly sent letters requesting any notes and recollections from the hearing to the presiding judge, the respondent's treating physician, the deputy clerk, counsel for the inpatient treatment facility at which the respondent was being treated, the respondent's counsel, and the respondent himself. *Id.* at __, __ S.E.2d at __, slip op. at 5-6.

In concluding that the respondent's appellate counsel in *Shackleford* had met his burden of attempting to reconstruct the record, we found our decision in *State v. Hobbs*, 190 N.C. App. 183, 660 S.E.2d 168 (2008), to be particularly instructive:

> 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. 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 [in *Hobbs*] had satisfied his burden of attempting to reconstruct the record.

Shackleford, __ N.C. App. at __, __ S.E.2d at __, slip op. at 6-7 (internal citations omitted).

We explained that because the respondent's appellate counsel in *Shackleford* "took essentially the same steps as the appellant's attorney in *Hobbs*[,] we similarly conclude that [the respondent] has satisfied his burden of attempting to reconstruct the record." *Id.* at __, __ S.E.2d at __, slip op. at 7. The same is true in the present case.

Therefore, we must next determine 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 explained below, we conclude that an adequate alternative has, in fact, been produced in this case.

Respondent's appellate counsel received responses from each of the recipients of his letters. Callaway replied that she did not have any notes from the hearing. Dr. Robbins stated that he did not have a specific recollection of the hearing and did not keep any notes from it. Respondent reported that he had no detailed recollection of the hearing. Todd provided her notes from the hearing, which consisted of eight pages of handwritten notes. Hayes replied with a brief summary of the hearing testimony based upon his notes from, and memory of, the hearing.

The most significant response came from Judge Meyer, who provided Respondent's appellate counsel with a detailed account of the testimony offered at the hearing in a five-page, single-spaced, typed memorandum. Judge Meyer stated that the document was "based on his memory of testimony at the hearing after reviewing personal notes of

the hearing made by [him] during the hearing and after additional reflection and recollection." The memorandum contained individual sections detailing the testimony of each witness: Kawana Woodard ("Kawana"), Respondent's sister; Donnie Farrington ("Farrington"), Respondent's father; Dr. Robbins; and Respondent. Judge Meyer's memorandum not only provides support for each finding of fact in the trial court's 12 February 2015 order but also contains even greater detail regarding the testimony supporting these findings.[2]

The contrast between the results of the attempted reconstruction of the hearing in this case and that in *Shackleford* is significant. In concluding that the reconstruction efforts in *Shackleford* had failed to produce an adequate alternative to a verbatim transcript, we explained that

> 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.

Shackleford, __ N.C. App. at __, __ S.E.2d at __, slip op. at 9-10 (internal citation, quotation marks, and brackets omitted and emphasis added).

The present case serves as an example of the precise scenario contemplated in the above-quoted language from *Shackleford*. Here, as in *Shackleford*, Respondent's counsel from the involuntary commitment hearing provided limited handwritten notes referencing witness testimony from the hearing. However, while in *Shackleford* these notes *alone* constituted the product of the respondent's appellate counsel's efforts to reconstruct the proceeding, that is not the case here. Rather, in the present case, these handwritten notes — along with the State's attorney's

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2. While Judge Meyer acknowledged in a prefatory statement that his memorandum was not intended to be a comprehensive account of every aspect of the hearing, in light of the detail contained therein and the obvious care with which the document was prepared, we are satisfied that his memorandum, as supplemented by the notes and summary provided by the two attorneys who participated in the hearing, is sufficient to constitute an adequate alternative to a verbatim transcript. As we have previously explained, "notwithstanding the critical importance of a complete trial transcript for effective appellate advocacy, the unavailability of a verbatim transcript does not automatically constitute error." *Hobbs*, 190 N.C. App. at 186, 660 S.E.2d at 170 (citation, quotation marks, and brackets omitted).

summary of the hearing testimony — supplemented the thorough memorandum provided by Judge Meyer. Thus, this case is materially distinguishable from *Shackleford*.

Together, the materials supplied to Respondent's appellate counsel provide the following account of the hearing: Kawana testified that at the beginning of January 2015 Respondent posted false comments on social media, including statements that "I'm a Navy Seal . . . I've been raped." She also stated that around this time Respondent had been having altercations with his other two sisters, which was not something that occurred when he was taking his medication and complying with his treatment.

Farrington, with whom Respondent lived, testified that two weeks prior to Respondent's pre-hearing inpatient admission, Respondent constantly fought with his sisters and Farrington and falsely posted on Facebook that he was a "known gang member." Respondent admitted to Farrington that he had made posts regarding gang members and said that he had "beat somebody up." Two men came to Farrington's home to confront Respondent about his social media posts concerning gang members, but Farrington told them to leave because Respondent was sick. Farrington also testified that on the coldest day of December 2014, when the temperature was 17 degrees, Respondent walked from his home to Farrington's workplace (a quarter mile away) wearing nothing but shorts and a t-shirt.

Dr. Robbins, who has been a psychiatrist since 2007 and at the time of the hearing was UNC Wakebrook's medical director, was qualified by the trial court as an expert in psychiatry. Dr. Robbins stated that he had been treating Respondent at UNC Wakebrook for the eight days preceding the hearing. He had also treated Respondent at UNC Wakebrook for 10 days in November 2013.

Dr. Robbins testified that Respondent suffered from schizophrenia, a diagnosis he had reached based on Respondent's November 2013 inpatient admission (during which Respondent "presented with paranoia and delusions, punched walls when frustrated with his treatment, and then improved with medication and treatment") as well as his admission immediately preceding the 12 February 2015 hearing. Dr. Robbins made the following observations regarding Respondent's mental condition at the time of the latter admission:

> (a) Respondent having multiple delusions that he is a Navy Seal, that he is being followed by the Black Panthers and the Secret Service, that he is a six time Olympic gold

> medalist, that he has microchips implanted in his head, that [UNC] Wakebrook medical staff are trying to "enlist him," that he is President Obama's nephew, and that he is a PhD. with eight degrees; (b) Respondent throwing away most of his clothes and exhibiting disorganized thinking and a "disconnect" between what his family wants and what he wants; (c) Respondent beating on windows during his current inpatient admission; (d) reports by family members of Respondent's altercations with his sisters and other behavior such as Respondent walking long distances in the freezing cold with very little clothes on; and (e) a family history of schizophrenia, to wit, Respondent's mother suffering from schizophrenia.

Dr. Robbins also testified that after Respondent's November 2013 inpatient admission at UNC Wakebrook, he refused to continue taking his medication, claiming that it was unnecessary because he was not mentally ill. During the inpatient admission immediately preceding the 12 February 2015 commitment hearing, UNC Wakebrook medical staff had to force Respondent to take medication because of his refusal to take it voluntarily.

Dr. Robbins further related Respondent's statement that he had gotten into a physical altercation with his sister. According to Dr. Robbins, Respondent also threatened to kill certain law enforcement officers and threatened to punch both Dr. Robbins and a nurse who was trying to give Respondent medication by means of a forced injection. Dr. Robbins explained that medical staff planned to further increase Respondent's dosage because he was "guarded, irritable, and paranoid" and that although he had "shown some decrease in overt threats and delusions," he was "still exhibiting delusional behavior."

Dr. Robbins testified that, in his professional opinion,

> Respondent's delusions and latent thoughts of behavior threatening to himself and his family would pose a threat of more altercations with his sister and others if he resides at home with his father, that there is a reasonable probability of Respondent repeating such conduct without additional inpatient treatment followed by outpatient treatment, that outpatient treatment alone is insufficient because of Respondent's pattern of refusing to take his prescribed medication and refusing to comply with follow up appointments and other outpatient treatment

> requirements, and that without additional inpatient treatment followed by outpatient treatment Respondent is unable to exercise self-control, judgment and discretion to take care of his medical needs and safety and there is a reasonable probability of Respondent suffering serious physical debilitation without additional inpatient treatment followed by outpatient treatment.

Finally, Dr. Robbins testified as to his recommendation that Respondent undergo 30 days of additional inpatient treatment followed by at least 60 days of outpatient treatment.

Respondent testified that a fight with his sisters had precipitated his most recent inpatient admission. He denied ever claiming that he was a gang member, had been raped, was President Obama's nephew, and had been followed by the Black Panthers or the Secret Service. In addition, Respondent testified that he did not need medication and that it made him bipolar. He further stated that he had threatened Dr. Robbins and the nurse in "self-defense" because he did not want to take any more medication and had stopped taking his medication after his November 2013 admission because of its side effects.

Respondent also denied that he was schizophrenic or mentally ill but admitted he was "just bi-polar at times." He testified that he would not take medication if the dosage was too high because that would adversely affect his ability to get a job. He stated that when he walked to Farrington's workplace on the cold December day, he was wearing a coat over his basketball shorts and t-shirt. Finally, Respondent denied that he had (1) threatened to kill any law enforcement officers or told Dr. Robbins he had done so; or (2) punched or beat on a window at UNC Wakebrook.

We observe that the above-referenced testimony provides support for all of the trial court's findings of fact. While Respondent notes that Judge Meyer's memorandum does not specifically indicate whether any objections were made to evidence presented at the hearing, given that no mention of evidentiary disputes are reflected either in that memorandum or in the accounts provided by the attorneys who were present at the hearing, we are unwilling to deem the reconstructed record inadequate simply because of the theoretical possibility that one or more rulings might have been made by the trial court at the hearing in response to objections by counsel.

As the differing results we have reached in *Shackleford* and the present case aptly demonstrate, the issue of whether an attempted

reconstruction of a proceeding is sufficient to preserve the right to meaningful appellate review does not lend itself to clear, bright-line rules. Rather, such a determination must be made on a case-by-case basis depending on the unique circumstances of each particular case.

Accordingly, we conclude that because Respondent has been able to obtain an adequate alternative to a verbatim transcript of his involuntary commitment hearing, he cannot show he was prejudiced by the absence of an actual transcript. Consequently, he was not deprived of the opportunity for meaningful appellate review of his involuntary commitment hearing.[3]

Conclusion

For the reasons stated above, we affirm the trial court's 12 February 2015 order.

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

3. We note that appellants who assert on appeal that they have been deprived of the ability to obtain meaningful appellate review due to the unavailability of a verbatim transcript from a trial court proceeding may also argue, in the alternative, specific errors that appear on the face of the order from which appeal is being taken or errors that are discovered as a result of an attempt to reconstruct the proceeding. However, Respondent has not raised any such specific errors in the present case.

KB AIRCRAFT ACQUISITION, LLC, PLAINTIFF
v.
JACK M. BERRY, JR., AND 585 GOFORTH ROAD, LLC, DEFENDANTS

No. COA15-823

Filed 16 August 2016

1. Fraud—debtor's transfer of property—date of transfer

In an action involving a debtor, the fraudulent transfer of real property, and a limitations period, the term "transfer" within the plain meaning of N.C.G.S. § 39-23.9 referred to the date that the transfer actually occurred and not the date the fraudulent nature of the transfer became apparent.

2. Statutes of Limitations and Repose—fraudulent transfer—statute of repose

N.C.G.S. § 39-23.9 functions as a statute of repose because it establishes a finite and fixed time within which the prescribed actions may be brought. It measures the time period in relation to an event separate from the realization of an injury by the claimant.

3. Statutes of Limitation and Repose—fraudulent transfers—equitable remedies—precluded

Equitable remedies were precluded from the statute of repose for fraudulent transfers because the language of N.C.G.S. § 39-23.9 did not include language creating an exception for equitable doctrines.

4. Statutes of Limitation and Repose—fraudulent transfers—action not timely under two statutory subsections

Although plaintiff alleged causes of action under two subsections of N.C.G.S. § 39-23 arising from a fraudulent transfer, all of its claims were barred by the applicable statute of repose because they arose from a transfer occurring more than four years prior to the filing of the complaint and because plaintiff had notice of the transfer more than one year prior to the filing of the complaint.

Appeal by Plaintiff from order entered 6 February 2015 by Judge Richard L. Doughton in Watauga County Superior Court. Heard in the Court of Appeals 28 January 2016.

Smith, Debnam, Narron, Drake, Saintsing, & Myers, L.L.P., by Byron L. Saintsing, for Plaintiff-Appellant.

Brooks, Pierce, McLendon, Humphrey, and Leonard, L.L.P., by John H. Small and Clint S. Morse, for Defendants-Appellees.

INMAN, Judge.

KB Aircraft Acquisition, LLC ("Plaintiff") appeals from an Order and Summary Judgment in favor of Jack M. Berry, Jr. ("Defendant Berry") and 585 Goforth Road, LLC ("Defendant 585") (together, "Defendants") dismissing Plaintiff's claims for fraudulent transfer of property and declaratory relief.

This appeal presents two issues of first impression: (1) the interpretation of the term "transfer" in N.C. Gen. Stat. § 39-23.9 (2015), part of the North Carolina Uniform Voidable Transactions Act; and (2) whether the statute is one of limitations or repose. We hold that the term "transfer" refers to the actual date on which an asset was transferred, rather than the date when its fraudulent nature became apparent to a creditor, and that the statute is one of repose. Accordingly, we hold that Plaintiff's claims are time-barred and affirm the trial court's Order and Summary Judgment.

I. Factual and Procedural History

This dispute arises out of the transfer of real property located in North Carolina by Defendant Berry during a time when Defendant Berry was indebted as a guarantor on a loan to a business he owned.

Plaintiff is a Delaware limited liability company with its principal place of business in New York. Defendant Berry is a resident of Florida. Jurisdiction in North Carolina is proper because the property is located at 585 Goforth Road in Blowing Rock, North Carolina ("the Property").

Defendant Berry became indebted to Plaintiff in 2010 after Plaintiff purchased all rights in a loan from Key Equipment Finance, Inc. ("Key"), made to BerryAir, LLC ("BerryAir"), which was guaranteed by Defendant Berry. At the time Plaintiff purchased the loan, BerryAir and Defendant Berry were in default on their loan obligations.

In 2006, Key, Plaintiff's predecessor in interest, loaned $10,156,500.00 to BerryAir for the purchase of an airplane. Defendant Berry, on behalf of BerryAir, executed a Promissory Note ("the Note") and an Airplane Security Agreement providing Key a security interest in a Bombardier Challenger 601-3A Aircraft purchased by BerryAir with the loan proceeds.

To provide further security for the loan, Defendant Berry signed a Personal Guaranty ("the Guaranty") stating that he "intend[ed] to guarantee at all times the performance and prompt payment when due, whether at maturity or earlier by reason of acceleration or otherwise, of all Obligations" of BerryAir under the loan. The Aircraft Security Agreement, in paragraph 2.11(b), provided that within 90 days after the last day of each year, BerryAir was required to provide to Key a copy of the personal financial statement for Defendant Berry regarding his financial condition during the prior year. At the time the loan was made, Defendant Berry's assets, which included the Property, were valued at more than $47 million. The majority of the assets were equity interests in various businesses. The Property, valued at more than $3 million, was Defendant Berry's largest real estate asset.[1]

By October 2008, BerryAir, as the debtor, and Defendant Berry, as the guarantor, had defaulted on the loan and were negotiating with Key to modify the loan repayment terms.

On 10 October 2008, Defendant Berry organized Defendant 585 as a limited liability company in Florida with Defendant Berry and his wife as its only members. Defendant Berry transferred the Property to Defendant 585 by special warranty deed that same day. At the time, according to a personal financial statement later provided by Defendant Berry to Key, the Property was Defendant Berry's most valuable real estate asset and worth $4,250,626.00. No consideration was paid to Defendant Berry in the transfer. The deed stated on its face that "THIS TRANSACTION IS BETWEEN RELATED PARTIES AND THERE IS NO CONSIDERATION BEING PAID." The deed was recorded on 23 October 2008 in Book 1406, Page 196 of the Watauga County Register of Deeds. Neither Defendant Berry nor BerryAir provided actual notice to Key at the time of the transfer.

In November 2008, following negotiations with Key, Defendant Berry executed Amendment No. 1 to the Note on behalf of BerryAir, modifying the payment terms of the Note, along with a Confirmation of Guaranty. Both documents reaffirmed that there had been no interruption in the obligations of BerryAir and Defendant Berry under the terms of the Note and the Guaranty.

Despite the repayment modifications, BerryAir and Defendant Berry continued to default on the terms of the Note and the Guaranty

1. We make note of this information from the record, although it is not material to our analysis, simply to provide additional context to Plaintiff's claims.

throughout 2009 and the early months of 2010. Defendant Berry, on behalf of BerryAir as the debtor and on behalf of himself as the guarantor, continued negotiating with Key to resolve the payment defaults, ultimately entering into a Forbearance Agreement and eventually two Amendments to the Forbearance Agreement. The last of these agreements was signed by Defendant Berry on 24 February 2010, over a year after he had transferred the Property. Each document ratified, reaffirmed, and confirmed all terms, conditions, rights, and obligations contained within the original loan documents, except as modified by the Forbearance Agreement. The final agreement extended the forbearance period until 6 August 2010.

In accordance with the terms of the Note, the Security Agreement, and related Amendments and Forbearance Agreements, Defendant Berry annually provided to Key a copy of his personal financial statements for the preceding year, no later than 90 days after the last day of the respective year. The financial statements were certified by Defendant Berry as true and accurate statements of his financial condition during the time specified.

The record on appeal does not include any of Defendant Berry's personal financial records provided to Key prior to 2008. On or about 7 November 2008, during negotiations for Key to forbear from taking action on the loan default and to modify the repayment terms, Defendant Berry submitted to Key a one-page personal financial statement listing his assets for the years 2004, 2005, 2006, 2007, and as of 30 June 2008. The statement listed the Property, described as "Blowing Rock House," and represented its value as $4,250,626.00. No evidence in the record indicates that Key requested a current personal financial statement or looked any further than the statement provided on or about 7 November 2008.

At some point in 2009,[2] Defendant Berry provided Key with a three-page personal financial statement for the period ending 31 December 2008, along with a one-page attachment. The first page of the statement listed Defendant Berry's real estate assets as being valued at $353,355.00. The attachment, a balance sheet, stated the Defendant Berry owned a 100% interest in Defendant 585 valued at $1,142,100.00. This document was inaccurate in one respect—Defendant Berry owned a 100% interest

2. The statement itself is undated, and the record includes only an undated letter from Defendant Berry's accountant transmitting this statement to Key. According to the loan parties' agreements and course of conduct, however, BerryAir was required to provide the statement in the first 90 days of 2009.

in Defendant 585 jointly with his wife.[3] This statement was also the first document of record provided to Key reflecting that Defendant Berry had transferred the Property and that Defendant Berry had an ownership interest in Defendant 585.

On 28 April 2010, Defendant Berry provided Key with his personal financial statement for the year ending 31 December 2009. The 2009 personal financial statement also reflected that Defendant Berry had transferred the Property, that the Property was owned by Defendant 585, and that Defendant Berry had an ownership interest in Defendant 585.

On or about 30 September 2010, Key sold and assigned to Plaintiff all of its right, title, and interest in and to the Note, the Guaranty, and all related loan documents. Plaintiff notified Defendant Berry of the assignment of his debt in a demand letter dated 4 October 2010.

Soon after demanding payment from BerryAir and Defendant Berry, Plaintiff filed suit against them in Florida for their failure to cure the longstanding default. In December 2010, a month after filing suit and two months after purchasing the loan from Key, Plaintiff conducted a title search on the Property which reflected that Defendant Berry had transferred it in 2008 to Defendant 585.

In July 2013, Plaintiff obtained a judgment for $10,577,895.90 against BerryAir and Defendant Berry in Florida. Plaintiff perfected a judgment lien in North Carolina which is enforceable against any real property owned by Defendant Berry in Watauga County. Plaintiff was unable to enforce the lien against the Property because, although it is in Watauga County, Defendant Berry no longer owned it.[4]

Plaintiff filed suit against Defendants in North Carolina on 2 December 2013, alleging a claim for fraudulent transfer pursuant to N.C. Gen. Stat. § 39-23.1 *et seq.* and a claim for declaratory relief. Plaintiff's complaint sought a judgment setting aside the conveyance of the Property to Defendant 585 and, in accordance with the statute, vesting the Property back into Defendant Berry's name and subject to Plaintiff's judgment lien. Defendants moved for summary judgment, arguing that Plaintiff's claims were time barred because they were brought outside the relevant limitations periods allowed by the Uniform Voidable Transactions Act. Following a hearing in January 2015, Judge

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3. The record includes no information regarding how the value of Defendant Berry's ownership interest in Defendant 585 was calculated.

4. Counsel advised this Court during oral argument that Plaintiff foreclosed on the airplane, resulting in a deficiency in excess of $10 million.

Richard L. Doughton entered an Order and Summary Judgment in Defendants' favor. Plaintiff timely appealed.

II. Analysis

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). The trial court rules as a matter of law when granting a motion for summary judgment, and is not exercising its discretion. *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 633, 272 S.E.2d 374, 376 (1980).

> "A movant [for summary judgment] may meet its burden by showing either that: (1) an essential element of the non-movant's case is nonexistent; or (2) based upon discovery, the non-movant cannot produce evidence to support an essential element of its claim."

McKinnon v. CV Indus., Inc., 213 N.C. App. 328, 332, 713 S.E.2d 495, 499 (2011) (quoting *Moore v. City of Creedmoor*, 120 N.C. App. 27, 36, 460 S.E.2d 899, 904 (1995)).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). "By moving for summary judgment, a defendant may force a plaintiff to produce evidence which shows plaintiff's ability to establish a *prima facie* case." *Moore v. F. Douglas Biddy Constr., Inc.*, 161 N.C. App. 87, 92, 587 S.E.2d 479, 483 (2003). When a defendant moves for summary judgment based on a statute of limitations or repose, "the burden is on the plaintiff to show that the action was instituted within the requisite period . . . ." *Marshburn v. Associated Indem. Corp.*, 84 N.C. App. 365, 368, 353 S.E.2d 123, 125 (1987).

B. Interpretation of "Transfer"

[1] The core issue in this appeal is the meaning of the term "transfer" in N.C. Gen. Stat. § 39-23.9, a statute which extinguishes claims for fraudulent transfers brought after a statutorily defined time period. The parties dispute whether the term "transfer" refers to the actual date that the transfer at issue occurred or, rather, the date that the fraudulent nature of the transfer became apparent to the creditor. This issue has not

been addressed since our legislature enacted the Uniform Fraudulent Transfers Act, later renamed the Uniform Voidable Transactions Act ("UVTA"), as Article 3A of Chapter 39 of the North Carolina General Statutes nearly two decades ago.

Section 39-23.9 of the UVTA provides:

> A claim for relief with respect to a voidable transfer or obligation under this Article is extinguished unless action is brought:
>
> (1) Under G.S. 39-23.4(a)(1), not later than four years after the transfer was made or the obligation was incurred or, if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant;
>
> (2) Under G.S. 39-23.4(a)(2) or G.S. 39-23.5(a), not later than four years after the transfer was made or the obligation was incurred; or
>
> (3) Under G.S. 39-23.5(b), not later than one year after the transfer was made.

The UVTA defines "Transfer" as follows:

> Every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, license, and creation of a lien or other encumbrance.

N.C. Gen. Stat. § 39-23.1(12) (2015). Starting with the word "every," this definition is all-inclusive. It does not limit its scope to transfers that are fraudulent or that appear to be fraudulent. Likewise, Section 39-23.9 uses the word "transfer" consistently without any modifying or qualifying terms. If the legislature had intended for the date triggering extinguishment of the claim to be anything other than when "the transfer was made," it could have said so in the statute. Additionally, the word "fraudulent" appears nowhere in this statute.

Thus, the plain language of the statute indicates that the limitations period for all claims authorized by the UVTA begins to run at the time of the transfer upon which the claim is based, or from such point as the claimant should reasonably have known of the transfer. " 'Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give [the statute] its plain and

definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' " *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 575, 573 S.E.2d 118, 121 (2002) (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)).

Our interpretation of the statute is consistent with the legislature's Comment when it was enacted:[5]

> The UFTA's limitations provisions *make some change* to the limitations period previously prescribed under North Carolina law. *Under prior law*, the limitations period applicable to fraudulent conveyances was three years *and the limitations period began to run as of the time when the fraud was known* or should have been discovered by the aggrieved party.
>
> . . . [Under the current law], [a]s to claims based on a transfer in which the debtor does not receive reasonably equivalent value, *the limitations period is four years from the date of transfer*.

N.C. Gen. Stat. § 39-23.9, North Carolina Cmt. (1997) (emphasis added) (citation omitted).

In conformity with the plain meaning of the statute, we hold that the term "transfer" within N.C. Gen. Stat. § 39-23.9 refers to the date that the transfer actually occurred, and not the date that the fraudulent nature of the transfer became apparent. The latter interpretation is inconsistent with the plain meaning of the statute.

Plaintiff argues that this case is controlled by *Cowart v. Whitley*, 39 N.C. App. 662, 664, 251 S.E.2d 627, 629 (1979), which held that the limitations period for bringing a fraudulent transfer claim began to run only when the claimant knew or should have known: (1) that the transfer had occurred, and (2) that the transfer was fraudulent. We disagree. *Cowart* involved a claim arising under N.G. Gen. Stat. § 39-15 (1997), the "prior law" referenced in the 1997 Comment to the current statute.

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5. Because we hold that the plain language of Section 39-23.9 is unambiguous, it is not necessary for us to resort to further canons of construction to determine the legislature's intent. However, because this is an issue of first impression, in the interest of completeness, we cite the Comment. North Carolina legislative history, such as its committee notes, is rarely held to be authoritative, but is often cited as some indication of the intent of the legislature. *See Savage v. Zelent*, __ N.C. App. __, __, 777 S.E.2d 801, 806 (2015); *see generally Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993); *Belk v. Belk*, 221 N.C. App. 1, 19, 728 S.E.2d 356, 367 (2012).

In urging this Court to follow *Cowart*, Plaintiff notes that the current N.C. Gen. Stat. § 39-23.10 (2015) provides that "the principles of law and equity" supplement the provisions of the UVTA. This argument is undermined by the introductory phrase in Section 39-23.10, "[u]nless displaced by the provisions of this Article[.]"

Plaintiff also urges this Court to consider the decisions of other jurisdictions that have applied the "discovery-of-the-fraud rule" to fraudulent transfer claims.[6] *See.*, *e.g.*, *Cortez v. Vogt*, 52 Cal. App. 4th 917, 931, 60 Cal. Rptr. 2d 841, 850 (1997) (holding that it would be impracticable to require a creditor to "bring suit to set aside a fraudulent transfer before the claim has matured"). Courts applying the discovery-of-the-fraud rule have reasoned that the statutes providing for relief from fraudulent transfers have no application to transfers that are not fraudulent, that often the event that makes the fraudulent nature of a transfer apparent is the acquisition of a judgment lien by the claimant, and that the claimant should not be "require[d] to maintain an action to annul a fraudulent conveyance before his debt has matured." *Id.* at 930, 60 Cal. Rptr. 2d at 849. *See also Fid. Nat'l Title Ins. Co. of N.Y. v. Howard Sav. Bank*, 436 F.3d 836, 840 (7th Cir. 2006) (holding that the liability of a third party transferee pursuant to the uniform statute "implies that the discovery statute of limitations does not begin to run until the plaintiff has discovered or should have discovered not that money has been transferred illegally but that it has been transferred to someone who is a fraudulent transferee, for otherwise it is not a fraudulent transfer and the owner of the money has no claim against the transferee"). While the policy underlying this reasoning may be sound, in light of the plain language of the North Carolina statute, it must be addressed to our legislature rather than to this Court.

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6. In both its brief on appeal and oral argument, Plaintiff cited *Fed. Deposit Ins. Corp. v. Mingo Tribal Pres. Trust*, __ F. Supp. 2d __, 2015 WL 1646751, 2015 U.S. Dist. LEXIS 49777 (W.D.N.C. 2015). This decision is not binding on this Court. *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973). In any event, it does not support Plaintiff's argument. The court in *Mingo* noted that the plaintiff's fraudulent transfer claim would not be disposed of at the pleadings stage, "as the Defendants apparently concede." __ F. Supp. 2d at __, 2015 WL 1646751, at *6, 2015 U.S. Dist. LEXIS 49777, at *17. The court referred to N.C. Gen. Stat. § 39-23.9 as a statute of limitations only in passing, with no discussion of the distinction between limitations and repose. *Id.* The court cited *Cowart*, but only for its holding that the recordation of a deed is insufficient to place a creditor on notice of a transfer for purposes of the statute of limitations on a fraudulent transfer claim. *Id.* The court did not mention the common law discovery rule. Instead, with regard to the term "transfer," the court determined that the statutory deadline to file claims ran from the date of the transfer or the date the creditor reasonably should have learned of the transfer. *Id.*

This Court is not the first to conclude that a frustrated claimant's plea for broader relief from a fraudulent transfer must be addressed to the legislative branch. In *National Auto Serv. Ctrs., Inc. v. F/R 550, LLC*, __ So. 3d __, __, 2016 Fla. App. LEXIS 4820, at *18 (Fla. Dist. Ct. App. 2016), the Florida Court of Appeals held that: (1) the Florida statutory period, with language identical to that in N.C. Gen. Stat. § 39-23.9, was triggered by the transfer at issue or the claimant's discovery of the transfer, without regard to whether the transfer was at that time fraudulent or discovered to be so; and (2) that the statute is one of repose rather than one of limitation. Acknowledging the plaintiff's argument that a more flexible time bar would better serve the legislative purpose of deterring fraud and protecting creditors, the Florida court explained that "[w]hen statutory text is unambiguous, 'courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent.' " *Id.* at __, 2016 Fla. App. LEXIS at *21 (quoting *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006)). Chief Judge Villanti wrote a separate concurring opinion to express "trepidation" that the statute as written would allow "the judgment debtor, having already actively engaged in fraud, [to] continue[] his or her fraudulent ways so as to hide any evidence that a given transfer was, in fact, fraudulent[,]" and to urge the Florida legislature to consider amending the statute. *Id.* at __, 2016 Fla. App. LEXIS at *39.

At least one state legislature has amended its statute to deviate from the Uniform Act in this respect. Arizona amended its statute in 1990 to provide that some claims based upon a fraudulent transfer are extinguished if not brought "within four years after the transfer was made or the obligation was incurred or, if later, within one year after the fraudulent nature of the transfer or obligation was or through the exercise of reasonable diligence could have been discovered by the claimant." Ariz. Stat. § 44-1009(1) (2016). It appears that the Arizona legislature did not interpret the term "transfer" any differently than we do with respect to our statute, but added the words "the fraudulent nature of" to the discovery clause of the statute to broaden the protection for creditors.

C. Statute of Limitations or Repose

[2] A second issue of first impression presented in this case is whether N.C. Gen. Stat. § 39-23.9 functions as a statute of limitations or as a statute of repose. The function of Section 39-23.9, the language of the statute, and a comparison of this language to other statutes leads us to hold that it is a statute of repose.

A statute of limitations functions to limit the amount of time that a claimant has to file an action. *Tipton & Young Constr. Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 117, 446 S.E.2d 603, 604 (1994). The limitations period begins to run on the date the cause of action accrues, which is generally "the time of an injury or the discovery of the injury." *Id.* Statutes of limitation are purely procedural bars to the bringing of claims; they "affect only the remedy and not the right to recover." *Id.*

By contrast, statutes of repose function as more rigid stops. The time limitations imposed by statutes of repose are usually not measured from the accrual of the cause of action. *Boudreau v. Baughman*, 322 N.C. 331, 340, 368 S.E.2d 849, 856 (1988). Instead, they often run from the " 'defendant's last act giving rise to the claim.' " *Id.* (quoting *Trustee of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 276-77 n.3 (1985)). While statutes of limitation are classified as affirmative defenses, a statute of repose need not be pled as an affirmative defense. *Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 862 (2006). Rather, statutes of repose are more appropriately pled as a condition precedent to the bringing of an action at all. *Id.* This elemental nature makes the time span imposed by a statute of repose " 'so tied up with the underlying right that . . . the limitation clause is treated as a substantive rule of law.' " *Boudreau*, 322 N.C. at 341, 368 S.E.2d at 857 (quoting *Chartener v. Rice*, 270 F. Supp. 432, 436 (E.D.N.Y. 1967)).

" 'A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations.' " *McCrater v. Stone & Webster Eng'g Corp.*, 248 N.C. 707, 709, 104 S.E.2d 858, 860 (1958) (quoting 34 Am. Jur., *Limitation of Actions* § 7). N.C. Gen. Stat. § 39-23, et seq., like the workers compensation statute at issue in *McCrater*, crafted a new civil cause of action related to a wide variety of fraudulent transactions not previously recognized in North Carolina. Furthermore, the "common law" claim for fraudulent conveyance upon which Plaintiff relies was itself a creature of statute, dating back to 1966 and adopted from English Code.[7] N.C. Gen. Stat. § 39-23 (2015), Official Cmt.

Chapter 39, Article 3A of our General Statutes provides for the definition, cause of action, and procedure for which an individual may

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7. The law of fraudulent conveyances as we know it was first codified in 1570 as a number of Statutes of Elizabeth, and was later codified in 1966 by North Carolina, largely verbatim. N.C. Gen. Stat. §§ 39-15, 39-16, 39-19 (1966). For a detailed account of the history of claims against fraudulent conveyances, see E. Cader Howard, *The Law of Fraudulent Conveyances in North Carolina: An Analysis and Comparison with the Uniform Fraudulent Conveyances Act*, 50 N.C. L. Rev. 873 (1971).

bring a claim for relief for a fraudulent transfer. Section 39-23.9 establishes a finite and fixed time within which the prescribed actions may be brought. Because Section 39-23.9 measures the time period in relation to an event separate from the realization of an injury by the claimant, the statute is one of repose.

" 'A statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained.' " *Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 474, 665 S.E.2d 526, 531 (2008) (quoting *Hargett v. Holland*, 337 N.C. 651, 654, 447 S.E.2d 784, 787 (1994)). " 'If the action is not brought within the specified period, the plaintiff literally has no cause of action. The harm that has been done is *damnum absque injuria* – a wrong for which the law affords no redress.' " *Id.* (quoting *Hargett*, 337 N.C. at 654, 447 S.E.2d at 787).

Because statutes of repose do not require an injury to begin running, a statute of repose can extinguish a cause of action before it accrues. *In Colony Hill Condo. I Ass'n. v. Colony Co.*, 70 N.C. App. 390, 391, 320 S.E.2d 273, 274 (1984), condominium owners sued after an allegedly defective prefabricated fireplace in one unit caused a fire which spread throughout the building, allegedly because the developers and builder failed to install firewalls between the units. The fire occurred in December 1979, approximately six years after the condominium was built, and the plaintiffs filed suit two years later, in 1981. *Id.* at 391, 393–94, 320 S.E.2d at 274, 276. This Court held that a six-year statute of repose began running before the plaintiffs even owned their condominiums and precluded any claim relating to the omission of firewalls brought after December 1979—the same month as the fire. The applicable statute, N.C. Gen. Stat. § 1-50(a)(5) (1963), provided that " '[n]o action . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance or furnishing of such services and construction.' " *Colony Hill Condo. I Ass'n.*, 70 N.C. App. at 393, 320 S.E.2d at 275 (quoting 1963 N.C. Sess. Laws c.1030). The Court reasoned that "[a] statute of repose, unlike an ordinary statute of limitations, defines substantive rights to bring an action[,]" and that "[o]nce the time limit on the plaintiffs' cause of action expired, the defendants were effectively 'cleared' of any wrongdoing or obligation." *Id.* at 394, 320 S.E.2d at 276. The Court sympathized "with the plaintiff condominium owners, who [found] that the statute of repose barred their claims even before injury occurred" but

held that "we cannot let our sympathies lead us to construe the statute" to allow plaintiffs' claim. *Id.* The Court also held that a six-year statute of repose precluded any claim concerning the fireplace brought after September 1979 because the statute of repose for product liability, N.C. Gen. Stat. § 1-50(a)(6), provided that " '*[n]o action . . . based upon or arising out of any alleged defect or any failure in relation to a product* shall be brought more than six years after the date of initial purchase for use or consumption.' " *Colony Hill Condo. I Ass'n.*, 70 N.C. App. at 396, 320 S.E.2d at 277 (quoting N.C. Gen. Stat. § 1-50(6)). The fireplace was initially purchased no later than September 1973 by the condominium developer, prior to completion of construction. *Id.* The plaintiffs in *Colony Hill*, like Plaintiff in this case, did not even own their condominiums at the time the limitations period began running.

As with claims for defective construction and product liability, injury from a fraudulent transfer may occur after the date when the limitations period begins to run, because the period is triggered by the transfer of a debtor's property, regardless of whether the creditor had a claim against the debtor at that time. In some cases, injury does not occur until the claimant has obtained an actual money judgment for which there are insufficient funds to satisfy.

The language of Section 39-23.9 is more consistent with one of repose than one of limitations. A claim for relief "is extinguished" if not commenced within the statutorily defined time period. The term "extinguished" denotes elimination of a claim, as opposed to merely barring a remedy. *See Nat'l Auto Serv. Ctrs.*, __ So. 3d at __, 2016 Fla. App. LEXIS 4820, at *28-29, and cases cited therein. As stated above, although other state court decisions are not controlling, their respective analyses may be persuasive when applied to statutes of identical or similar language, particularly with respect to uniform acts. Unif. Fraudulent Transfer Act § 9, 7A-2 U.L.A. 266, 359 cmt. (1999).

[3] Here, Plaintiff contends that even if Section 39-23.9 is a statute of repose, the time period should be extended based upon courts' inherent authority to do equity, specifically equitable tolling when the period of repose is asserted by a defendant who has made a fraudulent transfer. We disagree.

Plaintiff quotes the holding in *Wood v. BD&A Constr. L.L.C.*, 166 N.C. App. 216, 220, 601 S.E.2d 311, 314 (2004), that "[e]quitable estoppel may also defeat a defendant's statute of repose defense." This quotation is taken out of context. *Wood* involved a claim for defective construction governed by a specific statute of repose, N.C. Gen. Stat. § 1-50(a)(5)

(2015). That statute provides that no action to recover damages for defective construction shall be brought more than six years after the last act of the defendant giving rise to the claim or substantial completion of the construction, whichever is later. N.C. Gen. Stat. § 1-50(a)(5)(a). However, unlike Section 39-23.9, the statute of repose at issue in *Wood* also contains an express exception that the limitation period "shall not be asserted as a defense" by any person who has engaged in fraud, willful or wanton negligence, or wrongful concealment. N.C. Gen. Stat. § 1-50(a)(5)(e).

In the absence of a specific statutory exception such as that in Section 1-50(a)(5), " 'equitable doctrines do not toll statutes of repose.' " *Goodman*, 192 N.C. App. at 475, 665 S.E.2d at 532 (quoting *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998)). In *Goodman*, the plaintiff argued that *Wood* required the trial court to apply equitable estoppel to toll the statute of repose for a legal malpractice claim. *Id.* at 474, 665 S.E.2d at 531. In rejecting the argument, we noted that the statute of repose governing legal malpractice claims, N.C. Gen. Stat. § 1-15(c), contains no exception comparable to the statute at issue in *Wood*. *Id.*, 665 S.E.2d at 532. Accordingly, "[t]his Court has consistently refused to apply equitable doctrines to estop a defendant from asserting a statute of repose defense in the legal malpractice context . . . ." *Goodman*, 192 N.C. App. at 474-75, 665 S.E.2d at 532.

We hold that Section 39-23.9 is a statute of repose and includes no language creating an exception for equitable doctrines, thereby precluding equitable remedies such as equitable tolling, and limiting Plaintiff's arguments on appeal to those founded in law.

D. Applying the Statute

[4] Plaintiff's first cause of action alleges fraudulent transfer in violation of two separate subsections of the UVTA: N.C. Gen. Stat. § 39-23.4(a)(1) (2015), which creates a cause of action for transfers or obligations voidable as to present or future creditors, and N.C. Gen. Stat. § 39-23.5(a) (2015), which creates a cause of action for transfers or obligations voidable as to present creditors.

Claims allowed by N.C. Gen. Stat. § 39-23.4(a)(1), regarding transfers voidable as to present or future creditors, are extinguished if not brought within four years after the transfer was made. N.C. Gen. Stat. § 39-23.9(1)-(2). This section also includes a "savings clause" providing that an action is not extinguished if brought within one year after the complaining party discovered the transfer or could have reasonably

discovered it. *Id.* This section applies only to a debtor who acts "[w]ith the intent to hinder, delay, or defraud any creditor . . . ." N.C. Gen. Stat. § 39-23.4(a)(1).

Claims allowed by N.C. Gen. Stat. § 39-23.5(a), regarding transfers voidable as to present creditors, regardless of whether the debtor acted with intent, are extinguished if not brought within four years from when the transfer was made, without a savings clause. N.C. Gen. Stat. § 39-23.9(2).

All of Plaintiff's claims are barred by the applicable statute of repose because they arise from a transfer occurring more than four years prior to the filing of the complaint and because Plaintiff had notice of the transfer more than one year prior to filing the complaint.

It is undisputed that Defendant Berry transferred title in the Property to Defendant 585 on 10 October 2008, when Defendant Berry was indebted to Key. Therefore, Plaintiff's claims derived from Key and arising under Section 39-23.5(a) were extinguished because they were not brought before 10 October 2012. Plaintiff's direct claims arising under Section 39-23.4(a)(1) were extinguished either on that date or at the latest—because of the savings clause—within one year from the date Plaintiff discovered or reasonably could have discovered the transfer.

Plaintiff purchased the loan from its predecessor in interest, Key, in September 2010 and reasonably should have known about the transfer of the Property before that date. Basic due diligence would have revealed that Defendant Berry—the only personal guarantor of the loan who was in default at the time Plaintiff bought the loan—did not have sufficient real estate assets to cover the loan obligation and had transferred his most valuable real estate asset at a time when the loan was in default. A cursory comparison of Defendant Berry's 2008 and 2009 personal financial statements would have revealed the transfer of the Property two years earlier.

Finally, Plaintiff conducted a title search of Defendant Berry's property in December 2010, more than two months after purchasing the loan. The title search report explicitly showed that Defendant Berry had transferred the Property to Defendant 585 two years earlier, in 2008. The latest possible time when Plaintiff knew or reasonably should have known of the transfer of the Property was December 2010. Thus, the extra one year provided by the savings clause in Section 39-23.9(1) for claims arising under Section 39-23.4(a)(1) expired in December 2011, two years before Plaintiff brought the present action.

Plaintiff argues that it retains a cause of action under Section 39-23.4(a)(1) because it learned of the fraudulent nature of the transfer upon receipt of the judgment lien on the Note on 31 July 2013. This argument is unpersuasive.

The deed reported in the December 2010 title search stated on its face that Defendant Berry transferred the Property to a related party for no consideration. Accordingly, the title search put Plaintiff on notice that Defendant Berry had not only transferred the Property, but that he had transferred it in violation of creditors' rights actionable under the UVTA.[8] In other words, the title search should have put Plaintiff on notice of the alleged fraudulent nature of the transfer. Thus, even if we agreed with Plaintiff's interpretation of the one-year "savings clause" in the applicable statute of repose, it could not save Plaintiff's claims, which were brought two years after this discovery.

Plaintiff, in opposing Defendants' motion for summary judgment, had the burden of demonstrating when it reasonably could have discovered the transfer, or at least demonstrating that there was a material issue of fact regarding whether that discovery date was less than one year prior to the filing of the lawsuit. Plaintiff offered no evidence to the trial court and no argument to this Court that could satisfy this burden.

"[A] plaintiff has a duty to exercise reasonable diligence to discover the fraud or misrepresentations that give rise to [its] claim." *Doe v. Roman Catholic Diocese of Charlotte, N.C.*, __ N.C. App. __, __, 775 S.E.2d 918, 922 (2015). " '[W]hen an event occurs to excite the aggrieved party's suspicion or put [it] on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud,' " that party is deemed to have inquiry notice of the same. *Id.* at __, 775 S.E.2d at 922 (quoting *Forbis v. Neal*, 361 N.C. 519, 525, 649 S.E.2d 382, 386 (2007)). The information contained in Defendant Berry's personal financial statements was enough to cause a reasonable person with an interest in the Property to inquire further into its present status and to ultimately discover the alleged fraudulent nature of the transfer, *i.e.*, that the transfer was made when Defendant Berry was indebted to Key. The deed reflected in the title search was unequivocal evidence of the alleged fraudulent nature of the transfer. Therefore, even if this Court were to

8. Defendants deny the transfer was fraudulent for two reasons: (1) that Defendant Berry was not rendered insolvent as a result of the transfer; and (2) that he transferred the property for estate planning purposes. However, it is not necessary that a defendant admit to the existence of all elements of the claim for the plaintiff to have notice of the claim. The merits of Plaintiff's claims are not before this Court.

agree with Plaintiff's interpretation of the word "transfer," Plaintiff's claims would be time barred.

Plaintiff's claims are time barred by the statute of repose. The statute operates as a condition precedent to Plaintiff's claims, and by bringing a claim outside of the statute of repose, Plaintiff has failed to adequately establish its *prima facie* case. All Plaintiff's claims were brought later than four years from the date of the transfer upon which they are based and later than one year from when Plaintiff knew or reasonably should have known that the transfer had occurred.

III. Conclusion

For the foregoing reasons, we affirm the trial court's Order and Summary Judgment granting Defendants' motion for summary judgment as a matter of law.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

ROBERT KING, ANN KING, MARGARET WHALEY, AND A. WILLIAM KING, PLAINTIFFS
v.
PENDER COUNTY, MARIANNE ORR, AND ROBERT ORR, DEFENDANTS

No. COA16-51

Filed 16 August 2016

Declaratory Judgments—legal right to real property—family cemetery

The trial court did not err by granting plaintiff's request for a declaratory judgment finding that plaintiffs are persons with legal right to the real property notwithstanding the fact that they do not hold a fee or leasehold interest in the real property. Plaintiffs have not abandoned the pertinent family cemetery. Our Supreme Court has long recognized the right of *certain* descendants to enter upon the land of another to visit and maintain the graves of their ancestors.

Appeal by Defendants from judgment entered 26 August 2015 by Judge W. Allen Cobb, Jr., in Pender County Superior Court. Heard in the Court of Appeals 6 June 2016.

Shipman & Wright, LLP, by W. Cory Reiss and Gary K. Shipman, for the Plaintiffs-Appellees.

Murchison, Taylor & Gibson, PLLC, by Andrew K. McVey, for the Defendants-Appellants.

DILLON, Judge.

Marianne and Robert Orr ("Defendants") appeal from the trial court's grant of Plaintiffs' request for declaratory judgment. For the following reasons, we affirm.

I. Background

This matter stems from a long-standing dispute concerning a family cemetery located on Defendants' property. This dispute has been the subject of numerous appeals to this Court. A comprehensive factual background of the dispute is discussed in our opinion from the first appeal. *See King v. Orr*, 209 N.C. App. 750, 709 S.E.2d 602 (2011) (unpublished) ("*King I*").

The facts relevant to this appeal are as follows: Robert King, Margaret Whaley, and A. William King ("Plaintiffs") are descendants of the individuals interred in the cemetery (the "King Family Cemetery") located on property now owned by Defendants, who are not related to the King family. In 2012, the Pender County Board of County Commissioners granted consent to Defendants to disinter and relocate the bodies located in the King Family Cemetery pursuant to N.C. Gen. Stat. § 65-106 (2011).[1]

Plaintiffs subsequently filed for a declaratory judgment, requesting that the trial court review the Commissioners' decision. In 2014, the trial court entered a declaratory judgment in favor of Plaintiffs, concluding as a matter of law that the Commissioners' grant of consent was based on an improper interpretation of N.C. Gen. Stat. § 65-106, that it was unreasonable, arbitrary, and irrational, that it violated previous court decisions, and that it constituted an abuse of discretion. In *King v. Pender County*, ___ N.C. App. ___, 775 S.E.2d 695 (2015) (unpublished) ("*King V*"), we reversed the trial court's judgment and remanded the matter to allow the trial court to make a specific finding as to whether the cemetery was "abandoned," in accordance with N.C. Gen. Stat.

1. N.C. Gen. Stat. § 65-106 allows for the disinterment, removal, and reinterment of graves with the consent of the governing body of the municipality or county in which an *abandoned* cemetery is located. *See* N.C. Gen. Stat. § 65-106(a)(4).

§ 65-106(a)(4) and § 65-85, and to modify its findings of fact and conclusions of law, if necessary.

In August 2015, the trial court again entered a declaratory judgment in favor of Plaintiffs, specifically finding that Plaintiffs are "persons 'with legal right to the real property[,]' " and that "the cemetery is not an 'abandoned cemetery.' " Defendants timely appealed.

II. Analysis

We agree with the trial court that Plaintiffs are "person[s] with legal right to the real property" and that they have not "abandoned" the cemetery. Therefore, we affirm the judgment of the trial court.

N.C. Gen. Stat. § 65-106 allows for "any person, firm, or corporation who owns land on which an *abandoned* cemetery is located[,] after first securing the consent of the governing body of the municipality or county in which the abandoned cemetery is located[,]" to "effect the disinterment, removal, and reinterment of graves." N.C. Gen. Stat. § 65-106(a)(4) (emphasis added). That is, landowners have the right to remove graves from their property where the graves have been "abandoned" so long as they follow certain procedures. "Abandoned" is defined in Chapter 65 as: "[c]eased from maintenance or use by the *person with legal right to the real property* with the intent of not again maintaining the real property in the foreseeable future." N.C. Gen. Stat. §65-85(1) (2011) (emphasis added).

When interpreting N.C. Gen. Stat. § 65-106 and § 65-85(1), we must first look to the "plain words of the statute." *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). "Moreover, we are guided by the structure of the statute and certain canons of statutory construction. . . . An analysis utilizing the plain language of the statute and the canons of construction must be done in a manner which harmonizes with the underlying reason and purpose of the statute." *Id.*

Here, we conclude that Plaintiffs are persons "with legal right to the real property," notwithstanding the fact that they do not hold a fee or leasehold interest in the real property. To hold that persons "with legal right" include only those who own the property would render the statute's requirement that the cemetery be "abandoned" almost meaningless: it is the *owner* who seeks consent from the government to remove the graves. Further, it would ignore the provision in the same Chapter providing a mechanism by which descendants can obtain a court order recognizing their right to access the property of another to visit and maintain the graves of their ancestors. *See* N.C. Gen. Stat. § 65-102.

Our Supreme Court has long recognized that persons, other than the holder of the fee and leasehold interest, may have "legal right to real property." For example, the right to hunt or fish on the land of another is considered an interest in real estate subject to our Statute of Frauds, set forth in N.C. Gen. Stat. § 22-2, as is the right to remove timber or extract coal. *See Council v. Sanderlin*, 183 N.C. 253, 257-58, 111 S.E. 365, 367 (1922). Further, our Supreme Court has long recognized the right to use another's land in the form of an easement. *See Davis v. Robinson*, 189 N.C. 589, 598, 127 S.E. 697, 702 (1925) (describing appurtenant easements and easements in gross).

And, relevant to the present case, our Supreme Court has long recognized the right of *certain* descendants to enter upon the land of another to visit and maintain the graves of their ancestors, stating as follows:

> Persons having a right to protect private cemeteries or graves therein may erect a fence around the cemetery[,] . . . [and] any member of a family whose dead were buried in a family cemetery might enjoin the removal of a fence or an interference with any portion of the cemetery. However, any one or more of the heirs of persons buried in a private cemetery may prevent an interference with the *rights held in common*.

Rodman v. Mish, 269 N.C. 613, 616, 153 S.E.2d 136, 138 (1967) (internal citations omitted) (emphasis added). This right is rooted in the long-held view that landowners do not have an unfettered right to remove graves that are located on their land, as expressed by our Supreme Court in the 1800s:

> [A landowner] had not the right to remove the dead bodies interred there, or the memorial stones erected by the hand of affection and respect . . . .Causes might arise that would require and justify the removal of dead bodies from one place of interment to another, but such removal should be made, *with the sanction of kindred*, in a proper way, or by legislative sanction.

State v. Wilson, 94 N.C. 1015, 1020 (1886) (emphasis added). In the 1900s, the Court reiterated this view:

> Courts are reluctant to require disturbance and removal of bodies that have once been buried, for courts are sensitive to all those emotions that men and women hold for sacred in the disposition of their dead. . . . The aversion to disturbance of one's remains is illustrated by Shakespeare's choice of his own epitaph:

> Good friend, for Jesu's sake forbear
> To dig the dust enclosed here.
> Blest be the man that spares these stones,
> And curst be he that moves my bones.

Mills v. Carolina Cemetery, 242 N.C. 20, 27, 86 S.E.2d 893, 898 (1955) (internal marks omitted).

More recently, in 1987, our General Assembly enacted N.C. Gen. Stat. § 65-102, providing a procedure by which certain persons may obtain a court order recognizing their right to access the private lands of others in order to maintain graves and cemeteries located thereon.

In the present case, Plaintiffs did obtain an order, pursuant to N.C. Gen. Stat. § 65-102, allowing them access to Defendants' property in order to maintain and visit the King Family Cemetery. And we note that during the course of this dispute, we have held that Plaintiffs have rights "in and to the cemetery." *King I*, 209 N.C. App. 750, 709 S.E.2d 602, 2011 WL 32295 at *3. This conclusion was the basis of our Court's decision in *King I* that Plaintiffs, "as members of a family whose dead were buried in the [King Family Cemetery], are entitled to enjoin the removal of the fence or the interference with any portion of the cemetery." *King V*, ___ N.C. App. ___, 775 S.E.2d 695, 2015 WL 379303 at *3 (citing *King I*, 209 N.C. App. 750, 709 S.E.2d 602, 2011 WL 32295 at *9). This decision was reaffirmed in *King V* when this Court held that "based on [precedent], the binding language in *King I*, and the uncontested fact that [P]laintiffs are members of the King family," Plaintiffs suffered an injury in fact and therefore had standing to bring a declaratory judgment action. *Id.* at *3.

III. Conclusion

Plaintiffs qualify as "person[s] with a legal right" to the King Family Cemetery. This litigation first arose as the result of Plaintiffs' attempts to maintain and protect the King Family Cemetery. The record contains evidence that Plaintiffs have consistently maintained or attempted to maintain the King Family Cemetery throughout the long history of this litigation and that Plaintiffs intend to continue to maintain it in the future. Therefore, because Plaintiffs qualify as "person[s] with legal right" and Plaintiffs have *not* abandoned the King Family Cemetery, we affirm the judgment of the trial court.

AFFIRMED.

Chief Judge McGEE and Judge STROUD concur.

STATE v. BRIGGS

[249 N.C. App. 95 (2016)]

STATE OF NORTH CAROLINA
v.
ANTRAVIOUS BRIGGS, DEFENDANT[1]

No. COA15-767

Filed 16 August 2016

1. Appeal and Error—no notice of appeal—brief treated as petition for certiorari

Defendant's appellate brief was treated as a petition for a writ of certiorari and the petition was granted where defendant did not give notice of appeal from an amended judgment following the resentencing outside his presence.

2. Sentencing—resentencing—increased term—defendant's presence

The trial court erred by resentencing defendant for attempted second-degree sexual offense outside of defendant's presence. Regardless of whether the change in defendant's sentence was merely the correction of a mistake, the trial court substantially increased the maximum term; such a change can only be made in defendant's presence.

3. Sentencing—prior record level—worksheet—lack of defense objection—stipulation

In a case remanded on other grounds, the trial court did not err when it sentenced defendant as a prior record level II offender where the State showed a prior offense only by a prior record level worksheet that had not been signed by defense counsel. Defense counsel's lack of objection despite the opportunity to do so constituted a stipulation to the prior felony conviction.

Appeal by Defendant from judgment and amended judgment entered 10 November 2014 and 30 January 2015 by Judge Christopher W. Bragg and Judge W. David Lee, respectively, in Union County Superior Court. Heard in the Court of Appeals 28 January 2016.

Attorney General Roy Cooper, by Assistant Attorney General Roberta A. Ouellette, for the State.

1. Defendant's first name was misspelled in the original indictment, but the trial court granted the State's motion to amend to correct his name. Despite the amendment of the indictment, both the judgment and amended judgment reflect the incorrect spelling of Defendant's first name.

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for Defendant-appellant.

INMAN, Judge.

Following a jury trial and conviction for attempted second degree sexual offense, Antravious Q. Briggs ("Defendant") was sentenced to an active term of 73 to 100 months in prison. Defendant gave oral notice of appeal on the day of his sentencing. A few months later, outside of Defendant's presence, the trial court issued an amended judgment resentencing Defendant to a term of 73 to 148 months in prison. Because the trial court resentenced Defendant outside of his presence, resulting in a lengthier prison term, we vacate and remand for resentencing.

I. Background

The State's evidence tended to show the following:

On 23 June 2013, CL[2] was sexually assaulted by Defendant while she was staying with her daughter in Monroe, North Carolina. The night before, CL and her daughter had attended a cookout in the neighborhood that was also attended by Defendant. CL and her daughter went home after attending the cookout and after midnight, CL, who was sleeping on the couch in the living room, heard a knock at the front door. She answered the door and saw Defendant, who pulled her close to him and walked her to the edge of the porch. CL fell down and busted her lip, and while she was lying on the ground on her stomach, Defendant pulled down her pants and attempted to penetrate her anus with his penis about three or four times without success. CL was trying to get up, and told him several times that he was hurting her. Defendant eventually stopped and CL got up. CL hurried into the house. Defendant then left. The attack resulted in rectal bleeding. At some point later, CL found Defendant's wallet at the location where the attack had occurred. CL's daughter called the police, and CL was taken to the hospital in a rescue squad vehicle.

Defendant was charged with second degree sexual offense. At trial, the trial court granted Defendant's motion to dismiss the charge of second degree sexual offense but submitted to the jury the lesser included offense of attempted second degree sexual offense. The jury found Defendant guilty of attempted second degree sexual offense, a Class D felony.

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2. We use initials for CL to protect the privacy of the victim.

At Defendant's sentencing hearing, the State presented a prior record level worksheet showing that Defendant had committed one prior felony: a drug offense in South Carolina. The prior record level worksheet was signed by the prosecutor but was not signed by Defendant or his counsel. The prosecutor explained to the trial court that she had a copy of Defendant's criminal history, but the record does not show whether she provided that document to the trial court. The prosecutor did provide to the trial court a copy of the relevant South Carolina statute and asserted that the offense was "substantially similar" to a Class H or I felony offense in North Carolina. In calculating Defendant's prior record level, the trial court included the prior felony, which added two points, found that Defendant was a prior record level II, and sentenced him to an active term of 73 to 100 months in prison. Defendant gave oral notice of appeal in open court following sentencing.

About one month later, the North Carolina Division of Adult Correction ("DAC") sent notice to the Superior Court of Union County that Defendant's sentence was erroneous because the maximum prison term did not correspond to the minimum prison term. For a Class D felony sexual offense, the correct maximum term that corresponds with a minimum of 73 months is 148 months. N.C. Gen. Stat. § 15A-1340.17(f) (2015). Judge W. David Lee of the Union County Superior Court issued an amended judgment in response to the DAC notice, resentencing Defendant outside of his presence to a term of 73 to 148 months.

II. Analysis

A. Jurisdiction

[1] Defendant did not give notice of appeal from the amended judgment following the resentencing outside of his presence. The State does not address in its brief the jurisdictional concern that Defendant has failed to give timely notice of appeal. We elect to treat Defendant's appellate brief as a petition for writ of certiorari for review of the amended judgment and grant his petition. *See* N.C. R. App. P. 21 (2016); *State v. Jarman*, 140 N.C. App. 198, 201, 535 S.E.2d 875, 878 (2000).

B. Resentencing Outside Defendant's Presence

[2] Defendant asserts that the trial court erred in amending Defendant's sentence outside of his presence. We agree. Defendant had a right to be present at sentencing and the trial court prejudicially erred. We therefore remand for resentencing.

On appeal, this Court reviews *de novo* whether a defendant was improperly sentenced outside his presence. *State v. Arrington*, 215 N.C.

App. 161, 166, 714 S.E.2d 777, 781 (2011). "In every criminal prosecution it is the right of the accused to be present throughout the trial, unless he waives the right." *State v. Pope*, 257 N.C. 326, 330, 126 S.E.2d 126, 129 (1962). "It is well-settled that a defendant has a right to be present at the time that his sentence is imposed." *State v. Leaks*, __ N.C. App. __, __, 771 S.E.2d 795, 799 (2015).

In *Leaks*, the defendant was sentenced in court as a level V offender to a term of 114 to 146 months active imprisonment, but the trial court later entered written judgments, outside of the defendant's presence, sentencing him to 114 to 149 months active imprisonment. *Id.* at __, 771 S.E.2d at 799. The sentence reflected in the written judgments was the one imposed upon the defendant. *Id.* at __, 771 S.E.2d at 799. This Court held that "[b]ecause the written judgments reflect a different sentence than that which was imposed in defendant's presence during sentencing, we must vacate defendant's sentence and remand for the entry of a new sentencing judgment." *Id.* at __, 771 S.E.2d at 800.

Here, Defendant was sentenced to 73 to 100 months imprisonment at the sentencing hearing following Defendant's trial. He was resentenced over two months later to a term of 73 to 148 months outside of his presence. The amended written judgment shows "a different sentence than that which was imposed in [D]efendant's presence." *Id.* at __, 771 S.E.2d at 800. Therefore, like the Court in *Leaks*, we must vacate Defendant's sentence and remand for resentencing in Defendant's presence.

The State argues that the trial court was simply correcting a mistake in amending the judgment. It asserts that since Defendant was, in fact, present at the sentencing hearing, the trial court's correction of a mistake in the maximum term was not error. We reject this argument. Regardless of whether the change in Defendant's sentence was merely correcting a mistake, the prison term ultimately imposed upon Defendant was imposed outside Defendant's presence and substantially increased the maximum term. Such a change in the sentence "could only be made in . . . Defendant's presence, where he and/or his attorney would have an opportunity to be heard." *State v. Crumbley*, 135 N.C. App. 59, 67, 519 S.E.2d 94, 99 (1999).

C. Prior Record Level

[3] Since we are remanding for resentencing, we also address Defendant's other issue related to sentencing. *See State v. Midyette*, 87 N.C. App. 199, 203, 360 S.E.2d 507, 509 (1987) ("Because it is necessary to remand this case for resentencing, we deem it appropriate to briefly discuss defendant's other assignment of error relating to the sentencing hearing.").

Defendant argues that the trial court erred when it sentenced him as a prior record level II offender because there was insufficient evidence to support the prior record level determination. We disagree.

"This Court reviews the calculation of a prior record level *de novo*." *State v. Boyd*, 207 N.C. App. 632, 642, 701 S.E.2d 255, 261 (2010). "This review is appropriate even though no objection, exception, or motion has been made in the trial division." *Id.* (internal quotation marks omitted). For a trial court to calculate a defendant's prior record level, " '[t]he State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction.' " *Id.*, 701 S.E.2d at 262 (quoting N.C. Gen. Stat. § 15A-1340(f)(2009)).

Under N.C. Gen. Stat. § 15A-1340.14(f) (2015), a prior conviction must be proven by:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

"Our Court has repeatedly held that a prior record level worksheet, standing alone, does not meet the State's burden for establishing prior convictions under N.C.G.S. § 15A-1340.14(f)." *State v. English*, 171 N.C. App. 277, 280, 614 S.E.2d 405, 408 (2005). " '[T]he law requires more than the State's unverified assertion that a defendant was convicted of the prior crimes listed on a prior record level worksheet.' " *Boyd*, 207 N.C. App. at 643, 701 S.E.2d at 262 (quoting *State v. Jeffrey*, 167 N.C. App. 575, 579, 605 S.E.2d 672, 675 (2004)). "Stipulations do not require affirmative statements and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object, yet failed to do so." *State v. Hurley*, 180 N.C. App. 680, 684, 637 S.E.2d 919, 923 (2006).

At the sentencing hearing, the State presented only a prior record level worksheet that had not been signed by defense counsel to show Defendant's prior offense. Defense counsel admitted that he and Defendant had "reviewed the sheet[,]" and later stated that "[t]he State is only alleging that prior felony conviction in South Carolina." Defendant

argues that defense counsel's statement that he had reviewed the worksheet did not amount to tacit stipulation, and that defense counsel was careful to only reference *allegations* about the prior conviction. Defendant contends that the State did not meet its burden of proving the prior conviction. Defendant's argument is without merit.

This case is similar to *Hurley*. In *Hurley*, a prior record level worksheet was introduced by the State and defense counsel did not object to it despite knowledge of its contents. *Id.* at 684–85, 637 S.E.2d at 923. Defense counsel asked the trial court for work release for the defendant. *Id.* at 684, 637 S.E.2d at 923. This Court held that, "[w]hile the sentencing worksheet submitted by the State was alone insufficient to establish [the] defendant's prior record level, the conduct of [the] defendant's counsel during the course of the sentencing hearing constituted a stipulation of [the] defendant's prior convictions sufficient to meet the requirements of N.C. Gen. Stat. § 15A-1340.14(f)." *Id.* at 685, 637 S.E.2d at 923.

Here, defense counsel acknowledged reading the prior record level worksheet submitted by the State and did not object to its inclusion of the prior South Carolina conviction. Defense counsel asked that the trial court not sentence Defendant at the top of the presumptive range, acknowledging that the State was alleging the prior conviction as a basis for the sentencing range. Defendant argues that this case is distinguishable from *Hurley* because defense counsel referred to the worksheet's "allegation" of the prior conviction, indicating that "he did not accept that allegation as true." However, regardless of whether defense counsel accepted the allegation as true, he did not object to its inclusion and did not argue that the trial court should sentence Defendant as a prior record level I offender. Here, as in *Hurley*, we hold that defense counsel's lack of objection despite the opportunity to do so constituted a stipulation to Defendant's prior felony conviction. *See id.*

III. Conclusion

For the foregoing reasons, we hold that the trial court prejudicially erred in resentencing Defendant outside of his presence. Defendant's sentence is vacated and the case is remanded for resentencing.

VACATED and REMANDED.

Judges STEPHENS and HUNTER, JR. concur.

STATE v. JESTER

[249 N.C. App. 101 (2016)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
LESLIE W. JESTER, DEFENDANT

No. COA16-10

Filed 16 August 2016

1. Sentencing—habitual felon—guilty plea

The trial court erred by sentencing defendant as a habitual felon where the record did not show that his status as a habitual felon was submitted to the jury or that he entered a plea of guilty to the status. The trial court failed to comply with the requirements of N.C.G.S. § 15A-1022.

2. Sentencing—prior record level—worksheet of prior convictions

The trial court did not err by sentencing defendant as a prior record level IV. Defense counsel did not dispute the prosecutor's description of defendant's prior record or raise any objection to the contents of the proffered worksheet, and defense counsel referred to defendant's record during his sentencing argument.

3. Possession of stolen property—obtaining property by false pretenses—sufficient evidence

The trial court did not err by denying defendant's motion to dismiss the charges of possession of stolen goods and obtaining property by false pretenses. The State presented sufficient evidence of the charges to submit them to the jury.

4. Constitutional Law—effective assistance of counsel—claim dismissed

The Court of Appeals dismissed defendant's argument regarding ineffective assistance of counsel without prejudice to his right to raise the issue in a motion for appropriate relief in the trial court.

Appeal by defendant from judgments entered 20 May 2015 by Judge Reuben F. Young in Columbus County Superior Court. Heard in the Court of Appeals 9 June 2016.

Attorney General Roy Cooper, by Assistant Attorney General M. Denise Stanford, for the State.

Kimberly P. Hoppin for defendant-appellant.

ZACHARY, Judge.

Leslie Jester (defendant) appeals from judgments entered upon his convictions for possession of stolen property, obtaining property by false pretenses, and having attained the status of an habitual felon. On appeal, defendant argues that the trial court erred by sentencing him as an habitual felon, by failing to correctly calculate his prior criminal record level, and by denying his motion to dismiss the charges of obtaining property by false pretenses and possession of stolen goods. Defendant also contends that he received ineffective assistance of counsel. We find no error in defendant's convictions for possession of stolen goods and obtaining property by false pretenses, or in the trial court's calculation of defendant's prior criminal record level. We conclude that the trial court erred by sentencing defendant as an habitual felon and vacate and remand for resentencing. We dismiss defendant's claim of ineffective assistance of counsel without prejudice to his right to file a motion for appropriate relief in the trial court.

I. Factual and Procedural Background

Craig Whaley is the owner of a building where he stored farming equipment and metal tools. On 31 July 2012, Mr. Whaley discovered that a large number of items were missing from the building. The next day Mr. Whaley located his missing property on the premises of Metal Recyclers of Whiteville ("Metal Recyclers"), a business that purchases scrap metal. Mr. Whaley testified that the total value of his property that was found at Metal Recyclers was in excess of $1000.00.

Josh Holcomb, who was employed by Metal Recyclers in July 2012, testified that defendant came to Metal Recyclers on 31 July 2012, with metal items to sell. Metal Recyclers weighed and photographed the items, photographed defendant, copied defendant's driver's license, and took defendant's index finger fingerprint. In addition, defendant signed a document certifying that he was the owner of the items and acknowledging that he was being paid $114.00 for approximately 1200 pounds of steel equipment.

Detective Rene Trevino of the Chadbourn Police Department testified that he was employed as a detective with the Columbus County Sheriff's Department in 2012. On 1 August 2012, Mr. Whaley reported to the Sheriff's Department that he had found stolen property belonging to him at Metal Recyclers. Detective Trevino obtained information identifying defendant as the person who had sold the items to Metal Recyclers. When defendant returned to Metal Recyclers later that day,

he agreed to accompany Detective Trevino to the law enforcement center, where defendant waived his *Miranda* rights and gave a statement. Defendant told Detective Trevino that he had obtained the metal items from a white male. However, defendant was unable to provide the name of this person, did not affirmatively state that he had purchased the items from this man, and did not produce a receipt for any of the items. After speaking with defendant, Detective Trevino arrested defendant on charges of felony larceny and obtaining property by false pretenses.

On 6 February 2013, defendant was indicted for possession of stolen property and obtaining property by false pretenses, and on 13 March 2013, defendant was indicted for having attained the status of an habitual felon. Defendant was tried before a jury at the 18 May 2015 criminal session of Columbus County Superior Court. On 20 May 2015, the jury returned verdicts finding defendant guilty of possession of stolen goods and obtaining property by false pretenses. Based on defendant's stipulation to having the status of an habitual felon, the trial court sentenced defendant to two consecutive prison sentences of 120 to 156 months. Defendant filed *pro se* notices of appeal on 22 May 2015 and 2 June 2015. Defendant's filings were procedurally defective, and on 15 March 2016, defendant's appellate counsel filed a petition for a writ of certiorari in order to obtain review of the merits of defendant's appeal. In our discretion, we grant defendant's petition for certiorari, and proceed to address the issues raised by defendant on appeal.

II. Sentencing Defendant as an Habitual Felon

[1] Defendant argues first that the trial court erred by sentencing him as an habitual felon where the record does not show that his status as an habitual felon was submitted to the jury or that he entered a plea of guilty to having the status of an habitual felon. We agree.

"A court may accept a guilty plea only if it is 'made knowingly and voluntarily.' A plea is voluntarily and knowingly made if the defendant is made fully aware of the direct consequences of his plea." *State v. Russell*, 153 N.C. App. 508, 511, 570 S.E.2d 245, 248 (2002) (quoting *State v. Wilkins*, 131 N.C. App. 220, 224, 506 S.E.2d 274, 277 (1998) (citing *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)). This requirement is codified in Chapter 15A of the General Statutes, which provides in relevant part that a trial judge "may not accept a plea of guilty or no contest from the defendant without first addressing him personally" and:

> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;

> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
>
> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation; [and]
>
> (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge. . . .

N.C. Gen. Stat. § 15A-1022(a) (2015). Proceedings to determine whether a criminal defendant has the status of an habitual felon "shall be as if the issue of habitual felon were a principal charge." N.C. Gen. Stat. § 14-7.5 (2015). Accordingly, a trial court may not accept a defendant's plea of guilty to having the status of an habitual felon without complying with the requirements of N.C. Gen. Stat. § 15A-1022. *See*, *e.g.*, *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001) (holding that the trial court was required to comply with N.C. Gen. Stat. § 15A-1022 before accepting the defendant's plea to having attained the status of an habitual felon).

In the present case, defendant argues that the trial court erred by sentencing him as an habitual felon without personally addressing him to make the inquiries required by N.C. Gen. Stat. § 15A-1022, having defendant execute a transcript of plea, or otherwise creating a record that defendant's plea was knowingly and voluntarily entered. Defendant cites *Gilmore*, in which we held that a defendant's stipulation, without more, does not establish a plea of guilty. In *Gilmore*, as in the instant case, the defendant stipulated to his status as an habitual felon, based upon his convictions for the predicate offenses. The trial court sentenced the defendant as an habitual felon based on his stipulation, without conducting a colloquy addressing the requirements of N.C. Gen. Stat. § 15A-1022 or having the defendant execute a plea transcript. We held that:

> In this case, the record shows Defendant stipulated to the three prior convictions alleged by the State, pursuant to N.C. Gen. Stat. § 14-7.4. . . .The issue of whether Defendant was an habitual felon, however, was not submitted to

> the jury, and Defendant did not plead guilty to being an habitual felon. Although Defendant did stipulate to his habitual felon status, *such stipulation, in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea*. . . . [*See*] N.C.G.S. § 15A-1022(a) (trial court may not accept guilty plea without first addressing defendant personally and making inquiries of defendant as required by this statute). Accordingly, Defendant's habitual felon conviction is reversed and remanded. (emphasis added).

Gilmore, 142 N.C. App. at 471-72, 542 S.E.2d at 699. In this case, as in *Gilmore*, the defendant stipulated to his status as an habitual felon and to his prior convictions for the predicate felonies, as indicated in the following dialogue between defendant and the trial court:

> THE COURT: All right. Madam Court Reporter, we are back on the record in Mr. Jester's case. And as I understand it, Mr. Williamson, your client is - has agreed to stipulate to his status as a habitual felon. Is that correct?
>
> MR. WILLIAMSON: Your Honor, in an effort to expedite things, . . . [Mr. Jester] is prepared to stipulate and to - take his medicine as we would say.
>
> THE COURT: Is that correct, Mr. Jester?
>
> MR. JESTER: [Nods affirmatively].
>
> THE COURT: Okay. All right. Gentlemen, thank you, very much. We are ready to proceed with sentencing in this case. And Mr. McGee, the Court will hear from the State.
>
> . . .
>
> THE COURT: All right. Thank you, very much. Mr. Jester, you understand, do you not, that you have been indicted as a habitual felon with regard to this case? You understand that?
>
> MR. JESTER: Yes, sir. I do.
>
> THE COURT: You also understand that you are admitting to the convictions that have been recited in the record based on the indictment that has been handed down? You understand that?

MR. JESTER: Yes, sir, Your Honor.

THE COURT: Do you also stipulate, sir, that these convictions are true and accurate?

MR. JESTER: Yes, sir.

THE COURT: Do you also stipulate, sir, that, based on these convictions, that you are indeed of a habitual felon status?

MR. JESTER: Yes, sir, I do.

THE COURT: All right. And you also understand, do you not, sir, that, because of your status as a habitual felon, that your exposure with regard to the offense for which you have just been found guilty of by the jury that your sentence exposure increases with regard to your admitting or stipulating to being a habitual felon?

MR. JESTER: Yes, sir.

THE COURT: All right. And so you are hereby for the record agreeing and thereby stipulating that you are a habitual felon for purposes of sentencing in these two cases. Is that correct?

MR. JESTER: Yes, sir.

THE COURT: Okay. All right. Thank you, very much. You may have a seat. And Mr. McGee, you may proceed.

We conclude that this dialogue failed to comply with any of the requirements of N.C. Gen. Stat. § 15A-1022. Specifically, we note that:

1. Although the trial court personally addressed defendant, the court did not make any of the inquiries required by N.C. Gen. Stat. § 15A-1022.

2. The trial court did not inform defendant that he had a right not to plead guilty to being an habitual felon.

3. The trial court did not inform defendant that by pleading guilty to having the status of an habitual felon, he was waiving his constitutional rights to have the charge determined by a jury and to cross-examine witnesses.

4. The court did not inform defendant of the minimum and maximum sentence that he might receive, or the

> felony class under which he would be sentenced as an habitual felon.
>
> 5. The court did not determine whether defendant was satisfied with his court-appointed counsel.
>
> 6. The trial court did not state on the record that defendant was entering a plea of guilty, did not ask defendant if he was entering a plea of guilty, and did not have defendant execute a transcript of plea under oath.

We conclude that this case is functionally indistinguishable from *Gilmore*, in that the record fails to establish either that defendant entered a plea of guilty to having the status of an habitual felon, or that the trial court complied with the requirements of N.C. Gen. Stat. § 15A-1022. As a result, we vacate defendant's conviction for being an habitual felon and remand for a new sentencing hearing.

In reaching this conclusion, we have considered the State's arguments for a contrary result. The State argues the trial court's "failure to strictly comply with the provisions of N.C. Gen. Stat. § 15A-1022 is not reversible error *per se*, but must be evaluated upon a prejudice analysis." In support of this position, the State directs our attention to cases in which the record showed a relatively minor or technical omission from the requirements of N.C. Gen. Stat. § 15A-1022.

It is true that where the record establishes, whether through a trial court's colloquy with a defendant or through the defendant's execution of a plea transcript, that the defendant was fully informed of his rights as required by N.C. Gen. Stat. § 15A-1022, we have required the defendant to establish that an insignificant or technical error by the trial court was prejudicial. For example, in *State v. McNeill*, 158 N.C. App. 96, 580 S.E.2d 27 (2003), the record established that the defendant signed a plea transcript, was asked under oath by the trial court whether he understood the consequences of his plea of guilty, was informed of his rights, and was told the class of felony applicable to his sentences as well as the maximum number of months to which he could be sentenced for each offense. The defendant argued on appeal that the trial court had failed to comply with N.C. Gen. Stat. § 15A-1022, on the grounds that the court had not specified that if the defendant were sentenced to consecutive terms of imprisonment, he would receive a longer sentence than the maximum for each offense. We held that although the trial court's omission "was neither ideal nor preferable," the defendant had failed to establish prejudice. *McNeill*, 158 N.C. App. at 105, 580 S.E.2d at 32.

In contrast, in *Gilmore* and similar cases, we have held that where there is no record of a valid plea of guilty, either from the trial court's questioning the defendant in accordance with N.C. Gen. Stat. § 15A-1022 or by means of a properly executed plea transcript, the plea must be vacated and the defendant resentenced. In such cases we have not required the defendant to produce evidence that he was prejudiced beyond the prejudice inherent in the court's failure to ensure that the defendant's plea was knowingly and voluntarily entered. The present case, like *Gilmore*, is one in which there is no record that the requirements of N.C. Gen. Stat. § 15A-1022 were met. Thus:

> We acknowledge the State's argument, based on this Court's decision in *State v. Hendricks*, 138 N.C. App. 668, 531 S.E.2d 896, (2000), that where a defendant simply alleges technical non-compliance with G.S. § 15A-1022, but fails to show resulting prejudice, vacation of the plea is not required. However, in *Hendricks*, although the record failed to establish that the trial court itself personally addressed defendant as to all statutory factors as required by the statute, the record indicated the trial court did make some of the required inquiries, and further, the transcript of plea between the State and the defendant "covered all the areas omitted by the trial judge." . . . In contrast, *in this case, there is no indication in the record of compliance, even in part, with G.S. § 15A-1022[.] . . . [N]or does the record contain any transcript of plea[.] . . . We believe such an absence constitutes more than mere "technical" non-compliance, and is sufficient to establish prejudice to defendant.*

State v. Glover, 156 N.C. App. 139, 146-47, 575 S.E.2d 835, 839-40 (2003) (emphasis added) (quoting *State v. Hendricks*, 138 N.C. App. 668, 669-70, 531 S.E.2d 896, 898 (2000)). Accordingly, we conclude that defendant is entitled to a new sentencing hearing.

III. Sentencing Defendant as a Prior Record Level IV

[2] Defendant argues next that the trial court erred by sentencing defendant as a prior record level IV, on the grounds that the State failed to present sufficient evidence to support this classification. We disagree.

The Structured Sentencing Act requires that the trial court determine a defendant's prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14 before sentencing a defendant for a felony conviction. Prior convictions may be proved by any of the following methods:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the Court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2015). This statute also provides that the "State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." Defendant maintains that the State failed to meet this burden because it offered only a worksheet as evidence of defendant's prior criminal record. Defendant's argument is ill-founded.

It is well established that defense counsel may be deemed to have stipulated to the worksheet of a defendant's prior convictions by counsel's failure to dispute or object to the worksheet coupled with counsel's use of the worksheet in his argument:

> [A] worksheet, prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions. Thus, the question here is whether the comments by defendant's attorney constitute a 'stipulation' to the prior convictions listed on the worksheet submitted by the State.

State v. Eubanks, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002) (citing *State v. Hanton*, 140 N.C. App. 679, 689, 540 S.E.2d 376, 382 (2000)).

In this case, during the sentencing hearing, the prosecutor stated the following:

> PROSECUTOR: Judge, in regard to sentencing, Mr. Jester is going to - I'm about to submit the worksheet which shows he's got 19 points for sentencing purposes, Your Honor. He's going to be a level six.
>
> His prior convictions, Judge, prior possession of stolen goods, a second-degree burglary, unauthorized use of a motor vehicle, simple possession of schedule IV controlled substance, assault by strangulation, B and E, three

> separate DWI's, an additional second-degree burglary, as well as a communicating threats. Mr. Jester has a lengthy criminal record, one that consists of similar crimes for which he has been charged with today and convicted of, spanning from 1982 forward to today. . . .

"[C]ounsel need not affirmatively state what a defendant's prior record level is for a stipulation with respect to that defendant's prior record level to occur." *State v. Alexander*, 359 N.C. 824, 830, 616 S.E.2d 914, 918 (2005). In *Alexander*, our Supreme Court stated the following:

> Here, defense counsel did not expressly state that he had seen the prior record level worksheet; however, we find it telling that he specifically directed the trial court to refer to the worksheet to establish that defendant had no prior felony convictions. Defense counsel specifically stated that "up until this particular case he had no felony convictions, as you can see from his worksheet." This statement indicates not only that defense counsel was cognizant of the contents of the worksheet, but also that he had no objections to it. Defendant, by arguing that his trial counsel did not stipulate to his previous misdemeanor conviction, simply seeks to have his cake and eat it too. If defense counsel's affirmative statement with respect to defendant's lack of previous felony convictions was proper, then so too was the implicit statement that defendant's previous misdemeanor convictions were properly reflected on the worksheet in question.

Similarly, in *State v. Cromartie*, 177 N.C. App. 73, 81, 627 S.E.2d 677, 682-83 (2006), we discussed *Alexander* and held that:

> [T]rial counsel acknowledged the worksheet by making specific reference to it. . . . Then counsel proceeded to use the information contained in the worksheet to minimize defendant's prior record as being 'nonviolent.' Finally, at no time did trial counsel dispute any of the convictions on the worksheet. As our Supreme Court held in *Alexander*, defendant cannot "have his cake and eat it too." Defendant cannot use the worksheet during his sentencing hearing to seek a lesser sentence and then have his appellate counsel disavow this conduct on appeal in order to obtain a new sentencing hearing.

(quoting *Alexander*, 359 N.C. at 830, 616 S.E.2d at 918, and citing *Eubanks*, 151 N.C. App. at 506, 565 S.E.2d at 743). In the instant case, as in *Alexander* and *Cromartie*, defendant's counsel did not dispute the prosecutor's description of defendant's prior record, or raise any objection to the contents of the proffered worksheet. In addition, defense counsel referred to defendant's record during his sentencing argument:

> DEFENSE COUNSEL: Your Honor, if I could just briefly. I forgot to mention this. And this was something with Mr. Jester, his point of contention has always been - and this is his first trial. *You see his record level? He has always stood up and taken accountability for the things he has done.* As such, this is his first trial. He has always, by his contention, admitted and taken responsibility for his actions. This is the first time, and he still contends that he is not guilty of this, but he has always been accountable. *And you can see from his record he hasn't committed any crimes within the - '06 was his last conviction, as far as I can tell. As such, he's been a good boy*, and I would ask Your Honor to take that into consideration.

(emphasis added). We conclude, pursuant to the holdings in *Alexander* and *Cromartie*, that defendant stipulated to the prior record as stated on the worksheet.

Defendant also contends that the trial court erred by assigning points to three out-of-state convictions in defendant's criminal record. N.C. Gen. Stat. § 15A-1340.14(e) (2015) provides in relevant part that:

> Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. . . . If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. . . .

In this case, defendant challenges the trial court's calculation of prior record points assigned to three convictions from South Carolina for DWI, breaking and entering, and second-degree burglary. The

convictions for breaking and entering and for second-degree burglary were treated as Class I felonies and assigned two points each. On appeal, defendant argues that the State was required to offer proof that breaking and entering and second-degree burglary are classified as felonies in South Carolina. As discussed above, we have held that defendant stipulated to the accuracy of the worksheet offered by the prosecutor, which includes the points assigned to the offenses. In *State v. Hinton*, 196 N.C. App. 750, 675 S.E.2d 672 (2009), we held that if a defendant stipulates to his prior record and the prosecutor does not seek to assign a classification higher than the default Class I, the State is not required to prove that the out-of-state offenses correspond to equivalent North Carolina offenses:

> A sentencing worksheet coupled with statements by counsel may constitute a stipulation to the existence of the prior convictions listed therein. In this case, Defendant argues that the trial court's calculation of his prior record level was not supported by sufficient evidence to show that his out-of-state convictions were "substantially similar" to North Carolina offenses. Because Defendant's assertions at trial and failure to object to the sentencing worksheet constituted a stipulation to the existence of his prior convictions, we affirm his sentence. . . .
>
> . . .
>
> According to the statute, the default classification for out-of-state felony convictions is "Class I." Where the State seeks to assign an out-of-state conviction a *more serious* classification than the default Class I status, it is required to prove "by the preponderance of the evidence" that the conviction at issue is "substantially similar" to a corresponding North Carolina felony. However, where the State classifies an out-of-state conviction as a Class I felony, no such demonstration is required.

Hinton, 196 N.C. App. at 751, 754-55, 675 S.E.2d at 673, 675. We hold that because defendant stipulated to his prior record and the prosecutor did not seek to assign a classification more serious than Class I to his out-of-state convictions for second-degree burglary and breaking and entering, the State was not required to offer proof that these offenses were considered felonies in South Carolina or that they were substantially similar to specific North Carolina felonies.

Regarding the South Carolina DWI conviction, defendant argues that in the absence of proof that this offense was substantially similar

to a North Carolina offense, the conviction should have been classified as a Class 3 misdemeanor with no points assigned to defendant's criminal record level. Assuming that defendant is correct, this would have resulted in defendant's having eighteen prior record points instead of nineteen points, and defendant would nonetheless have been classified as a Level VI offender. As a result, defendant has failed to establish prejudice arising from any error in classification of the South Carolina DWI conviction.

Defendant also maintains that the trial court erred by assigning prior record points to two convictions that the record indicated were obtained on the same day. Defendant concedes that this situation is not a factual impossibility, and we again note that defendant stipulated to his prior record. We conclude that the trial court did not err in its calculation of defendant's prior record level and that defendant is not entitled to relief based on this argument.

IV. Denial of Defendant's Motion to Dismiss

[3] Defendant argues next that the trial court erred by denying defendant's motion to dismiss the charges against him, on the grounds that the State failed to present sufficient evidence to submit the charges to the jury. We disagree.

The standard of review regarding motions to dismiss is well settled:

> "When reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines whether the State presented substantial evidence in support of each element of the charged offense. Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. . . . [I]f there is substantial evidence - whether direct, circumstantial, or both - to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied."

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (quoting *State v. Abshire*, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009)).

We first consider defendant's challenge to the evidence of possession of stolen property. N.C. Gen. Stat. § 14-71.1 (2015) provides in relevant part that:

> If any person shall possess any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a Class H felony. . . .

The elements of the crime of possession of stolen goods are: "(1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). In this case, defendant challenges the sufficiency only of the evidence that he knew or had reasonable grounds to believe that the metal items were stolen.

"Whether the defendant knew or had reasonable grounds to believe that . . . [property was] stolen must necessarily be proved through inferences drawn from the evidence." *State v. Brown*, 85 N.C. App. 583, 589, 355 S.E.2d 225, 229 (1987) (citation omitted). "Our Supreme Court has held the legislature intended for the 'reasonable man' standard to apply to the offense of possession of stolen goods." *State v. Weakley*, 176 N.C. App. 642, 652, 627 S.E.2d 315, 321 (2006) (citing *State v. Parker*, 316 N.C. 295, 304, 341 S.E.2d 555, 560 (1986)). "The fact that a defendant is willing to sell property for a fraction of its value is sufficient to give rise to an inference that he knew, or had reasonable grounds to believe, that the property was stolen." *Brown*, 85 N.C. App. at 589, 355 S.E.2d at 229.

In this case, the evidence tended to show that defendant was in possession of stolen property valued at more than $1000.00, which he sold for only $114.00. Although defendant told Detective Trevino that he obtained the stolen property from a "white man," he could not provide the man's name. Defendant did not specifically tell Detective Trevino that he *bought* the items from this unidentified man, and did not produce a receipt. We hold that these circumstances were sufficient to allow the jury to determine whether defendant knew or had reasonable grounds to know that the metal items were stolen.

Defendant also challenges the sufficiency of the evidence that he obtained property by false pretenses. N.C. Gen. Stat. § 14-100(a) (2015)

provides in pertinent part that a person is guilty of the felony of obtaining property by false pretenses if he shall "by means of any kind of false pretense . . . obtain or attempt to obtain from any person within this State any . . . property . . . with intent to cheat or defraud any person of such [property]. . . . " Defendant argues that because there was no evidence that he knew or had reasonable grounds to believe that the metal items he sold were stolen, there was no basis for the jury to find that defendant's representation that he was authorized to sell the items was false. For the reasons discussed above, we conclude that there was sufficient evidence that defendant knew or had reasonable grounds to believe that the items were stolen, and that the trial court did not err by denying defendant's motion to dismiss this charge.

V. Ineffective Assistance of Counsel

Finally, defendant argues:

> Should this Court determine that trial counsel's brief comments at the sentencing hearing constitute a stipulation to Mr. Jester's prior record despite insufficient proof and no indication of Mr. Jester's assent, then Mr. Jester contends that he received ineffective assistance of counsel in his counsel's failure to challenge the insufficient proof of his prior convictions.

Defendant is thus arguing that his counsel was ineffective for stipulating to the accuracy of the worksheet setting out his criminal record instead of challenging the proof of his prior convictions. "When raising claims of ineffective assistance of counsel, the 'accepted practice' is to bring these claims in post-conviction proceedings, rather than on direct appeal. . . . To best resolve this issue, an evidentiary hearing available through a motion for appropriate relief is our suggested mechanism." *State v. Dinan*, 233 N.C. App. 694, 700, 757 S.E.2d 481, 486-87 (quoting *State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985)), *disc. review denied*, 367 N.C. 522, 762 S.E.2d 203 (2014). We dismiss this issue without prejudice to defendant's right to raise it in a motion for appropriate relief in the trial court.

VI. Conclusion

[4] For the reasons discussed above, we conclude that defendant received a fair trial free of reversible error as to his convictions for possession of stolen property and obtaining property by false pretenses, as well as the calculation of his prior criminal record level. We conclude that the trial court erred in sentencing defendant as an habitual felon

and vacate the judgment and remand for resentencing. We dismiss defendant's claim of ineffective assistance of counsel without prejudice to defendant's right to file a motion for appropriate relief in the trial court.

NO ERROR IN PART, VACATED IN PART AND REMANDED FOR RESENTENCING, AND DISMISSED WITHOUT PREJUDICE IN PART.

Judge STEPHENS and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
AMANDA GAYLE REED, DEFENDANT

No. COA15-363

Filed 16 August 2016

1. Criminal Law—motion to dismiss—insufficient evidence—defendant's evidence considered

The defendant's evidence is generally not considered on a motion to dismiss because the evidence is viewed in the light most favorable to the State, but defendant's evidence may be considered when it is consistent with the State's evidence. Furthermore, the defendant's evidence must be considered when it rebuts the inference of guilt and is not inconsistent with the State's evidence.

2. Child Abuse, Dependency, and Neglect—creating or allowing a substantial risk of injury—insufficient evidence

The trial court erred by denying defendant's motion to dismiss a charge of misdemeanor child abuse where defendant went to the bathroom for five to ten minutes, leaving her daughter (Mercadiez) playing on a side porch with friends under the supervision of another person in the house, and Mercadiez drowned in their outdoor pool. Considering the State's evidence and the evidence from defendant that was not in conflict with the State's evidence, there was insufficient evidence that defendant created or allowed to be created a substantial risk of physical injury to the child by other than physical means, an essential element of the offense as charged.

3. Child Abuse, Dependency, and Neglect—misdemeanor child abuse—sufficiency of evidence

In a case reversed on other grounds, which included a dissent and an opinion concurring with the dissent on this issue, defendant's motion to dismiss a prosecution for misdemeanor child abuse should have been granted even without State's evidence that was improperly excluded.

4. Juveniles—contributing to the delinquency—fathers' competence to care for young children

Defendant's motion to dismiss a prosecution for contributing to the delinquency of a juvenile should have been granted in a case arising from the drowning of a child in a swimming pool. Defendant was not the only "parent" involved; essentially, the State's theory hinged on the theory that fathers are per se incompetent to care for young children.

5. Evidence—other crimes or bad acts—misuse

In a case that involved the drowning of a child in a swimming pool, reversed on other grounds, with a dissent and a concurring opinion that joined the dissent in some regards, defendant would also have been entitled to a new trial based on the misuse by the State of evidence of another child's death.

Judge DAVIS concurring.

Judge STEPHENS dissenting.

Appeal by defendant from judgment entered on or about 6 October 2014 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Court of Appeals 21 October 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Melody R. Hairston, for the State.

The Coxe Law Firm, PLLC, by Matthew C. Coxe, for defendant-appellant.

STROUD, Judge.

Defendant appeals her convictions for misdemeanor child abuse and contributing to the delinquency of a juvenile. For the following reasons, we conclude that defendant's convictions must be vacated.

I. Background

The facts of this case, as presented by the State, begin simply enough: defendant went to use the bathroom in her home for a few minutes, and her toddler, Mercadiez, tragically managed to fall into their outdoor pool and drown. The complexity of this case arises from the fact that about two years before, defendant was babysitting another child, Sadie Gates, who got out of the house and drowned just outside of her home. Defendant was indicted, tried, and convicted by a jury of misdemeanor child abuse and contributing to the delinquency of a juvenile for Mercadiez's death. Defendant appeals.

II. Defendant's Appeal

Defendant makes three separate arguments on appeal: (1) the trial court erred in denying her motion in limine to exclude the evidence of Sadie's death because it was not an appropriate use of evidence under North Carolina Rule of Evidence 404(b) regarding prior crimes and bad acts *and* it should have been excluded pursuant to North Carolina Rule of Evidence 403 because the probative value of the evidence did not substantially outweigh the unfair prejudice; (2) the trial court erred in denying defendant's motions to dismiss because there was not substantial evidence of each essential element of the crimes charged; and (3) the State went so far beyond the scope of the appropriate use of the admitted Rule 404(b) evidence in its questioning and arguments to the jury that it amounted to plain error in defendant's trial.

This panel has struggled mightily on this case. While defendant's issues may seem typical for a criminal appeal, unfortunately, an analysis of these issues has turned out to be quite complex, but we have addressed each issue, since we believe that all are interrelated as they appear in this case and all have merit.

III. Motions to Dismiss

Defendant argues that "the trial court erred by denying [her] motions to dismiss all three of the charges at the close of the State's evidence and at the close of all the evidence." (Original in all caps.) The jury found defendant not guilty of involuntary manslaughter, and thus we address only the crimes for which defendant was convicted: misdemeanor child abuse and contributing to the delinquency of a juvenile.

> This Court reviews the trial court's denial of a motion to dismiss *de novo*. On a motion to dismiss for insufficiency of evidence, 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.

State v. Clark, 231 N.C. App. 421, 423, 752 S.E.2d 709, 711 (2013) (citations and quotation marks omitted), *disc. review denied*, 367 N.C. 322, 755 S.E.2d 619 (2014).

A. Misdemeanor Child Abuse

Turning to defendant's conviction for misdemeanor child abuse, North Carolina General Statute § 14-318.2(a) provides,

> Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2(a) (2013). North Carolina General Statute § 14-318.2(a) is awkwardly worded, and it is not immediately clear what the phrase "by other than accidental means" is modifying, but our Supreme Court has clarified that issue: "This statute provides for three separate offenses: If the parent by other than accidental means (1) inflicts physical injury upon the child, (2) allows physical injury to be inflicted upon the child, or (3) creates or allows to be created a substantial risk of physical injury." *State v. Fredell*, 283 N.C. 242, 244, 195 S.E.2d 300, 302 (1973). In other words,

> To convict defendant of misdemeanor child abuse, the State needed to prove only one of the following elements: (1) that the parent nonaccidentally inflicted physical

> injury on the child; (2) that the parent nonaccidentally allowed physical injury to be inflicted on the child; or (3) that the parent nonaccidentally created or allowed to be created a substantial risk of physical injury on the child.

State v. Armistead, 54 N.C. App. 358, 360, 283 S.E.2d 162, 164 (1981). Furthermore, "G.S. 14-318.2(a), contemplates active, purposeful conduct" on the part of the defendant. *State v. Hunter*, 48 N.C. App. 656, 660, 270 S.E.2d 120, 122 (1980).

Because this Court is required to consider the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor" at this point we would normally turn only to the evidence presented in the State's case in chief to determine whether there was "substantial evidence" of "each essential element of the offense charged[.]" *Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711. But in this case, defendant presented direct evidence which does not conflict with the State's evidence, and although the charges against defendant should have been dismissed even without consideration of her evidence, in this case, consideration of her evidence is more than appropriate; here, it is required. *See generally State v. Bates*, 309 N.C. 528, 535, 308 S.E.2d 258, 262-63 (1983) ("[O]n a motion to dismiss, the court must consider the defendant's evidence which explains or clarifies that offered by the State. The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence.").

1. Consideration of Defendant's Evidence

[1] Generally, the defendant's evidence is disregarded when deciding whether the evidence is sufficient to submit the charged offenses to the jury unless that evidence is favorable to the State. *See generally State v. Nabors*, 365 N.C. 306, 312, 718 S.E.2d 623, 627 (2011) ("The defendant's evidence, unless favorable to the State, is not to be taken into consideration." (citation and quotation marks omitted)). "However, if the defendant's evidence is consistent with the State's evidence, then the defendant's evidence may be used to explain or clarify that offered by the State." *Id.* (citation and quotation marks omitted). Indeed, our Supreme Court has noted that "[w]e have consistently held that on a motion to dismiss, the court must consider the defendant's evidence which explains or clarifies that offered by the State. The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence." *Bates*, 309 N.C. at 535, 308 S.E.2d at 262-63.

A comparison of the evidence presented by the State and the defendant in *Bates* is helpful to illustrate how defendant's evidence should be used in this situation. *Id.* at 529-32, 308 S.E.2d at 260-61. In *Bates*, the State's evidence was summarized by the Supreme Court as follows:

> The State offered evidence tending to show that at around 11:00 p.m. on 6 January 1982, defendant came to the residence of Mrs. Mary Godwin at 307 Kenleigh Road in Fayetteville, North Carolina. Mrs. Godwin testified that defendant appeared to be severely injured and was pleading for help. She stated that defendant's clothing was covered with blood and dirt. A nurse at Cape Fear Valley Hospital, Mrs. Godwin attempted to render first aid assistance to defendant Bates and immediately called an ambulance and the Cumberland County Sheriff's Department.
>
> Deputy John Dean responded to Mrs. Godwin's call. Deputy Everette Scearce arrived shortly thereafter and began to search the area around the Godwin residence. In a field approximately 300 feet from the house, Scearce discovered the body of Roy Lee Warren, Jr., lying beside an automobile. Warren's body was partially covering what appeared to be a lead pipe approximately 18 inches in length. Scearce testified that he remained in the field only a few moments before leaving to call an ambulance for Warren.
>
> Conrad Rensch, a crime scene technician with the City/County Bureau of Investigation, testified that he received a call to come to Kenleigh Road at approximately 12:30 a.m. on 7 January. He immediately proceeded to the field and began his investigation of the crime scene. He observed that there were numerous scuff marks in the dirt surrounding the body and he detected spots of blood on the car.
>
> Items of personal property belonging to both Bates and Warren were discovered in an area near the edge of the field. These items ranged in distance from approximately 73 feet to 116 feet from Warren's body and were generally located within 25 feet of each other. A watch, keys, wallet, checkbook and calculator were identified as the victim's possessions, while a gauze bandage, gold neck chain and jacket were determined to belong to defendant.

> Rensch noted that there were scuff marks near several of the items and that the ground was covered with blood in some places.
>
> Rensch also testified that he found a .22 caliber revolver in a grassy area not far from the other items. Douglas Branch, a ballistics expert with the State Bureau of Investigation, stated that in his opinion a bullet recovered from the decedent's body was fired from the revolver discovered in the field. Rensch related that there was a large amount of blood near the gun. He did not see scuff marks in that area, but admitted that it was usually difficult to find them in the grass.
>
> David Hedgecock is a forensic serologist employed by the S.B.I. Crime Laboratory. He testified that after performing laboratory tests upon blood samples removed from Bates and Warren, he determined that defendant's ABO grouping was type B and the deceased's ABO grouping was type O. Hedgecock stated that the blood removed from the car was type B and therefore consistent with defendant's blood type, but that the bloodstains found on the ground and on the various personal items strewn throughout the field were of both type O and B.
>
> The State also presented testimony of Dr. Thomas Bennett, a forensic pathologist. He testified that during the post-mortem examination of the deceased, he located numerous small cuts and abrasions and 32 stab wounds. He further identified two gunshot wounds, one to Warren's right abdomen and another, a grazing wound to the left cheek. Dr. Bennett recovered one bullet from the body in the midline section.
>
> Dr. Bennett testified that in his opinion the gunshot wounds were inflicted at close range, at least within four feet. He further gave his opinion that the gunshot wounds were probably inflicted before the stab wounds.

309 N.C. at 529-31, 308 S.E.2d at 260.

The defendant's evidence was entirely consistent with the State's evidence, but explained what had happened between the defendant and the decedent:

Defendant's evidence, which included his own testimony, tended to show that he and Warren were friends and former co-workers at the Food Town grocery. Defendant Bates testified that a few days prior to 6 January 1982, Warren asked him if he had a gun. Defendant replied that he did not have one, but that his mother did. Defendant asked Warren to meet him in the field on Kenleigh Road and there gave Warren his mother's .22 caliber revolver. Defendant acknowledged that Warren gave him $30.00 for the weapon, although he maintained that he did not ask for any money in exchange for the gun.

Defendant further testified that, on 6 January, he went to the Food Town where Warren worked and asked him to return the pistol because his mother had discovered that it was missing. Warren offered to bring the gun to defendant's home later that evening, but defendant told Warren he would rather meet at the same field on Kenleigh Road so his mother would not see them. Warren agreed and told defendant to watch for him around 7:00 p.m. Defendant stated that he lived near the field and watched for Warren's car from his bedroom window. Warren arrived at the field at around 10:00 p.m. and defendant then walked out to meet him.

Defendant testified that he and the decedent had a disagreement over the gun because Warren refused to return it until defendant gave him $30.00. After Warren consistently refused to relinquish the weapon without payment, defendant said he would have to tell his mother where the gun was. As he rose and turned to get out of the car, defendant testified that Warren stabbed him in the back. Defendant remembered that he stumbled, but after regaining his balance he began to run in the direction of the nearest house. Because defendant had a cast on his leg from a football injury, he did not run to his own home because it was farther away and he was afraid he would not make it.

Defendant testified that Warren fired one or two gunshots and shouted something like, "If you don't stop running, I'll kill you." Defendant stated that he stopped running and Warren caught up with him in the general

> area where most of the items of personal property were later found. Defendant stated, however, that he did not recall seeing any of the decedent's possessions.
>
> Defendant testified that Warren approached him and hit him across the forehead with the gun. Defendant fell to the ground, Warren jumped on him and they started to fight. Defendant related that at one point during the tussle, he tried to wrestle the gun from the decedent. He testified that the gun went off while he and Warren were fighting on the ground, although he was unaware that a bullet had struck the decedent.
>
> Eventually, defendant was able to break free from Warren and he crawled back toward the car. Defendant testified that he was about to enter the car when Warren grabbed him from behind and pulled him to the ground. Defendant stated that when he opened the door to get into the car, a metal pipe rolled out from the floorboard and onto the ground.
>
> Defendant remembered tussling with Warren beside the car and receiving a second stab wound to the chest. He testified that he pulled the knife from his chest and began to stab the decedent. At some point, Warren fell off of defendant and, shortly thereafter, defendant lost consciousness. He later wakened and made his way to the Godwin residence on Kenleigh Road.

Id. at 531-32, 308 S.E.2d at 260-61.

The jury convicted the defendant in *Bates* of felony murder and robbery with a firearm. *Id.* at 533, 308 S.E.2d at 262. The defendant argued on appeal that his motion to dismiss the charge of robbery with a firearm should have been allowed "for insufficiency of the evidence[,]" *id.*, and the Supreme Court agreed and expressly based its determination upon consideration of the "defendant's uncontroverted testimony[.]" *Id.* at 535, 308 S.E.2d at 262. The Court explained that the

> [d]efendant's uncontroverted testimony refutes a conclusion that he forcibly took these items of personal property from the victim with the intent to steal them.
>
> We have consistently held that on a motion to dismiss, *the court must consider the defendant's evidence which explains or clarifies that offered by the State. The*

court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence.

Defendant Bates' testimony in its entirety must be characterized as a clarification of the State's testimonial and physical evidence; it in no way contradicted the prosecution's case.

Defendant's testimony and the physical evidence reveal that a brutal fight took place between Bates and Warren. Blood of both defendant and the deceased was found on the items of personal property, on the hood of the automobile and on the ground. Conrad Rensch testified that there were numerous scuff marks in the dirt surrounding the automobile and in other areas in the clearing. It is also important to note that items of personal property belonging to defendant were also scattered throughout the field. Defendant testified that he never saw decedent's possessions nor was he aware of how they came to be strewn around the area.

When defendant's explanatory testimony is considered along with the physical evidence presented by the State, the logical inference is that the decedent lost these items of personal property during the struggle with defendant. There is simply no substantial evidence of a taking by defendant with the intent to permanently deprive Warren of the property. We therefore hold that defendant's motion to dismiss the charge of robbery with a dangerous weapon should have been granted.

We further note that defendant was found not guilty of premediated and deliberated murder. He was convicted of felony murder, premised upon the commission of armed robbery. Because there was insufficient evidence to support the commission of the underlying felony, there is also insufficient evidence to support defendant's conviction of felony murder.

Id. at 535, 308 S.E.2d at 262-63 (emphasis added) (citations omitted).

[2] Under the circumstances of this case, as discussed in more detail herein, defendant's motion to dismiss the misdemeanor child abuse charge could only have been properly denied if there was substantial

evidence demonstrating that on 11 May 2013, defendant committed some act or omission that created or allowed to be created a substantial risk of physical injury to Mercadiez. N.C. Gen. Stat. § 14-318.2(a); *see Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711. Here, defendant's evidence is entirely consistent with the State's evidence, and thus *must* be considered, according to *Bates*. *Bates*, 309 N.C. at 535, 308 S.E.2d at 262-63. Defendant's evidence can also be "characterized as a clarification of the State's testimonial and physical evidence; it in no way contradicted the prosecution's case." *Id.* at 535, 308 S.E.2d at 263.

The State elicited testimony from Sergeant Michael Kellum of the Jacksonville Police Department ("JPD"), who at the time of the incident was a detective with the JPD's criminal investigative division. Sergeant Kellum explained that he was involved in the investigation of Mercadiez's death and that he spoke with defendant about the events leading up to the drowning two days after it had occurred. Sergeant Kellum testified that defendant told him she had been in the bathroom that afternoon for approximately five to ten minutes and that "when she went into the bathroom, she had seen Mercadiez playing on the side concrete porch by the side door, with the other girls, that being [Sarah] and [Sarah's] friends from down the street."[1] Defendant further told Sergeant Kellum that upon leaving the bathroom, she saw Sarah without Mercadiez and asked about Mercadiez's whereabouts. Detective Kellum's testimony regarding the pretrial statements that defendant had made to him was the State's primary evidence concerning the series of events that immediately preceded Mercadiez's drowning. The State did not call as witnesses Mr. Reed or any of the children who were present in the house at the time of the incident.

During defendant's case, Mr. Reed testified at length concerning the events leading up to the drowning, clarifying and elaborating upon the State's evidence. Mr. Reed stated that defendant had asked him, "You got this?" before going to use the bathroom. Mr. Reed explained that he understood defendant's question to mean that she was inquiring as to whether he would supervise the children while she was in the bathroom, and he responded "[Y]es."[2] After defendant had been in the bathroom for "not even a couple minutes[,]" he then heard defendant say, "Can't I [use the bathroom] in peace?"

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1. Pseudonyms will be used to protect the identity of the other minors involved.

2. Mr. Reed also testified that he had been on active duty in the United States Marine Corps for the past 18 years and was attending college to become a social worker. No evidence was offered suggesting that Mr. Reed was in any way an unsuitable caretaker.

Mr. Reed testified that at that point he got up, walked towards the bathroom, and on his way, observed that Mercadiez was still sitting with Sarah on the side porch. Mr. Reed took the two other children from the bathroom into their bedroom to watch a video. Mr. Reed then checked on one of the other children, and as he walked back through the hall he passed defendant leaving the bathroom. Defendant saw Sarah and immediately asked, "[W]here is Mercadiez?" Sarah responded that she "had just put her in the house." Defendant looked at Mr. Reed and said "[H]ey, she's with you." When Mr. Reed responded that Mercadiez was not in fact, with him, defendant and Mr. Reed began to search the house and yard and found Mercadiez in the pool.

While the State's case did not emphasize the fact that Mr. Reed was also home with defendant at the time of Mercadiez's drowning, the evidence the State offered did indicate that he was at the house during the relevant period of time. Specifically, Detective Kellum testified that Mr. Reed "came out to reach Mercadiez" from the pool. Furthermore, Mr. Josue Garcia, defendant's neighbor who came to perform CPR, testified on behalf of the State that he "saw Mr. Reed with the little girl in his hands" "frantically yelling[,]" and Mr. Reed told him Mercadiez had been in the water from "a couple of minutes" to "seven minutes."[3] Thus, the State's own evidence implied that Mr. Reed was at home during the relevant time period, although it does not specify his exact location or what he was doing at the relevant time; it in no way indicates he was not present. Therefore, the evidence presented by defendant — in the form of Mr. Reed's testimony — is not in conflict with the evidence offered by the State.

In claiming that defendant's evidence regarding Mr. Reed contradicted the State's case-in-chief, the dissent argues that the State's evidence also referenced the general fact that Mr. Reed was present in the home on the day of Mercadiez's death. Even if this were true, however, if *both* the State's and defendant's evidence noted his presence in the home, where is the conflict? The only difference between the State's case regarding Mr. Reed's presence and defendant's evidence on this subject is that the State made no effort to ascertain precisely *where* in the house he was immediately prior to and during the time when defendant left to use the bathroom, whereas defendant's case-in-chief filled in this gap in the State's evidence. Had the State put on evidence placing

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3. The State also stated in its opening statement that the jury would "hear that Will Reed, the defendant's husband, the father of this child, was also in the home at the time that Mercadiez got into the pool and drowned."

Mr. Reed at a specific location in the home that was different from the locations described by him during his testimony, then a conflict would exist. However, because the State did not put on such evidence, no such conflict existed.

In lieu of providing *actual evidence* from defendant's case that *contradicts* the State's evidence, the dissent relies entirely on the fact that upon coming out of the bathroom, defendant questioned Sarah rather than Mr. Reed as to Mercadiez's whereabouts. We fail to see how this is inconsistent with defendant's evidence. The dissent has failed to show any concrete fact offered during defendant's case in chief that conflicts *in any way* with the State's evidence.

Had the State offered evidence that Mr. Reed was in a different part of the house during the time period in question or that defendant had not spoken with him before she went into the bathroom, then the dissent would be correct that defendant's evidence showing that Mr. Reed understood he was responsible for watching Mercadiez while defendant was in the bathroom would conflict with the State's evidence, and therefore, be ineligible for consideration in connection with defendant's motion to dismiss at the close of the evidence. *See generally Nabors*, 365 N.C. at 312, 718 S.E.2d at 627. But because the State offered no evidence at all regarding Mr. Reed, we cannot agree with the dissent's insistence that defendant's evidence confirming his precise whereabouts from the time defendant left to go to the bathroom until the time of Mercadiez's death somehow contradicts the State's evidence.

By choosing not to offer evidence at all from Mr. Reed and to instead essentially restrict its entire case-in-chief to Sergeant Kellum's account of his interview with defendant, the State left the door open for defendant to fill this crucial gap in the events leading to Mercadiez's death by offering testimony from Mr. Reed, which is exactly what defendant did. Given (1) the State's strategic decision to forego calling as a witness the only adult in the house during the relevant time period other than defendant; and (2) the consistency of defendant's evidence with the State's evidence, the dissent has failed to make any coherent argument why Mr. Reed's testimony should be disregarded.

The dissent notes that when defendant left the bathroom and saw Mercadiez's older sister, Sarah, she asked Sarah – rather than Mr. Reed -- about Mercadiez's whereabouts. However, when defendant left to go to the bathroom, Mercadiez had, in fact, been playing with her sister – while Mr. Reed was watching her. Thus, the fact that defendant directed

her question to Sarah is in no way inconsistent with the State's evidence. Indeed, Mr. Reed's testimony included this same exchange between defendant and Sarah.

The dissent also appears to be arguing that defense counsel was required to cross-examine Sergeant Kellum about Mr. Reed's role in these events. But again, the State chose to rely solely upon Sergeant Kellum and not to call Mr. Reed as a witness. The burden of proof is on the State; the defendant has no burden of proof. *See generally State v. Womble*, 292 N.C. 455, 459, 233 S.E.2d 534, 537 (1977) ("[N]o burden is placed upon a defendant to prove or disprove any of the elements of the crime[.]"). And as discussed above, our Supreme Court has consistently held that the defendant's evidence may -- indeed, must -- be considered in connection with a motion to dismiss at the close of all the evidence where it supplements rather than contradicts the State's evidence. *See Bates*, 309 N.C. at 535, 308 S.E.2d at 262-63. Thus, the fact that defense counsel opted to let the jury hear from Mr. Reed directly on this issue in no way precluded his testimony from being considered in a ruling on the motion to dismiss.

Consistent with the State's evidence, Mr. Reed testified that defendant went to use the bathroom for approximately five to ten minutes and sometime during that period of time, Mercadiez wandered away from the house and drowned in the backyard pool. The State's evidence at trial showed that defendant left Mercadiez for a period of five to ten minutes without defendant's supervision. However, the State did not offer any evidence affirmatively establishing that defendant had failed to secure adult supervision for Mercadiez, but rather only evidence that she herself was not watching Mercadiez. Thus, defendant introduced evidence consistent with that offered by the State; that is, evidence that she was not personally supervising Mercadiez while she was in the bathroom.

Critically, however, defendant's consistent evidence rebutted the inference raised by the State that she had failed to ensure her child was being properly supervised while see went to the bathroom. *See generally id.* at 535, 308 S.E.2d at 263. ("The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence."). The additional evidence introduced in defendant's case-in-chief through Mr. Reed's testimony, including that: (1) before defendant walked to the bathroom, she confirmed that he would be watching the children, and (2) after defendant had entered the bathroom he left Mercadiez unattended, did not in any way contradict the evidence presented by the State during its case. Defendant's

evidence merely clarified where Mr. Reed was in the house and what he was doing during the key events leading up to Mercadiez's death. Consequently, consideration of this evidence is *necessary* in determining whether defendant's motion to dismiss should have been granted. *See id.* at 535, 308 S.E.2d at 262 ("We have consistently held that on a motion to dismiss, the court must consider the defendant's evidence which explains or clarifies that offered by the State.").

Turning back to the relevant statute, North Carolina General Statute § 14-318.2(a), while defendant was in the bathroom, her only affirmative act was to say, "Can't I [use the bathroom] in peace?" Defendant did not ask Mr. Reed to do anything, much less request that he stop watching Mercadiez; rather, Mr. Reed unilaterally decided to step in and remove the children from the bathroom while leaving Mercadiez. It cannot be rationally inferred that defendant, simply by making this statement, engaged in conduct that would subject her to criminal liability under North Carolina General Statute § 14-318.2(a). *See* N.C. Gen. Stat. § 14-318.2(a). Accordingly, defendant's consistent evidence rebutted the inference raised by the State's evidence that she "create[d] or allow[ed] to be created a substantial risk of physical injury[.]" *Id.*

Thus, after reviewing the State's evidence and defendant's evidence that is not in conflict therewith, we conclude that there was not substantial evidence that defendant "create[d] or allow[ed] to be created a substantial risk of physical injury . . . to [Mercadiez] by other than accidental means[.]" *Id.* Because an essential element was missing from misdemeanor child abuse, *see id.*, the trial court erred in denying her motion to dismiss the charge. *See Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711. We thus vacate defendant's conviction for misdemeanor child abuse.

2. Consideration of Only the State's Evidence

[3] Although, as discussed above, defendant's motion to dismiss should have been granted upon consideration of both the State's evidence and defendant's evidence, the motion should also have been granted even without consideration of defendant's evidence. The dissent takes the position that defendant's evidence should not have been considered, and that defendant's motion should have been denied. We will therefore address why we believe that even without consideration of defendant's evidence, the trial court still erred in denying defendant's motion to dismiss the charge of misdemeanor child abuse. Even assuming *arguendo*, that defendant's evidence did contradict the State's evidence and thus should not be considered, *see generally Bates*, 309 N.C. at 535, 308 S.E.2d at 262, the State still did not present "substantial evidence . . . of

each essential element of the offense charged[.]" *Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711.[4]

To determine what conduct may fall within the "by other than accidental means" element of North Carolina General Statute § 14-318.2(a), we will examine some cases which have found sufficient purposeful conduct pursuant to North Carolina General Statute § 14-318.2(a). In *State v. Fritsch*, the Supreme Court determined there was sufficient evidence of misdemeanor child abuse, *see* 351 N.C. 373, 382, 526 S.E.2d 451, 457 (2000), where "the victim suffered from cerebral palsy and severe mental retardation, functioning at the level of an infant[,]" and

> [o]n 4 October 1995 the DSS observed that the victim appeared emaciated; that her arms and legs were in a fetal position; that she looked and smelled bad; that she had crusted dirt between her toes and various folds of her skin; that her left foot was swollen; and that she had pressure sores on her right foot, right ear, back, and the back of her head at the hairline. When questioned about the victim's physical condition, defendant responded that the pressure sores were actually ant bites that had not healed. The DSS then told defendant to take the victim to the doctor for a medical evaluation. On or about 19 October 1995, the victim was treated for an ear and upper respiratory infection; and the physical examination was rescheduled. However, defendant missed two scheduled appointments to have the victim physically examined. Despite numerous calls and visits to defendant's home and a mailed certified letter requesting contact, the DSS was unable to contact defendant until 18 December 1995. On 19 December 1995 the DSS stressed to defendant that the victim needed a physical evaluation and that she needed to be back at the Center. On 20 December 1995 the DSS substantiated neglect for lack of proper care and lack of proper medical care of the victim by defendant based on

4. We note that the dissent fails to address an element of each of the crimes at issue. As to North Carolina General Statute § 14-318.2(a) it fails to address that the act must be "by other than accidental means[.]" N.C. Gen. Stat. § 14-318.2(a). As to North Carolina General Statute § 14-316.1, it includes only the first portion of the definition of neglect under North Carolina General Statute § 7B-101(15): "does not receive proper care, supervision, or discipline . . . . " N.C. Gen. Stat. § 7B-101(15). It omits the final phrase "from the juvenile's parent[.]" The dissent concedes that Mr. Reed was present at the house during the relevant time period but still considers his presence to be irrelevant.

> observations made at the Center on 4 October 1995 and defendant's continued failure to take the victim to a doctor for a physical examination. The victim died on 1 January 1996 before case workers were scheduled to visit defendant's home.
>
> On 2 January 1996 Dr. John Leonard Almeida, Jr., a pathologist, performed an autopsy of the victim's body. The autopsy revealed that the victim weighed eighteen pounds at her death and that the victim's stomach contained approximately a quart of food. Dr. Almeida opined that the underlying cause of the victim's death was starvation malnutrition.

Id. at 374-76, 526 S.E.2d at 451-54 (quotation marks omitted).

In *State v. Church*, this Court found substantial uncontroverted evidence of misdemeanor child abuse where

> Travis' face was burned while he was under defendant's supervision and no other adults were present . . . . Competent medical evidence at trial was that Travis' facial burn was well-circumscribed, or perfectly round. The burn looked like the child's face had been immersed in a bowl or cup of liquid. There were not any areas that looked as though there had been dripping, running, or motion. Instead, it appeared that something had been placed or held against the child's face. The medical evidence also included an opinion that Travis suffered from battered child syndrome and an opinion that he had been abused.

99 N.C. App. 647, 654-55, 394 S.E.2d 468, 473 (1990).

In *State v. Woods*, this Court concluded there was sufficient evidence that "created or allowed to be created a substantial risk of physical injury, upon or to her child by other than accidental means, in violation of the third distinct offense described in G.S. 14–318.2(a)" where the evidence showed the "defendant's husband had repeatedly abused this child during the several weeks prior to 12 October, and that the defendant was aware of this deplorable and dangerous situation but took no effective action to stop or prevent the abuse until 12 October[,]" though defendant was not actually charged with that offense, 70 N.C. App. 584, 587-88, 321 S.E.2d 4, 7 (1984) (brackets omitted). And in *State v. Armistead*, this Court determined that though some evidence was erroneously admitted there was "ample uncontradicted evidence" that

the "defendant intentionally inflicted some physical injury on his child. The force used was at least sufficient to draw blood and leave visible signs of the injury for several days[,]" and thus defendant was properly convicted of misdemeanor child abuse. 54 N.C. App. 358, 359-60, 283 S.E.2d 162, 164 (1981).

In *State v. Mapp*, this Court determined there was sufficient evidence of misdemeanor child abuse where

> [t]he evidence clearly shows that defendant was the mother of the child and the child was less than 16 years of age. Dr. Ronald Kinney, a physician with a specialization in treating abused children, testified for the State. The doctor stated that the deceased child was the victim of the battered child syndrome; that the term meant that the child had suffered nonaccidental injuries; and that the injuries were caused by the child's custodian.

45 N.C. App. 574, 581-82, 264 S.E.2d 348, 354 (1980) (quotation marks omitted).

Church, *Woods*, *Armistead*, and *Mapp*, all involved evidence of the purposeful physical abuse of a child or at least knowing about such abuse and not taking action to prevent or stop it; they have little in common with this case. *See Church*, 99 N.C. App. at 655, 394 S.E.2d at 473; *Woods*, 70 N.C. App. at 587, 321 S.E.2d at 7; *Armistead*, 54 N.C. App. at 360, 283 S.E.2d at 164; *Mapp*, 45 N.C. App. at 582, 264 S.E.2d at 354. *Fristch* is also distinguishable because it involved a child dying of "starvation malnutrition" over the course of months of improper care against the advice of DSS. 351 N.C. at 374-76, 526 S.E.2d at 452-54. While the defendant's conduct in *Fristch*, *see id.*, may not rise to the level of intentionally beating a child, it is certainly a form of purposeful, long-term abuse.

Therefore, this case is most apposite to *State v. Watkins*, ___ N.C. App. ___, 785 S.E.2d 175 (2016). Because *Watkins* is the only precedential case that bears any similarities to this case, we repeat the facts verbatim:

> At approximately 1:30 p.m. on 28 January 2014, Defendant drove with her 19–month–old son, James, to the Madison County Sheriff's Office to leave money for Grady Dockery ("Dockery"), an inmate in the jail. The temperature at the time was 18 degrees, and it was windy with accompanying sleet and snow flurries.

> After parking her SUV, Defendant left James buckled into his car seat in the backseat of the vehicle and went into the Sheriff's Office. While inside, Defendant got into an argument with employees in the front lobby. Detective John Clark ("Detective Clark") was familiar with Defendant based on prior complaints that had been made about Defendant letting her toddler run loose in the lobby and into adjacent offices while she visited inmates in the jail. Detective Clark entered the lobby and told Defendant that by order of Chief Deputy Michael Garrison she was not supposed to be on the property and that she needed to leave.
>
> Defendant and Detective Clark argued for several seconds, and then he escorted her to her vehicle in the parking lot. Defendant was inside the building for at least six-and-a-half minutes. Detective Clark testified that from where Defendant was positioned in the lobby she could not see her vehicle, which was parked approximately 46 feet away from the front door.
>
> When Detective Clark was within 10 feet of Defendant's vehicle, he noticed a small child sitting alone in the backseat. Defendant acknowledged that the child was hers. Detective Clark observed that the vehicle was not running and that the driver's side rear window was rolled more than halfway down. He testified that it was very, very cold and windy and the snow was blowing. He stated that snow was blowing onto his head, making him so cold I wanted to get back inside. He noticed that the child, who appeared to be sleeping, had a scarf around his neck. Before walking back into the building, Detective Clark told Defendant to turn on the vehicle and get some heat on that child.

Id. at ___, 785 S.E.2d at 176 (quotation marks omitted).

In *Watkins*, a jury convicted the defendant of misdemeanor child abuse, and she appealed arguing the trial court should have allowed her motion to dismiss. *See id.* at ___, 785 S.E.2d at 177. This Court's opinion in *Watkins* focuses heavily on whether there was a "substantial risk of physical injury[;]" but the ultimate determination was that

> [g]iven the harsh weather conditions, James' young age, and the danger of him being abducted (or of physical harm

> being inflicted upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that Defendant created a substantial risk of physical injury to him by other than accidental means.

Id. at ___, 785 S.E.2d at 178.

While foreseeability is not an element of misdemeanor child abuse, it is difficult to engage in an analysis of when behavior crosses the line from "accident" to "nonaccidental" without consideration of it; furthermore, an "accidental cause" is "not foreseen[.]" Black's Law Dictionary 15 (5th ed. 1979). In *Watkins*, the defendant was aware of the harsh weather conditions, that the window was rolled down, and that she was leaving her child unattended in a public space; in other words, defendant engaged in the purposeful conduct of leaving her child in the circumstances just enumerated; which is purposeful action that crosses the "accidental" threshold as "physical injury" in this case is very foreseeable, whether by hypothermia or abduction. *Id.* at ___, 785 S.E.2d at 178. From a commonsense standpoint, most, if not all parents, know there are inherent and likely dangers in leaving a child entirely alone in an open car in freezing weather in a public parking lot.

Turning to this case, the State's evidence never crossed the threshold from "accidental" to "nonaccidental."[5] The known danger here was an outdoor pool. The only purposeful action defendant took, even in the light most favorable to the State, was that defendant went to the bathroom for five to ten minutes. In choosing to go to the restroom, defendant did not leave her child in a circumstance that was likely to create physical injury. This Court in *Watkins* deemed it to be "a close one," but the actions of the defendant in *Watkins* are far more active and purposeful in creating the dangerous situation than defendant's actions here. *See id.* at ___, 785 S.E.2d at 178. If defendant's conduct herein is considered enough to sustain a conviction for misdemeanor child abuse, it seems that any parent who leaves a small child alone in her own home, for even a moment, could be prosecuted if the child is injured during that time, not because the behavior she engaged in was negligent or

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5. The statistics cited by the dissent come from the CDC's statistics labelled as "*Unintentional* Drowning" and certainly they are disturbing; yet they are irrelevant to this case. (Emphasis added). These "Unintentional Drownings" arise in many different types of situations, including some with supervision by parents, lifeguards, or others. Most importantly, most "*unintentional* drownings" would likely also be described as "accidental drownings," and the issue here is whether the acts were "by *other than* accidental means." N.C. Gen. Stat. § 7B-101(15) (emphasis added).

different from what all other parents typically do, but simply because theirs is the exceedingly rare situation that resulted in a tragic accident.[6] The State did not present substantial evidence that defendant's conduct caused injury to Mercadiez "by other than accidental means[.]" N.C. Gen. Stat. § 14-318.2(a); *see Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711 ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). Therefore, the trial court also erred in failing to allow defendant's motion to dismiss the charge of misdemeanor child abuse even without consideration of defendant's evidence.

B. Contributing to the Delinquency of a Juvenile

[4] Defendant was also convicted of contributing to the delinquency of a juvenile pursuant to North Carolina General Statute § 14-316.1. North Carolina General Statute § 14-316.1 provides:

> Any person who is at least 16 years old who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7B-101 and G.S. 7B-1501 shall be guilty[.]

N.C. Gen. Stat. § 14-316.1 (2013). Based on the facts of this case, the jury was instructed only on the issue of neglect. North Carolina General Statute § 7B-101 defines a "[n]eglected juvenile" as one "who does not receive proper care, supervision, or discipline from the juvenile's parent[.]" N.C. Gen. Stat. § 7B-101(15) (2013).

Thus, North Carolina General Statute § 14-316.1

> requires two different standards of proof. First, the State must show, beyond a reasonable doubt, that Defendant knowingly or willfully caused, encouraged, or aided the juvenile to be in a place or condition whereby the juvenile could be adjudicated neglected. Second, adjudication of neglect requires the State to show, by clear and convincing evidence, that a juvenile is neglected.

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6. We agree with the dissent that the State's theory was that *defendant*, and only defendant, failed to personally supervise Mercadiez, but the State failed to address one element of the crime, since it failed to show that defendant also left Mercadiez without supervision from her *other parent* to prove neglect under North Carolina General Statute § 7B-101(15). *See* N.C. Gen. Stat. § 7B-101(15).

State v. Stevens, 228 N.C. App. 352, 356, 745 S.E.2d 64, 67, *disc. review denied*, 367 N.C. 256, 749 S.E.2d 886 (2013). Thus, we must consider whether defendant "knowingly or willfully cause[d], encourage[d], or aid[ed the] juvenile . . . to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated[,]" N.C. Gen. Stat. § 14-316.1, neglected, and under these facts the neglect alleged was that Mercadiez did "not receive proper care, supervision, or discipline from the juvenile's parent[.]" N.C. Gen. Stat. § 7B-101(15).

The flaw in the State's case is that defendant was not the only "parent" involved. *Id.* Essentially, the State's theory at trial was that it did not matter that Mr. Reed was present; in other words, the State's theory hinges on the theory that fathers are *per se* incompetent to care for young children. However, Mr. Reed was a "parent[,]" and thus he had an equal duty to supervise and care for Mercadiez. *Id.* The evidence does not show that defendant "knowingly or willfully" left Mercadiez "in a place or condition[,]" N.C. Gen. Stat. § 14-316.1, where she would "not receive proper care [or] supervision" from a "parent[.]" N.C. Gen. Stat. § 7B-101(15). There is no evidence that defendant reasonably should have known that Mr. Reed was in any way incompetent to supervise Mercadiez when she went to the bathroom.

Furthermore and once again, even assuming *arguendo* that defendant's direct evidence of Mr. Reed's express agreement to watch Mercadiez while defendant went to the bathroom should not be considered, the State's evidence alone supports an inference that Mr. Reed was present and competent during the relevant time periods, and thus the evidence still does not show that defendant "knowingly or willfully" left Mercadiez "in a place or condition[,]" N.C. Gen. Stat. § 14-316.1, where she would "not receive proper care [or] supervision" from a "parent[.]" N.C. Gen. Stat. § 7B-101(15). Therefore, defendant's motion to dismiss should have been granted. *See generally Clark*, 231 N.C. App. at 423, 752 S.E.2d at 711.

IV. Misuse of 404(b) Evidence

[5] Although we have already determined that defendant's motions to dismiss should have been granted, either with or without consideration of defendant's evidence, there are two other issues which defendant has raised on appeal and which are addressed by the dissent: (1) the trial court erred in denying defendant's motion in limine to exclude the evidence of Sadie's death because it was not an appropriate use of evidence under North Carolina Rule of Evidence 404(b) regarding prior crimes and bad acts *and* it should have been excluded pursuant to North Carolina Rule of Evidence 403 because the probative value of

the evidence did not substantially outweigh the unfair prejudice, and (2) the State went so far beyond the scope of the allowed purposes of the admitted 404(b) evidence in its arguments to the jury that it amounted to plain error in defendant's trial. Considering the extent of the evidence regarding Sadie Gates's death and the use of the evidence, we believe we should address these issues as well. As noted below, evidence of Sadie's death was stressed as much or more than that of Mercadiez, and thus without substantive consideration of that evidence by the jury, it is difficult to understand how the defendant was convicted. For the reasons stated below, even if defendant did not prevail on the motions to dismiss, she would be entitled to a new trial based on the misuse of the evidence of Sadie's death by the State.

Before her trial began, defendant filed a motion to exclude the evidence regarding the death of Sadie. The State argued that the evidence was proper under North Carolina Rule of Evidence Rule 404(b). Rule 404(b) allows for the admission of prior "crimes, wrongs, or acts" to show "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). Ultimately, the trial court found in its order that the evidence of Sadie's death could be used *solely* as evidence under Rule 404(b) because

> [t]here are sufficient similarities between the two events [Sadie's and Mercadiez's deaths] to support the State's contention that the former incident is evidence that shows (1) knowledge on the part of the defendant of the dangers and possible consequences of failing to supervise a young child who has access to or is exposed to bodies of water; (2) *absence of accident*; and (3) explains the context of her statements at the scene and later to law enforcement.

(Emphasis added).

> [W]hen analyzing rulings applying Rules 404(b) and 403, we conduct distinct inquiries with different standards of review. When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Beckelheimer, 366 N.C. 127, 130, 726 S.E.2d 156, 159 (2012). The three reasons enumerated by the trial court are proper reasons to allow in the evidence of Sadie's death pursuant to the plain language of Rule 404(b).[7] *See* N.C. Gen. Stat. § 8C-1, Rule 404(b).

As to North Carolina Rule of Evidence 403, this rule precludes evidence unless "its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2013). " 'Unfair prejudice' within its context [of Rule 403] means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." N.C. Gen. Stat. § 8C-1, Rule 403 Commentary (2013). It is difficult to fathom evidence more likely to lead to an emotional decision than the death of a child; however, though this Court under *de novo* review may have come to an alternate conclusion, as our review is abuse of discretion, *see Beckelheimer*, 366 N.C. at 130, 726 S.E.2d at 159, we cannot say that "the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) (citation and quotation marks omitted). Therefore, the trial court did not err in allowing in the evidence regarding Sadie's death.

But that does not end our analysis. Defendant also argues that the State went so far beyond the scope of the proper use of the admitted 404(b) evidence in its arguments to the jury that it amounted to plain error in defendant's trial. Because defendant's argument hinges on the admission of evidence during the trial, it is appropriate for plain error review. *See State v. Wolfe*, 157 N.C. App. 22, 33, 577 S.E.2d 655, 663

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7. While the jury instructions in this case were not raised as an issue on appeal, we will briefly note the conflict within these instructions. In accordance with the Rule 404(b) order, the jury was instructed they could not use the evidence regarding Sadie as substantive evidence, but that they could use it for evidence of "absence of accident[.]" While the trial court did not err in the traditional sense by instructing the jury pursuant to the language of Rule 404(b), in this particular case the language of Rule 404(b) mirrored the element of misdemeanor child abuse which was most highly contested — "by other than accidental means" — which was an element the jury must find to convict defendant of misdemeanor child abuse. N.C. Gen. Stat. § 14-318.2(a). Thus the instructions told the jury that they could use the evidence of Sadie's death to show "absence of accident[,]" but the jury was also instructed that the evidence could not be used for the elements which included "by other than accidental means[.]" *Id.* The confusion arises because typically, the 404(b) evidence is used to show that the defendant acted intentionally, but here, the State was not seeking to show that defendant intentionally killed Mercadiez. There is no way that the jury could have understood this fine legal distinction between "absence of accident" and "by other than accidental means." *Id.* But the jury instructions were not raised or argued as an issue on appeal so we do not address it, other than noting how it compounded the problems with the use of the evidence of Sadie's death.

("[T]he plain error doctrine is limited to errors in jury instructions and the admission of evidence."), *appeal dismissed and disc. review denied*, 357 N.C. 255, 583 S.E.2d 289 (2003).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Sessoms, 226 N.C. App. 381, 382, 741 S.E.2d 449, 451 (2013) (citation omitted).

After a thorough review of the transcript, we believe that the State used the evidence of Sadie's death far beyond the bounds allowed by the trial court's order. By our count, the State mentioned Sadie to the jury by name 12 times in its opening; by comparison, Mercadiez, the actual child this case was about, was mentioned 15. Even more concerning, during the State's direct examination Mercadiez is mentioned 33 times, while Sadie is mentioned 28.[8] Lastly, during closing, the State mentions Mercadiez 15 times to the jury and Sadie 12 times, with the State asserting that the "bottom line" hinged on Sadie:

> So the bottom line is this. It does not matter how she got into the pool. She got into the pool and drowned, and the defendant, Amanda Reed, was not watching her. She failed to supervise her and ensure her safety. She failed to supervise her daughter, *just like she failed to supervise Sadie Gates.*

(Emphasis added.)

Turning solely to the legal questions before us, here, the State mentioned Sadie Gates almost as many times to the jury as the child who had actually died in this case. While Mercadiez was often being discussed by pronouns -- as was Sadie, for that matter -- and we have not counted those, it is clear what the jury must have gathered from hearing Sadie's

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8. If we include all references in questioning or testimony during the State's case in chief by both the State and defendant rebutting the State's inferences, Sadie was mentioned 32 times and Mercadiez 45 times.

name more than 52 times, as compared to 63 for Mercadiez, only to finally be left with Sadie's tragic death as their "bottom line[.]" The State's use of the evidence regarding Sadie went far beyond showing that defendant was aware of the dangers of water to small children or any other proper purpose as found by the trial court. This case is the "exceptional case" where "a fundamental error occurred at trial" establishing "prejudice that, after examination of the entire record . . . had a probable impact on the jury's finding that the defendant was guilty" and "seriously affect[ed] the fairness" of this case. *Id.* Therefore, on this issue, defendant would be entitled to a new trial, but as noted above, we have reversed defendant's convictions based upon her motions to dismiss.

We are not, as the dissent suggests, relying solely upon the number of references to Sadie, nor are we taking a single statement out of context. The State repeatedly suggested that the jury rely improperly upon Sadie's death to find defendant guilty. Here are some other examples:

> *Had the defendant not been responsible for Sadie Gates's death, had she not been warned of the dangers of leaving a child unsupervised by Julie Dorn, then you would not be sitting here today, deciding this case.* Will Reed can come in here and try to take the blame, and they can try to put it on a sibling. They can talk about how good a parent Amanda Reed is, and they can show all the appropriate emotions and responses for a parent that has lost a child, but she cannot avoid responsibility any longer. She cannot continue to shift the blame. *It did happen again. Another child left under her care and her supervision, another child that drowned and died.*
>
> . . . .
>
> . . . Two children, two, under her care, left unsupervised by her, who got out of the house and into the water and drowned. Her inactions, her lack of supervision, without question, demonstrate a grossly negligent omission. Sadie Lavina Gates, born 2/23/2009. Date of death: 9/27/2010. Cause of death: drowning. Place of injury: pond. Location: 3390 Burgaw Highway. Sadie Gates.
>
> Mercadiez Kohlinda Reed, born 9/14/2011. Date of death: 5/11/2013. Cause of death: drowning. Place of injury: residence. Location: 313 Forest Grove Avenue, Jacksonville.
>
> . . . .

> . . . Two children, the same age, both girls, left unsupervised, out of the house, drowned in water. You know what the common denominator is that everyone has overlooked, what's not on either one of those death certificates right there in front of you? What's the common denominator? Her. Amanda Reed is the common denominator. She is the one. And just as she was responsible for the death of Sadie Gates, so, too, is she responsible for the death of Mercadiez Reed. Not a sibling, not Will Reed, but her. She is the person that can and should be held criminally responsible for her daughter's death, because she is the only person who knew of the dangers, who had been negligent before, and who acted in a grossly negligent manner.
>
> . . . .
>
> In the beginning, I told you there were six questions: who? What? Where? When? How and why? I want to talk about the one question [defendant's counsel] didn't talk about. Why. Isn't that what the case is all about? *Why? You know why. You know why. Sadie Gates's death was caused by the defendant's lack of supervision and care. Mercadiez Reed's death was caused by the same lack of supervision and care.*

(Emphasis added.)

We have considered the totality of the evidence and arguments, and the specter of Sadie's death permeated the entirety of the State's case-in-chief. Although some portions of the State's argument were, as noted by the dissent, within the proper scope of use of the evidence, others, as we have cited above, were not. By referencing only the portions of the State's argument that stayed within the Rule 404(b) bounds, the dissent takes the use of the evidence out of context. Considering the argument as a whole, the prosecution clearly used the evidence of Sadie's death far beyond the purposes for which the trial court admitted the evidence and essentially argued that defendant has a propensity to leave two-year-old girls unattended, resulting in death by drowning; this is the use forbidden by Rule 404(b). *See* N.C. Gen. Stat. § 8C-1, Rule 404(b).

V. Conclusion

In certain cases, "we must bear in mind Lord Campbell's caution: 'Hard cases must not make bad law.' " *Hackos v. Goodman*, *Allen & Filetti*, *PLLC*, 228 N.C. App. 33, 43, 745 S.E.2d 336, 343 (2013) (citation

and quotation marks omitted). Here, the death of Mercadiez was tragic, as was Sadie's death, but the law does not support the charges against defendant with an appropriate consideration of the actual evidence in *this* case. The trial court erred in denying defendant's motion to dismiss both charges, and defendant's convictions are vacated.

VACATED.

Judge DAVIS concurs with separate opinion.

Judge STEPHENS dissents.

DAVIS, Judge, concurring.

I concur in the result reached by the majority and in the bulk of its analysis. However, I write separately to note the areas of the majority's opinion as to which I disagree.

With regard to the trial court's denial of Defendant's motion to dismiss at the close of the evidence, I agree with the majority that because the evidence introduced during Defendant's case-in-chief did not in any way contradict the State's evidence, the trial court was required to consider Defendant's evidence in ruling on the motion to dismiss. For the reasons discussed by the majority, this evidence establishes that Defendant did not leave Mercadiez without adult supervision for the limited time period during which Defendant was not personally supervising Mercadiez because she had left to use the bathroom.

However, I do not join the majority's alternative analysis in which it determines that even if Defendant's evidence is *not* considered, Defendant would still be entitled to have her convictions vacated. To the contrary, I agree with the dissent that based exclusively on the State's evidence, the denial of Defendant's motions to dismiss would have been proper.

Furthermore, I part company with the majority on the appropriate definition of the phrase "by other than accidental means" in N.C. Gen. Stat. §14-318.2(a). In my view, the manner in which the majority interprets this phrase would prevent a defendant from *ever* being convicted of N.C. Gen. Stat. §14-318.2(a) on a theory of negligence, a result that cannot be squared with the plain language of this statutory provision or with our Court's recent decision in *State v. Watkins*, __ N.C. App. __, 785 S.E.2d 175 (2016).

Finally, while the issue is technically moot in light of our holding that Defendant's convictions must be vacated, I also agree with the section of the majority's analysis addressing whether — in the absence of our decision to vacate her convictions — Defendant would be entitled to a new trial due to the extent to which the State's arguments improperly focused on *Sadie's* death. Even assuming *arguendo* that the trial court did not err in deeming evidence of Sadie's death admissible pursuant to Rule 404(b) and not unduly prejudicial under the balancing test of Rule 403, this evidence was admitted for limited purposes by the trial court. However, in my view, the manner in which the Rule 404(b) evidence was actually used by the State in its arguments grossly exceeded these limited purposes for which the evidence was originally admitted. As the majority's analysis explains, it is difficult — if not impossible — to read the transcript and conclude that Defendant received a fair trial.

STEPHENS, Judge, dissenting.

Applying our well-established standard of review to the trial court's denial of defendant's motion to dismiss, I conclude that the State offered sufficient evidence of defendant's failure to properly supervise Mercadiez to submit the case to the jury. Further, I would find no error in the admission of Rule 404(b) evidence or in the trial court's failure to intervene *ex mero motu* in the State's closing argument. For the reasons discussed below, I would hold that defendant received a trial free from error. Accordingly, I respectfully dissent.

I. Relationship between the State's and the defense's evidence on supervision

I agree with the majority opinion that, in ruling on a defendant's motion to dismiss, the "defendant's evidence may be considered on a motion to dismiss where it clarifies and *is not contradictory to the State's evidence* or where it rebuts permissible inferences raised by the State's evidence *and is not contradictory to it*." *State v. Reese*, 319 N.C. 110, 138-39, 353 S.E.2d 352, 368 (1987) (citations omitted; emphasis added), *overruled on other grounds by State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997); *see also State v. Barnett*, 141 N.C. App. 378, 382-83, 540 S.E.2d 423, 427 (2000) (holding that "the trial court is not to consider [a] defendant's evidence rebutting the inference of guilt except to the extent that it explains, clarifies or is not inconsistent with the State's evidence") (citation and internal quotation marks omitted), *affirmed per curiam*, 354 N.C. 350, 554 S.E.2d 644 (2001). I reach a different result from the majority because, in my view, defendant's evidence regarding

the events immediately before Mercadiez drowned *was contradictory* to the State's evidence on the same point.

The majority opinion notes that, "[w]hile the State's case did not emphasize the fact that Mr. Reed was also home with defendant at the time of Mercadiez's drowning, the evidence the State offered did indicate that he was at the house during the relevant period of time." I fully agree.[1] The uncontradicted evidence was that Mr. Reed was *in the home* at the time of Mercadiez's drowning, just as the uncontradicted evidence was that defendant herself was also *in the home* at the time. The critical issue regarding defendant's criminal responsibility for the death of her daughter, however, is not what adults were *in the home* at the time Mercadiez found her way into the pool, but rather, what adult, if any, was *supervising* Mercadiez. On that critical issue, the State's evidence showed that defendant left her 19-month-old baby in the care of nine-year-old Sarah. I simply do not agree with the majority's assertion that the acknowledged presence of Mr. Reed *somewhere* inside a multi-room house, without any evidence that he could hear or see Mercadiez as she played *outside* on the side porch with other children, was in any way relevant to the question of who was *supervising* Mercadiez when she wandered away to her death. The majority further contends that Mr. Reed's testimony for the defense—*that he was in the living room when defendant went to the bathroom and that defendant specifically asked him to supervise Mercadiez*—was not inconsistent with, and merely clarified, the State's evidence. A careful reading of the trial transcript belies this characterization of the evidence presented by the State and the defense.

The only evidence offered by the State about what happened in the minutes leading up to the drowning came from Sergeant Michael Kellum of the Jacksonville Police Department ("JPD"). After testifying in detail about the Reeds' home and its appearance after Mercadiez's death, Kellum briefly discussed the interview he conducted with defendant.

> Q Did you ask [defendant] to explain to you what she had been doing in the moments leading up to this incident?
>
> A Yes, sir.

---

1. I disagree, however, with the majority's apparent assertion that the *only* way to establish a conflict between the State's evidence and defendant's evidence would have been for the State to offer evidence placing Mr. Reed in a different location inside the house from the location Mr. Reed described.

Q What did she tell you?

A That she was in the bathroom.

Q Did she tell you how long she had been in the bathroom?

A Yes. She estimated, I believe, it was five to ten minutes.

[*discussion of which bathroom defendant used*]

Q What happened then, or what did she explain to you happened then?

A She said that she came out of the bathroom and she saw the oldest daughter, or the older daughter, playing in that—or in the house, and she had earlier seen the infant, Mercadiez, with—playing with the older daughter. So she asked the older daughter where Mercadiez was, and she—the daughter indicated that she had brought her inside and put her inside the living room, earlier. And she—according to her interview, she immediately started looking for the child, inside the house, going room to room, trying to find the house—or trying to find the child, and then went out the front door and around the house, trying to find the child, until she went out the master bedroom door overlooking the pool, and saw the baby floating in the pool.

[*discussion of how Mercadiez was retrieved from the pool and 911 was called*]

Q You said she indicated that she had been in the bathroom for five to ten minutes.

A Yes, sir.

Q Did you ask her about that?

A No. She provided that, previously. During the interview, she had provided that she had begun menstruating and was—that's why she was in the bathroom.

[*discussion of the time defendant spent in the bathroom*]

Q Okay. And I guess she acknowledged to you that Mercadiez was not with her, at that time?

A That's correct.

Q And based on what [defendant]—did [defendant] explain to you where Mercadiez was, at that time?

> A She had—when she went into the bathroom, she had seen Mercadiez playing on the side concrete porch by the side door, with the other girls, that being [Sarah] and [Sarah's] friends from down the street.
>
> Q And those are minors,[2] as well, right?
>
> A Yes, sir.
>
> Q Did she acknowledge to you that [Sarah] told her when she brought Mercadiez back into the house?
>
> A She—once she came out of the bathroom and asked [Sarah] what—she saw [Sarah] without Mercadiez, asked [Sarah] where Mercadiez was. [Sarah] said she had put her in the living room.

In sum, on direct examination, the State's evidence was that: (1) Mercadiez was playing outside with Sarah and other children when (2) defendant went to the bathroom where (3) she remained for five to ten minutes because she was menstruating and, when she came out of the bathroom, (4) defendant encountered Sarah inside the house without Mercadiez and (5) asked Sarah where her youngest sister was.[3] Kellum did not offer *any testimony* about what Mr. Reed was doing, where he was in the house, or whether defendant asked him to watch Mercadiez when she went to the bathroom.

On cross-examination of Kellum, defendant had the opportunity to clarify the critical question of what happened in the moments before defendant went to the bathroom. However, defendant's trial counsel did not ask Kellum whether defendant mentioned asking her husband to watch Mercadiez when she went to the bathroom nor did he ask

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2. Sarah was nine years old at the time.

3. This account of his interview with defendant is substantially similar to Kellum's testimony at a pretrial hearing on the admission of Rule 404(b) evidence:

> Q And based on your conversations with [defendant], what was your understanding about where [defendant] was and what she was doing immediately prior to this incident?
>
> A She indicated that she was in the bathroom and that a couple of the girls were—some of the other kids in the house were trying to talk to her through the bathroom door. She came—once she came out of the bathroom, she indicated that she saw [Sarah], which was one of the other children in the house, and that was when they realized [Mercadiez] was missing. She asked [Sarah] where the child was, and then the search began to find the child.

whether Mr. Reed mentioned being asked to watch Mercadiez during Mr. Reed's interview with Kellum. Defendant's trial counsel did not even ask whether Mr. Reed or defendant had mentioned Mr. Reed's presence in the living room at the time defendant went to the bathroom.[4] Indeed, the *only* questions defense counsel asked about Kellum's interviews with defendant and Mr. Reed sought to clarify how Mercadiez got outside onto the side porch:

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4. I find the majority opinion's characterization of the direct examination of Kellum as "the State's strategic decision to forego calling as a witness the only adult in the house during the relevant time period other than defendant[,]" an unsupported assumption regarding the prosecution's motive. Certainly, the State was focused on proving its case against defendant, but it is equally as reasonable to assume that the prosecutor (and Kellum) were likely very surprised that defendant's trial counsel elected not to ask Kellum on cross-examination whether, during Kellum's interviews with the Reeds, defendant or Mr. Reed mentioned that defendant asked Mr. Reed to watch Mercadiez when defendant went to the bathroom. The failure of defense counsel to undertake this line of inquiry is difficult to understand in that, at a pretrial hearing regarding the admissibility of Rule 404(b) evidence, defendant's trial counsel cross-examined Kellum about the interview and Kellum testified:

> According to her statement that she made on the day she was interviewed in the office, she indicated to [Mr. Reed] that she needed to use the restroom; her stomach was bothering her and she was beginning her menstrual cycle. She went to the bathroom, . . . which is near the den/kitchen area. She said that the kids . . . began talking to her through the door, and [Mr. Reed] shooed them away from the door back to their rooms. When she walked out of the bathroom, she saw [Sarah] in the kitchen and asked where the daughter was, or where [Mercadiez] was, and [Sarah] indicated that she had brought [Mercadiez] into the house 15 minutes prior.

At the same hearing, Kellum described his interview with Mr. Reed on cross-examination as follows:

> Q You interviewed Mr. Reed the night of this incident at the hospital, correct?
>
> A I did.
>
> Q Mr. Reed, would you say, told you the same or consistent story regarding his whereabouts that day, where the child was on the night of the accident, as he did three days later?
>
> A Yes, sir. It was quite a bit more limited due to his obvious grief, but, yes, there were little or no inconsistencies.
>
> Q And Mr. Reed also indicated that [defendant] left the child with him in the living room when she went to the bathroom, right?
>
> A He indicated she used the bathroom.

Of course, none of this testimony from the pretrial hearing was evidence at trial, and thus, it was not part of the trial court's consideration when ruling on defendant's motion to dismiss.

Q Well, as you remember this interview, did [defendant and Mr. Reed] tell you the same thing about what happened that day?

A Yes, sir.

[*discussion of when the interviews took place]*

Q And in response to some of [the prosecutor's] questions, you indicated that their belief was that the child went from the side porch, through the locked gate.

A Yes, sir.

Q And that the child had been out there with her older sister, [Sarah].

A Yes, sir.

[*discussion of the ages of the other children in the home that day*]

Q Okay. Do you remember how they told you Mercadiez got outside?

A That she had—[Sarah] was playing with them and had taken her outside, I believe.

[*discussion of the layout of the Reeds' home*]

Q During your interview with Mr. Reed, you discussed how Mercadiez got outside.

A We discussed the movements of the family that day, yes, sir.

Q Okay. And per your recollection, what did he tell you about that?

[THE STATE]: Objection.

THE COURT: Sustained.

Q You talked to [defendant] about it.

A About the movements of the children during the day? Yes, sir.

Q Did she give you any indication of how the child got outside?

> A No, sir, not that I recall. The children were in and out, playing, all during the day. . . .

I am not, as the majority opinion suggests, "arguing that defense counsel was *required* to cross-examine . . . Kellum about Mr. Reed's role in these events." (Emphasis added). I am simply observing that the State presented its version of the events leading up to Mercadiez's drowning, and I fully agree with the majority's observation that, in doing so, "the State chose to rely solely upon . . . Kellum and not to call Mr. Reed as a witness." Defendant had no duty whatsoever to cross-examine Kellum on any point *unless* she wished to elicit evidence contradictory to the State's version of how Mercadiez came to be unsupervised and find her way tragically into the backyard pool. To recap, the State's evidence about the critical minutes before the drowning was that defendant reported leaving Mercadiez outside on the side porch with Mercadiez's nine-year-old sister, Sarah, while defendant went to the bathroom for five to ten minutes. In addition, Kellum testified that defendant told him she realized Mercadiez was missing when she saw Sarah inside without the toddler and that defendant immediately asked *Sarah* where Mercadiez was. According to Kellum's account of the interview, defendant did not mention asking Mr. Reed to watch Mercadiez, seeing Mr. Reed when she left the bathroom, or asking Mr. Reed where Mercadiez was, as might be expected if defendant had left Mercadiez in Mr. Reed's care. Therefore, I reject defendant's argument that the State offered no evidence of a lack of supervision by defendant.

Mr. Reed was the only witness to testify for the defense, and, as noted *supra*, his testimony "may be considered . . . [only] where it clarifies and *is not contradictory to the State's evidence* or where it rebuts permissible inferences raised by the State's evidence *and is not contradictory to it.*" *See Reese*, 319 N.C. at 139, 353 S.E.2d at 368 (citations omitted; emphasis added). Mr. Reed's account of the events during the critical time period was as follows:

> A . . . I went back over here and continuously, you know, helped her with the laundry, and then I went out and sat down on the—once the laundry was done, I sat on the couch—well, when she was finishing up, I sat on the couch.
>
> . . . .
>
> Q From there, you could see out the door [onto the side porch]?

A From there, you can see out the door.

Q Did you see Mercadiez?

A Yes.

Q You had your eye on her from sitting right there?

A Yep.

Q And after you sat down, tell me what happened from there.

A I sat down from there, and that's when [defendant] said, you know, I have to use the bathroom, you got this? And I said, yes.

Q You got this?

A You got this.

Q What does that mean?

A To me, it means you got what's going on in the house, everything that's going on.

Q Referring to the children?

A Referring to the children, whatever.

Q And [defendant] left?

A To go use the bathroom, yes.

[*discussion of which bathroom defendant was using*]

Q Tell me what happened, from there.

A Like anything, I was sitting there. I said, yes. She left to go to the bathroom. I was sitting—not even a couple minutes later, I mean, I heard—

[*discussion of why defendant was going to the bathroom*]

Q And I'm sorry, I just wanted—if you will, so she goes to the bathroom.

A Right. While she was in the bathroom, like anything, and then I was sitting over here, and Mercadiez is up front in the yard with—the side porch with [Sarah], I heard, "Can't I [use the bathroom] in peace?"

Q And that was [defendant]?

A That was [defendant], yes.

Q What was that about?

A While she was in the bathroom, the two younger [children were] in there, bothering her. And from there, like anything, I mean, just when I heard that, I got up. When I was walking by, walking by this area right here, I got up, walked around, was walking right through here, that's when I looked over to the front door, which is this way, and I saw Mercadiez sitting down on the porch with [Sarah], playing in the flower—the flower pot that was in the picture, she was playing in the flower pot.

Q Where did you go from there?

A I went into the—the bathroom where she was located, where [defendant] was located, and grabbed the two girls from there.

[*discussion of which two girls were bothering defendant*]

Q And at that point, [defendant] was sitting on the toilet?

A Yes, she was sitting on the toilet.

Q And what did you do with those two little girls?

[*discussion of Mr. Reed setting up a movie for the two girls*]

A I checked on [another child], and then I walked back up through the hallway. When I was walking up through the hallway, [defendant] got done using the bathroom and came out.

Q So you essentially met her in the hallway?

A Met her in the hallway, yes.

Q She's in front of you. Which way did she go?

A She went through the—through the hallway, into the kitchen.

[*discussion of how close defendant and Mr. Reed were in the hallway*]

> A When I got into the kitchen, like anything, well, she walked up, and she walked towards the middle of the counter right there, by the middle of the counter, and then [Sarah] walked in. And when [Sarah] walked in, the first thing [defendant] said is, "where is Mercadiez?"

Thus, Mr. Reed's account was that (1) he was with defendant in the living room already supervising Mercadiez when defendant announced that she was going to the bathroom and asked Mr. Reed to watch the toddler; (2) he heard defendant call out in frustration because two other children were in the bathroom bothering her; (3) he left the living room for several minutes to settle the other children in front of a movie; and (4) he met defendant in the hallway as she left the bathroom.[5] Mr. Reed's version of events is plainly not consistent with the State's evidence that defendant left Mercadiez outside on the side porch with Sarah while defendant went to the bathroom for five to ten minutes and that, when defendant returned to the living room, she was surprised to encounter Sarah inside without Mercadiez. Accordingly, in considering the merits of defendant's motion to dismiss for insufficiency of the evidence, neither the trial court nor this Court should consider Mr. Reed's testimony regarding the events immediately preceding the drowning.

I find *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983), the primary case relied upon in the majority opinion, easily distinguishable. The defendant in *Bates*, having been convicted of felony murder and robbery with a dangerous weapon as a result of an admitted altercation with another man, argued on appeal that "the trial court erred in denying his motion to dismiss the armed robbery charge[, which was also the predicate felony supporting his felony murder conviction] for insufficiency of the evidence." *Id.* at 533, 308 S.E.2d at 262. "Specifically, [the] defendant argue[d] that the State ha[d] not shown by substantial evidence a taking of the victim's property with the intent to permanently deprive him of its use." *Id.* at 534, 308 S.E.2d at 262. As noted in the majority opinion, the State's evidence concerned the scene of the crime, including the condition of the victim's and the defendant's bodies, and the location of the victim's and the defendant's personal possessions. *Id.* at 534-35, 308 S.E.2d at 262-63. There were no witnesses to the fight, but the defendant testified about the events which led up to the altercation and his account of how the victim was killed. *Id.* at 535,

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5. This is the "*actual evidence from defendant's case*[,]" as quoted above and summarized here, that, in my view, "*contradicts the State's evidence*[,]" quoted at length and summarized on the third through sixth pages of this dissent. (Emphasis added).

308 S.E.2d at 263. Importantly, both the "[d]efendant's testimony and the physical evidence reveal[ed] that a brutal fight took place between" the defendant and victim. *Id.* On the only point of dispute—whether the defendant had robbed the victim—"[t]he State relie[d solely] on the fact that the deceased's property was found some distance from his body to establish a taking by [the] defendant[,]" while the "[d]efendant testified that he never saw [the victim's] possessions nor was he aware of how they came to be strewn around the area." *Id.* at 534, 535, 308 S.E.2d at 262, 263. Our Supreme Court, in holding the evidence was insufficient to survive the defendant's motion to dismiss, observed that, "[w]hen [the] defendant's explanatory testimony is considered along with the physical evidence presented by the State, the logical inference is that the [victim] lost these items of personal property during the struggle with [the] defendant." *Id.* at 535, 308 S.E.2d at 263. In other words, there were *not* two possible accounts of the crime presented. Instead, the State's evidence was entirely a description of the physical crime scene—the "what" of the altercation—while the defendant's evidence concerned the "how" and "why" of the fight. The State's evidence would have supported an inference of robbery, but the defendant's evidence provided an explanation that rebutted the inference of robbery by permitting an innocent inference from the State's crime scene evidence.

Here, in contrast, the State and defendant each presented a distinct "story" of how Mercadiez came to be unsupervised such that she could wander away and drown. The State's evidence was that defendant was watching Mercadiez play outside on the side porch with her sister when defendant left the living room and spent several minutes in the bathroom where she could not supervise Mercadiez and that the toddler was not with her older sister when defendant returned from the bathroom. Defendant's evidence was that her husband was already watching Mercadiez when defendant asked him to supervise the toddler while she went to the bathroom for several minutes only to find Mercadiez missing when defendant and her husband both returned to the living room.[6] Unlike in *Bates*, the question here is not whether an inference permitted by the State's evidence is rebutted by the clarifying evidence of the defendant which supports a more likely inference. It is whether the jury believed the State's theory of the case, to wit, that defendant left Mercadiez unsupervised when she went to the bathroom, or whether they believed defendant's account that she left her child in the care of

6. In my opinion, these contrasts between the State's and defendant's evidence are a "coherent argument [about] why Mr. Reed's testimony should be disregarded."

her husband. Simply put, both versions of the moments before the tragic drowning cannot be true. Thus, the State's evidence is inconsistent with defendant's evidence and could not be considered by the trial court or by this Court in evaluating the sufficiency of the evidence against defendant. *See Reese*, 319 N.C. at 139, 353 S.E.2d at 368 (stating that a defendant's evidence "may be considered . . . [only] where it clarifies and *is not contradictory to the State's evidence* or where it rebuts permissible inferences raised by the State's evidence *and is not contradictory to it*" (citations omitted; emphasis added)). However, in order to fully address defendant's argument that the trial court erred in denying her motion to dismiss, her contentions that the trial court erred in admitting certain Rule 404(b) evidence must also be considered.

II. Admission of Rule 404(b) evidence

I agree with the ultimate determination in the majority opinion that the trial court did not err in admitting, pursuant to Rules 403 and 404(b) of the North Carolina Rules of Evidence, evidence regarding the previous drowning of another toddler left in defendant's care. However, because a more thorough discussion of the evidence and the basis for its admission is helpful in understanding why (1) defendant's motion to dismiss was properly denied and (2) the trial court did not err in failing to intervene *ex mero motu* in the State's closing argument, I write separately on this issue.

As noted by the majority, during the investigation of Mercadiez's death, JPD officers learned about the 22 September 2010 death of 19-month-old Sadie Gates, who had wandered away and drowned in a rain-filled creek while in defendant's care. Defendant was convicted of involuntary manslaughter in connection with that incident and was still on probation at the time of Mercadiez's death. In addition, investigators received a report from a neighbor of the Reeds regarding an incident that occurred about a month before Mercadiez's death. The neighbor had been driving past the Reeds' home and noticed two children, one a toddler and the other about three or four years old, playing at the edge of the curb next to the street. Concerned for the children's safety, the neighbor stopped her car and knocked on defendant's door, which was answered by a five- or six-year-old child. When defendant eventually came to the door, the neighbor pointed out the unsupervised young children in the yard, and defendant went to retrieve them.

In June 2014, the State filed a motion *in limine* regarding the admissibility of the neighbor's report of unsupervised young children in defendant's yard and the 2010 drowning of Sadie Gates. In July 2014,

defendant filed her own motion *in limine*, arguing that the admission of evidence of those events was barred by Rule 404(b). Following a hearing, on 23 September 2014, the trial court entered an order denying defendant's motion *in limine* to exclude evidence of the 2010 drowning. The court deferred ruling on the admissibility of the neighbor's testimony until trial, ultimately allowing the neighbor to testify about the unsupervised children seen in defendant's yard about a month before Mercadiez drowned.

On appeal, defendant argues that the trial court erred in admitting testimony under Rules 403 and 404(b) about the 2010 drowning of Sadie Gates.[7] I disagree.

As our Supreme Court has observed:

> When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling, as it did here, we look to whether the evidence supports the findings and whether the findings support the conclusions. We review *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). . . .
>
> Rule 404(b) is a clear general rule of *inclusion*. The rule lists numerous purposes for which evidence of prior acts may be admitted, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. This list is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime. . . .
>
> Though it is a rule of inclusion, Rule 404(b) is still constrained by the requirements of similarity and temporal proximity. Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them. We do not

7. Although the subsection caption of defendant's brief alleges that the trial court erred in denying her motion *in limine* and admitting evidence regarding both the 2010 drowning *and* the incident when defendant's children were left unsupervised in her front yard, defendant only presents an argument regarding the evidence of Sadie Gates' drowning. Accordingly, defendant's assertion that the trial court erred in admitting evidence about the unsupervised children is deemed abandoned on appeal. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

> require that the similarities rise to the level of the unique and bizarre.

State v. Beckelheimer, 366 N.C. 127, 130-31, 726 S.E.2d 156, 159 (2012) (citations and internal quotation marks omitted; italics added; emphasis in original).

Here, the trial court summarized the similarities between the 2010 and 2013 drownings in its seven-page order as follows:

> There are sufficient similarities between the two events to support the [S]tate's contention that the former incident is evidence that shows (1) knowledge on the part of [defendant] of the dangers and possible consequences of failing to supervise a young child who has access to or is exposed to bodies of water; (2) absence of accident; and (3) explains the context of her statements at the scene and later to law enforcement.
>
> Both events arose out of the supervision of children who were nineteen months old. [Defendant] was babysitting Sadie Gates who had been left with [defendant] on September 22, 2010 by her mother. A creek which had become swollen due to rainfall was located within 25 yards of [defendant's] home. In places the water was five feet deep. Any barrier to keep the child away from this hazard had become ineffective. The property did not have a fence between the house and the creek. At the probable time of the incident [defendant] was engaged in caring for another child or watching a television program with her estranged husband who was in the home. The time period that the child was not being attended to by [defendant] had been estimated to be between five and fifteen minutes. The child was able to get out of the house through an unsecured door and off of a porch with ineffective child barriers.
>
> In the May [11], 2013 case, the victim was [defendant's] nineteen[-]month[-]old daughter, Mercadiez Reed. She was able to leave the home through an unsecured door and gain access to an above ground swimming pool that was about four feet deep. [Defendant's] husband and her children were in or about the home when the victim wandered out of the house. [Defendant] told law enforcement officers that she was in the bathroom for about five to ten

> minutes when the child probably left the home to go outside. She advised law enforcement that she did not watch the children in the pool because she was uncomfortable due to the previous incident.

Defendant contends that the thirteen findings of fact in the order were "inadequate and incomplete" and thus failed to support the trial court's conclusions of law that the 2010 and 2013 drownings were sufficiently similar to permit admission of the 2010 evidence under Rule 404(b). Specifically, defendant contends that the 2010 drowning of Sadie Gates lacked any similarity to the 2013 drowning of Mercadiez on "the most important issue, supervision[.]"[8] Defendant misperceives the requirements for admission of prior bad acts under Rule 404(b) and the purpose for which the State sought to offer the evidence here.

Defendant notes that while she admitted leaving the victim of the 2010 drowning completely unsupervised, there was voir dire testimony at the pretrial hearing that she left Mercadiez in the same room as Mr. Reed before Mercadiez's drowning.[9] I would conclude that this difference pales in comparison to the numerous similarities between these tragic events. As the trial court noted, both incidents involved (1) 19-month-old children (2) who were being supervised by defendant (3) in her home (4) while her husband and other children were present (5) who drowned (6) in nearby bodies of water (7) after getting out of defendant's home, and (8) when defendant had stepped away from the child's immediate presence for a period of approximately five to ten minutes. Further, the evidence was not offered to *prove* that defendant failed to supervise Mercadiez, but rather, *inter alia*, to show defendant's *knowledge* "of the dangers and possible consequences of failing to supervise a young child who has access to or is exposed to bodies of water[.]" Whether defendant's husband was with Mercadiez when defendant left the room before her daughter escaped from the house and drowned is irrelevant to the issue of defendant's *knowledge* of the possible consequences of leaving a toddler with unsupervised access to an open source of water. Defendant's knowledge of such danger, in turn, was highly relevant to the jury's determination of her (1) culpable negligence, an element of involuntary manslaughter; (2) reckless disregard for human life, an

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8. On appeal, defendant does not argue that the two incidents lacked temporal proximity. *See Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159.

9. As noted *supra*, unlike at the trial itself, the defense elicited testimony from Kellum about Mr. Reed's presence in the living room when defendant went to the bathroom on cross-examination at the pretrial hearing.

element of felonious child abuse; and (3) willfully or knowingly allowing a child to be in a situation where the child could be adjudicated neglected, an element of contributing to the neglect of a juvenile. *See, e.g.*, *State v. Fritsch*, 351 N.C. 373, 379-80, 526 S.E.2d 451, 456 (2000), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000); *see also* N.C. Gen. Stat. § 14-316.1 (2015) (defining contributing to delinquency by a parent as "knowingly or willfully caus[ing] . . . any juvenile . . . to be in a place or condition . . . whereby the juvenile could be adjudicated . . . neglected"). For these reasons, I agree with the majority that the trial court properly concluded that evidence of the 2010 drowning was admissible under Rule 404(b).

Nonetheless, North Carolina's Rules of Evidence provide that even relevant

> evidence may . . . be excluded under Rule 403 if the trial court determines its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion. An abuse of discretion results when 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. Whaley, 362 N.C. 156, 159-60, 655 S.E.2d 388, 390 (2008) (citations and internal quotation marks omitted).

Defendant's appellate argument regarding Rule 403 is simply that evidence of the 2010 drowning was so lacking in probative value that it was outweighed by the obvious prejudice of evidence that another toddler had previously drowned while in defendant's care. While I agree that it was prejudicial, as explained *supra*, the evidence of the 2010 drowning was also highly probative of the issues before the jury in this case. The trial court noted in its order that it had performed the required Rule 403 balancing test in regard to the 2010 drowning and determined that the probative value of the evidence was not outweighed by unfair prejudice.

My conclusion that this was a reasoned decision is further supported by the trial court's decision to defer ruling until trial on admission of the neighbor's testimony about unsupervised children in defendant's yard and its ruling that evidence about defendant's possible drug use on the date of the 2010 drowning was inadmissible under Rule 403. I see no abuse of discretion in the admission of evidence about the 2010

drowning, and, accordingly, I agree with the statement in the majority opinion that this argument by defendant lacks merit.

III. Motion to dismiss for insufficiency of the evidence

I would also overrule defendant's arguments that the evidence at trial was insufficient to support her convictions for misdemeanor child abuse and contributing to the delinquency of a juvenile by neglect.

Taken together the State's evidence at trial shows that defendant knew (1) how quickly unsupervised toddlers in general could wander away into dangerous situations, (2) that two of her young children, including a toddler who appears to have been Mercadiez, had wandered unsupervised to the edge of the street only the month before, (3) that some of defendant's older children were in the habit of leaving gates open which allowed younger children to wander, (4) how attractive and dangerous open water sources like her backyard pool could be for toddlers, and (5) that defendant had previously been held *criminally responsible* in the death of a toddler she was babysitting after that child was left unsupervised inside defendant's home for five to fifteen minutes, managed to get outside, and wandered into a creek where she drowned. Despite this knowledge, defendant still chose to (6) leave toddler Mercadiez outside on a side porch (7) supervised only by other children (8) while defendant spent five to ten minutes in a bathroom where she could not see or hear her youngest child.

Regarding her conviction for misdemeanor child abuse, I agree with the assertion in the majority opinion that the most factually analogous case to defendant's is *State v. Watkins*, __ N.C. App. __, 785 S.E.2d 175 (2016). In *Watkins*, the defendant appealed from the denial of her motion to dismiss a charge of misdemeanor child abuse. *Id.* at __, 785 S.E.2d at 176. The defendant was charged after her son "James, who was under two years old, was left alone and helpless—outside of [the d]efendant's line of sight[10] —for over six minutes inside a vehicle with one of its windows rolled more than halfway down in 18-degree weather with accompanying sleet, snow, and wind." *Id.* at __, 785 S.E.2d at 178.

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10. The evidence was conflicting on this point. The "[d]efendant testified that from where she was standing in the Sheriff's Office she 'could look directly into my car and see my kid[,]' " while the detective who was the primary witness for the State "testified that from where [the d]efendant was positioned in the lobby she could not see her vehicle, which was parked approximately 46 feet away from the front door." *Id.* at __, 785 S.E.2d at 176, 177.

> Given the harsh weather conditions, James' young age, and the danger of him being abducted (or of physical harm being inflicted upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that [the d]efendant "created a substantial risk of physical injury" to him by other than accidental means. *See* N.C. Gen. Stat. § 14-318.2(a).
>
> [The d]efendant acknowledges that her actions "may not have been advisable[] under the circumstances" but argues nevertheless that "this was not a case of child abuse." However, the only question before us in an appeal from the denial of a motion to dismiss is whether a reasonable juror could have concluded that the defendant was guilty based on the evidence presented by the State. If so, even if the case is a close one, it must be resolved by the jury. *See State v. Franklin*, 327 N.C. 162, 170, 393 S.E.2d 781, 786-87 (1990) ("Although we concede that this is a close question . . . the State's case was sufficient to take the case to the jury."); *State v. McElrath*, 322 N.C. 1, 10, 366 S.E.2d 442, 447 (1988) (upholding trial court's denial of motion to dismiss even though issue presented was "a very close question").

Id. (emphasis omitted). Mercadiez and James were each left unsupervised by their mothers for a similarly short length of time—five to ten and six minutes, respectively. However, the actual danger to which Mercadiez, who was awake and mobile, was exposed during that time was significantly greater than that faced by James, who was sleeping and confined. While leaving her toddler partially exposed to cold and snowy weather for six minutes was certainly a poor decision by James's mother, it was unlikely to result in death and did not result in any actual injury to him. Indeed, the law enforcement officer who spotted James sleeping in his mother's car did not feel the need to check the child's well-being before the defendant left the scene.[11]

As for the other risk suggested by this Court in *Watkins*, I would note that the best available statistics indicate that drownings are far more common than nonfamily abductions. In 2015, the National Center

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11. The detective testified that he "noticed that [James], who appeared to be sleeping, had a scarf around his neck. Before walking back into the building, [the detective] told [the d]efendant to turn on the vehicle and 'get some heat on that child.' " *Id.* at __, 785 S.E.2d at 176.

for Missing and Exploited Children[12] "assisted law enforcement with more than 13,700 cases of missing children[,]" approximately 1% of which were nonfamily abductions. *See* The National Center for Missing & Exploited Children, http://www.missingkids.com/KeyFacts (last visited July 6, 2016). The resulting estimate of 137 nonfamily child abductions annually is dwarfed by the approximately 700 children under age 15 who drown in non-boating-related incidents each year. *See* Centers for Disease Control and Prevention, http://www.cdc.gov/homeandrecreationalsafety/water-safety/waterinjuries-factsheet.html (last visited July 6, 2016) ("From 2005-2014, there were an average of 3,536 fatal unintentional drownings (non-boating related) annually in the United States . . . . About one in five people who die from drowning are children 14 and younger.").[13] Indeed, "[d]rowning is responsible for more deaths among children [ages] 1-4 than any other cause except congenital anomalies (birth defects)." *Id.* For children ages 1-4 years, home swimming pools are the most common location for drownings. *Id.* In addition, "[f]or every child [age 14 and under] who dies from drowning, another five receive emergency department care for nonfatal submersion injuries." *Id.* Thus, I take issue with the majority opinion's characterization of Mercadiez's drowning as "the exceedingly rare situation that resulted in a tragic accident."[14] The primary distinction I see between this case and *Watkins* is that Mercadiez was exposed to far greater risk when she was left unsupervised and subsequently drowned.[15]

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12. The National Center for Missing & Exploited Children opened in 1984 to serve as the nation's clearinghouse on issues related to missing and sexually exploited children. Today NCMEC is authorized by Congress to perform 22 programs and services to assist law enforcement, families and the professionals who serve them." The National Center for Missing & Exploited Children, http://www.missingkids.com/About (last visited July 6, 2016).

13. The Centers for Disease Control and Prevention is part of the Department of Health and Human Services. *See* http://www.cdc.gov/about/organization/cio.htm (last visited July 6, 2016).

14. I would further note the defendant in *Watkins* was prosecuted even though her child suffered no harm at all, and, apparently, slept peacefully through the six-minute period when he was subjected to substantial *risk* of physical injury. *See Watkins*, __ N.C. App. at __, 785 S.E.2d at 176.

15. The majority opinion dismisses as "irrelevant" these statistics regarding unintentional drownings, asserting that "most *unintentional* drownings would likely also be described as 'accidental drownings,' and the issue here is whether the acts were by *other than* accidental means." (Internal quotation marks omitted). However, section 14-318.2, our misdemeanor child abuse statute, makes it a crime for the parent of a child under age 16 to "*allow*[] *to be created a substantial risk of physical injury*, upon or to such child *by other than accidental means* . . . ." N.C. Gen. Stat. § 14-318.2(a) (2015) (emphasis added). Thus, it is the *creation* of the risk, rather than any actual harm that may befall a

I find wholly unpersuasive the argument that *Watkins* and defendant's case are distinguishable on the basis of (1) the purposeful action of the parent in each case and (2) the foreseeability of the potential harm to the unattended child:

> In *Watkins*, the defendant was aware of the harsh weather conditions, that the window was rolled down, and that she was leaving her child unattended in a public space; in other words, [the] defendant engaged in the purposeful conduct of leaving her child in the circumstances just enumerated; which is purposeful action that crosses the "accidental" threshold as "physical injury" in this case is very foreseeable, whether by hypothermia or abduction. From a commonsense standpoint, most, if not all parents, know there are inherent and likely dangers in leaving a child entirely alone in an open car in freezing weather in a public parking lot.

(Citation omitted).

First, I do not understand how a parent who left her sleeping child in a car for six minutes while she went into a sheriff's office "engaged in the purposeful conduct of leaving her child in [those] circumstances[,]" but a parent who left her child playing outside near a swimming pool for five to ten minutes while she went into a bathroom did not. Both cases appear to me to involve "the purposeful conduct of leaving [a] child in the circumstances" which the State argued were dangerous. If evidence that a defendant left her sleeping toddler strapped in his car seat alone in a car parked in front of a sheriff's office in cold weather for six minutes was sufficient for "a reasonable juror [to find] that [the d]efendant created a substantial risk of physical injury to him by other than accidental means[,]" *see Watkins*, __ N.C. App. at __, 785 S.E.2d at 178 (internal quotation marks omitted), I have no trouble concluding that evidence that a defendant who left her toddler outside without adult supervision for five to ten minutes at a home with an outdoor swimming pool and a pool security gate often left open by other children in the family was likewise sufficient to withstand a motion to dismiss.

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child, that must be "by other than accidental means . . . ." *Id.* Here, the State's evidence was that defendant decided to leave Mercadiez playing outside without adult supervision while defendant went into a bathroom for five to ten minutes. That decision to walk out of eyesight and earshot of her toddler, which created the risk to Mercadiez, was not an accident, but a conscious, intentional choice. As for the CDC's statistics, I would assume that an *unintentional* drowning refers to any drowning that is not *intentional*, *i.e.*, the result of either suicide or homicide.

Second, regarding foreseeability, I believe that, in addition to being aware of the dangers of child abduction and hypothermia, "[f]rom a commonsense standpoint, most, if not all parents, know there are inherent and likely dangers in leaving a child" outside without supervision near a backyard swimming pool. Further, *even if most parents are not aware* of the grave danger of drowning for unsupervised young children, *defendant was undeniably aware* of the risk, given that she was still on probation for her conviction of involuntary manslaughter in connection with Sadie Gate's death at the time of Mercadiez's drowning. As noted *supra*, defendant was also aware that the gate to the backyard pool was often left open by other children in the home and that two of her younger children had recently been able to wander to the edge of the street while they were at home and in defendant's care.

Finally, I take issue with the assertion in the majority opinion that, if we do not find error in the trial court's denial of defendant's motion to dismiss, "any parent who leaves a small child alone in her own home, for even a moment, could be prosecuted if the child is injured during that time, not because the behavior she engaged in was negligent or different from what all other parents typically do, but simply because [hers] is the exceedingly rare situation that resulted in a tragic accident."[16] Defendant left her toddler outside on a side porch without adult supervision, not for a moment, but for five to ten minutes. Further, the evidence in this case is that defendant knew the risk of a young child drowning when left unsupervised, knew her own young children had a tendency to wander in the yard, and knew her swimming pool was not always securely enclosed, yet still left Mercadiez outside unsupervised for five to ten minutes.

As noted in the majority opinion, defendant's conviction for contributing to the delinquency of a minor was based upon the theory that she "knowingly or willfully cause[d Mercadiez] . . . to be in a place or condition" where she "could be adjudicated . . . neglected as defined by G.S. 7B-101[,]" *see* N.C. Gen. Stat. § 14-316.1, to wit, that Mercadiez did "not receive proper care, *supervision*, or discipline[,]" *see* N.C. Gen. Stat. § 7B-101(15) (2015) (emphasis added), from defendant in the moments before she wandered unsupervised into the backyard pool and drowned. For all of the reasons discussed *supra*, I can hardly conceive of a more textbook definition of failure to properly supervise one's toddler than to leave her outside without supervision for five to ten minutes at a home with a backyard swimming pool and a security gate that is often left ajar.

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16. *See* footnote 14, *supra*.

Further, I reject the assertion in the majority opinion that the State's theory of the case was "that fathers are *per se* incompetent to care for young children" and that the evidence was insufficient because the State produced "no evidence that defendant reasonably should have known that Mr. Reed was in any way incompetent to supervise Mercadiez when [defendant] went to the bathroom." The State's theory of the case had nothing to do with fathers in general nor with Mr. Reed in particular. Rather, as is clearly shown by the evidence it presented, the State's theory was that *defendant* left Mercadiez outside with Sarah and her young friends while *defendant* spent five to ten minutes in a bathroom where *defendant* could not see Mercadiez, even though *defendant* was aware that young children left unsupervised could quickly wander into danger such as the family's backyard pool. As discussed in section I of this dissent, when ruling on defendant's motion to dismiss, the trial court could not consider Mr. Reed's testimony that defendant left Mercadiez with him when she went to the bathroom, and, thus, Mr. Reed's competence to supervise Mercadiez was simply irrelevant.

In sum, taken in the light most favorable to the State, I conclude that there was substantial evidence that defendant knowingly "create[d] or allow[ed] to be created a substantial risk of physical injury" to Mercadiez, *see* N.C. Gen. Stat. § 14-318.2(a), and allowed Mercadiez to be in a situation where she was not properly supervised. *See* N.C. Gen. Stat. § 14-316.1. While this "evidence [may] not rule out every hypothesis of innocence[,] . . . a reasonable inference of defendant's guilt may be drawn from the circumstances, and, thus, it was for the jury to decide whether the facts, taken singly or in combination, satisf[ied it] beyond a reasonable doubt that the defendant [was] actually guilty." *See Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation, internal quotation marks, and emphasis omitted). Accordingly, I would hold that the trial court did not err in denying defendant's motion to dismiss.

IV. Failure to intervene ex mero motu during the State's closing argument[17]

In a related argument, defendant contends that the trial court should have intervened *ex mero motu* to strike the prosecutor's comment during

17. Although the caption of this portion of defendant's brief states that "THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING THE STATE TO ARGUE N.C.G.S. 8C-404(b) EVIDENCE OUTSIDE ITS BASIS FOR ADMISSION[,]" the text of the argument cites only case law regarding "improper closing arguments that fail to provoke [a] timely objection[,]" correctly noting the proper standard of review as stated in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002).

closing argument that "just as she was responsible for the death of Sadie Gates, so, too, is [defendant] responsible for the death of Mercadiez Reed."[18] Specifically, defendant contends that, with this remark, the State was urging the jury to ignore the trial court's Rule 404(b) instruction regarding the purpose for which evidence of the 2010 drowning was received. I am not persuaded.

As an initial matter, I address the proper appellate standard of review for defendant's argument regarding the State's closing remarks to the jury. The majority opinion frames defendant's argument as "that the State went so far beyond the scope of the proper use of the admitted 404(b) evidence in its arguments to the jury that it amounted to plain error in defendant's trial[.]" Asserting that this argument "hinges on the admission of evidence during the trial," the majority applies plain error review. While plain error review may be applied to unpreserved evidentiary issues, as discussed in section II of this dissent *supra*, defendant *did object* to the admission of evidence regarding Sadie Gates' drowning under Rules of Evidence 403 and 404(b). *See Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 158-59 (discussing the appropriate standard of review applied to appellate arguments under Rule 403—abuse of discretion—and Rule 404(b)—*de novo*). More importantly, as noted in footnotes 17 and 18 and discussed further below, defendant's sole argument is that the trial court erred in failing to intervene *ex mero motu* to a single remark made during the State's closing argument. Plain error review is not appropriate for such appellate arguments. *See State v. Wolfe*, 157 N.C. App. 22, 33, 577 S.E.2d 655, 663 (2003) ("[T]he plain error doctrine is limited to errors in jury instructions and the admission of evidence."), *disc. review denied and appeal dismissed*, 357 N.C. 255, 583 S.E.2d 289 (2003).

Instead, the correct

> 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

18. This statement is the only portion of the State's closing argument cited by defendant in her brief. Defendant does quote one other statement made by the State, but notes that it occurred during a hearing on defendant's pretrial motions and thus the jury did not hear it. Accordingly, we need not consider its propriety.

> 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.

Jones, 355 N.C. at 133, 558 S.E.2d at 107 (citation omitted). "[C]ounsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697 (1996), *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). Further, such "*comments must be viewed in the context in which they were made* and in light of the overall factual circumstances to which they referred." *State v. Call*, 349 N.C. 382, 420, 508 S.E.2d 496, 519 (1998) (emphasis added).

In addition to applying an incorrect standard of review, the majority opinion mischaracterizes defendant's argument on appeal regarding the State's reference to the death of Sadie Gates in its closing argument to the jury. In support of her contention of gross impropriety in the State's closing argument, defendant argues that:

> The State's . . . argument in essence encouraged the jury *to ignore the trial court's instructions regarding the 404(b) evidence*, and the basis upon which it was received, i.e., defendant's knowledge of not supervising a minor child, and to find the defendant guilty because it had happened to another child in [defendant's] care. . . . To suggest to the jury that it ignore a judge's instructions is grossly improper. Knowing the extent of the dispute as to whether the 404(b) [evidence] should have been allowed into evidence, the court upon hearing the State's argument should have stopped the argument of the State and reminded them that the evidence of [the] prior incident involving Sadie Gates was not to be considered to show a propensity on defendant's part, and she was therefore guilty again, as the State was encouraging the jury to so find. "Just as she was responsible for the death of Sadie Gates, so, too, is she responsible for the death of Mercadiez Reed."

(Emphasis added). Thus, defendant's argument is simple and straightforward: that when the challenged remark—"Just as she was responsible for the death of Sadie Gates, so, too, is she responsible for the

death of Mercadiez Reed"—was made, the trial judge, *ex mero motu*, "should have stopped the argument of the State and reminded them that the evidence of [the] prior incident involving Sadie Gates was not to be considered to show a propensity on defendant's part . . . ."

The majority opinion does not directly address defendant's argument, instead undertaking a review of the State's opening statement and direct examination of its witnesses, in addition to portions of its closing argument not challenged by defendant, and focusing on the number of times the State mentioned Sadie's and Mercadiez's names during the trial. In support of its conclusion that "the State used the evidence of Sadie's death far beyond the bounds allowed by the trial court's order[,]" the majority suggests that, because Sadie's name was used almost as frequently as Mercadiez's name was across the State's opening statement, case-in-chief, and closing argument, "[t]he State's use of the evidence regarding Sadie went far beyond showing that defendant was aware of the dangers of water to small children or any other proper purpose as found by the trial court." The majority opinion cites no authority for the proposition that the frequency of reference to evidence admitted under Rule 404(b) throughout a trial is a pertinent consideration in assessing the alleged gross impropriety of a single comment made during a closing argument, or, indeed, on any legal issue. I would simply note that, in considering the appropriate use of Rule 404(b) evidence and in determining whether a prosecutor's remark was so grossly improper that a trial court erred in failing to intervene *ex mero motu*, precedent requires that we consider the *purpose* and *nature* of statements rather than their *frequency*. *See Beckelheimer*, 366 N.C. at 130-31, 726 S.E.2d at 159; *see also Jones*, 355 N.C. at 133, 558 S.E.2d at 107-08.

I believe an analysis of defendant's actual argument on appeal can lead only to a conclusion that the State, far from making a grossly improper argument, specifically cautioned the jury against letting its emotions get in the way of a proper consideration of the evidence before it. A review of the challenged remark *in context* reveals that, while the court did not interrupt the prosecutor to remind the jury of the limited purposes for which the Sadie Gates evidence could be considered, the *prosecutor* did give the jury an explicit reminder, essentially repeating the limiting instruction given by the trial court:

> And just as she was responsible for the death of Sadie Gates, so, too, is she responsible for the death of Mercadiez Reed. Not a sibling, not [Mr.] Reed, but her. She is the person that can and should be held criminally responsible for

> her daughter's death, because she is the only person who knew of the dangers, who had been negligent before, and who acted in a grossly negligent manner.
>
> *Because of Sadie Gates's death, she had knowledge of the dangers of failing to supervise a child. She knew that if you didn't watch a child, bad things can happen and the child can die. Sadie's death gave her direct, firsthand knowledge of that, and also put a greater responsibility on her to ensure that no child under her care is left unsupervised, in a dangerous situation.*
>
> Now, *you're not here to decide her responsibility for Sadie Gates's death, and that evidence has not been presented to you to anger or inflame you, or prove that she's a bad parent. It's been offered to you, and should be considered by you, for the limited purpose of showing that she had direct knowledge of the dangers of failing to supervise a child who has access to water.* It is important, because it shows her conduct rose to the level of gross carelessness or recklessness that amounted to the heedless indifference of safety and rights of others.

(Emphasis added).[19] In my view, when read in context, the comment defendant challenges can *only* be interpreted as part of the State's argument that the 2010 drowning death of Sadie Gates was evidence of defendant's *knowledge* of the dangers of leaving a toddler near an accessible source of water, which as noted *supra* was offered to prove essential elements of both felonious child abuse and involuntary manslaughter. In light of the State's emphasis on the knowledge the 2010 drowning gave defendant about the danger of open water sources to very young children and *its explicit reminder of the limited purpose for which the jury could consider that evidence*, the challenged remark was not improper, let alone "so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *See Jones*, 355 N.C. at 133, 558 S.E.2d at 107. I would overrule this argument.

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19. The majority asserts that, "[b]y referencing only the portion of the State's closing argument that stayed within the Rule 404(b) bounds, it is the dissent [that] is taking the use of the evidence out of context." To the contrary, I focus on this portion of the State's closing statement because it includes the remark actually challenged by defendant and the context necessary to address her appellate argument. *See, e.g.*, *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam).

V. Conclusion

I would hold that the trial court did not err in denying defendant's motions to dismiss, admitting evidence of Sadie Gates' drowning, or failing to intervene *ex mero motu* in the State's closing argument.

STATE OF NORTH CAROLINA
v.
PARIS JUJUAN TODD, DEFENDANT

No. COA 15-670

Filed 16 August 2016

Constitutional Law—effective assistance of counsel—failure to raise issue during prior appeal

On appeal from the trial court's denial of defendant's motion for appropriate relief, the Court of Appeals held that the evidence presented at defendant's trial was insufficient to support his conviction for robbery with a dangerous weapon and that if this issue had been raised during defendant's prior appeal, there was a reasonable probability that his conviction would have been overturned. Defendant therefore received ineffective assistance of counsel in his first appeal and the trial court erred by denying his motion for appropriate relief.

Judge DIETZ concurring.

Judge TYSON dissenting.

Appeal by defendant from order entered 15 January 2015 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 19 November 2015.

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

N.C. Prisoner Legal Services, Inc., by Reid Cater, for defendant -appellant.

STROUD, Judge.

Defendant Paris Jujuan Todd appeals the trial court's denial of his motion for appropriate relief ("MAR"). On appeal, defendant argues that the trial court erred in denying his MAR because the evidence presented at trial was insufficient to support a conviction and had this been raised during his prior appeal, there is a reasonable probability that defendant's conviction would have been overturned. After reviewing the evidence presented below, we agree, and conclude that the trial court should have granted defendant's MAR. Accordingly, we reverse the trial court's denial of defendant's MAR and remand to the trial court to enter a ruling granting defendant's MAR and vacating his conviction.

Facts

Defendant was convicted of robbery with a dangerous weapon on 14 June 2012 and defendant appealed that conviction to this Court. In his first appeal, defendant raised two issues: "(1) the trial court erred when it denied defendant's motion for a continuance made on the first day of trial, and alternatively, (2) he received ineffective assistance of counsel." *State v. Todd*, 229 N.C. App. 197, 749 S.E.2d 113, 2013 WL 4460143, *1, 2013 N.C. App. LEXIS 875, *1 (2013) (unpublished) ("*Todd I*"). This Court found no error, and the Supreme Court denied defendant's petition for discretionary review. *State v. Todd*, 367 N.C. 322, 755 S.E.2d 612 (2014).

On 21 October 2014, defendant filed an MAR with the trial court. In the MAR, defendant moved that his convictions be vacated and a new trial granted, arguing that he "received ineffective assistance of appellate counsel in that counsel failed to argue that his case should have been dismissed for lack of evidence." In addition, defendant's MAR requested "post-conviction discovery from the State under N.C. Gen. Stat. § 15A-1415(f)." On 15 January 2015, the trial court summarily denied defendant's MAR without a hearing. In its order denying defendant's MAR, the trial court noted as follows:

> A review of all the matters of record, including the opinion of the North Carolina Court of Appeals which is attached, clearly demonstrates that the evidence was sufficient to support the jury verdict and appellate counsel rendered effective assistance to Defendant in his appeal.
>
> The Appellate Court was clearly aware of the nature of the fingerprint evidence and determined that such was sufficient to support the Defendant's conviction. Otherwise, the Court was obligated to reverse the conviction upon the Court's own motion.

On 12 March 2015, defendant filed a petition for certiorari of the trial court's order denying his MAR, which this Court allowed on 27 March 2015.

Discussion

I. Denial of MAR

a. Standard of review

"Our review of a trial court's ruling on a defendant's MAR is whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157 (2013) (internal quotation marks omitted). "The trial court's findings of fact are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Thomsen*, __ N.C. App. __, __, 776 S.E.2d 41, 48 (quotation marks omitted), *disc. review denied*, __ N.C. __, 778 S.E.2d 83 (2015).

In the trial court's order denying defendant's MAR, which is the order at issue in this appeal, there are no findings of fact, and the trial court determined, as a matter of law, that the issues raised by defendant had been considered by this Court in his first appeal and that based upon this Court's opinion, the evidence was sufficient to support the conviction and thus his appellate counsel was not ineffective. We will therefore review this conclusion *de novo*.

b. "Law of the case" doctrine

Defendant argues that the evidence presented was insufficient to support his conviction, and that the "trial court erred by not granting [defendant's] motion to dismiss, and had this been raised on appeal, there is a reasonable probability that [his] conviction would have been overturned." Before we consider this issue, however, we must determine whether the trial court was correct in its determination that the issues raised by the MAR had already been determined by this Court in defendant's first appeal.

In this case, the trial court determined:

> A review of all the matters of record, including the opinion of the North Carolina Court of Appeals which is attached, clearly demonstrates that the evidence was

> sufficient to support the jury verdict and appellate counsel rendered effective assistance to Defendant in his appeal.
>
> The Appellate Court was clearly aware of the nature of the fingerprint evidence and determined that such was sufficient to support the Defendant's conviction. Otherwise, the Court was obligated to reverse the conviction upon the Court's own motion.

Although it did not use the term, the trial court was recognizing the "law of the case" doctrine in its statement regarding this Court's prior review of defendant's case.

> The law-of-the-case doctrine generally provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. The doctrine expresses the practice of courts generally to refuse to reopen what has been decided, but it does not limit courts' power. Thus, the doctrine may describe an appellate court's decision not to depart from a ruling that it made in a prior appeal in the same case.

Musacchio v. United States, __ U.S. __, __, 193 L. Ed. 2d 639, 648-49, 136 S. Ct. 709, 716 (2016) (citations, quotation marks, and brackets omitted). Based upon the law of the case doctrine, if this Court's prior opinion addressed the sufficiency of the evidence to support defendant's conviction, neither we nor the trial court would be able to review it again and would be bound by that prior ruling.

Yet for the law of the case doctrine to apply, the issue presented must have been both raised and decided in the prior opinion.

> [T]he doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case. The doctrine does not apply to what is said by the reviewing court, or by the writing justice, on points arising outside of the case and not embodied in the determination made by the Court. Such expressions are *obiter dicta* and ordinarily do not become precedents in the sense of settling the law of the case.
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> In every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta*.

> On the subject of *obiter dicta*, . . . if the statement in the opinion was superfluous and not needed for the full determination of the case, it is not entitled to be accounted a precedent, for the reason that it was, so to speak, rendered without jurisdiction or at least extra-judicial. Official character attaches only to those utterances of a court which bear directly upon the specific and limited questions which are presented to it for solution in the proper course of judicial proceedings. Over and above what is needed for the solution of these questions, its deliverances are unofficial.
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> True, where a case actually presents two or more points, any one of which is sufficient to support decision, but the reviewing Court decides all the points, the decision becomes a precedent in respect to every point decided, and the opinion expressed on each point becomes a part of the law of the case on subsequent trial and appeal. In short, a point actually presented and expressly decided does not lose its value as a precedent in settling the law of the case because decision may have been rested on some other ground.
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> The rule that a decision of an appellate court is ordinarily the law of the case, binding in subsequent proceedings, is basically a rule of procedure rather than of substantive law, and must be applied to the needs of justice with a flexible, discriminating exercise of judicial power. Therefore, in determining the correct application of the rule, the record on former appeal may be examined and looked into for the purpose of ascertaining what facts and questions were before the Court.

Hayes v. City of Wilmington, 243 N.C. 525, 536-37, 91 S.E.2d 673, 682-83 (1956) (citations, quotation marks, and ellipses omitted).

Thus, "the law of the case applies only to issues that were decided in the former proceeding, whether explicitly or by necessary implication, but not to questions which might have been decided but were not." *Goldston v. State*, 199 N.C. App. 618, 624, 683 S.E.2d 237, 242 (2009), *aff'd*, 364 N.C. 416, 700 S.E.2d 223 (2010). *See also Goetz v. N. Carolina Dep't of Health & Human Servs.*, 203 N.C. App. 421, 432, 692 S.E.2d 395, 402-03 (2010) ("The law of the case doctrine . . . generally prohibits reconsideration of issues which have been decided

by the same court, or a higher court, in a prior appeal in the same case." (quotation marks omitted)).

As noted above, the trial court found that issues raised by defendant's MAR were barred by the law of the case doctrine. But for an issue to be barred, it must have been "actually presented and necessarily involved in determining the case" in the first appeal, so we must consider if it was both presented and "necessarily involved" in this court's prior ruling. In the first appeal, defendant raised two issues: (1) "that the trial court committed prejudicial error in denying defendant's motion for a continuance after defense counsel was served with essential discovery material on 11 June 2012, the day before trial[,]" and (2) "that, if the motion for a continuance was properly denied, he is entitled to a new trial because he was denied effective assistance of counsel." *Todd I*, 229 N.C. App. 197, 749 S.E.2d 113, 2013 WL 446013, at *2, *4, 2013 N.C. App. LEXIS 875, at *4, *11.

Defendant's arguments in the first appeal focused entirely upon his claim that his motion to continue should have been granted so that he could retain an expert witness to review the fingerprint evidence which had been provided to his counsel only a day before trial. This Court noted that defendant's counsel had been "notified of the State's intention to use fingerprint evidence as early as 18 January 2012" and the case was tried in June 2012. *Id.*, 2013 WL 4460143, at *2, 2013 N.C. App. LEXIS 875, at *4. This Court stated that

> because defense counsel knew the fingerprints would be provided at some point before trial, she had ample opportunity to retain a forensic expert for when the fingerprints eventually arrived. Despite knowing this, in her motion for a continuance counsel only stated that "it does not appear to be clear to me that [the latent fingerprint] might be a perfect match, and I'm asking for a continuance in the fact I need somebody with more expertise than myself to review this."
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> Moreover, the failure to identify an expert witness also evidences a lack of specificity regarding the reasons for requesting the continuance. Defense counsel failed to show (1) which expert would be called; (2) what testimony would be elicited by the expert; and (3) how defendant's case would have been stronger with expert testimony. In addition to counsel's aforesaid statement, she went on to state that "[i]f you are uninclined to continue the case

> . . . I would ask that you at least give me today to *try* to find an expert witness that could *potentially* testify in this case." (Emphasis added.) This vague assertion resembles an "intangible hope" that helpful evidence may surface.

Id., 2013 WL 4460143, at *3-4, 2013 N.C. App. LEXIS 875, at *9-10 (citations omitted).

In the prior appeal, defendant argued only that he lost an opportunity to have an expert review the evidence in an attempt to demonstrate that the State's forensic evidence was flawed. In his MAR, defendant's argument assumes that the State's evidence was correct and the fingerprint on the backpack was actually his but contends that even if the fingerprint is his, "there was not sufficient evidence to show that [defendant]'s fingerprint could only have been impressed at the time of the crime." Our Supreme Court has noted that

> Fingerprint evidence, standing alone, is sufficient to withstand a motion for nonsuit only if there is *substantial* evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed. What constitutes substantial evidence is a question of law for the court.
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> Circumstances tending to show that a fingerprint lifted at the crime scene could only have been impressed at the time the crime was committed include statements by the defendant that he had never been on the premises, statements by prosecuting witnesses that they had never seen the defendant before or given him permission to enter the premises, fingerprints impressed in blood.

State v. Irick, 291 N.C. 480, 491-92, 231 S.E.2d 833, 841 (1977) (citations and quotation marks omitted). Thus, defendant did not raise, and this Court's prior opinion did not expressly address, the issue of sufficiency of the evidence to support defendant's conviction.

The trial court, however, went a bit further than the law of the case doctrine allows, as it seems to have based its determination upon the fact that this Court was "clearly aware of the nature of the fingerprint evidence" and must have decided that it was sufficient to support defendant's conviction or this Court was "obligated to reverse the conviction upon the Court's own motion." We are unable to find any case law supporting any "obligation" or even any authority for this Court to *sua sponte* address sufficiency of the evidence to support a conviction. To the contrary, it is well-established that

> Appellate review is limited to those questions clearly defined and presented to the reviewing court in the parties' briefs, in which arguments and authorities upon which the parties rely in support of their respective positions are to be presented. It is not the role of the appellate courts to create an appeal for an appellant, nor is it the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein.

First Charter Bank v. Am. Children's Home, 203 N.C. App. 574, 580, 692 S.E.2d 457, 463 (2010) (citations, quotation marks, and ellipses omitted).

The State's brief acknowledges as much, stating: "Assuming this part of the trial court's order is erroneous, it is also immaterial. Omission of this paragraph does not impair the ruling which, as explained above, is otherwise correct." But if we omit this paragraph, we are left only with the first paragraph, which stated that "[a] review of all the matters of record, including the opinion of the North Carolina Court of Appeals which is attached, clearly demonstrates that the evidence was sufficient to support the jury verdict and appellate counsel rendered effective assistance to Defendant in his appeal." We have already determined that the issue of sufficiency of the evidence was not determined in the first appeal so the issue is not barred by the law of the case doctrine and the trial court's ruling is not "otherwise correct." We must therefore consider the issues raised in defendant's MAR.

c. Sufficiency of evidence to support conviction

Defendant argues that the trial court erred in denying his MAR because he received ineffective assistance of appellate counsel. He contends that if the issue of sufficiency of the evidence to support his conviction had been raised in the first appeal, there is a reasonable probability that his conviction would have been reversed.

> On a motion for nonsuit the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom.
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> . . . . The test of the sufficiency of the evidence to withstand such a motion is the same whether the evidence is circumstantial, direct, or both. When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the

> circumstances. If so, 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.
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> On the other hand, if the evidence raises merely a suspicion or conjecture as to either the commission of the offense, or defendant's identity as perpetrator, the motion for nonsuit should be allowed.

Irick, 291 N.C. at 491, 231 S.E.2d at 840-41 (citations and quotation marks omitted).

This Court summarized the facts from which defendant's conviction arose in our prior opinion:

> Shortly before midnight on 23 December 2011, the Raleigh Police Department responded to a report of an armed robbery at 325 Buck Jones Road. Upon arrival, George Major (the "victim") informed police that, as he was walking home from work, an unknown African-American male approached him from behind, placed his hand on his shoulder, told him to get on the ground if he did not want to be hurt, and then forced him to the ground on his stomach. Once victim was on the ground, a second unknown African-American male approached and held victim's hands while the original assailant went through victim's pockets and felt around victim's clear plastic backpack. As the assailants prepared to flee, they ordered victim to remain facedown on the ground until he counted to 200 because they "didn't want to shoot [him]." Victim complied until he could no longer hear the assailants' footsteps. The assailants took victim's wallet containing an identification card, credit cards, and a small velvet drawstring bag containing change.
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> During the police investigation, Stacey Sneider of the City-County Identification Bureau was dispatched to assist in processing the backpack for fingerprints. During her analysis, Sneider collected two fingerprints from the backpack, one of which was later determined to be the defendant's right middle finger. As a result, a warrant was issued for defendant's arrest.
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> On 18 January 2012, Officer Potter of the Raleigh Police Department stopped defendant for illegal tint on

> his car's windows near the scene of the robbery. During the stop, Officer Potter came across defendant's outstanding warrant and arrested defendant.

Todd I, 229 N.C. App. 197, 749 S.E.2d 113, 2013 WL 4460143, at *1, 2013 N.C. App. LEXIS 875, at *1-3.

Our prior opinion noted only the fingerprint evidence's existence because of the limited issues presented on appeal. In this appeal, we focus on whether "there is *substantial* evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed." *Irick*, 291 N.C. at 492, 231 S.E.2d at 841 (quotation marks omitted). Defendant argues that the fingerprint evidence here "stood alone" since the single, partial fingerprint was the only evidence that connected defendant to this crime. The question of whether there is "substantial evidence" is a question of law and thus we consider this issue de novo. *Id.*

We first note that many of the cases cited by the State regarding fingerprint evidence address evidence found at the "scene" of the crime, usually a building of some sort, *Irick*, 291 N.C. at 486, 231 S.E.2d at 838 (defendant's fingerprint found on victim's window sill); *State v. Jackson*, 284 N.C. 321, 334, 200 S.E.2d 626, 634 (1973) (testimony offered that latent fingerprint on window matched defendant's fingerprint on file); or upon an item stolen from the victim, *State v. Blackmon*, 208 N.C. App. 397, 402, 702 S.E.2d 833, 837 (2010) (defendant's fingerprint found on computer tower in front lawn); *State v. Boykin*, 78 N.C. App. 572, 575, 337 S.E.2d 678, 680 (1985) (defendant's fingerprint found on stolen radio). In this instance, however, the backpack was not stolen and none of the items removed from it were ever recovered. In addition, the backpack is not a stationary crime "scene" but rather is a moveable object which Mr. Major had owned for about six months prior to the crime and wore regularly on the way to and from work, riding on a public bus, and which he left unattended on a coatrack while he worked in a local restaurant. Defendant's single partial fingerprint, as well as other unidentified fingerprints, were found on the *exterior* of the backpack, on the outside surface, not the surface which would be against the back of the wearer.

The circumstances of the crime alone provide no evidence which might show that "the fingerprint[ ] could only have been impressed at the time the crime was committed." *Irick*, 291 N.C. at 492, 231 S.E.2d at 841 (quotation marks omitted). The State's evidence showed that on 23 December 2011, officers responded to the scene of the crime

immediately upon Mr. Major's call. He was unable to give any detailed physical description of his assailants and could tell only that they were African American men. He was able to discern that the hands of the man holding his wrists were "rough-skinned, callused hands" and that one man's jacket sleeves were tan and the other man's sleeves were dark blue or black. He was able to clearly hear the men's voices. The officers used a canine to see if they could pick up a track for the two assailants, and Officer Martinez testified that he thought the dog had picked up a track, but it ended in a parking lot off Portree Road, north of where the incident occurred. They did not find either assailant that night.

After fingerprints were lifted from the backpack, they were compared to those in a database, which generated several potential matches, and ultimately it was determined that one partial fingerprint matched Defendant's right middle finger. Detective Codrington, who had investigated the incident, received information of the match on the fingerprint from the backpack in January. He then showed a picture of defendant to Mr. Major to see if he was "a friend of his" but Mr. Major did not recognize him. On 12 January 2012, he obtained the arrest warrant for defendant based upon the fingerprint.

On 18 January 2012, Officer Potter of the Raleigh Police Department stopped defendant's vehicle in the Westcliff Court neighborhood off of Buck Jones Road for illegally tinted windows. Defendant was driving down a dead-end road before he was stopped. The place where defendant's car was stopped was "approximately about a few hundred yards" from the location on Buck Jones Road where Mr. Major had been robbed on 23 December 2011. After checking his license, Officer Potter asked defendant "what he was doing in the area" and he was "kind of hesitant about if he lived there or if he was visiting. Said he was stopping by to see a friend, wouldn't provide any information as to exactly where the friend was as far as which apartment." Another officer arrived to confirm the percentage of tint on the windows, which was "15 percent which is illegal" so he began to write a citation. Upon checking on defendant's license, Officer Potter discovered the outstanding warrant for defendant's arrest and then arrested him. When Officer Potter told defendant that he was under arrest for robbery, defendant's response was that "he seemed more preoccupied with us getting away from the vehicle. It wasn't like shocking as far as a warrant." He seemed "very nervous" but wanted "to try and hurry up to get transported wherever." Defendant's car was secured in accordance with protocol at the scene where he was arrested, but it was not searched.

Officer Potter transported defendant to Detective Codrington's office. When Detective Codrington entered the interrogation room where defendant was waiting, he noted that defendant was sleeping and he thought that "a reasonable person would have been a little more upset being charged about something that they didn't do and not sleeping in the interrogation room." Detective Codrington read defendant his *Miranda* rights; defendant agreed to talk to him and the interview was videotaped. Detective Codrington described defendant as a "pretty well-educated, well-spoken individual." Defendant "denied any involvement in the robbery." He asked defendant where he lived, and he said he was "back and forth between his mom's house in Apex" and "his sister's grandmother's house close to downtown." Detective Codrington asked defendant where he was picked up, and defendant said "Westcliff" and then that " 'I used to be over there but,' and then trailed off." Neither the Westcliff Court address which was "the closest residence we could in that area kind of associate him with" or any of the residences where defendant mentioned staying was ever searched. Defendant was unable to tell Detective Codrington where he was on the night of 23 December 2011. Detective Codrington asked defendant how his fingerprint might have gotten on the backpack, and he said "maybe a friend of his had gotten robbed or something and now the bag was in the victim's possession, something around that."

Detective Codrington also testified that Westcliff Court, where defendant was stopped, was "about 300 yards from the scene of the crime" and described this fact as important to him because it was "very, very close as far as the proximity, and it would explain and kind of explained to me from the direction that the person ran from after, explains that sort of in the direction of Westcliff Court and Little Sue's Mini-mart which everybody cuts behind." Detective Codrington also talked to defendant's mother and from his investigation, he determined that "all information that I could gather at that point kind of led me to him living at 448 Westcliff Court."

Detective Codrington described the area around the scene of the incident, noting that Westcliff was an apartment complex and there were also private residences nearby on Buck Jones Road. The canine unit had lost the trail on the night of 23 December on Portree Place, a "little private street from the townhouse they sort of plopped in the middle." Portree Place is a loop or "half moon" with a group of private townhomes as well as "two other separate buildings . . . right next to those townhomes." In regard to where the canine stopped tracking, Detective Codrington noted that "[a]ll the canine therefore is looking at recently,

recently traveled properties, so if it gets into an apartment complex, typically if a bunch of people just happen to walk past that place, the canine track will stop because it's confusing the dog. So highly traveled properties aren't good for initial canine searches as opposed to when they have somebody, like somebody's scent on somebody's property where they're following." He described the layout of the buildings as "like old Army housing" with a "common area that you walk in. There's no doors on that side. You just kind of walk into the common area, and then once you get into the building, it's either five or six units on each side of the hall, and then upstairs, the same way, so it didn't track to a specific door or anything."

We are unable to find any evidence, much less substantial evidence, of "[c]ircumstances tending to show that a fingerprint lifted at the crime scene could only have been impressed at the time the crime was committed[.]" *Id.* The State notes several prior cases which have identified some of the circumstances which may be sufficient. In *State v. Miller*, 289 N.C. 1, 6, 220 S.E.2d 572, 575 (1975), our Supreme Court referenced false statements by the defendant that he had never been on the premises. In this case, however, there are no premises involved. In *Jackson*, our Supreme Court noted that the victim testified that she did not know the defendant, had never seen him prior to when he entered her apartment, and that "[n]othing appears in the record to show that defendant had ever been in the apartment occupied by [the victim] prior to [the date of the offense]." 284 N.C. at 335, 200 S.E.2d at 635. In *Jackson*, the victim was able to identify the defendant by his voice. *Id.* Here, by contrast, although the victim heard his assailants speak, no identification was made based on voice recognition. Moreover, as we have already pointed out, in this case, there are no "premises," only a mobile backpack.

In *Blackmon*, the defendant's fingerprint was found a computer tower left on the grass outside the house that had been broken into. 208 N.C. App. at 402, 702 S.E.2d at 837. This Court held that the evidence was sufficient to show that the defendant was the perpetrator of the crime. *Id.* at 403, 702 S.E.2d at 837. Similarly, in *Boykin*, the defendant's fingerprint was found on a stolen radio, which this Court concluded was enough to support his conviction for larceny. 78 N.C. App. at 575, 337 S.E.2d at 680. In the present case, however, the stolen items were never recovered, and only fingerprint evidence found was the partial print linking defendant to the victim's mobile backpack.

In *State v. Thomas*, 291 N.C. 687, 688, 231 S.E.2d 585, 586 (1976), the Supreme Court referenced fingerprints impressed in blood, but those fingerprints were found on a serrated steak knife and a Cheerios box

in the kitchen of the victim's home, where the victim had been stabbed to death. In addition, about $400.00 to $500.00 cash was missing from the Cheerios box, and defendant had been aware that the victim kept cash in the Cheerios box. *Id.* There is simply no comparable evidence in this case.

The State also argues that if other evidence, taken alongside the fingerprint, permits a reasonable inference that defendant was the perpetrator, the trial court should deny the motion to dismiss. The State argues that there is "other evidence" connecting defendant to the robbery. Specifically, the State notes that "[d]efendant was arrested within a month of the robbery and only a few hundred yards from the crime scene." That is true, but defendant was stopped on Westcliff Court for a tinted window violation. And it is clear from the State's evidence that the area where defendant was stopped was a public street in a residential area with many apartments, townhomes, and private residences.

Although being found in close proximity to a crime scene at or very near the time of a crime may be "other evidence" which could connect a defendant to the crime, we have been unable to determine how defendant's presence in the general vicinity nearly a month after the crime was committed is relevant. The State cites to *Irick*, where the Supreme Court noted that "defendant's print was found on the inside frame of the window from which the tissue box and pasteboard had been removed on the night of the burglary, but other unidentified prints were found on and around the same window. These facts do not constitute 'substantial' evidence that the print could have only been impressed at the time of the alleged burglary." 291 N.C. at 492, 231 S.E.2d at 841. In *Irick*, the court determined that "other circumstances" could support a reasonable inference that defendant was the perpetrator. *Id.* Specifically,

> Defendant was observed by a police officer coming from the general direction of the Hipp home shortly after the burglary transpired; defendant had in his pocket at the time of his arrest loose bills in the same denominations and total amount as those stolen from the Hipp house; defendant was tracked by the bloodhound from the Wood home to the place where the stolen vehicle was parked (the dirty kitchen towel linked the Hipp and Wood burglaries), and defendant attempted to flee from police officers shortly after the burglaries took place.

Id., 231 S.E.2d at 841-42.

The only resemblance this case bears to *Irick* is the presence of a fingerprint identified as defendant's along with other unidentified fingerprints, in a place that could suggest that it may be been impressed at the time of the crime. None of the "other circumstances" are present. Defendant was not seen anywhere near the scene of the crime when it occurred. None of the stolen property was ever recovered. The canine was unable determine exactly where the perpetrators went, having lost the track in a heavily travelled courtyard. No one tried to flee from the officers on the night of the crime, and no physical evidence of any sort other than the lone partial print on the outside of the backpack connected defendant to the incident.

The State also argues that that fact that Detective Codrington "believed Defendant lived on Westcliff Court, where his vehicle was stopped" somehow "supports a reasonable inference of guilt,"[1] citing to *State v. Cross*, 345 N.C. 713, 483 S.E.2d 432 (1997). In Cross, the victim was attacked as she got into her car, and the assailant beat her and forced her to get into the back seat. He took her wallet and ATM card and drove her car to make "numerous stops for money" and eventually stopped the car and left. *Id.* at 715, 483 S.E.2d at 434. The State's evidence showed a "latent fingerprint on the edge of the left rear door of the victim's vehicle" which was from

> only one finger and was a portion of the finger, "like it had been cut off." This fact prompted Agent Duke to process the rear quarter panel adjacent to the area where the print was found on the rear door. No fingerprints or partial fingerprints were found in the area adjacent to the left rear door. In other words, the rear portion or remainder of this partial print did not extend over to the rear quarter panel of the car. Agent Joseph Ludas, a latent print examiner with the City/County Bureau of Identification, testified, as an expert in the field of fingerprint identification, that the latent fingerprint found on the left rear door of the victim's vehicle matched the right index finger of the defendant.
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> The fact that the defendant's fingerprint was only a partial print, which was cleanly cut off and did not extend over to the rear quarter panel, strongly suggests that the door was open when the defendant's finger contacted

1. The State also notes that "[d]efendant now admits that he kept an apartment on Westcliff Court." But this "admission" is in defendant's post-trial affidavit filed in support of his MAR and is not in the evidence presented at trial.

> the vehicle. The evidence is uncontradicted that the only time the rear driver's side door was opened during the victim's stay in Raleigh was when the assailant opened the door and shoved the victim into the backseat. Moreover, Agent Ludas testified that a lot of pressure and twisting was used when the defendant's finger made contact with the vehicle. This fact, when viewed in the light most favorable to the State, logically suggests that the print was left as defendant pushed the back door closed. The fingerprint evidence is consistent with the victim's account of the crime and does not support an inference that the defendant merely touched the victim's automobile while walking through the Crabtree Sheraton parking lot.

Id. at 718, 483 S.E.2d at 435.

The Supreme Court held in *Cross* that this evidence was sufficient to show that the defendant's fingerprint "could only have been impressed at the time the crime was committed." *Id.* at 718, 483 S.E.2d at 435. The Court then noted that although the fingerprint evidence alone was sufficient to survive the motion to dismiss, there was other "corroborating evidence" that

> the assailant abandoned the victim within blocks of where the defendant was frequently seen and where defendant was eventually located and arrested, that a pathway existed near that location which led to the back of the apartment defendant was in when he was arrested, that the defendant made efforts to change his appearance by shaving his head, that the defendant made an effort to evade arrest, and that the defendant repeatedly denied to police officers that his name was "Cross."

Id. at 718-19, 483 S.E.2d at 435-36.

Cross bears more resemblance to this case than the others cited by the State, since the fingerprint was on a mobile object and not stationary premises or a weapon. In *Cross*, however, the decisive factor was the victim's description of exactly how the assailant had grabbed the car door, which was consistent with the characteristics of the print that was found in the place she described. *Id.* at 718, 483 S.E.2d at 435. Here, by contrast, the fingerprint had no distinguishing features which would indicate how or when it was impressed, and it was on the outside of the backpack. And the other "corroborating evidence" noted in *Cross* was far stronger than here, as the *Cross* defendant was arrested in an apartment

which was at the end of the pathway near where he left the victim and her car, altered his appearance, and denied his name. *Id.* at 718-19, 483 S.E.2d at 435-36. Here, at the most, defendant had an apartment residence in a densely populated area of townhouses and apartments in the general vicinity of the place where a canine lost a trail nearly a month before the defendant's arrest on a public street nearby. This is simply not comparable to the evidence noted in other cases addressing "other circumstances" which along with fingerprint evidence connects a defendant to a crime. Many people had residences in that area, and other unidentified fingerprints were also found on the backpack.

The State also argues that "although Mr. Major could not identify who robbed him, his description of his assailant's manner of speaking was consistent with Defendant's manner of speaking," citing to two places in the trial transcript. We give the State the benefit of every reasonable inference from the evidence, but still the State's implication that defendant was identified by his voice goes far beyond anything the record can support. First, although the jury did hear the videotaped recording of the interview with defendant, Mr. Major never identified the voice in that video as sounding like one of the men who assaulted him. Mr. Major's entire testimony about the voices was the following:

> Q. You were able to hear these assailants talk; is that correct?
>
> A. Yes.
>
> Q. What if anything did you notice about the language that they used?
>
> A. They didn't use a lot of eubonics [sic]. They spoke to me very clearly. I understood what they were saying.

The other evidence cited by the State is Detective Codrington's testimony regarding his interview of defendant:

> Q. You had the opportunity to speak to him that night?
>
> A. Yes.
>
> Q. He's a pretty well-educated, well-spoken individual?
>
> A. Yes.

Defendant argues that *State v. Scott*, 296 N.C. 519, 522, 251 S.E.2d 414, 417 (1979) most resembles his, since in that case the single thumbprint

of the defendant stood alone, with no other evidence to show that it "could only have been placed on the box at the time of the homicide." We agree that there are similarities and comparisons that can be drawn. In *Scott*, the defendant's thumbprint was found in the victim's home on a "small metal box on top of the desk in the den." *Id.* at 521, 251 S.E.2d at 416. The box contained papers and "odds and ends" and was kept in a closed but unlocked filing cabinet in the den. *Id.* The victim was found in the home, dead, shot through the head, with his hands and feet tied with tape. *Id.* at 520, 251 S.E.2d at 415. The house had been ransacked and the deceased's pocket watch and money from his wallet had been stolen. *Id.* at 520-21, 251 S.E.2d at 415-16. Ms. Goodnight, who also lived in the home, testified that the defendant was " 'a total stranger' " and she had never seen him and he had never visited the house to her knowledge. *Id.* at 521, 251 S.E.2d at 416. She notified the police immediately upon finding her uncle on the floor and was careful not to disturb anything in the house until after the officers "completed their investigation." *Id.* The Supreme Court found that this single thumbprint, standing alone, was not sufficient to support defendant's conviction. *Id.* at 526, 251 S.E.2d at 419.

The *Scott* Court analyzed other cases in which a fingerprint was found on the premises of the crime and noted that in those cases, "the prosecuting witnesses were in a position to have personal knowledge of all persons visiting the premises and . . . there was some additional evidence of guilt." *Id.* at 525, 251 S.E.2d at 418. The Court noted that in *Scott*, Ms. Goodnight "was simply not in a position to know who came into the house 'during the five week days' " since she worked during the week, while her uncle who was retired, remained at home. *Id.* at 526, 251 S.E.2d at 419. The State's expert testified that the print could have been placed on the box "several weeks before the homicide." *Id.*

Ultimately, the Court concluded that

> In the light of all these facts, we are constrained to hold that the evidence was insufficient to withstand a motion to dismiss. The burden is not upon the defendant to explain the presence of his fingerprint but upon the State to prove his guilt. . . . We reach the conclusion that the evidence introduced in the present case is sufficient to raise a strong suspicion of the defendant's guilt but not sufficient to remove that issue from the realm of suspicion and conjecture.

Id. at 526, 251 S.E.2d at 419 (citations and quotation marks omitted).

The State argues that "[d]efendant's inability to offer a plausible explanation *when initially confronted with the evidence* supports a reasonable inference of guilt." The State describes defendant's argument in his brief that the fingerprint may have been impressed "while the backpack was on a crowded bus or on the coat rack at Red Lobster" (where Mr. Major worked) as "unavailing." Yet the flaw in the State's argument is that "[t]he burden is not upon the defendant to explain the presence of his fingerprint but upon the State to prove his guilt." *Id.* The State's evidence was that the print could have been on the backpack for "10 seconds or 10 days or 10 months" and that Mr. Major regularly wore the backpack on a crowded bus to and from work. He also left it unattended on a coat rack at work. If in the *Scott* case, Ms. Goodnight's testimony that she was not aware of defendant ever having been in her home was not sufficient to show that the thumbprint could not have been impressed at any other time than when her uncle was killed, certainly we cannot say that there was no other opportunity for defendant to impress a print on the outside of a backpack that has regularly been exposed to the public. In this regard, defendant's apartment near the scene of the crime does not favor the State's case, since that could make it more likely that he was on the same bus with Mr. Major during the months before the incident and may have inadvertently touched the bag.

Citing only to *Cross*, 345 N.C. at 718-19, 483 S.E.2d at 435-36 the State also argues that defendant's behavior was "incompatible with innocence" because he was "not surprised" when he was arrested and he fell asleep in the interrogation room. We are unable to determine how *Cross* supports this proposition. In *Cross*, the defendant "shav[ed] his head, . . . made an effort to evade arrest, and . . . repeatedly denied to police officers that his name was 'Cross.' " *Id.* at 719, 483 S.E.2d at 436. This behavior could be seen as "incompatible with innocence." Here, in comparison, defendant was not particularly nervous, even when he was stopped, and he was not evasive. He simply maintained his innocence during his questioning and denied knowing anything about the crime, but the State argues that even this is incriminating. The State has not cited any case in which an *absence* of nervousness was seen as evidence of guilt; typically we see exactly the opposite evidence and argument. *See, e.g.*, *State v. McClendon*, 350 N.C. 630, 638, 517 S.E.2d 128, 134 (1999) (discussing the use of nervousness in determination of reasonable suspicion of criminal activity and noting that "[n]ervousness, like all other facts, must be taken in light of the totality of the circumstances. It is true that many people do become nervous when stopped by an officer of the law. Nevertheless, nervousness is an appropriate

factor to consider when determining whether a basis for a reasonable suspicion exists." (Citations omitted)).

As we observed upon a similar occasion in *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967), we reach the conclusion that the evidence introduced in the present case "is sufficient to raise a strong suspicion of the defendant's guilt but not sufficient to remove that issue from the realm of suspicion and conjecture." *See also State v. Jones*, 280 N.C. 60, 67, 184 S.E.2d 862, 866 (1971) ("The circumstances raise a strong suspicion of defendant's guilt, but we are obliged to hold that the State failed to offer substantial evidence that defendant was the only who shot his wife in the back. The evidence proves only that at the time his wife was killed defendant was degradedly drunk and intermittently violent."); *State v. Minton*, 228 N.C. 518, 521, 46 S.E.2d 296, 298 (1948) ("The circumstances relied on by the State are inconclusive and do not lead to a satisfactory deduction that the accused, and no one else, perpetrated the crimes alleged in this action. All of these circumstances can be true, and the defendant can still be innocent.").

After considering all of the State's evidence in light of the applicable cases, we cannot find that there was substantial evidence to show that defendant's fingerprint could have only been impressed at the time of the crime, and thus, the trial court should have allowed defendant's motion to dismiss.

d. Ineffective assistance of counsel

Defendant argues that his appellate counsel in the first appeal "performed below an objective standard of reasonableness by failing to argue that the evidence was insufficient."

> The United States Supreme Court has set forth the test for determining whether a defendant received constitutionally ineffective assistance of counsel, which our Supreme Court expressly adopted in *State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985). Pursuant to the two-part test, First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466

> U.S. 668, 687, 80 L. Ed. 2d 674, 693[, 104 S. Ct. 2052, 2064] (1984). With respect to the first element, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689, 80 L. Ed. 2d at 694-95[, 104 S. Ct. at 2065] (citation and internal quotation marks omitted). The second element of the *Strickland* test requires that the defendant show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 80 L. Ed. 2d at 698[, 104 S. Ct. at 2068]. Our Supreme Court also has noted that defendants who seek to show ineffective assistance of counsel must satisfy both prongs: "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

Blackmon, 208 N.C. App. at 400-01, 702 S.E.2d at 836.

As to the first prong of the *Strickland* test, the State argues that defendant's prior appellate counsel "apparently made a strategic decision to pursue the constitutional claim that the trial court's failure to grant a continuance deprived him of adequate time to prepare a defense" and that he "received ineffective assistance of trial counsel." The State does not explain how omission of this issue could be a "strategic" decision. The law regarding fingerprint evidence was well-established at the time of the first appeal and it has not changed since then. The issues and arguments presented in the first appeal are not mutually exclusive or conflicting to the issue of sufficiency of the evidence. The text of the brief in defendant's first appeal was only about 19 pages, so the page limitations of our Appellate Rules did not force counsel to make a "strategic decision" to limit the brief to the two issues presented.

As to the second prong of *Strickland*, the State argues that "[d]efendant was not prejudiced by counsel's failure to challenge the sufficiency of the evidence on appeal" because the evidence was sufficient. But we have determined that there is " 'a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different' " in the first appeal, had the issue of sufficiency of the evidence been raised. *Blackmon*, 208 N.C. App. at 401, 702 S.E.2d at 836 (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 694-95, 104 S. Ct. at 2064). As discussed above, if defendant had raised this issue in his first appeal, this Court would have addressed it and there is a reasonable probability that we would have come to the same result as we have in this opinion, which is that the trial court should have allowed defendant's motion to dismiss. Therefore, the trial court erred by failing to grant defendant's MAR.

We have determined that defendant had ineffective assistance of appellate counsel in his first appeal and that he likely would have been successful had he raised sufficiency of the evidence. Defendant's motion did not raise any factual issues, only the legal question of sufficiency of the evidence, so there was no need for an evidentiary hearing and the trial court should have granted the MAR. Moreover, since we find that defendant's MAR should have been granted and that he has established that the fingerprint evidence presented at trial was insufficient, we need not address his request for post-conviction discovery. *See*, *e.g.*, *State v. McDowell*, 217 N.C. App. 634, 638, 720 S.E.2d 423, 425 (2011) ("Because we find that the trial court erred in denying defendant's motion to dismiss, we do not reach defendant's other arguments.").

Conclusion

In sum, we find that the trial court erred in concluding that defendant received effective assistance of his appellate counsel because the State presented insufficient evidence that defendant committed the underlying offense, and if defendant's appellate counsel had raised this issue in the initial appeal, defendant's conviction would have been reversed. Consequently, we hold that the trial court's denial of defendant's MAR was in error. We, therefore, reverse the trial court's order and remand to the trial court to enter an order granting defendant's MAR and vacating the defendant's conviction.

REVERSED AND REMANDED.

Judge DIETZ concurs with separate opinion.

Judge TYSON dissents.

DIETZ, Judge, concurring.

I concur in the judgment. There is no evidence, much less "substantial evidence" to suggest that the fingerprint "could only have been impressed at the time the crime was committed." *State v. Irick*, 291 N.C. 480, 492, 231 S.E.2d 833, 841 (1977). The victim carried his backpack around with him in public, and any number of people could have touched it in any number of public places.

Thus, under *Irick*, the fingerprint evidence was sufficient to survive a motion to dismiss only if "other circumstances tend to show that defendant was the criminal actor." *Id.* But the only "other circumstances" tying Todd to the robbery is his coincidental traffic stop, one month after the crime, on a dead-end road just a few hundred yards from where the robbery occurred. That, and the fact that Todd was an African-American man, as was the alleged perpetrator.

These facts alone cannot be enough to constitute "other circumstances" under *Irick*. If they were, then fingerprint evidence would be admissible against anyone who shared the same race and gender as the perpetrator, and who lived near the scene of a crime, even if there was no evidence that the fingerprint was impressed at the time of the crime. And this, of course, wholly undermines the rationale of *Irick*.

Still, it seems that the outcome here may not be what our Supreme Court intended when it established this fingerprint rule in cases like *Irick*. Suppose, for example, that instead of the fingerprint, it was some other circumstantial evidence, such as a witness who later saw the defendant with some of the items stolen from the victim. That evidence, combined with the coincidental stop nearby, and the fact that he matched the race and gender of the alleged perpetrator, would be sufficient to survive a motion to dismiss. *See State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (1981). Indeed, in those circumstances, the law actually creates a presumption that the defendant stole the items—a presumption that is "strong or weak depending on the circumstances of the case." *Id.*

It may be that our Supreme Court intended for *Irick* to be broader than this Court reads it. For example, in a case like this one, where the fingerprint match is relatively strong, perhaps the "other circumstances" tying the defendant to the crime can be much weaker yet still satisfy the *Irick* standard. This Court quite frequently entertains appeals challenging the admission of fingerprint evidence under *Irick*. *See*, *e.g.*, *State v. Martin*, 2016 WL 1745224, 786 S.E.2d 432 (N.C. Ct. App. May 3, 2016) (unpublished); *State v. Dawson*, 2016 WL 3889912, ___ S.E.2d ___ (N.C. Ct. App. July 19, 2016) (unpublished). Guidance from our State's highest court would benefit us as we review these frequently raised issues.

TYSON, Judge, dissenting.

This Court's prior issuance of a writ of certiorari brings review of defendant's IAC claim properly before us. Defendant has failed to show the performance of his appellate counsel in the prior appeal was deficient. The record contains sufficient evidence of all elements of the charge of robbery with a dangerous weapon. I would affirm the trial court's denial of defendant's motion for appropriate relief, and find no error in defendant's jury conviction and the judgment entered for robbery with a dangerous weapon. I respectfully dissent.

I. Standard of Review

"To show ineffective assistance of appellate counsel, [d]efendant must meet the same standard for proving ineffective assistance of trial counsel." *State v. Simpson*, 176 N.C. App. 719, 722, 627 S.E.2d 271, 275 (2006) (citing *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 764, 145 L.Ed.2d 756, 780 (2000)) *disc. review denied*, 360 N.C. 653, 637 S.E.2d 191 (2006). Judge Stroud accurately sets forth our standard of review to determine ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

II. State's Evidence

Appellate counsel in defendant's prior appeal was not deficient. Sufficient evidence was presented to the jury on each element of the charge of robbery with a dangerous weapon, to include defendant's identity as a perpetrator. Defendant's trial counsel moved to dismiss the charges at the close of the State's evidence and renewed her motion at the close of all the evidence. Defendant did not testify or offer any evidence at trial. Upon a motion to dismiss, evidence presented by the State is reviewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Irick*, 291 N.C. 480, 491, 231 S.E.2d 833, 840 (1977). The trial

court heard and considered the evidence, and denied the motions to dismiss.

The fingerprint evidence in this case does not "stand alone" to warrant a higher level of scrutiny. Citing *Irick*, Judge Stroud asserts appellate counsel on the prior appeal was deficient, and our Court must "focus on whether 'substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed.' " *Id.* at 492, 231 S.E.2d at 841. Presuming the plurality's notion that this higher level of scrutiny is required, "[o]rdinarily, the question of whether the fingerprints could have been impressed only at the time the crime was committed is a question of fact for the jury." *Id.* at 489, 231 S.E.2d at 839.

The assertion that "[t]he circumstances of the crime alone provide no evidence which might show that 'the fingerprint [] could only have been impressed at the time the crime was committed' " is incompatible with the record evidence. The record shows the State produced more than just "stand alone" evidence of defendant's fingerprint on the exterior of the victim's plastic backpack to help identify defendant to this crime.

The victim called the police immediately after he was robbed on the sidewalk near 325 Buck Jones Road. The victim testified he did not see the faces of his assailants, but saw their hands and arms. He described a perpetrator's hands as calloused, described the color of shirt sleeves, and the race and sex of both attackers. The victim indicated it sounded like his assailants had fled across Buck Jones Road. The police canines were able to track the perpetrators to a common area in the back of Portree Place townhomes, not far from the crime scene at 325 Buck Jones Road.

Trial testimony placed Portree Place townhomes near the intersection of Buck Jones Road and Bashford Drive. Detective Codrington testified Westcliff Court was "very, very close as far as the proximity, and it would explain . . . from the direction that the person ran from after [the robbery], explains that sort of in the direction of Westcliff Court and Little Sue's Mini-mart which everybody cuts behind." He testified that near the time of the crime "[a]ll the info [he] could gather" pointed to defendant "living at 448 Westcliff Court," near the crime scene. Detective Codrington testified the Westcliff Court entrance is right on Bashford Road, parallel to the side of the Little Sue's Mini-mart and near the back of Portree Place townhomes to where the canines tracked the attackers.

Three weeks after the victim was robbed, defendant was stopped by police on Westcliff Court for an illegal tint on his vehicle's windows, a few hundred yards from the crime scene. Defendant was arrested on the outstanding robbery warrant and was taken into the station for questioning.

Detective Codrington interviewed defendant. Defendant waived his right to remain silent and was unable to account for his whereabouts on the night of the robbery. Defendant offered an alternative "hypothesis" about how his fingerprint could have been placed upon the victim's backpack.

Defendant told the detective that perhaps "someone he knew had a bag that he had presumably touched and then that bag had gotten stolen, and that's how [the victim's] bag" may have "had his fingerprint on it." During his interview, Defendant did not identify who that "someone he knew" was, or possibly when, where, and how he could have touched the victim's backpack and left his identifiable fingerprint thereon other than during the robbery.

The State also offered the testimony of the crime scene investigator, who lifted defendant's print from the backpack, as well as the testimony of Officer Heinrich, the latent unit supervisor at the City County Bureau of Identification [CCBI]. Officer Heinrich testified defendant was linked by CCBI's database to the latent prints lifted from the backpack. Once the database produced matches, Heinrich physically reviewed the prints and concluded it was defendant's fingerprint present on the outside of the backpack.

The victim testified he had owned the backpack for 6 months and wore it to and from work. He indicated he wrapped the pack inside a jacket before he hung it on the employee coat rack in "the dry stock past the kitchen" in "an employee only" area at his work. The victim testified one of his assailants held him down, while the other was "going through his pockets and pawing around in [his] backpack."

III. Ineffective Assistance of Appellate Counsel

Effective appellate advocates winnow out weaker arguments and focus on those more likely to prevail on appeal. *Jones v. Barnes*, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 994 (1983). This accepted discretionary process lies within the professional judgment of appellate counsel. When the State's evidence is sufficient to support a conviction, defendant's counsel may use his professional judgment and select what he believes to be "the most promising issues for review." *Id.* at 752, 77 L. Ed.

2d at 994. This record and defendant's MAR provide nothing to support a claim that defendant's appellate counsel was ineffective, either under the standards provided by the Supreme Court of the United States or the Supreme Court of North Carolina to vacate his conviction on ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 673; *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985).

Defendant-Irick argued to our Supreme Court that the fingerprint evidence should not have been admitted into evidence until after the State showed that the print could only have been impressed at the time the crime was committed. The Supreme Court found defendant to have misconstrued the cases on this subject. *Irick*, 291 N.C. at 488, 231 S.E.2d at 839. The Court held "the probative force, not the admissibility, of a correspondence of fingerprints found at the crime scene with those of the accused, depends on whether the fingerprints could have been impressed only at the time the crime was perpetrated." *Id.* at 489, 231 S.E.2d at 839.

As discussed by the plurality, the defendant in *Irick* also challenged the trial court's denial of his motion for nonsuit (dismissal). *Id.* at 490, 231 S.E.2d at 840. The *Irick* Court recognized that a key piece of circumstantial evidence to connect the defendant in the case was the fingerprint identification.

The *Irick* Court found other circumstances tended to show the defendant was the criminal actor. The defendant was observed by a police officer coming from the general direction of the burglarized home shortly after the burglary transpired; the defendant had loose bills in the same denominations and total amount as those stolen; the defendant was tracked by the bloodhound from one crime scene to another, and attempted to flee from the police soon after the burglaries took place. The Court held "[a]ll of these circumstances, taken with the fingerprint identification, when considered in the light most favorable to the State, permit a reasonable inference that defendant was the burglar at the Hipp house." *Id.* at 492, 231 S.E.2d at 841-42.

When viewed in the light most favorable to the State, all of the circumstances shown by the State permit a reasonable inference that defendant was one of the robbers of Mr. Major. Where there is more than just fingerprint evidence "standing alone," the State is not required to provide a higher level of "substantial evidence of circumstances from which the jury can find the fingerprint[] could only have been impressed at the time the crime was committed" to survive a motion to dismiss. *Id.* at 491-92, 231 S.E.2d at 841. In addition, "[o]rdinarily, the question of

whether the fingerprints could have been impressed only at the time the crime was committed is a question of fact for the jury." *Id.* at 489, 231 S.E.2d at 839.

IV. Conclusion

Upon defense counsel's motion to dismiss for insufficiency of the evidence, the trial court reviewed the evidence, twice denied the motions, and allowed the case to be decided by the jury. The jury heard all of the evidence, the trial court's instructions, and found defendant to be guilty of robbery with a dangerous weapon beyond a reasonable doubt.

> The test of the sufficiency of the evidence to withstand such a motion is the same whether the evidence is circumstantial, direct, or both. When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, *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.*

Id. at 491, 231 S.E.2d at 841 (quotation marks and citations omitted) (emphasis supplied).

Reviewing the uncontroverted facts offered by the State, in the light most favorable to the State, the trial court properly denied defense counsel's motion to dismiss at the close of the State's evidence and at the close of all evidence. Appellate counsel apparently knew the standard of review and this question of fact was a jury issue, and made a tactical decision not to raise this issue on appeal. Defendant failed and cannot show his appellate counsel was deficient in his failure to raise the trial court's denial of defendant's motions to dismiss in defendant's initial appeal. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. The standard of review applicable to this appeal and the questions of fact for the jury should end our inquiry at the first prong.

Defendant also fails to meet *Strickland*'s second prong: but for appellate counsel's alleged "deficient performance" a different result would have occurred had the argument been raised by counsel on his prior appeal. *Id.* at 687, 80 L. Ed. 2d at 693. The conclusions to find error under either prong and vacate defendant's conviction is error. No error occurred in the trial court's denials of the motions to dismiss, the submission of the fingerprint evidence to the jury, and the jury's verdict or the judgment entered thereon. I respectfully dissent.

TROPIC LEISURE CORP. v. HAILEY

[249 N.C. App. 198 (2016)

TROPIC LEISURE CORP., MAGEN POINT, INC.
D/B/A MAGENS POINT RESORT, PLAINTIFFS
v.
JERRY A. HAILEY, DEFENDANT

No. COA15-1254

Filed 16 August 2016

Judgments—foreign—collateral attack—argument not raised below

The Uniform Enforcement of Foreign Judgments Acts did not permit defendant to mount a collateral attack on a foreign judgment from the Virgin Islands based on an argument that he could have raised in the rendering jurisdiction (violation of due process) but chose to forego until plaintiffs sought enforcement of the judgment in North Carolina.

Appeal by defendant from order entered 10 September 2015 by Judge Debra Sasser in Wake County District Court. Heard in the Court of Appeals 25 May 2016.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr. and Daniel K. Keeney, for defendant-appellant.

Warren, Shackleford & Thomas, P.L.L.C., by R. Keith Shackleford, for plaintiffs-appellees.

DAVIS, Judge.

Jerry A. Hailey ("Defendant") appeals from an order denying his motion for relief from a foreign judgment that Tropic Leisure Corp. and Magens Point, Inc., d/b/a Magens[1] Point Resort (collectively "Plaintiffs") sought to enforce in North Carolina. On appeal, Defendant argues that the foreign judgment should not be enforced because it was rendered in violation of his due process rights. After careful review, we affirm.

Factual Background

On 2 April 2014, Plaintiffs, who are corporations organized under the laws of the United States Virgin Islands (the "Virgin Islands"), obtained

1. While this entity's name appears as "Magen Point, Inc." in the trial court's order, it is referred to elsewhere in the record as "Magens Point, Inc."

a default judgment (the "Judgment") in the small claims division of the Virgin Islands Superior Court against Defendant, who is a resident of North Carolina, in the amount of $5,764.00 plus interest and costs. Defendant did not appeal the default judgment. On 17 February 2015, Plaintiffs filed a Notice of Filing Foreign Judgment in Wake County District Court along with a copy of the Judgment and a supporting affidavit.

Defendant filed a motion for relief from foreign judgment on 6 April 2015 in which he argued that the Judgment was not entitled to full faith and credit in North Carolina because it was obtained in violation of his constitutional rights and was against North Carolina public policy. Plaintiffs subsequently filed a motion to enforce the foreign judgment.

The parties' motions were heard before the Honorable Debra Sasser on 30 July 2015. On 10 September 2015, the trial court entered an order denying Defendant's motion for relief and concluding that Plaintiffs were entitled to enforcement of the Judgment under the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1, and North Carolina's Uniform Enforcement of Foreign Judgments Act ("UEFJA"), N.C. Gen. Stat. §§ 1C-1701 *et seq*. Defendant filed a timely notice of appeal.

Analysis

On appeal, Defendant argues that the trial court erred in extending full faith and credit to the Judgment. This issue involves a question of law, which we review *de novo*. *See DOCRX, Inc. v. EMI Servs. of N.C., LLC*, 367 N.C. 371, 375, 758 S.E.2d 390, 393 (applying *de novo* review to whether Full Faith and Credit Clause required North Carolina to enforce foreign judgment), *cert. denied*, __ U.S. __, 135 S. Ct. 678, 190 L.Ed.2d 390 (2014).

The Full Faith and Credit Clause "requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered."[2] *State of New York v. Paugh*, 135 N.C. App. 434, 439, 521 S.E.2d 475, 478 (1999) (citation omitted). "[B]ecause a foreign state's judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state, the foreign

2. The Full Faith and Credit Clause applies to the Virgin Islands because it is a territory of the United States. *See* 48 U.S.C. § 1541 (designating the Virgin Islands as a territory); 28 U.S.C. § 1738 (applying Full Faith and Credit Clause to judgments filed "in every court within the United States and its Territories and Possessions"); *see also Bergen v. Bergen*, 439 F.2d 1008, 1013 (3rd Cir. 1971) (holding that the Full Faith and Credit Clause "is applicable to judgments of the Territory of the Virgin Islands").

judgment must satisfy the requisites of a valid judgment under the laws of the rendering state before it will be afforded full faith and credit." *Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc.*, 113 N.C. App. 476, 478-79, 439 S.E.2d 221, 223, *disc review denied*, 336 N.C. 314, 445 S.E.2d 392 (1994).

The UEFJA "governs the enforcement of foreign judgments that are entitled to full faith and credit in North Carolina." *Lumbermans Fin., LLC v. Poccia*, 228 N.C. App. 67, 70, 743 S.E.2d 677, 679 (2013) (citation and quotation marks omitted). In order to domesticate a foreign judgment under the UEFJA, a party must file a properly authenticated foreign judgment with the office of the clerk of superior court in any North Carolina county along with an affidavit attesting to the fact that the foreign judgment is both final and unsatisfied in whole or in part and setting forth the amount remaining to be paid on the judgment. *See* N.C. Gen. Stat. § 1C-1703(a) (2015).

The introduction into evidence of these materials "establishes a presumption that the judgment is entitled to full faith and credit." *Meyer v. Race City Classics, LLC*, 235 N.C. App. 111, 114, 761 S.E.2d 196, 200, *disc. review denied*, 367 N.C. 796, 766 S.E.2d 624 (2014). The party seeking to defeat enforcement of the foreign judgment must "present evidence to rebut the presumption that the judgment is enforceable . . . ." *Rossi v. Spoloric*, __ N.C. App. __, __, 781 S.E.2d 648, 654 (2016). A properly filed foreign judgment "has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner[.]" N.C. Gen. Stat. § 1C-1703(c). Thus, a judgment debtor may file a motion for relief from the foreign judgment on any "ground for which relief from a judgment of this State would be allowed." N.C. Gen. Stat. § 1C-1705(a) (2015).

Our Supreme Court has held that "the defenses preserved under North Carolina's UEFJA are limited by the Full Faith and Credit Clause to those defenses which are directed to the validity and enforcement of a foreign judgment." *DOCRX*, 367 N.C. at 382, 758 S.E.2d at 397. In *DOCRX*, the Court provided the following examples of potential defenses to enforcement of a foreign judgment:

> that the judgment creditor committed extrinsic fraud, that the rendering state lacked personal or subject matter jurisdiction, that the judgment has been paid, that the parties have entered into an accord and satisfaction, that the judgment debtor's property is exempt from execution, that the judgment is subject to continued modification,

> or that the judgment debtor's due process rights have been violated.

Id. In the present case, Defendant argues that he was denied due process during the Virgin Islands proceeding because the rules governing small claims cases in that jurisdiction do not (1) permit parties to be represented by counsel; or (2) allow for trial by jury.

Some understanding of the structure of the Virgin Islands court system is necessary to our analysis. Congress has created the District Court of the Virgin Islands, which possesses jurisdiction equivalent to that of a United States district court. *See* 48 U.S.C. § 1611; *Edwards v. HOVENSA, LLC*, 497 F.3d 355, 358 (3rd Cir. 2007). In addition, the legislature of the Virgin Islands has established (1) the Virgin Islands Supreme Court, a court of last resort; and (2) the Superior Court of the Virgin Islands, a trial court of local jurisdiction. V.I. Code Ann. tit. 4, § 2.

The Virgin Islands Superior Court contains a small claims division "in which the procedure shall be as informal and summary as is consistent with justice." V.I. Code Ann. tit. 4, § 111. The small claims division has jurisdiction over all civil actions where the amount in controversy does not exceed $10,000.00. V.I. Code Ann. tit. 4, § 112(a). Neither party in a proceeding before the small claims court may appear through an attorney. V.I. Code Ann. tit. 4, § 112(d). Parties must appear in person, although a party who is not a natural person may send a personal representative. *Id.* In addition, small claims cases are heard before a magistrate without a jury. *See* V.I. Super. Ct. R. 64.

A party may appeal a judgment of the small claims division to the Appellate Division of the Superior Court. *See H & H Avionics, Inc. v. V.I. Port Auth.*, 52 V.I. 458, 462-63 (2009); V.I. Super. Ct. R. 322.1(a). No additional evidence may be taken in the Appellate Division. V.I. Super. Ct. R. 322.3(a). If a party does not agree with the decision of the Appellate Division, it may then appeal to the Virgin Islands Supreme Court. *See* V.I. Code Ann. tit. 4, § 32; *H & H Avionics*, 52 V.I. at 462-63. Parties are permitted to be represented by counsel on appeal to the Virgin Islands Supreme Court.[3] *See* V.I. Sup. Ct. R. 4(d).

In the present case, Defendant's failure to appear in the Virgin Islands small claims court to contest Plaintiffs' lawsuit against him resulted in a default judgment. Defendant did not appeal that judgment.

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3. It is unclear whether parties may appear through counsel in the Appellate Division of the Superior Court. *See Wild Orchid Floral & Event Design v. Banco Popular de Puerto Rico*, 62 V.I. 240, 249 (V.I. Super. Ct. 2015).

Defendant does not dispute the fact that Plaintiffs complied with the UEFJA by filing a properly authenticated copy of the Judgment and an accompanying affidavit in a North Carolina court. Accordingly, Plaintiffs are entitled to a "presumption that the judgment is entitled to full faith and credit." *Meyer*, 235 N.C. App. at 114, 761 S.E.2d at 200.

We also note that Defendant does not argue that the Virgin Islands small claims court lacked subject matter jurisdiction or personal jurisdiction in the underlying action. Rather, Defendant's sole argument in this Court is that the Judgment is not entitled to full faith and credit because he was deprived of his right to due process by the rules of the rendering jurisdiction's small claims court, which did not allow the parties to appear through counsel or provide for trial by jury.[4]

However, Defendant failed to raise these due process concerns in the Virgin Islands proceedings, and he has not demonstrated that he was in any way prevented from doing so. In fact, caselaw from the Virgin Islands establishes that courts in that jurisdiction are authorized to adjudicate due process challenges concerning matters arising in small claims court. *See*, *e.g.*, *Gore v. Tilden*, 50 V.I. 233, 239-40 (2008) (due process challenge to adequacy of notice in connection with small claims court default judgment); *Moore v. Walters*, No. SX-09-SM-203, 2013 V.I. LEXIS 73, at *7, 2013 WL 9570350, at *3 (V.I. Super. Ct. Sept. 25, 2013) (due process challenge to small claims court evidentiary matter), *aff'd*, 61 V.I. 502 (2014).

We hold that the UEFJA does not permit Defendant to mount a collateral attack on a foreign judgment based on an argument that he could have raised in the rendering jurisdiction but instead chose to forego until Plaintiffs sought enforcement of the judgment in North Carolina. Allowing Defendant to raise in the present action an issue "that could have and should have been litigated in the rendering court is inconsistent with decisions of the United States Supreme Court holding that judgments that are valid and final in the rendering state are entitled to enforcement in the forum state under the Full Faith and Credit Clause." *DOCRX*, 367 N.C. at 382, 758 S.E.2d at 397.

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4. The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state may "deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, §1. Congress has applied this rule to the Virgin Islands by statute. *See* 48 U.S.C. § 1561 ("No law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law . . . .")
.

This principle has been recognized by numerous courts. *See*, *e.g.*, *Wilson v. Wilson*, 667 F.2d 497, 498 (5th Cir.) (Full Faith and Credit Clause and doctrine of *res judicata* required enforcement of out-of-state judgment because party seeking to defeat enforcement "could have appealed or raised the points he now makes" yet failed to do so in the rendering jurisdiction), *cert. denied*, 458 U.S. 1107, 73 L.Ed.2d 1368 (1982); *Dawson v. Duncan*, 144 Ill. App. 3d 532, 537, 494 N.E.2d 900, 903 (1986) (under Uniform Enforcement of Foreign Judgments Act, a "judgment debtor may defend against a foreign judgment sought to be enforced in this State, but not on grounds which could have been presented to the foreign court in which the judgment was rendered"); *Osteoimplant Tech., Inc. v. Rathe Prods., Inc.*, 107 Md. App. 114, 118, 666 A.2d 1310, 1311-12 (1995) ("To permit appellant to reopen litigation in Maryland and address issues that were or could have been addressed in the previous forum would effectively subject appellee to trying its case over again."); *Duncan v. Seay*, 553 P.2d 492, 494 (Okla. 1976) (because litigant seeking to defeat enforcement of out-of-state custody judgment "could have litigated [service and personal jurisdiction] questions there, but he did not choose to do so . . . [h]e should not be rewarded for fleeing the jurisdiction instead of remaining and contesting the issues in a manner provided by law").

Here, Defendant did not appear in the Virgin Islands small claims court at all — either to defend Plaintiffs' claims against him on the merits or to assert a due process challenge to the rules prohibiting him from being represented by counsel or having a trial by jury. Nor did he raise his due process argument in appeals to the Appellate Division of the Superior Court or to the Virgin Islands Supreme Court. Accordingly, he is foreclosed from raising such an argument for the first time here as a defense under the UEFJA.

Conclusion

For the reasons stated above, we affirm the trial court's 10 September 2015 order.

AFFIRMED.

Judges ELMORE and DIETZ concur.

KEVIN J. TULLY, PLAINTIFF
v.
CITY OF WILMINGTON, DEFENDANT

No. COA15-956

Filed 16 August 2016

Constitutional Law—North Carolina—police department promotional process—failure to follow policies

Where plaintiff, a city police officer, filed a complaint against the City of Wilmington alleging claims for violations of his due process rights under the Equal Protection and "fruits of their own labor" clauses of the North Carolina Constitution based on the City's failure to comply with its own established promotional process, the trial court erred by dismissing plaintiff's complaint. The Court of Appeals held that it is inherently arbitrary for a government entity to establish and promulgate policies and procedures and then not only fail to follow them but also claim that the employee subject to the policies is not entitled to challenge that failure.

Judge BRYANT dissenting.

Appeal by Plaintiff from judgment entered 1 May 2015 by Judge Gary E. Trawick in New Hanover County Superior Court. Heard in the Court of Appeals 29 March 2016.

Tin Fulton Walker & Owen, PLLC, by Katherine Lewis Parker, for Plaintiff.

Cranfill Sumner & Hartzog LLP, by Katie Weaver Hartzog, for Defendant.

The McGuinness Law Firm, by J. Michael McGuinness, for amici curiae the Southern States Police Benevolent Association and the North Carolina Police Benevolent Association.

STEPHENS, Judge.

Plaintiff, a city police officer, appeals from the trial court's judgment on the pleadings in favor of Defendant, his employer, foreclosing Plaintiff's claims for violation of his State constitutional rights to substantive due process and equal protection as a result of Defendant's

failure to comply with its own rules and policies regarding its promotion process. Because we hold that Plaintiff has alleged a valid property and liberty interest in requiring Defendant to comply with its own established promotional process, we reverse the order of the trial court.

Factual and Procedural Background

Since 2000, Plaintiff Kevin J. Tully has been employed with the Wilmington Police Department ("the WPD"), a department of Defendant the City of Wilmington. He obtained the rank of Corporal in June 2007. In 2008, Tully was assigned to the WPD's Violent Crimes Section ("the VCS"), investigating major cases involving, *inter alia*, alleged rape, robbery, homicide, and sexual assault. As part of the VCS, through 2014, Tully worked on more than fifty homicide cases with a one hundred percent clearance rate in those for which he served as lead investigator. In 2011, Tully was named Wilmington Police Officer of the Year, and, in 2014, he was awarded the "Public Safety Officer Medal of Valor," the highest award given to a police officer in the United States.

The events giving rise to this case began in the fall of 2011, when Tully decided to seek promotion to the rank of Sergeant, following the policies and procedures established by the WPD. The promotion process involves several phases, beginning with a written examination. According to the WPD's policy on promotions, only candidates scoring in the top 50th percentile of those taking the written examination may advance to the next phase of the promotional process. The top-scoring one-third of candidates who complete all specified phases are then placed on an eligibility list for promotion, which is then provided to the Chief of Police. The Chief of Police reviews a file on each promotion-eligible candidate, which may include, *inter alia*, materials regarding supervisory evaluation ratings, length of service, educational background, current position, commendations and awards, and disciplinary actions. From the candidates whose files he reviews, the Chief of Police selects officers for promotion. Finally, the Chief's selections must be approved by the City Manager.

In the fall of 2011, Tully sat for the written examination for promotion to the rank of Sergeant and thereafter was notified that he had failed it, thus barring Tully from moving forward in the promotion process. However, Tully alleges that, when he reviewed a copy of the purportedly correct answers for the written examination, he realized that several of the "correct" answers were based on outdated law, particularly regarding searches and seizures. Thus, Tully alleges that other candidates for the position of Sergeant who answered those examination questions

"correctly"—meaning their answers matched the official test answers—and therefore advanced in the promotional process, had actually revealed an incorrect understanding of some areas of the current law in our State. Meanwhile, Tully, who actually demonstrated an understanding of the current law on those issues, was disqualified from advancing to the next phase of the WPD's promotion process.

Noting that the WPD's promotional policy provided that "[c]andidates [for promotion] may appeal any portion of the selection process[,]" Tully grieved this issue of the outdated examination answers through the WPD's internal grievance procedure. On 3 January 2012, Tully was informed by the City Manager that his grievance was denied because the examination answers were not a grievable item.

On 30 December 2014, Tully filed his complaint in this action, alleging claims for violations of his due process rights under the Equal Protection and "fruits of their own labor" clauses of the North Carolina Constitution. On 15 March 2015, the City filed its answer to the complaint, along with a motion for judgment on the pleadings pursuant to Rule of Civil Procedure 12(c). The City's motion was heard at the 8 April 2015 session of New Hanover County Superior Court, the Honorable Gary E. Trawick, Judge presiding. Following the hearing, the trial court granted the City's motion and dismissed Tully's complaint in its entirety. A written judgment dismissing the case with prejudice was entered on 1 May 2015. From that judgment, Tully timely appealed.

Discussion

On appeal, Tully argues that the trial court erred in granting the City's motion and entering judgment against Tully on the pleadings. We agree.

I. Standard of review

North Carolina Rule of Civil Procedure 12(c), provides that, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C. Gen. Stat. § 1A-1, Rule 12(c) (2015). "Judgment on the pleadings is not favored by law[,] and the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant." *Carpenter v. Carpenter*, 189 N.C. App. 755, 762, 659 S.E.2d 762, 767 (2008) (citation omitted). "A motion for judgment on the pleadings [pursuant to Rule 12(c)] should not be granted *unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law*." *B. Kelley Enters., Inc.*

v. Vitacost.com, Inc., 211 N.C. App. 592, 593, 710 S.E.2d 334, 336 (2011) (citation and internal quotation marks omitted; emphasis added). When ruling on a motion for judgment on the pleadings, "[a]ll allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant . . . ." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). "This Court reviews a trial court's grant of a motion for judgment on the pleadings *de novo*." *Carpenter*, 189 N.C. App. at 757, 659 S.E.2d at 764 (citation omitted).

II. Tully's constitutional claims

As an initial matter, we must clarify the bases for Tully's claims that his constitutional rights have been violated. Our review of the record reveals that, both in the trial court and on appeal, the City has consistently attempted to reframe Tully's claims as assertions of a property and liberty interest *in receiving a promotion*, a position that, as the City accurately observes, is not supported by precedent. However, Tully's actual claim is that the City violated Tully's constitutional rights *by failing to comply with its own policies and procedures regarding the promotional process*. In other words, as Tully states in his reply brief, he

> is *not arguing that he has an absolute property interest in being promoted*. Rather, he is arguing that if the government has a process for promotion of its employees, particularly law enforcement officers who are sworn to uphold and apply the law to ordinary citizens, *that process cannot be completely arbitrary and irrational* without running afoul of the North Carolina Constitution.

(Emphasis added). Thus, before addressing the pertinent case law we find persuasive in support of Tully's position, we review the details of his claims and allegations.

In his complaint, citing Article I, section 19 of our State's Constitution (containing the "law of the land" and "Equal Protection" clauses),[1] Tully first alleged that, "[b]y denying [Tully's] promotion *due to his answers on the Sergeant's test* and then *determining that such a reason was not grievable*, the City *arbitrarily and irrationally* deprived [Tully] of property in violation of the law of the land, in violation of the North

1. "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws . . . ." N.C. Const. art. I, § 19.

Carolina Constitution." (Emphasis added). Similarly, citing Article I, section 1 (containing the "fruits of their own labor" clause),[2] Tully further alleged that, "[b]y denying [Tully's] promotion *due to his answers on the Sergeant's test* and then *determining that such a reason was not grievable*, the City arbitrarily and irrationally deprived [Tully] of [the] enjoyment of the fruits of his own labor, in violation of the North Carolina Constitution." (Emphasis added).

Specifically, Tully contends that the City violated his property and liberty interests in an equal and non-arbitrary promotional *opportunity* under Article I, sections 1 and 19 of the North Carolina Constitution by failing to comply with its own promotional policies and procedures in two respects. First, Tully alleges that the City administered a written Sergeant's examination that included questions based upon incorrect and outdated law such that, *although Tully answered certain questions accurately based on the correct and existing law, those answers were marked wrong, causing Tully to fail the examination* and score below the 50th percentile of candidates, thereby barring him from proceeding to the next stage of the promotional process.[3] Tully contends that the use of a Sergeant's test based on outdated and incorrect law violates specific promotional policies promulgated by the City.

The record on appeal includes a copy of a document entitled "Wilmington Police Department Policy Manual / Directive 4.11 Promotions / Effective: 02/24/2005 Revised: 07/25/2011" ("the manual").[4] The manual states that its purpose is to "*establish*[] *uniform guidelines that govern promotional procedures* within the Wilmington Police Department *and ensure*[] *procedures used are job-related* and non-discriminatory" with "the objective of . . . provid[ing] *equal promotional opportunities* to all members of the Police Department *based on a candidate's merit, skills*,

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2. "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1.

3. As noted *supra*, the City's alleged use of outdated law on the examination would also have caused other applicants for promotion to receive credit for correct answers even where their answers were in reality wrong. Thus, the City's alleged use of a flawed Sergeant's examination doubly disadvantaged Tully, in that, not only was his score wrongly lowered, but other applicants' scores were wrongly raised. In light of the City's policy that only applicants in the top half of scorers could advance in the promotional process, the use of an allegedly flawed examination was highly prejudicial to Tully.

4. The manual was attached to the City's answer as Exhibit 1 and thus was before the trial court.

knowledge, and abilities . . . ." (Emphasis added). In order to achieve this goal, per Policy A.1.c of the manual, the Chief of Police is responsible for "[c]onducting *a review of the promotional process* prior to each promotional opening *to ensure* [*that*] *the selection of the qualified candidates is done in a fair and equitable manner*." (Emphasis added). In addition, under Policy B.1.c of the manual, the Chief of Police must

> *establish screening devices*, *to include written examinations* . . . . specific to the vacancy, [including p]roviding written examination instruments using both job and task analysis specific to the Wilmington Police Department or by using nationally recognized instruments. *All instruments used shall have demonstrated content and criterion validity*,[5] which is accomplished by contracting with qualified outside entities *to develop the written testing instruments. Instruments will assess candidate's knowledge*, *skills and abilities as related to the promotional position.* Work sample exercises will be internally validated using Wilmington Police Department subject matter experts.

(Emphasis added).

As part of his first constitutional claim, Tully has alleged that the City violated its own policies by administering a written examination based on outdated and inaccurate law such that it did not assess "a candidate's merit, skills, knowledge, and abilities." The hearing transcript makes clear that, despite the City's consistent focus on case law establishing that employees do not have a property or liberty interest in *receiving a promotion*, Tully's trial counsel clarified that his claims were based on the City's failure to provide a *non-arbitrary promotional process* in regard to the allegedly outdated test materials: "[T]o deny [Tully] his right to *pursue* [a promotion] based on an *arbitrary test* that is absolutely contrary to the public interest[,]. . . interfering with [his] fundamental right to the fruits of [his] own labor . . . ." (Emphasis added).

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5. "Content validity addresses the match between test questions and the content or subject area they are intended to assess." The College Board, https://research.collegeboard.org/services/aces/validity/handbook/evidence (last visited 25 July 2016). "Criterion-related validity looks at the relationship between a test score and an outcome." *Id.* "The College Board is a mission-driven not-for-profit organization that connects students to college success and opportunity. . . . Each year, the College Board helps . . . students prepare for a successful transition to college through programs and services in college readiness and college success—including the SAT and the Advanced Placement Program." *See* The College Board, https://www.collegeboard.org/about (last visited 25 July 2016).

The second violation of his constitutional rights alleged by Tully concerns the City's failure to follow its own grievance policy in regard to the promotional process. Policy F.1 of the manual provides that "[c]andidates [for promotion] *may appeal any portion of the selection process*. . . ." (Emphasis added). Again, at the hearing, Tully's counsel noted that the City placed "significant emphasis on *policies* and their officers following policies, invit[ed] [Tully] to grieve [his allegations regarding the flawed test questions] and walk[ed] him through the process and then just walk[ed] all over him at the end and [said], well, *you didn't really have a grievable item* anyway . . . ." (Emphasis added).

In sum, Tully's constitutional claims are *not* based upon an assertion that he was entitled *to receive a promotion* to the rank of Sergeant, but simply that he was entitled *to a non-arbitrary and non-capricious promotional process*. Tully's argument—that a government employer that fails to follow its own established promotional procedures acts arbitrarily, and thus, unconstitutionally—appears to be one of first impression in this State. However, it is supported by persuasive federal case law and is in keeping with our State's constitutional jurisprudence.

III. Analysis

> Arbitrary and capricious acts by government are . . . prohibited under the Equal Protection Clause[] of . . . the North Carolina Constitution[]. No government shall deny any person within its jurisdiction the equal protection of the laws. The purpose of the Equal Protection Clause . . . is to secure every person within the [S]tate's jurisdiction *against intentional and arbitrary discrimination*, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.

Dobrowolska v. Wall, 138 N.C. App. 1, 14, 530 S.E.2d 590, 599 (2000) (citations and internal quotation marks omitted; emphasis added), *disc. review allowed*, 352 N.C. 588, 544 S.E.2d 778 (2000), *disc. review improvidently allowed in part and appeal dismissed ex mero motu in part*, 355 N.C. 205, 558 S.E.2d 174 (2002). Likewise, "irrational and arbitrary" government actions violate the "fruits of their own labor" clause. *See*, *e.g.*, *Treants v. Onslow Cty.*, 83 N.C. App. 345, 354, 350 S.E.2d 365, 371 (1986) (citations omitted), *affirmed*, 320 N.C. 776, 360 S.E.2d 783 (1987).

In this light, we find highly persuasive the rule discussed and applied by the Fourth Circuit Court of Appeals in *United States v. Heffner*:

> An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. This doctrine was announced in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954). There, the Supreme Court vacated a deportation order of the Board of Immigration because the procedure leading to the order did not conform to the relevant regulations. The failure of the Board and of the Department of Justice to follow their own established procedures was held a violation of due process.

420 F.2d 809, 811-12 (4th Cir. 1969); *see also Poarch v. N.C. Dep't of Crime Control & Pub. Safety*, 223 N.C. App. 125, 133, 741 S.E.2d 315, 320 (2012) (citing *Heffner* with approval), *disc. review denied*, 366 N.C. 419, 735 S.E.2d 174 (2012). In *Heffner*, the defendant appealed after he was convicted of "two counts of wilfully furnishing to his employer . . . false and fraudulent statements of federal income tax withholding exemptions" in violation of federal law. 420 F.2d at 810. The Fourth Circuit reversed the defendant's convictions, noting that the Internal Revenue Service ("IRS") had "issued instructions to all Special Agents of the Intelligence Division. . . . describ[ing] its procedure for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations[,]" but that the Special Agent who interrogated the defendant had failed to comply with those procedures. *Id.* at 811 (citation and internal quotation marks omitted). The Court explained that it was "of no significance that the procedures or instructions which the IRS has established [were] more generous than the [United States] Constitution requires. . . . [n]or . . . that these IRS instructions to Special Agents were not promulgated in something formally labeled a 'Regulation' or adopted with strict regard to the [federal] Administrative Procedure Act . . . ." *Id.* at 812 (citations omitted). The critical point is that the constitutional violation was demonstrated by "the *arbitrariness which is inherently characteristic of an agency's violation of its own procedures*." *Id.* (emphasis added). Additionally, "[t]he *Accardi* doctrine . . . requires reversal irrespective of whether a new trial will produce the same verdict." *Id.* at 813.

Although as noted *supra*, this appeal presents a matter of first impression in our State courts, courts in other jurisdictions have considered similar arguments made by government employees and have reached the same result we reach here. *See, e.g.*, *McCourt v. Hampton*, 514 F.2d 1365 (4th Cir. 1975) (applying the reasoning of *Heffner* where a

civilian employee of the United States Army Aviation Systems Command alleged his government employer acted arbitrarily in violating its own rules); *Sumler v. Winston-Salem*, 448 F. Supp. 519 (M.D.N.C. 1978) (citing *Heffner* with approval where a recreation department employee alleged his government employer acted arbitrarily in violating its own rules); *Burnaman v. Bay City Indep. Sch. Dist.*, 445 F. Supp. 927 (S.D. Tex. 1978) (applying the reasoning of *Heffner* where a public school vocational counselor alleged his government employer acted arbitrarily in violating its own rules); *Bd. of Educ. v. Ballard*, 507 A.2d 192 (Md. App. 1986) (applying the reasoning of *Heffner* and *Accardi* where a public school librarian alleged her government employer acted arbitrarily in violating its own rules); *Bd. of Educ. v. Barbano*, 411 A.2d 124 (Md. App. 1980) (applying the reasoning of *Heffner* and *Accardi* where a public school teacher alleged her government employer acted arbitrarily in violating its own rules). While not mandatory authority, these decisions present a convincing case supporting our adoption of the *Heffner* rule in this matter.

In addition, while we have found no case from our State's appellate courts applying the rule of *Heffner* and *Accardi* in the context of a government entity alleged to have failed to follow its own established procedures in a matter where, as here, that allegation is the sole basis to establish a property or liberty interest, this Court has noted this concept with approval in *dictum*:

> The parties have not cited in their briefs and we have not found a North Carolina case [that] deals with the power of an administrative agency not to follow its own rules. There have been cases in the federal courts dealing with this question. We believe the rule from these cases is that a party has the right to require an administrative agency to follow its own rules if its failure to do so would result in a substantial chance that there would be a different result from what the result would be if the rule were followed. This insures that those who appear before a board will be treated equally. We believe this rationale is sound.

Farlow v. N.C. State Bd. of Chiropractic Exam'rs, 76 N.C. App. 202, 208, 332 S.E.2d 696, 700 (1984) (citations omitted), *disc. review denied and appeal dismissed*, 314 N.C. 664, 336 S.E.2d 621 (1985). In *Farlow*, the plaintiff "appealed from a judgment . . . affirm[ing] an order of the North Carolina State Board of Chiropractic Examiners [("the Board")] suspending his license to practice for a period of six months[,]" arguing that the Board failed to render its decision within 90 days of the plaintiff's

disciplinary hearing as its rules required. *Id.* at 204, 207, 332 S.E.2d at 697, 699-70. This Court overruled the appellant's argument after determining that "the result was not changed because the Board did not follow its own rule[,]" and thus the Board's failure to follow its own rules was not prejudicial to the plaintiff. *Id.* at 208, 332 S.E.2d at 670.

While the Court in *Farlow* considered prejudice, whereas the *Heffner* and *Accardi* decisions explicitly held that prejudice was irrelevant, this distinction is not pertinent here where Tully's appeal is before us from a dismissal on the pleadings. We cite *Farlow* merely to demonstrate that this Court has previously found the "rationale . . . sound" that a government entity should follow its own established procedures and rules to ensure equal treatment. *See id.* at 208, 332 S.E.2d at 700. In line with the reasoning discussed in *Accardi*, *Heffner*, and *Farlow*,[6] we now hold that it is *inherently arbitrary* for a government entity to establish and promulgate policies and procedures and then not only utterly fail to follow them, but further to claim that an employee subject to those policies and procedures is not entitled to challenge that failure.[7] To paraphrase Tully, if a government entity can freely disregard its policies at its discretion, why have a test or a grievance process or any promotional policies at all?

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6. While decisions interpreting the United States Constitution, like *Heffner* and *Accardi*, do not bind North Carolina courts on issues of North Carolina constitutional law, *see e.g.*, *Evans v. Cowan*, 122 N.C. App. 181, 183-84, 468 S.E.2d 575, 577 (1996), we find their reasoning highly persuasive on this matter of first impression.

7. *Compare N.C. Dep't of Pub. Safety v. Owens*, __ N.C. App. __, 782 S.E.2d 337 (2016). In that case, the Highway Patrol placed a patrol sergeant on administrative duty during which time the Highway Patrol did not permit him "to complete the firearms training or other training which were required to maintain his credentials" and then, after the administrative duty period ended, fired the sergeant "based [in part] on . . . his loss of certain credentials necessary to perform" his job duties. *Id.* at __, 782 S.E.2d at 341. On appeal, this Court affirmed the reversal of the sergeant's termination, noting:

> The Administrative Code may allow for an employee to be terminated without prior warning for the failure to maintain required credentials; however, an employee so terminated is entitled to relief . . . where the employer-agency acts arbitrarily and capriciously in terminating him on this basis. Here, . . . the Highway Patrol acted arbitrarily and capriciously in terminating [the sergeant] on the basis of loss of credentials. For instance, it was arbitrary and capricious for the Highway Patrol to prevent [the sergeant] from taking his annual firearms training (necessary to retain his credentials), though the Highway Patrol was under no disability to allow the training to take place, and then terminate [the sergeant] for his failure to complete said training.

Id. at __, 782 S.E.2d at 342-43.

In reaching this holding, we emphasize that the questions before the trial court in ruling on the City's motion for judgment on the pleadings and now before this Court on appeal are *not* whether the City did violate its own promotional policies and procedures and whether Tully should prevail in this matter. Instead, the dispositive questions before us are whether Tully has sufficiently *alleged* claims of arbitrary and capricious action by the City in its failure to follow its own procedures and whether the City has established on the pleadings "that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *See B. Kelley Enters., Inc.*, 211 N.C. App. at 593, 710 S.E.2d at 336 (citation and internal quotation marks omitted). For the reasons discussed *supra*, we conclude that Tully has sufficiently alleged constitutional claims and that genuine issues of material fact remain to be resolved. Accordingly, to permit Tully to engage in discovery and present a forecast of evidence to support his allegations of arbitrary and capricious action in the City's failure to follow its own policies and procedures regarding promotions, we reverse the trial court's order.

REVERSED.

Judge McCULLOUGH concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

The majority states

> the dispositive questions before us are whether Tully has sufficiently alleged claims of arbitrary and capricious action by the City in its failure to follow its own procedures and whether the City has established on the pleadings "that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *See B. Kelley Enters., Inc.*, 211 N.C. App. at 593, 710 S.E.2d at 336 (citation and internal quotation marks omitted).

The majority also acknowledges this is an issue of first impression, as our courts have never held that a governmental employer that fails to follow its own established procedures acts arbitrarily and, therefore, unconstitutionally. Because the City is acting as an employer rather than as a sovereign, and is vested with the power to manage its own internal operations, Tully's pleadings—although asserting what appears to be an

unfair result in a standard process—do not state a viable constitutional claim. Therefore, I respectfully dissent.

Tully alleged in his complaint that denying him a promotion "due to his answers on the test and then determining that the reason was not grievable" was an "arbitrary and irrational deprivation of property in violation of the North Carolina Constitution." Tully now argues on appeal that he was subjected to an arbitrary and capricious *process* by the City's failure to follow its own established promotional procedures, an important distinction that was not alleged in Tully's complaint. Tully says in brief that "he never had a true opportunity to grieve his denial of a promotion based on his answers to the Sergeant's test." However, Tully's complaint alleges that he was given the opportunity to appeal the selection process and to be heard on his grievance, and was then "informed that his grievance was denied, as the test answers were not a grievable item." Nevertheless, Tully's allegations in his complaint tend to undercut his ultimate constitutional claims where the promotional process was followed and he was heard on his grievance through the internal grievance procedure.

Tully contends he was arbitrarily discriminated against based on test results that he was not permitted to challenge and that such arbitrary and irrational treatment violated his liberty interests as protected by the North Carolina Constitution. Further, Tully argues that his lack of opportunity to adequately challenge his test results was in violation of the WPD's own regulations. While I recognize Tully's opinion of the unfairness of the result of the WPD's testing scheme (Tully's denial of a promotion), and his unsuccessful challenge to the result, it is not clear that Tully's claims have a basis in our state constitution. Further, the cases cited by Tully in support of his claims for constitutional review relate to the government acting as a *sovereign*, rather than as an *employer*, and are inapposite to the facts at hand.

"[T]here is a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.' " *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598, 170 L. Ed. 2d 975, 983 (2008) (alteration in original) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896, 6 L. Ed. 2d 1230, 1236 (1961)). " '[T]he government as employer indeed has far broader powers than does the government as sovereign.' " *Id.* (quoting *Waters v. Churchill*, 511 U.S. 661, 671, 128 L. Ed. 2d 686, 697 (1994) (plurality opinion)). In *Engquist*, the U.S. Supreme Court explained this distinction as follows:

> [T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. Given the common-sense realization that government offices could not function if every employment decision became a constitutional matter, constitutional review of governmental employment decisions must rest on different principles than review of . . . restraints imposed by the government as sovereign.

553 U.S. at 598–99, 170 L. Ed. 2d at 983–84 (alterations in original) (internal citations and quotation marks omitted); *see also Connick v. Myers*, 461 U.S. 138, 150–51, 75 L. Ed. 2d 708, 722 (1983) (explaining that the government has a legitimate interest "in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] [maintaining] proper discipline in the public service' " (quoting *Ex parte Curtis*, 106 U.S. 371, 373, 27 L. Ed. 232, 235 (1882)).

The cases cited by plaintiff in his principal brief and in the Amicus Brief submitted on his behalf concern either a governmental entity's assertion of its power as a *sovereign* to regulate or prohibit acts detrimental to their citizens' health, safety, or welfare, *see*, *e.g.*, *King v. Town of Chapel Hill*, 367 N.C. 400, 401–02, 758 S.E.2d 364, 367 (2014) (addressing town's regulation of vehicle towing services); *Roller v. Allen*, 245 N.C. 516, 517–18, 96 S.E.2d 851, 853 (1975) (considering the legality of a statute regulating the licensure of tile, marble, and terrazzo contractors); *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 732–33 (1949) (addressing the regulation of photographers), or is otherwise not binding precedent on this Court, *see*, *e.g.*, *Isabel v. City of Memphis*, 404 F.3d 404, 413–15 (6th Cir. 2005) (striking down promotional test for police officers that violated Title VII as it was based on arbitrary standards and did not approximate a candidate's potential job performance); *Guardians Ass'n of the NYC Police Dep't, Inc. v. Civil Serv. Comm'n*, 630 F.2d 79, 109–12 (2d Cir. 1980) (holding test designed to select candidates for hiring as entry level police officers had a racially disparate impact and ordering any subsequent exam receive court approval prior to use); *Johnson v. Branch*, 364 F.2d 177, 180–82 (4th Cir. 1966) (en

banc) (remanding with instructions that school board renew teacher's contract for the next school year after board failed to renew it).[1]

As the "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large[,]" *Engquist*, 553 U.S. at 599, 170 L. Ed. 2d 984, the cases cited in the briefs submitted on behalf of plaintiff related to the government acting in its capacity as a sovereign are inapplicable here where the government acted as an employer in denying plaintiff a promotion.

Because plaintiff cannot establish a valid property or liberty interest in obtaining a promotion or in the promotional process itself, nor can plaintiff establish that he was deprived of substantive due process or equal protection rights in failing to be so promoted, I dissent from the majority opinion. However, because our state Supreme Court has mandated that the N.C. Constitution be liberally construed, particularly those provisions which safeguard individual liberties, *see Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) ("We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." (citation omitted)), I would strongly urge the Supreme Court to take a close look at this issue to see whether it is one that, as currently pled, is subject to redress under our N.C. Constitution. Accordingly, I respectfully dissent.

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1. Neither *Isabel* nor *Guardians* asserted a constitutional violation, and *Johnson*, which raised arguments based on the federal constitution, was remanded based on the plaintiff's federal statutory claims. *See Johnson*, 364 F.2d at 179 ("No one questions the fact that the plaintiff had neither a contract nor a constitutional right to have her contract renewed, but these questions are not involved in this case. It is the plaintiff's contention that her contract was not renewed for reasons which were either capricious and arbitrary in order to retaliate against her for exercising her constitutional right to protest racial discrimination.").

AURORA ZETINO-CRUZ, PLAINTIFF
v.
ZOILA NOHEMY BENITEZ-ZETINO AND CARLOS GIOVANI AMAYA-AREVALO, DEFENDANTS

No. COA15-1154

Filed 16 August 2016

1. Appeal and Error—interlocutory orders and appeals—change of venue—statutory right

Plaintiff was allowed to appeal from an interlocutory order where the judge sua sponte changed venue. Plaintiff had a statutory right for the action to remain in Durham County, unless and until defendant filed a motion for change of venue to a proper county.

2. Venue—change sua sponte by judge—no legal basis—no inherent power

The trial court erred by changing venue from Durham County to Lee County. The trial court had no legal basis to change venue since no defendant had answered or objected to venue. Further, the trial court did not have any inherent power to change venue for the "convenience of the court." The order was vacated and remanded to Durham County.

Appeal by plaintiff from order entered 14 August 2015 by Judge Doretta L. Walker in District Court, Durham County. Heard in the Court of Appeals 7 March 2016.

The Law Office of Derrick J. Hensley, by Derrick J. Hensley, for plaintiff-appellant.

No brief filed on behalf of defendants-appellees.

STROUD, Judge.

Plaintiff Aurora Zetino-Cruz appeals from the trial court's order changing venue from Durham County to Lee County, North Carolina. Plaintiff argues that the court committed reversible error when it changed venue to Lee County *sua sponte*. We conclude that the trial court had no legal basis upon which to change venue since no defendant had answered or objected to venue. Nor did the trial court have any inherent power to change venue for the "convenience of the court." We therefore vacate the trial court's order and remand to Durham County for further proceedings.

Facts

On 1 May 2015, plaintiff filed a complaint in Durham County, seeking custody of her grandchildren, Javier, born in 2006, and Maria, born in 2009.[1] According to the verified complaint, defendants are the children's mother and father. Both of the children and defendants are citizens of El Salvador. Plaintiff, the children's maternal grandmother, had lived in North Carolina for about 15 years prior to filing this action, and the two children had resided with her in Sanford, North Carolina, since May 2014, or for about 12 months before the filing of the action. Plaintiff's complaint set forth extensive details regarding how the children ended up in her care. They have never lived with defendant-father, whom plaintiff alleged was involved in "Mara 18, one of the principal criminal gangs in El Salvador that controls many communities and subjects local residents to violence and terror." Defendant-father has also never provided financially for the children or assisted in their care. She further alleged that defendant-mother had fled El Salvador "[f]earing for her life and for the well-being of the Minor Children," due to defendant-father's criminal activities and the "extreme violence committed by organized criminal gangs that have taken control of" much of El Salvador as the "de facto government."

In May 2014, defendant-mother and the children were "apprehended by U.S. Immigration officers" in Texas and later released on their own recognizance; they then moved to North Carolina to live with plaintiff. Defendant-mother failed to appear at her scheduled immigration hearing on 24 November 2014 and absconded. Plaintiff alleged that defendant-mother has made only one phone call to her since she absconded and has failed to provide any support for the children. When defendant-mother absconded, she left the children with plaintiff but failed to sign any documents which would give plaintiff legal authority to "fulfill the regular legal, medical, and educational decisionmaking that may only be done by a legal custodian." In addition, plaintiff alleged that Javier has "very extensive special needs" which require special services in school, including occupational therapy and speech therapy. Without any legal authority to authorize care or make decisions regarding Javier's services, plaintiff has had extreme difficulty maintaining the care that Javier needs.

Plaintiff's complaint requested full physical and legal custody of the children and also requested additional factual findings by the trial court regarding "Special Immigrant Juvenile Status" of the children pursuant to 8 U.S.C. § 1101(a)(27)(J) and 8 CFR 204.11. Plaintiff alleged that these findings would assist her in preventing removal of the children

1. We have used pseudonyms to protect the privacy of the children.

by immigration authorities and possible deportation, since return of the children to El Salvador would subject them to abuse and neglect from defendant-father, disruption of their education, and risk from the "extraordinarily high levels of crime and violence" in El Salvador. The complaint had many attached exhibits including birth certificates of the children and affidavits regarding the situation in El Salvador and risks to the children should they have to return there.

Plaintiff filed a motion for emergency temporary custody along with the verified complaint and a notice of hearing for 14 May 2015 for an emergency temporary custody hearing. On 14 May 2015, the Honorable James T. Hill, District Court Judge presiding, entered a temporary custody order granting plaintiff full legal and physical custody of the children. In this order, the court concluded that the children are "at risk of irreparable harm if an emergency custody order is not issued to allow their legal, educational, and medical needs to be met." The temporary custody order also provided that:

> The terms of this order will remain in effect until such time as a further hearing occurs, and is entered without prejudice to the rights of the parties to a full and fair hearing on the merits of this matter. Should no further hearing occur in a reasonable time frame, this order will become the permanent order of this court, subject to modification only by a showing of a substantial change in circumstances.

The temporary custody order also set the case for a pre-trial hearing and "any necessary review of this temporary order" on 14 August 2015 at 9:30 am and set a permanent custody hearing on 10 September 2015 at 9:30 am in Courtroom 6B of the Durham County Courthouse. The complaint was served on both defendants by publication, in both Spanish and English in Durham and in Spanish in El Salvador; the affidavit of service was filed on 24 July 2015. The publication also included the dates set by the temporary order for the pretrial hearing and trial. The first publication date was 10 June 2015, so defendants' answers were due by 20 July 2015. Neither defendant filed any answer or other response.

On Friday, 14 August 2015, the matter came on for pretrial hearing as scheduled by the temporary order, but before a different judge. Plaintiff, her counsel, and the minor children were present.[2] The case was called for hearing, and the following colloquy ensued:

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2. Plaintiff filed a memorandum regarding child custody venue on 14 August 2015, the day of the hearing, that noted that the minor children "are physically present in Durham County and attending today's pretrial hearing[.]"

MR. HENSLEY: Good morning, Your Honor. That's on for pretrial this morning.

THE COURT: Does everybody live in Durham?

MR. HENSLEY: Your Honor, nobody lives in Durham.

THE COURT: All right. It will be the Court's own motion will be transferring.

MR. HENSLEY: Your Honor, if I may be heard briefly. I prepared –

THE COURT: I'll hear you briefly. Just be brief. Tell me what county you want this transferred to.

MR. HENSLEY: We will not be transferring this, Your Honor.

The trial court then called another case.

After the trial court returned to plaintiff's case, the following discussion continued between the court and plaintiff's counsel:

THE COURT: All right. Now you want to address something with me, Aurora Cruz?

MR. HENSLEY: Yes, Your Honor.

THE COURT: I'm listening.

MR. HENSLEY: If I could switch out my piles here.

Your Honor, it came to my attention yesterday afternoon that the question of venue had recently come to your attention. I previously prepared a memorandum for Judge Battaglia on this subject which was in my understanding satisfactory to him. So I prepared a memorandum for you this morning. If I may approach.

THE COURT: All right.

MR. HENSLEY: I do have two copies.

THE COURT: What county is this?

MR. HENSLEY: The Plaintiff and the children happen to reside in Lee County but they may be found as contemplated by the statute and case law in the County of Durham.

THE COURT: I already looked this up. The Court is changing venue to Lee County.

MR. HENSLEY: Your Honor -- Your Honor, if I could go back to the table and be heard briefly.

THE COURT: I'm listening.

MR. HENSLEY: So I would like to first object to lack of notice for this Court's motion.

THE COURT: I have so noted.

MR. HENSLEY: And, Your Honor, the matter of venue is a substantive procedural right for the plaintiff and for the defendant when timely objected to.

In this case the defendant has not objected and it is convenient to the Plaintiffs to be heard in the County of Durham wherein the children may be found on the occasion of filing the complaint and case law specifies that that is sufficient.

Moreover, I'm representing these individuals and it is most convenient for them to have an attorney practice in its own district in order to have most efficient representation possible.

And beyond that, Your Honor, the case law specifically gives the right to object to venue only to the defendant, the parties may agree otherwise, but the only statutory basis for changing venue is by objection of a defendant and ask that you carefully read the memorandum before issuing any order in this matter, Your Honor.

THE COURT: I carefully read the law and I transfer --

MR. HENSLEY: And the only other --

THE COURT: -- the venue to Lee County and you may have the same option as the people that you talked to yesterday. Thank you very much.

MR. HENSLEY: Your Honor, could you please state for the record what that option would be. I would like to have a full and complete record of these proceedings and what you mean by these things because I was not given any notice. I was not given a written motion. I just heard

from a friend yesterday afternoon that there was a question of venue.

THE COURT: This transfers to Lee County.

MR. HENSLEY: And what are the alternatives that you spoke of just a moment ago, Your Honor?

THE COURT: I happen to move my calendar, Mr. Hensley, which consist [sic] of you.

The trial court never identified what the "same option as the people that you talked to yesterday" was. The trial court then called another case. After completion of all of the remaining cases plaintiff's counsel had with the court, the trial court returned to plaintiff's case, and counsel asked the trial court the following in relation to this case:

MR. HENSLEY: . . .

Is there a written ruling with regards to the out-of-county matter?

THE COURT: Yes, sir, there is.

MR. HENSLEY: All right. Is there a copy available for me at this time?

THE COURT: Ask the clerk.

MR. HENSLEY: Thank you, Your Honor.

Both plaintiff's memorandum regarding child custody venue, which was handed up to the trial court during the hearing, and the trial court's order changing venue were filed at 9:40 am on the same day as the hearing, Friday, 14 August 2015 with the Durham County Clerk of Superior Court. Plaintiff filed notice of appeal from the order in Durham County on 28 August 2015 and an alternative notice of appeal from the order in Lee County on 31 August 2015, since the case had been transferred to Lee County. Defendants were served with the notices of appeal by filing with the clerk of court, in accord with Rule 26(c) of the Rules of Appellate Procedure. Neither has appeared in this appeal.

Discussion

A. Interlocutory appeal

[1] Because the order on appeal does not finally resolve the case, it is interlocutory. *See Pay Tel Commc'ns, Inc. v. Caldwell Cnty.*, 203 N.C. App. 692, 694, 692 S.E.2d 885, 887 (2010) ("[T]he trial court's order

granting defendants' motion to change venue is an interlocutory order, and thus, not generally subject to appellate review."). Plaintiff argues that the order changing venue affects her substantial rights and thus she has a right to immediate appeal. Plaintiff notes that the trial court relied upon N.C. Gen. Stat. § 50-13.5(f) (2015) as authority for the change of venue. This statute provides in pertinent part:

> (f) Venue. -- An action or proceeding in the courts of this State for custody and support of a minor child *may* be maintained in the county where the child resides or *is physically present* or in a county where a parent resides, except as hereinafter provided.[3]

N.C. Gen. Stat. § 50-13.5(f) (emphasis added).

Thus, plaintiff argues that she had a statutory right to file the lawsuit in Durham County, since she claims that the children were "physically present" in Durham County, even if she and the children reside in Lee County. In addition, she argues that even if Durham County was an improper venue based upon residence of the parties, venue is not jurisdictional and may be waived. Our case law agrees. *See, e.g.*, *Bass v. Bass*, 43 N.C. App. 212, 215, 258 S.E.2d 391, 393 (1979) ("Venue may be waived by any party. Plaintiff voluntarily appeared and participated in the 27 June 1977 hearing on child support. He did not object to the venue or move for change of venue." (Citation omitted)).

Our Supreme Court has noted that

> Although the initial question of venue is a procedural one, there can be no doubt that a right to venue established by statute is a substantial right. Its grant or denial is immediately appealable.

Gardner v. Gardner, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) (internal citations omitted). Unfortunately, we have only the appellant's brief in this case, since neither defendant has appeared. Furthermore, since the trial court's action was *sua sponte*, we also have no argument or legal authority, other than that cited in the order itself, addressing the rationale behind the trial court's ruling. Based upon the cases discussed in detail below, however, plaintiff had a statutory right for the action to remain in Durham County, unless and until a defendant should

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3. The remainder of the subsection addresses cases in which there are also claims for annulment, divorce, or alimony, none of which are applicable here.

file a motion for change of venue to a proper county. *See, e.g.*, *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978) ("[S]ince venue is not jurisdictional it may be waived by express or implied consent[.]"). Accordingly, plaintiff's interlocutory appeal is properly before this court.

1. Standard of Review

[2] Plaintiff argues that our review should be *de novo* since the trial court's order was expressly based upon N.C. Gen. Stat. § 50-13.5(f). Plaintiff is correct that the order cites N.C. Gen. Stat. § 50-13.5(f) as the venue statute for custody matters, but based upon the conclusions of law, we believe that the trial court ultimately relied instead upon N.C. Gen. Stat. § 1-83 (2015) as to the change of venue.[4] We have been unable to find any case addressing the standard of review for a trial court's *sua sponte* change of venue in this type of factual situation, so we will look to the usual standards of review for questions regarding venue.

Our review of an issue of venue involves two steps, and each step has a different standard of review. The first step is determining the proper venue for a case, which is based upon the substantive statute for the particular type of claim. This determination of proper venue under the substantive statute presents a question of law which is reviewed *de novo*. The second step is determining whether a change of venue is appropriate under the procedural statute regarding changes of venue, which in this instance appears to be N.C. Gen. Stat. § 1-83. If a case has been filed in an improper venue under the substantive statute and a defendant has filed a timely objection to venue "before the time of answering expires," N.C. Gen. Stat. § 1-83, then the trial court must change the venue and has no discretion to deny removal.

" 'The general rule in North Carolina, as elsewhere, is that where a demand for removal for improper venue is timely and proper, the trial court has no discretion as to removal. The provision in N.C.G.S. § 1-83 that the court *may* change the place of trial when the county designated is not the proper one has been interpreted to mean *must* change.' " *Kiker v. Winfield*, 234 N.C. App. 363, 364, 759 S.E.2d 372, 373 (2014) (emphasis added) (quotation marks omitted) (quoting *Miller*, 38 N.C. App. at 97, 247 S.E.2d at 279), *aff'd per curiam*, 368 N.C. 33, 769 S.E.2d 837 (2015). If, however, the case has been filed in a substantively proper venue and a defendant moves to change venue after filing an answer, the trial court

4. The order does not refer to N.C. Gen. Stat. § 1-83 specifically, but most of the language in the conclusion of law is based upon this statute, and we cannot determine any other potential statutory basis for change of venue.

may in its discretion change venue, so we review that ruling for abuse of discretion. *See N. Carolina Farm Bureau Mut. Ins. Co. v. Paschal*, 231 N.C. App. 558, 562, 752 S.E.2d 775, 778, *disc. review improvidently allowed per curiam*, 367 N.C. 642, 766 S.E.2d 282 (2014). There is no "bright line" test for abuse of discretion as to venue, and our review is based upon all of the facts and circumstances.

> The trial court is given broad discretion when ruling on a motion to change venue for the convenience of witnesses: The trial court may change the place of trial when the convenience of witnesses and the ends of justice would be promoted by the change. However, the court's refusal to do so will not be disturbed absent a showing that the court abused its discretion. The trial court does not manifestly abuse its discretion in refusing to change the venue for trial of an action pursuant to subdivision (2) of N.C. Gen. Stat. § 1-83 unless it appears from the matters and things in evidence before the trial court that the ends of justice will not merely be promoted by, but in addition demand, the change of venue, or that failure to grant the change of venue will deny the movant a fair trial. In resolving this issue here, we do not set forth a "bright line" rule or test for determination of whether a trial court has abused its discretion in denying a motion to change venue. Rather, the determination of whether a trial court has abused its discretion is a case-by-case determination based on the totality of facts and circumstances in each case.

Id. (citations, quotation marks, brackets, and ellipses omitted).

The common element in review of changes of venue, whether from an improper venue or proper venue, is that the right to any change of venue is triggered by a timely motion filed by a defendant. The question then normally becomes whether the defendant has waived proper venue, and we review the determination of waiver *de novo*.

> [A]lthough we apply abuse of discretion review to general venue decisions, we apply *de novo* review to waiver arguments. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

LendingTree, LLC v. Anderson, 228 N.C. App. 403, 407-08, 747 S.E.2d 292, 296 (2013) (citations, quotation marks, and brackets omitted).

2. Analysis

The order on appeal is brief, so we will quote its findings of fact, conclusions of law, and decretal in their entirety:

FINDINGS OF FACT

1. That neither party is a resident or citizen of Durham County, North Carolina.

2. That N.C.G.S. § 50-13.5(f) states that "An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides."

3. Although a court may hear actions in counties in which neither party resides, a change of venue is within the discretion of the presiding judge.

4. That in the above listed case, Durham County is an inconvenient forum for the courts and neither party, nor the minor child resides in Durham County, North Carolina.

CONCLUSIONS OF LAW

1. That . . . because of the convenience of witnesses, the convenience of the court, significant ties of minor child and Plaintiff to the County in which they reside, and the interests of justice Durham County is not the appropriate forum.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That venue shall be changed to Lee County, North Carolina and all files shall be transferred for continuing issues regarding child custody and Petitions for Special Immigration Status.

The order appears to be on a form, as it is typed, except for the handwritten additions of information specific to this case: the parties' names, the file number, the date of hearing, and the county to which the case is being removed.[5]

5. The county to which the case is to be removed is the only blank in the body of the order, underlined above.

Although the order has a section entitled "Findings of Fact," it only contains one true factual finding: "That neither party is a resident or citizen of Durham County, North Carolina." The rest of the "findings" are either legal conclusions or general statements of law. Moreover, plaintiff does not challenge the trial court's findings of fact on appeal, and plaintiff has never disputed that she lives in Lee County. In any event, the trial court did not hear any evidence upon which it could make findings of fact. Plaintiff does challenge the trial court's legal conclusions on appeal, both those contained within the "Findings of Fact" and the one conclusion of law titled as such.

First, the trial court skipped the first requisite inquiry into whether venue was proper under N.C. Gen. Stat. § 50-13.5(f) in the county where plaintiff filed the action. The order contains no findings of fact upon which a determination of proper or improper venue could be made. Yet to the extent that the trial court's conclusion of law is based upon N.C. Gen. Stat. § 50-13.5(f), it does seem to overlook one distinction: the statute does not address where the *parties* reside. Venue is based upon residence of the *parents* or a child or where a child is "physically present." Plaintiff is the children's grandmother, not their parent. N.C. Gen. Stat. § 50-13.5(f) places proper venue in custody actions in "the county where the child resides or is physically present or in a county where a parent resides[.]"

As is apparent from the complaint, the service by publication, and the lack of response from either defendant, no one knows where the parents reside. The complaint does show that the children reside with plaintiff, but the record also indicates that the children were "physically present" in Durham County for the hearing, as noted in plaintiff's memorandum regarding child custody venue. In any event, the order made no factual findings about the children's residence or physical presence. Nevertheless, it would appear that even under N.C. Gen. Stat. § 50-13.5(f), either Lee County, where the complaint alleges that the children reside, or Durham County, where they were "physically present," could have proper venue. And basing venue on the physical presence of the children would seem entirely appropriate, particularly where a grandparent is seeking to protect grandchildren whose parents have disappeared. In fact, the order does not really conclude that venue in Durham County is "improper" under N.C. Gen. Stat. § 50-13.5(f) but only that it is "inappropriate" based upon various factors.

Yet even if we assume that Durham County was not a proper venue under N.C. Gen. Stat. § 50-13.5(f), the trial court may not change venue, even if the action was filed in an improper venue, "unless the defendant,

before the time of answering expires, demands in writing that the trial be conducted in the proper county[.]" N.C. Gen. Stat. § 1-83. In this case, "time of answering" expired in July 2015, and the defendants filed no answer. The trial court made one legal conclusion:

> 1. That . . . because of the convenience of witnesses, the convenience of the court, significant ties of minor child and Plaintiff to the County in which they reside, and the interests of justice Durham County is not the appropriate forum.

Although the order does not cite to N.C. Gen. Stat. § 1-83, the language of the conclusion of law seems to be based upon it, at least to the extent that the order concludes that venue should be changed based upon "the convenience of witnesses" and "interests of justice." There is no legal conclusion regarding proper or improper venue.

If Durham County was a proper venue for this case, the trial court may have discretion to move the matter, as laid out in N.C. Gen. Stat. § 1-83. N.C. Gen. Stat. § 1-83(2) provides that venue may be changed "When the convenience of witnesses and the ends of justice would be promoted by the change." Under N.C. Gen. Stat. § 1-83, however, a defendant must first file an answer and also move for change of venue before the trial court has discretion to order removal. This Court has previously addressed a situation in which a trial court changed venue under N.C. Gen. Stat. § 1-83(2) where a defendant had not yet answered, and based upon Supreme Court precedent, held that the trial court abused its discretion in changing venue prior to the defendant's answer.

> Pursuant to N.C. Gen. Stat. § 1-83(2), the court may change the place of trial when the convenience of witnesses and the ends of justice would be promoted by the change. Whether to transfer venue for this reason, however, is a matter firmly within the discretion of the trial court and will not be overturned unless the court manifestly abused that discretion. Moreover, motions for change of venue based on the convenience of witnesses, pursuant to section 1-83(2), must be filed after the answer is filed. Defendant's motion, based upon the "convenience of the witnesses and the ends of justice," was filed prior to an answer and it was therefore prematurely filed. As the trial court abused its discretion to the extent that it prematurely made a discretionary ruling to remove the case to Haywood County, we believe that this Court must reverse and remand to the trial court for further proceedings.

ITS Leasing, Inc. v. RAM DOG Enterprises, LLC, 206 N.C. App. 572, 576, 696 S.E.2d 880, 883 (2010) (citations, quotation marks, brackets, ellipses, and emphasis omitted).

Since the trial court's authority to change venue is triggered by a defendant's objection to venue whether the filing venue was proper or improper, we cannot find any authority for a *sua sponte* change of venue in this situation. Whether we review this order for abuse of discretion or *de novo*, we must reverse the order changing venue. Neither defendant has filed an answer or objected to venue. Even assuming that Durham County was an improper venue under N.C. Gen. Stat. § 50-13.5(f), unless a defendant has filed an objection in writing to venue, the issue has been waived. Here, since defendants never appeared or filed an answer, they made no objection to venue and thus it is clear that they waived it.

We have searched to find any inherent power for a trial court to change venue s*ua sponte* but have not found any legal authority which can support the trial court's order. "Courts have the inherent power to do only those things which are reasonably necessary for the administration of justice *within the scope of their jurisdiction*. Inherent powers are limited to those powers which are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction." *Matter of Transp. of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 559 (1991) (citations omitted). We cannot discern any reason that a change of venue in this case would be "necessary to the orderly and efficient exercise of [the trial court's] jurisdiction." *Id.*

We have been able to find only two cases addressing a trial court's power to change venue *ex mero motu*, at least in dicta, under a related statute, N.C. Gen. Stat. § 1-84, in cases in which a party is unable to have a "fair and impartial trial" in the county where the action was filed. Both cases noted that the trial court does have discretionary as well as statutory authority to change venue. *See Everett v. Town of Robersonville*, 8 N.C. App. 219, 224, 174 S.E.2d 116, 119 (1970) ("In addition, however, to the express statutory authority granted in G.S. 1-84, the judge of superior court has the inherent discretionary power to order a change of venue *ex mero motu* when, because of existing circumstances, a fair and impartial trial cannot be had in the county in which the action is pending."); *English v. Brigman*, 227 N.C. 260, 260, 41 S.E.2d 732, 732 (1947) (holding superior court judge "had the inherent power *ex mero motu* to order a change of venue" after concluding a fair and impartial trial could not be held in original county). But the trial court did not conclude that plaintiff (or defendants) could not have a "fair and impartial"

trial in Durham County, and nothing in our record suggests any reason to believe this.

Since the legal basis for the order is unclear, we will also address the other factors the trial court cited as supporting a change of venue under N.C. Gen. Stat. § 1-83, "convenience of the court," "convenience of witnesses," and "the interests of justice." We cannot discern how plaintiff and the children, who were present and ready to proceed, could possibly find removal to Lee County "convenient." In fact, plaintiff's counsel expressed that removal to Lee County would not be convenient for plaintiff. The record does not indicate any other potential witnesses who may be in Lee County. But the phrase "convenience of witnesses" is at least a recognized factor under N.C. Gen. Stat. § 1-83 and may apply based upon the facts of a particular case and where proper objection or motion is made. Yet we cannot find any authority for a transfer of venue based upon "convenience of the court." We cannot even determine what this phrase means and we decline plaintiff's invitation to speculate.

Nor can we determine how the "interests of justice" are furthered by the change of venue. The most obvious "interest of justice" in this case is the welfare of the minor children. Plaintiff is a grandmother seeking custody of her grandchildren who were, as alleged by her complaint, abused, neglected, and abandoned by their parents. She requested legal authority to address their medical and educational needs, and in fact had already been granted temporary custody based upon the "risk of irreparable harm if an emergency custody order is not issued to allow their legal, educational, and medical needs to be met." Our legislature and courts have many times recognized the importance of the court's role in protecting children:

> The legislature has spoken to the issue of child custody in three separate chapters, Chapter 50 (addressing primarily divorce and separation proceedings), Chapter 7A of the Juvenile Code, (focusing on juvenile delinquency, neglect and abuse), and Chapter 50A, (the Uniform Child Custody Jurisdiction Act). A constant theme sounded throughout each of these chapters is the overriding importance of protecting the welfare of children.

Sharp v. Sharp, 124 N.C. App. 357, 362, 477 S.E.2d 258, 261 (1996) (citations omitted).

The order changing venue has served only to delay a final resolution of custody of the children, and our Supreme Court has often recognized the need to avoid delay in cases involving children:

> The importance of timely resolution of cases involving the welfare of children cannot be overstated. A child's perception of time differs from that of an adult. As one commentator observed, "The legal system views [child welfare] cases as numbers on a docket. However, to a child, waiting for a resolution seems like forever -- an eternity with no real family and no sense of belonging."
>
> This Court has recognized that justice delayed in custody cases is too often justice denied. Notably, our Rules of Appellate Procedure provide for expedited appeals in cases involving termination of parental rights and issues of juvenile abuse, neglect, and dependency. Thus, in almost all cases, delay is directly contrary to the best interests of children, which is the "polar star" of the North Carolina Juvenile Code.

In re T.H.T., 362 N.C. 446, 450, 665 S.E.2d 54, 57 (2008) (citations omitted.)

Javier and Maria are not "numbers on a docket;" they are children who need protection. The trial court's concern "to move my calendar" was misplaced in this instance, and it had no legal authority to change venue *sua sponte* under N.C. Gen. Stat. § 1-83 where no defendant had answered or objected to venue. The only party actively participating in the proceedings was present and ready to proceed in Durham County. All in all, we can find no inherent authority for the trial court to change venue *sua sponte*. The plaintiff has the right to select a forum initially for filing, and although circumstances may later change in such a way that venue could be changed for various reasons, there was no such change here. Accordingly, we reverse the trial court's order changing venue to Lee County and remand for further proceedings in Durham County consistent with this opinion.

Conclusion

The trial court had no authority to enter an order *sua sponte* changing venue where no defendant had answered or objected to venue. We vacate the order and remand this matter to the trial court for further proceedings in Durham County consistent with this opinion.

VACATED AND REMANDED.

Chief Judge McGEE and Judge ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 AUGUST 2016)

BERENS v. BERENS No. 15-1136	Mecklenburg (13CVD11484)	Affirmed
BOLING v. GREER No. 15-681	Iredell (14CVS1176)	Affirmed
BULLOCK v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 15-1391	Granville (15CVS238)	Affirmed
DUTCH v. LAUREL HEALTH CARE HOLDINGS, INC. No. 15-1045	N.C. Industrial Commission (Y18976)	Affirmed
EBRON v. AM. RED CROSS No. 15-1166	N.C. Industrial Commission (X29498)	Affirmed
IN RE A.H. No. 16-187	Robeson (13JT333) (13JT334)	Affirmed
IN RE APPEAL OF OLD N. STATE ACQUISITION LLC No. 15-769	Property Tax Commission (12PTC1362)	Reversed and Remanded
IN RE ESTATE OF SANDERS No. 15-1244	Johnston (12E332)	Affirmed in part; Dismissed in part
IN RE S.M.W. No. 16-138	Orange (15JT10)	Affirmed
IN RE T.D.A. No. 16-95	Cabarrus (14JT14-16)	Dismissed in Part and Affirmed in Part
IN RE T.R. No. 16-154	Orange (14JT47-50)	Affirmed in part; Remanded in part.
LENNON v. STATE OF N.C. No. 15-1341	Pitt (14CVS2142)	Reversed and Remanded
OWEN v. HOGSED No. 15-1321	N.C. Industrial Commission (PH-2616) (W85154)	Affirmed

STATE v. ASHFORD No. 15-1245	Wayne (13CRS53715)	Affirmed and Remanded for correction of Clerical Error
STATE v. BLACK No. 15-1387	Cabarrus (14CRS54134) (15CRS392)	No Error
STATE v. BLOUNT No. 15-1330	Mecklenburg (12CRS246618) (12CRS49083)	No Error
STATE v. DAVIS No. 15-1268	Hertford (13CRS52049-50) (14CRS431) (15CRS489)	No Error
STATE v. HILL No. 16-133	Buncombe (06CRS11483-84) (06CRS60021) (06CRS60038-39)	Affirmed
STATE v. JONES No. 15-935	Pitt (14CRS52758)	No Error
STATE v. MAYNOR No. 15-1159	Union (13CRS54353) (14CRS1911)	Affirmed
STATE v. MITCHELL No. 16-110	McDowell (15CRS50504-07)	Affirmed
STATE v. MOORE No. 16-136	Buncombe (13CRS59400) (13CRS59404) (13CRS59502) (13CRS61789) (13CRS62966) (13CRS703674)	Affirmed
STATE v. MUNJAL No. 15-1203	Buncombe (13CRS62573)	Affirmed in part; remanded in part
STATE v. PACE No. 15-1338	Forsyth (13CRS1562)	Affirmed in part; dismissed without prejudice in part
STATE v. PLESS No. 16-81	Rowan (15CRS50279)	No Error

STATE v. PRIDGEN No. 16-75	Forsyth (12CRS51379) (13CRS153)	No Error
STATE v. SEEGARS No. 16-150	Union (14CRS2732-33) (14CRS54753-55)	Affirmed
TD BANK, N.A. v. EAGLES CREST AT SHARP TOP, LLC No. 15-807	Yancey (13CVS73)	Dismissed in part and Affirmed in part

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