250 N.C. App.—No. 4 Pages 511-826

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

FEBRUARY 26, 2019

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

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[1]Sworn in 1 January 2017 [2]Sworn in 1 January 2017 [3]Appointed 24 April 2017
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APPEAL AND ERROR

Appeal and Error—failure to support argument—abandoned—Where defendant-parents argued that the trial court erred by awarding defendant-daughter a constructive trust in the proceeds from the sale of a tailor shop in the amount of 50 percent of the initial purchase money contributed by plaintiff-husband and defendant-wife, the Court of Appeals deemed their argument abandoned because defendant-parents failed to support their argument with any legal authority. **Zhu v. Deng, 803.**

Appeal and Error—failure to support argument—dismissed—Where defendant-parents argued that the trial court erred by dismissing their counterclaim against defendant-wife for living expenses, the Court of Appeals dismissed their argument because defendant-parents failed to support their argument with any legal authority. **Zhu v. Deng, 803.**

Appeal and Error—interlocutory orders and appeals—failure to give notice of appeal—no substantial right—Defendant failed to preserve for appellate review the denial of her motion for consolidation of cases where she failed to give notice of appeal from the denial of her motion. Further, the denial did not involve the merits of plaintiff's claim for money owed and did not affect the judgment in that case in order to allow immediate appeal from the interlocutory order. **Judith M. Daly Att'y at Law, P.A. v. McKenzie, 611.**

Appeal and Error—motion to modify preliminary injunction—brought under Rules 59 and 60—did not toll time to appeal—Where a subcontractor filed complaints against a contractor for various claims concerning payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss and granting the subcontractor's motion for a preliminary injunction, the Court of Appeals lacked jurisdiction to review the contractor's appeal from the preliminary injunction order. The contractor failed to appeal the order within 30 days, and its motion to modify the preliminary injunction order—purportedly brought under Rules 59 and 60 of the N.C. Rules of Civil Procedure—did not toll the time to appeal. **Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC, 791.**

Appeal and Error—preservation of issues—failure to argue at trial—post-traumatic stress disorder—Although defendant argued that the trial court committed prejudicial error in a child sexual abuse case by allowing an expert witness to testify that she diagnosed the minor child with post-traumatic stress disorder and thus impermissibly vouched for the child, defendant failed to preserve this argument by failing to raise this issue at trial. **State v. Mendoza, 731.**

Appeal and Error—preservation of issues—failure to object at trial—guardian ad litem—Respondent mother failed to object to the lack of a guardian ad litem (GAL) for her minor child during the parental termination proceedings, and the issue was therefore not preserved for appellate review. Further, there was nothing to

suggest it was unreasonable for the trial court to forego GAL assistance in determining the minor child's best interests. **In re P.T.W., 589.**

Appeal and Error—writ of certiorari—procedural process—Rule 1—Rule 2—Rule 21—Defendant's petition for writ of certiorari to review her motion to dismiss in a driving while impaired case, prior to entry of her guilty plea, did not assert any of the procedural grounds set forth in Rule 21 to issue the writ. Although the statute provides jurisdiction, the Court of Appeals is without a procedural process under either Rule 1 or 21 to issue the discretionary writ under these facts, other than by invoking Rule 2. **State v. Ledbetter, 692.**

CONTEMPT

Contempt—civil and criminal—distinct conduct with partially overlapping facts—Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court erroneously found him in both civil and criminal contempt based on the same conduct. It was readily apparent from the trial court's order that defendant was in civil and criminal contempt for distinctly separate and discrete conduct based on a partially overlapping nucleus of facts. **State v. Revels, 754.**

Contempt—criminal—jurisdiction—show cause order—Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court's show cause order failed to adequately allege that he was subject to being found in criminal contempt of court with sufficient specificity so as to confer jurisdiction upon the trial court. The trial court was fully authorized to find defendant in criminal contempt because it entered a show cause order requiring him to appear in court and explain why he had failed to comply with the temporary restraining order and preliminary injunction. **State v. Revels, 754.**

Contempt—criminal—punitive punishment—Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court erred by finding him in criminal contempt and imposing a civil punishment. The sentence imposed for the criminal contempt of court was clearly punitive in nature. **State v. Revels, 754.**

Contempt—effective assistance of counsel—Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that he received ineffective assistance of counsel due to his counsel's failure to object to the criminal contempt proceedings. Defendant could not show that the trial court erred procedurally in finding him in civil and criminal contempt of court, so he could not demonstrate that his trial counsel's failure to object to the proceedings affected the outcome. **State v. Revels, 754.**

Contempt—omission of term "guilty"—Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that his conviction should be overturned because the trial court never expressly used the term "guilty" in finding him in contempt of court. Defendant could not show that but for the omission of such language the trial court would have reached a contrary result. **State v. Revels, 754.**

Contempt—proceedings during pending appeal—no jurisdiction—Where a subcontractor filed complaints against a contractor for various claims concerning

payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss and granting the subcontractor's motion for a preliminary injunction, the Court of Appeals vacated the trial court's contempt order imposing sanctions on the contractor for violating the preliminary injunction order. The trial court lacked jurisdiction to conduct a contempt proceeding and impose sanctions because the contractor's appeal divested the trial court of jurisdiction to do so while the appeal was pending. **Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC, 791.**

CONTRACTS

Contracts—immigration—Form I-864 Affidavit of Support—enforceable contract—Where defendant-wife, a Chinese citizen, married plaintiff-husband, a U.S. citizen, and came to the U.S. on a K-1 visa, for which plaintiff-husband and his parents (defendant-parents) were the sponsors pursuant to a Form I-864 Affidavit of Support, the trial court did not err by concluding that defendant-wife was entitled to ongoing support based on the Form I-864A. The form was an enforceable contract against defendant-parents, and defendant-wife had no affirmative duty to mitigate her damages under the contract. Further, defendant-wife's assets did not reduce the amount of support she was entitled to receive. **Zhu v. Deng, 803.**

Contracts—immigration—Form I-864 Affidavit of Support—no duty to mitigate damages—Where defendant-wife, a Chinese citizen, married plaintiff-husband, a U.S. citizen, and came to the U.S. on a K-1 visa, for which plaintiff-husband and his parents (defendant-parents) were the sponsors pursuant to a Form I-864 Affidavit of Support, the trial court erred by concluding as a matter of law that defendant-wife had a continuing duty to mitigate her damages under the Form I-864A contract. **Zhu v. Deng, 803.**

CONVERSION

Conversion—improper dismissal of claim—collateral estoppel—federal court dismissal not an adjudication on merits—The trial court erred by dismissing plaintiff-appellant's conversion claim on the basis of collateral estoppel based on the dismissal of the same claim in federal court. The federal court's dismissal pursuant to Federal Rule 12(b)(6) was not an adjudication on the merits for purposes of collaterally estopping plaintiff from raising the same or related claim under North Carolina state law in our State's courts. **Bishop v. Cty. of Macon, 519.**

CORPORATIONS

Corporations—electrical cooperative—fiduciary duty—capital credits—The trial court did not err by granting defendant electric cooperative's second motion for summary judgment. Defendant did not owe plaintiff members a fiduciary duty with regard to the discounting of capital credits. **Lockerman v. S. River Elec. Membership Corp., 631.**

DAMAGES AND REMEDIES

Damages and Remedies—recoupment—breach of contract—The trial court's order granting summary judgment was reversed and remanded to determine the amount of recoupment, if any, defendant may recover from plaintiffs on its claim for

breach of contract after deduction of any damages proven by plaintiffs. **Settlers Edge Holding Co., LLC v. RES-NC Settlers Edge, LLC, 645.**

DISCOVERY

Discovery—motion for continuance—no request for 11 months—The trial court did not abuse its discretion by denying defendant's request for a continuance. Even if defendant had informed the trial court of specific relevant and admissible matters on which she wanted to conduct discovery, defendant failed to file any motion or request for discovery during the 11 months that the case was pending. **Judith M. Daly Att'y at Law, P.A. v. McKenzie, 611.**

DIVORCE

Divorce—marital property—wedding gifts—Where the trial court determined that $150,000 of money given as wedding gifts was marital property, the Court of Appeals held that the determination was supported by competent evidence and affirmed the trial court on the issue. **Zhu v. Deng, 803.**

DRUGS

Drugs—acting in concert—presence in home where marijuana burning in oven—Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court plainly erred by instructing the jury on acting in concert. The State presented no evidence that defendant had a common plan or purpose to possess marijuana or drug paraphernalia with the other man. At most, the State showed that defendant and the man were acquainted and that defendant was present in the house on the day the drugs were found. **State v. Holloway, 674.**

Drugs—constructive possession—presence in home where marijuana burning in oven—Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court erred by denying defendant's motion to dismiss the charges related to possession of marijuana and drug paraphernalia. Defendant did not live or admit to living in the house, no identifying documents of his were found in the house, and the most incriminating circumstance presented by the State, besides defendant's presence in the house on the day of fire, was a photograph of defendant found face down in a plastic storage bin in one of the bedrooms. **State v. Holloway, 674.**

Drugs—maintaining a dwelling—presence in home where marijuana burning in oven—Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court erred by denying defendant's motion to dismiss the charge of maintaining a dwelling. There was no evidence that defendant was the owner or the lessee of the dwelling, and there was no evidence that defendant paid for its utilities or upkeep. Further, there was no evidence that defendant had been seen in or around the dwelling before or that he lived there. **State v. Holloway, 674.**

EVIDENCE

Evidence—expert testimony—sexual child abuse—report and treatment records—late discovery—additional time to review—The trial court did not

abuse its discretion in a child sexual abuse case by admitting certain expert testimony over defendant's objections. Defendant conceded, both the report and treatment records were made available to defendant in February 2015, and the trial court granted defendant approximately two additional months to review the evidence and prepare to cross-examine the witnesses at trial. **State v. Mendoza, 731.**

Evidence—expert witnesses—treatment records—sexual child abuse—minor child's sexual activity—The trial court did not abuse its discretion in a child sexual abuse case by not allowing defendant to cross-examine two expert witnesses about information in their treatment records regarding the minor child's sexual activity with partners other than defendant father even though it did not fall within one of the categories in the Rape Shield Statute. **State v. Mendoza, 731.**

Evidence—expert witness—letters—bias or prejudice—child advocacy—sexual child abuse—The trial court did not abuse its discretion in a child sexual abuse case by failing to admit into evidence three letters the expert witness wrote that were published in the Winston-Salem Journal in 2003. Defendant failed to demonstrate a reasonable possibility of a different result at trial had the letters been admitted since defendant was still permitted to cross-examine the expert about her possible bias or prejudice in child advocacy matters. **State v. Mendoza, 731.**

JURY

Jury—statement by trial court—futility of requesting to review witness testimony—The trial court erred in defendant's trial for offenses stemming from a robbery and murder by making comments prior to closing arguments that suggested it would be futile for the jury to request to review witness testimony. The error, however, was not prejudicial, as defendant failed to identify any particular testimony by the accomplice witnesses which, if reviewed by the jury, would suggest a reasonable probability of a different result at his trial. **State v. Lyons, 698.**

LIBEL AND SLANDER

Libel and Slander—defamation—libel—slander per se—motion to dismiss—The trial court erred by dismissing plaintiffs' complaint for failure to state a claim for defamation. Plaintiffs stated a claim for libel and slander *per se* sufficient to withstand defendant's motion to dismiss. **Eli Global, LLC v. Heavner, 534.**

NEGLIGENCE

Negligence—contributory—auto collision at stoplight—The evidence at trial was not sufficient to show that plaintiff was contributorily negligent in a case in which plaintiff proceeded straight through an intersection while defendant turned left at the same time in the same intersection. There was nothing in the record to suggest that plaintiff acted unreasonably in assuming that defendant would yield and would not turn her vehicle into plaintiff's path after he entered the intersection. **Daisy v. Yost, 530.**

PLEADINGS

Pleadings—sanctions—sufficiency of evidence—The trial court did not err by denying defendants' motion to impose sanctions. There was no evidence in the record

to support a legal conclusion that sanctions were proper on the basis asserted by defendants. **Bishop v. Cty. of Macon, 519.**

PRETRIAL PROCEEDINGS

Pretrial Proceedings—preliminary injunction—modification—Where a subcontractor filed complaints against a contractor for various claims concerning payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss and granting the subcontractor's motion for a preliminary injunction requiring the contractor to hold in escrow and not disburse or distribute any monies received from the federal government on the projects to any person or entity other than plaintiff subcontractor, the trial court did not abuse its discretion by denying the contractor's motion to alter or amend the preliminary injunction to allow the contractor to pay certain third parties. The trial court carefully considered the contractor's arguments and modified the injunction to permit the U.S. to pay the project surety, who could use the funds to pay subcontractors and suppliers on the project. **Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC, 791.**

SATELLITE-BASED MONITORING

Satellite-Based Monitoring—as-applied challenge to statute—Fourth Amendment—reasonableness inquiry—The satellite-based monitoring program was unconstitutional as applied to defendant. Under *Grady*, the trial court was required to consider the reasonableness of the satellite-based monitoring when defendant challenged the monitoring on Fourth Amendment grounds. The imposition of satellite-based monitoring was vacated and the case was remanded to the trial court to conduct the necessary reasonableness inquiry. **State v. Stroessenreuther, 772.**

Satellite-Based Monitoring—facial challenge to statute rejected—Fourth Amendment—Defendant's facial challenge to the satellite-based monitoring statute was rejected. Although the statute does not expressly authorize trial courts to consider the reasonableness of the monitoring under the Fourth Amendment, trial courts are free to address this issue and hold a hearing if necessary when defendants assert it. **State v. Stroessenreuther, 772.**

SEARCH AND SEIZURE

Search and Seizure—intoxicated driver—totality of circumstances—Where the Grifton Police Department received an anonymous tip regarding an intoxicated driver; a police lieutenant subsequently observed a car matching the description from the tip; and the lieutenant followed the car and observed it driving well below the speed limit, stopping for an unusual period of time before making a right turn, and stopping for fifteen or twenty seconds before crossing railroad tracks, the trial court properly denied defendant's motion to suppress evidence obtained as a result of the stop of his vehicle. The trial court's findings of fact were supported by competent evidence, its conclusions of law were supported by the findings of fact, and, based on the totality of the circumstances, the police lieutenant had reasonable, articulable suspicion to stop defendant. **State v. Mangum, 714.**

Search and Seizure—investigatory stop—motion to suppress evidence—driving while impaired—resisting public officer—driving while license

revoked—exigent circumstance—hot pursuit—The Court of Appeals invoked Rule 2 and held that the trial court did not err by denying defendant's motion to suppress. Hot pursuit is an exigent circumstance sufficient to justify a warrantless entry and arrest. The officers here were in hot pursuit when they initiated an investigatory stop for driving while license revoked in front of defendant's residence and then pursued defendant into his residence to arrest him for resisting a public officer when he did not obey their orders to stop. **State v. Adams, 664.**

Search and Seizure—uniformed officer by marked car—gesture to stop—no seizure—Where a uniformed police officer standing outside of his marked patrol car waved both of his arms above his head to gesture defendant to stop his vehicle, and the officer smelled alcohol coming from inside the vehicle when defendant rolled down his window, the trial court did not err by concluding that defendant was not seized and denying his motion to suppress. Considering the totality of the circumstances, the officer's hand motions were not so authoritative that a reasonable person would not have felt free to leave. **State v. Wilson, 781.**

SENTENCING

Sentencing—enhancement based on prior conviction and habitual felon status—The trial court erred by enhancing defendant's sentence for misdemeanor possession of marijuana to a Class I felony based on a prior conviction and then to a Class E felony based on defendant's habitual felon status. Status as a habitual felon cannot be used to further enhance a sentence that is not itself a substantive offense. **State v. Howell, 686.**

STATUTES OF LIMITATION AND REPOSE

Statutes of Limitation and Repose—conversion—unjust enrichment—unfair or deceptive trade practices—breach of contract—equitable estoppel—The trial court did not err by granting defendant electric cooperative's third motion for summary judgment on the issues of conversion, unjust enrichment, unfair or deceptive trade practices, breach of contract, and equitable estoppel. Plaintiffs' claims were barred by the statute of limitations or were released pursuant to N.C.G.S. § 28A-25-6(e). **Lockerman v. S. River Elec. Membership Corp., 631.**

Statutes of Limitation and Repose—driving while impaired—prosecution within two years—The trial court did not err by dismissing the charge of driving while impaired. The express language of N.C.G.S. § 15-1 required the State to prosecute defendant's misdemeanor charge within two years. Because the State failed to take any action in that time, prosecution was barred by the statute of limitations. **State v. Turner, 776.**

TERMINATION OF PARENTAL RIGHTS

Termination of Parental Rights—best interests of children—findings of fact—The trial court did not abuse its discretion in a termination of parental rights case by determining that termination of the mother's parental rights was in the best interests of the two minor children. The trial court made the requisite findings and respondent failed to show that the court's decision was so arbitrary that it could not have been the result of a reasoned decision. **In re A.H., 546.**

Termination of Parental Rights—care and supervision of child—findings—An order terminating the respondent's parental rights was reversed and the matter was remanded for further proceedings. Respondent's parental rights were terminated on the ground that he was incapable of providing the proper care and supervision of the child. The court's finding to that effect was based on drug use, the inability to care for the child's daily needs, poor decision-making, failure to comply with the case plan, and the lack of an appropriate child care placement arrangement. Those findings were not supported by the evidence and did not support the conclusion that respondent was incapable of providing proper care and supervision. I**n re D.T.N.A., 582.**

Termination of Parental Rights—cessation of reunification efforts—sufficiency of findings of fact—The trial court did not err by entering an order ceasing reunification efforts and an order terminating respondent mother's parental rights. Although the trial court's finding that respondent had not reengaged in therapy since moving to Pitt County was not supported by the evidence presented at the hearing, the remaining findings of fact supported the trial court's ultimate decision to cease reunification efforts. **In re P.T.W., 589.**

Termination of Parental Rights—grounds—abandonment—findings of fact—willfulness—The trial court erred by terminating respondent mother's parental rights on the ground of abandonment where the trial court failed to make findings of willfulness. The trial court's order was vacated and remanded for further findings of fact and conclusions of law regarding N.C.G.S. § 7B-1111(a)(7). **In re D.M.O., 570.**

Termination of Parental Rights—hearing—right to present evidence—The trial court did not abuse its discretion in a termination of parental rights case by allegedly restricting respondent mother's right to present evidence at the termination hearing. The trial court applied the same evidentiary standards to all parties and respondent had the right to participate and present relevant evidence at the disposition hearing. **In re A.H., 546.**

UNFAIR TRADE PRACTICES

Unfair Trade Practices—in or affecting commerce—misappropriation of funds—unlawful acts within a corporation—The trial court erred by concluding that defendant Alexander's actions were in or affecting commerce, and there was no legal basis for finding defendant liable under North Carolina's Unfair and Deceptive Trade Practices Act. Defendant misappropriated Otto Trucking, Inc. funds through payments made directly to himself and his family members as well as payments made to cover personal expenses. The case involved unlawful actions within a single market participant, not outside businesses, distinct corporate entities, or the interruption of a commercial relationship between two market participants. **Alexander v. Alexander, 511.**

Unfair Trade Practices—motion to dismiss—defamation—attorney fees—The trial court erred by dismissing plaintiffs' claim for unfair and deceptive practices. The trial court's dismissal of this claim was predicated on its erroneous determination that plaintiffs had failed to state a claim for defamation. Further, the court erred by awarding attorney fees to defendant under N.C.G.S. § 75-16.1. **Eli Global, LLC v. Heavner, 534.**

Workers' Compensation—additional medical compensation—expiration of statute of limitations—correction of underpayment—The trial court did not err by denying plaintiff's request for additional medical compensation for expiration of the statute of limitations where a corrective payment was made for underpayment of indemnity compensation after the original statute of limitations had expired. Although plaintiff argued that the corrective payment was actually the last payment, so that the statute of limitations had not run, the corrective payment had not yet been made at the time of the Industrial Commission's decision and could not have been the last payment. **Lewis v. Transit Mgmt. of Charlotte, 619.**

Workers' Compensation—corrective payment—laches—remedy at law—The doctrine of laches was not available as an alternative in a workers' compensation case where a corrective payment for an underpayment was ordered after the statute of limitations had initially run. Equitable doctrines are not available in a workers' compensation case where there is a remedy at law; here, both N.C.G.S. § 97-25.1 and 97-47 supplied remedies at law to bar claims where there had been a delay in the case. **Lewis v. Transit Mgmt. of Charlotte, 619.**

Workers' Compensation—indemnity compensation corrected—request for additional medical payments—It was not clear whether the Industrial Commission erred by denying plaintiff's request for additional medical benefits following a corrective payment for indemnity compensation. Because the corrective payment had not yet been made to restart the limitations, the issue of how to treat such corrective payments under N.C.G.S. § 97-25 did not need to be decided and was left to the legislature. **Lewis v. Transit Mgmt. of Charlotte, 619.**

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.

ERIC CARL ALEXANDER, PLAINTIFF
v.
RICHARD C. ALEXANDER, AN INDIVIDUAL, AND OTTO TRUCKING, INC.,
A NORTH CAROLINA CORPORATION, DEFENDANTS

No. COA16-556

Filed 6 December 2016

Unfair Trade Practices—in or affecting commerce—misappropriation of funds—unlawful acts within a corporation

The trial court erred by concluding that defendant Alexander's actions were in or affecting commerce, and there was no legal basis for finding defendant liable under North Carolina's Unfair and Deceptive Trade Practices Act. Defendant misappropriated Otto Trucking, Inc. funds through payments made directly to himself and his family members as well as payments made to cover personal expenses. The case involved unlawful actions within a single market participant, not outside businesses, distinct corporate entities, or the interruption of a commercial relationship between two market participants.

Appeal by defendant from judgment entered 31 July 2015 by Judge Tommy Davis in Macon County Superior Court. Heard in the Court of Appeals 2 November 2016.

Kenney Sloan & VanHook, PLLC, by Stuart Sloan, for plaintiff-appellee.

Griffin Wells, P.A., by M. Chase Wells, for defendant-appellant.

DAVIS, Judge.

This case involves a dispute regarding the meaning of the phrase "in or affecting commerce" as used in North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"). Richard C. Alexander ("Defendant") appeals from a default judgment entered in favor of Eric Carl Alexander ("Plaintiff") on his claims for breach of fiduciary duty, unjust enrichment, and unfair and deceptive trade practices under the UDTPA. On appeal, Defendant argues that the trial court erred in determining that his acts were "in or affecting commerce" for purposes of the UDTPA. After careful review, we affirm in part, reverse in part, and remand for entry of a new judgment.

Factual Background

Defendant and his late brother, Carl Alexander ("Carl"), operated Otto Trucking, Inc. ("Otto Trucking"), a closely-held corporation, together from 1998 until February 2013. The company provided shipping services to Caterpillar, Inc., its sole customer. Originally, out of the 100 total shares of stock in the corporation, Defendant and Carl each held 45 shares, the corporation controlled nine shares, and the bookkeeper, Claire Graham, held the remaining share.

A stock transfer occurred at some point prior to February 2013 as a result of which Defendant held 51 shares, Carl controlled 45 shares, and Graham held the remaining four shares. Upon Carl's death in February 2013, his 45 shares passed to Plaintiff, his son.

Before Carl's death, he and Defendant had generally made decisions regarding shareholder distributions jointly and informally. At the end of each year, they would distribute all of the funds held by the corporation except for those funds necessary to operate the company through the following March.

On 13 May 2015, Plaintiff sued Defendant in Macon County Superior Court alleging that Defendant had misappropriated Otto Trucking's corporate assets. The complaint included allegations that Defendant had (1) "caused the Corporation to pay himself individually a monthly fee to use an area of land near the Defendant's real property . . . to park and store corporate vehicles and equipment[,]" the monthly payment for which was "grossly in excess of a market rent for the land used . . . ."; (2) "used corporate funds and credit to pay for wholly personal expenses," including a vacation to Costa Rica and personal health care; and (3) paid a total of $16,925 in corporate funds to family members and friends even though the payments "had no business purpose . . . ."

In his complaint, Plaintiff alleged that Defendant was liable for breach of fiduciary duty, unjust enrichment, and unfair and deceptive trade practices under the UDTPA. Plaintiff also requested that Otto Trucking be dissolved. Defendant was served with a summons and complaint on 14 May 2015. After Defendant failed to file an answer, Plaintiff moved for entry of default on 18 June 2015, and the clerk of court made an entry of default that same day.

Plaintiff moved for a default judgment on 19 June 2015. A hearing was held on 20 July 2015 before the Honorable Tommy Davis in Macon County Superior Court. Plaintiff, Defendant, and Graham testified at the hearing. The trial court entered a default judgment on 31 July 2015, which included the following pertinent findings of fact:

10. The Defendant RICHARD ALEXANDER, as majority shareholder in the corporation OTTO TRUCKING, INC., over the course of the years 2014 and 2015 misdirected and misappropriated corporate funds to his personal benefit. The amounts found to be misdirected and misappropriated by the Defendant RICHARD ALEXANDER in 2014 and 2015 are as follows:

2014 payments

a) $24,000 in total payments denominated as 'land rent' in the corporation's financial records;

b) $16,925 in total payments made to the Defendant RICHARD ALEXANDER'S mother and other family members;

c) $759.02 in a payment made to purchase airline tickets with Spirit Airlines for a personal trip to Costa Rica;

d) $183.71 in a payment made to Asheville Eye Associates for a personal expense;

e) $389.62 in total payments for personal meals and entertainment;

f) $202.46 in a payment made for golfing;

g) $100 in a payment made for repairs to an excavator;

2015 payments

h) $12,000 in total payments denominated as 'land rent' in the corporation's financial records;

i) $1,490.99 in total payments for personal travel;

j) $202.11 in total payments made for meals and entertainment in Costa Rica;

The total amount of misappropriations for 2014 and 2015 is $56,252.91.

The trial court found Defendant liable for breach of fiduciary duty, unjust enrichment, and unfair and deceptive trade practices under the UDTPA. The court declined to dissolve Otto Trucking "given the profitability and ongoing operation of the business of the company." With regard to Plaintiff's UDTPA claim, the trial court specifically found that Defendant's "acts of misappropriation were unfair and deceptive acts which occurred in and affected commerce."

The trial court determined that had the funds not been misappropriated Plaintiff would have received a $25,313.81 disbursement. Based on the court's conclusion that Plaintiff was entitled to prevail on his UDTPA claim, the court trebled his damages to the amount of $75,941.42 and awarded Plaintiff attorney's fees in the amount of $5,125, resulting in a total judgment for Plaintiff in the amount of $81,066.42. Defendant filed a timely notice of appeal.[1]

Analysis

Defendant's sole argument on appeal is that the trial court erred in finding him liable under the UDTPA because his acts were not "in or affecting commerce."[2] We agree.

Pursuant to Rule 55 of the North Carolina Rules of Civil Procedure, "[w]hen a defendant fails to timely answer a complaint, an entry of default may be made by the clerk on motion of the plaintiff." *Revelle v. Chamblee*, 168 N.C. App. 227, 230, 606 S.E.2d 712, 714 (2005) (citation omitted). Once an entry of default has been made, Rule 55 authorizes the plaintiff to move for entry of a default judgment. *See* N.C. R. Civ. P. 55(b). Upon the filing of a motion for a default judgment, the trial court may hold a hearing in order to "determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter[.]" N.C. R. Civ. P. 55(b)(2)(a).

"Once the default is established defendant has no further standing to contest the factual allegations of plaintiff's claim for relief." *Webb v. McJas, Inc.*, 228 N.C. App. 129, 133, 745 S.E.2d 21, 24 (2013) (citation and quotation marks omitted). If "the allegations of the complaint are sufficient to state a claim, the defendant has no further standing to contest the merits of plaintiff's right to recover." *Hartwell v. Mahan*, 153 N.C. App. 788, 790, 571 S.E.2d 252, 253 (2002) (citation and quotation marks omitted), *disc. review denied*, 356 N.C. 671, 577 S.E.2d 118 (2003). However, "[a] default judgment admits only the allegations contained within the complaint, and a defendant may still show that the complaint is insufficient to warrant plaintiff's recovery." *Webb*, 228 N.C. App. at 133, 745 S.E.2d at 24 (citation and quotation marks omitted).

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1. Although Otto Trucking was named as a defendant in the complaint, it is not a party to this appeal.

2. Defendant does not challenge any aspect of the trial court's default judgment other than its finding that his acts were "in or affecting commerce" and the resulting determination that Defendant was liable under the UDTPA.

The UDTPA, which is contained in Chapter 75 of the North Carolina General Statutes, provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2015). "Whether an act found . . . to have occurred is an unfair or deceptive practice which violates N.C.G.S. § 75-1.1 is a question of law for the court." *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 71, 653 S.E.2d 393, 399 (2007) (citation and quotation marks omitted). If a violation of the UDTPA is shown, the plaintiff is entitled to recover treble damages, and the trial court has the discretion to award attorney's fees. N.C. Gen. Stat. §§ 75-16, -16.1 (2015).

For purposes of the UDTPA, the term " 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b). The phrase " 'business activities' connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010) (citation, quotation marks, brackets, and ellipses omitted).

"Although this statutory definition of commerce is expansive, the [UDTPA] is not intended to apply to all wrongs in a business setting." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 593, 403 S.E.2d 483, 492 (1991). In *White*, our Supreme Court emphasized that the UDTPA "is not focused on the internal conduct of individuals within a single market participant, that is, within a single business[,]" but rather "the General Assembly intended the Act's provisions to apply to interactions *between market participants*." *White*, 364 N.C. at 53, 691 S.E.2d at 680 (emphasis added).

In *White*, three welders formed Ace Fabrication and Welding ("ACE"), a partnership created primarily to provide welding services for a plant owned by Smithfield Packing Company, Inc. ("Smithfield"). *Id.* at 49, 691 S.E.2d at 677. The three partners agreed that they would divide up the contracts they won between themselves and earn hourly wages for the hours each of them actually worked. One of the partners — the defendant — subsequently violated this agreement by (1) hiring several welders not affiliated with ACE to help him perform certain Smithfield jobs that had been awarded to ACE; and (2) bidding for Smithfield welding jobs on behalf of a new company he had formed called PAL. As a result of the defendant's actions, ACE ultimately went out of business. *Id.* at 49-50, 691 S.E.2d at 677-78. The defendant's former business

partners sued him for breach of fiduciary duty and for unfair and deceptive trade practices. *Id.* at 50, 691 S.E.2d at 678.

After the jury found that the defendant had breached his fiduciary duty to the plaintiffs, the trial court determined that the defendant had violated the UDTPA. *Id.* at 51, 691 S.E.2d at 678. Our Supreme Court affirmed the decision of a divided panel of this Court, holding that the defendant's unlawful acts toward his partners did *not* fall within the UDTPA because his acts were not "in or affecting commerce." The Supreme Court explained its ruling as follows:

> [T]he unfairness of [the defendant's] conduct occurred in interaction among the partners within ACE. Plaintiffs were partners with [the defendant] in a single market participant. Plaintiffs alleged and proved that [the defendant] breached his fiduciary duty as a partner in this single market participant. . . . Because [the defendant] unfairly and deceptively interacted only with his partners, his conduct occurred completely within the ACE partnership and entirely outside the purview of the [UDTPA].

Id. at 53-54, 691 S.E.2d at 680.

The Court specifically rejected the argument that the defendant's acts were "in or affecting commerce" on the theory that they caused ACE to cease its operations as a viable competitor in the marketplace for specialty fabrication work, which potentially increased the prices that Smithfield would need to pay for such work in the future. The Court held that such an argument "overlooks that the unfairness of [the defendant's] conduct did not occur in his dealings with Smithfield Packing" and that the defendant "was found to have breached his fiduciary duty to *his partners* through his conduct within the ACE partnership." *Id.* at 54, 691 S.E.2d at 680 (emphasis added). The Supreme Court concluded that "[t]he General Assembly simply did not intend for such conduct to fall within the [UDTPA]'s coverage." *Id.*

We believe that the Supreme Court's analysis in *White* compels a result in Defendant's favor in the present case. Here, the evidence shows that the unlawful acts by Defendant involved his misappropriation of Otto Trucking funds through payments made directly to himself and his family members as well as payments made to cover some of his own personal expenses.

As in *White*, the "unfairness of [Defendant's] conduct did not occur in his dealings with [other market participants.]" *Id.* The inflated

payments that Defendant caused Otto Trucking to make to himself — as "land rent" in connection with the storage of the company's vehicles — and the other payments he caused Otto Trucking to make for the benefit of himself and his family members are more properly classified as the misappropriation of corporate funds within a single entity rather than commercial transactions between separate market participants "in or affecting commerce." Like the plaintiff in *White*, Plaintiff here "alleged and proved that [Defendant] breached his fiduciary duty as [co-owner of] this single market participant. . . . Because [Defendant] unfairly and deceptively interacted only with [Plaintiff, his co-owner], his conduct occurred completely within [the corporation] and entirely outside the purview of the [UDTPA]." *Id.* at 53-54, 691 S.E.2d at 680.

The cases cited by Plaintiff are materially distinguishable. Defendant principally relies on *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999), *disc. review denied*, 365 N.C. 360, 718 S.E.2d 396 (2011). In that case, the defendant-employee of the plaintiff, Sara Lee Corporation ("Sara Lee"), was responsible for purchasing computer equipment for Sara Lee from outside vendors. The defendant created several companies through which he sold Sara Lee equipment at inflated prices while concealing his own ownership interests in those businesses. *Id.* at 29, 519 S.E.2d at 309.

The trial court found that the defendant had breached his fiduciary duty to Sara Lee through this self-dealing and that his acts came within the UDTPA, and the Supreme Court agreed that the defendant's actions were "in or affecting commerce." The Court held that "[t]rusting that these were legitimate transactions secured at competitive prices in the marketplace, [Sara Lee] regularly conducted business with the companies in which defendant had an interest. In this case, defendant and plaintiff clearly engaged in buyer-seller relations in a business setting[.]" *Id.* at 33, 519 S.E.2d at 312. In *White*, the Supreme Court distinguished *Sara Lee*, noting that there "the defendant-employee's unfair or deceptive actions were within the [UDTPA]'s ambit because they did not occur solely within the employer-employee relationship, but rather occurred in interactions between the plaintiff and the defendant's outside businesses." *White*, 364 N.C. at 53, 691 S.E.2d at 680.

Defendant also cites *Songwooyarn Trading Co. v. Sox Eleven, Inc.*, 213 N.C. App. 49, 714 S.E.2d 162 (2011). In that case, the plaintiff corporation, Songwooyarn Trading Company ("Songwooyarn"), created a separate corporation, Sox Eleven, Inc. ("Sox Eleven"), and hired the defendant, Ung Chul Ahn, to operate it. Sox Eleven was set up as an intermediary to facilitate the sale of socks manufactured by Songwooyarn

— a South Korean company — to wholesalers in the United States. *Id.* at 51, 714 S.E.2d at 164. Songwooyarn sued Ahn after he failed to remit to Songwooyarn a payment that had been made by a wholesaler to Sox Eleven for an order of socks sold by Songwooyarn. The trial court found Ahn liable under the UDTPA. *Id.* at 53, 714 S.E.2d at 166.

On appeal, this Court affirmed the trial court's ruling, finding the case to be analogous to *Sara Lee* and relying on the fact that Songwooyarn and Sox Eleven were "distinct corporate entities." *Id.* at 57, 714 S.E.2d at 168. We held as follows:

> By misappropriating th[e] funds, Defendant Ahn interrupted the commercial relationship between Songwooyarn and Sox Eleven. Because there are multiple companies, including a North Carolina corporation, involved, we conclude that Ahn's actions were "in or affecting commerce" and constituted unfair or deceptive acts or practices.

Id.

Unlike in *Sara Lee* and *Songwooyarn*, the present case does not involve "outside businesses," "distinct corporate entities," or the interruption of a "commercial relationship" between two market participants. Rather, as in *White*, the unlawful acts at issue here occurred within a single market participant.

For these reasons, the trial court erred in concluding that Defendant's actions were "in or affecting commerce." Therefore, no legal basis existed for finding Defendant liable under the UDTPA and awarding Plaintiff treble damages and attorney's fees.

Conclusion

For the reasons stated above, we reverse the portion of the trial court's 31 July 2015 judgment finding Defendant liable under the UDTPA, trebling the amount of damages, and awarding Plaintiff attorney's fees. Accordingly, we remand this matter for entry of a new judgment consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Judges INMAN and ENOCHS concur.

BISHOP v. CTY. OF MACON

[250 N.C. App. 519 (2016)]

DONNA J. BISHOP AND JOHN WILLIAM BISHOP, PLAINTIFFS
v.
COUNTY OF MACON; MACON COUNTY SHERIFF'S DEPARTMENT; ROBERT L. HOLLAND, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF MACON COUNTY; C.J. LAU, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY SHERIFF OF MACON COUNTY; GARY GARNER AND W.T. POTTS, DEFENDANTS

No. COA16-350

Filed 6 December 2016

1. Conversion—improper dismissal of claim—collateral estoppel—federal court dismissal not an adjudication on merits

The trial court erred by dismissing plaintiff-appellant's conversion claim on the basis of collateral estoppel based on the dismissal of the same claim in federal court. The federal court's dismissal pursuant to Federal Rule 12(b)(6) was not an adjudication on the merits for purposes of collaterally estopping plaintiff from raising the same or related claim under North Carolina state law in our State's courts.

2. Pleadings—sanctions—sufficiency of evidence

The trial court did not err by denying defendants' motion to impose sanctions. There was no evidence in the record to support a legal conclusion that sanctions were proper on the basis asserted by defendants.

Appeal by plaintiff Donna J. Bishop and cross-appeal by defendants Macon County Sheriff's Department; Robert L. Holland, individually and in his official capacity as Sheriff of Macon County; C.J. Lau, individually and in his official capacity as Deputy Sheriff of Macon County, and W.T. Potts from order entered 5 October 2015 by Judge Robert T. Sumner in Macon County Superior Court. Heard in the Court of Appeals 20 September 2016.

Bidwell & Walters, P.A., by Paul Louis Bidwell and Jessica A. Walters, for plaintiff-appellant Donna J. Bishop.

Bidwell & Walters, P.A., by Paul Louis Bidwell and Douglas A. Ruley, for plaintiff-appellee John William Bishop.

Womble, Carlyle, Sandridge and Rice, LLP, by Sean F. Perrin, for defendant-appellants Macon County, Macon County Sheriff's Department, Robert Holland, and C.J. Lau.

Long, Parker, Warren, Anderson & Payne, P.A., by Ronald K. Payne, for defendant-appellant W.T. Potts.

BRYANT, Judge.

Where a federal court's dismissal of claims pursuant to Federal Rule 12(b)(6) is not an adjudication on the merits for purposes of collaterally estopping a plaintiff from raising the same or related claim under North Carolina State law in our State's courts, the trial court erred in dismissing plaintiff-appellant's conversion claim based on collateral estoppel, and we reverse. Where there is no evidence in the record to support a legal conclusion that sanctions are proper, we affirm the trial court's order denying defendants' motion to impose sanctions.

In September 2006, John William Bishop resided with his friend, Gary Garner, in Macon County, North Carolina. During that time, John Bishop worked for W.T. Potts, who operated a real estate management company. Between late 2006 and early 2007, multiple larcenies were reported by owners of vacation homes managed by Potts. On 1 March 2007, John Bishop went to live with his mother, Donna J. Bishop.

Three days later, Garner filed a complaint with the Macon County Sheriff's Department, accusing John Bishop of stealing cash from him and telling investigating officers that John Bishop was in possession of stolen goods. On or about 20 March and 11 April 2007,[1] based on Garner's allegations, Deputy Sheriff C.J. Lau executed search warrants at the home of John Bishop and his mother, Donna, and seized numerous items of personal property. The Bishops alleged that the items seized were not identified either in the applications for the warrants or in the warrants themselves. The seized items included two televisions, a remote control, a surround-sound system, a router, and eight oriental rugs of varying sizes. It is alleged that Deputy Lau released the seized property to Potts, but did not instruct Potts to preserve the seized property; instead, the Bishops allege Potts distributed items to purported victims of the larcenies, and kept or disposed of the remainder of the property.

Following the execution of the search warrants, Donna Bishop was arrested on charges of possession of stolen property, which were later dismissed. The Bishops alleged the charges were dismissed for "insufficient evidence, in return for guilty pleas by [her son, John Bishop],

1. The dates on which the search warrants were executed vary throughout the record.

entered, in part, to protect his mother." John Bishop entered *Alford* pleas to two charges of breaking and entering. The Bishops demanded that their personal property be returned, but their demand was refused.

On 5 April 2010, the Bishops filed a federal court complaint against Garner, Potts, the County of Macon, and the Macon County Sheriff's Office (collectively, "defendants"), arising out of the same incidents alleged in the complaint filed in the instant case, including claims under 42 U.S.C. § 1983 against Sheriff Robert L. Holland and Deputy Lau. *See State of N.C. ex. rel. Bishop v. Cnty. of Macon et. al*, 2: 10cv09, 2010 WL 4640222 (W.D.N.C. Aug. 22, 2010). In addition to the section 1983 claims alleging violations of the Fourth and Fourteenth Amendments for arrest and illegal seizure, the Bishops alleged state claims of negligence, false arrest, malicious prosecution, conversion, bailment, and punitive damages. *See id.* All the named defendants filed motions to dismiss and, by order filed 22 August 2011, the Honorable Martin Reidinger dismissed the federal and state law claims without prejudice.

The Bishops appealed to the United States Court of Appeals for the Fourth Circuit and Judge Reidinger's order was affirmed in part, vacated in part, and remanded. *Bishop v. Cnty. of Macon et. al*, No. 11-2021, 2012 WL 2366162 (4th Cir. June 22, 2012) (per curiam) (unpublished). The Fourth Circuit held John Bishop's federal section 1983 suit was barred by *Heck v. Humphrey*, 512 U.S. 477, 129 L.Ed.2d 383 (1994), which holds that a section 1983 suit must be dismissed if "judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." 2012 WL 2366162 at *1; *see Heck*, 512 U.S. at 486, 129 L.Ed.2d at 393–94 ("[T]he hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction . . . ."). The Fourth Circuit reasoned that John Bishop's "success on his claim for deprivation of property would . . . imply the invalidity of his convictions" as they "cannot stand without evidence that John was in possession of the stolen items. This is so because his possession was the only evidence that John committed any offense." *Bishop*, 2012 WL 2366162 at *2 (citation omitted). The Fourth Circuit held that *Heck* did not bar Donna Bishop's section 1983 claims and remanded those and the remaining state claims to the district court. *Id.*

On remand, Donna Bishop's federal claims and both John and Donna's state claims for negligence and bailment were dismissed with prejudice by the Honorable Max Cogburn on 29 September 2014. Judge Cogburn declined to exercise supplemental jurisdiction over the remaining state

law claims for false arrest, malicious prosecution and abuse of process, and conversion, and dismissed them without prejudice. On 28 October 2014, the Bishops filed notice of appeal to the Fourth Circuit.

On 18 November 2014, the Bishops (hereinafter, "plaintiffs") filed their complaint in the instant case in Buncombe County Superior Court based on the same facts alleged in federal court, but omitting the federal claims. Subsequently, plaintiffs filed a motion to stay proceedings in superior court as "the determination of [plaintiffs'] state law claims remain[ed] on appeal at [that] time . . . [and] in the event that the Fourth Circuit Court of Appeals affirms the lower Court's ruling."

Venue was changed to Macon County, and thereafter, defendants County of Macon, Macon County Sheriff's Department, Sheriff Holland, Deputy Lau, and Potts[2] filed a motion to dismiss the entire complaint and a motion for sanctions against plaintiffs and their respective counsel. On 9 July 2015, the Fourth Circuit affirmed Judge Cogburn's order in *Bishop v. Cnty. of Macon et. al*, No. 14-2172, 2015 WL 4126427 (4th Cir. July 9, 2015) (per curiam) (unpublished).

Thereafter, plaintiffs dismissed all claims of negligence, malicious prosecution, abuse of process, and bailment. At a 14 September 2015 hearing on defendants' motions to dismiss, plaintiffs also dismissed claims against Macon County. As a result, the only claims remaining on the date of the hearing were for conversion, false arrest (against all defendants except Potts), and a claim for punitive damages. On 5 October 2015, the Honorable Robert T. Sumner granted defendants' motion to dismiss plaintiffs' complaint and denied defendants' motion for sanctions. Donna Bishop ("plaintiff-appellant") appealed, and defendants cross-appealed the denial of their motion for sanctions only as against John Bishop and his counsel.

I. Plaintiff-Appellant's Appeal

[1] On appeal, plaintiff-appellant Donna Bishop argues the trial court erred in dismissing her claim for conversion on the basis of collateral estoppel based on the dismissal of the same claim in federal court. We agree, as the federal court's dismissal was not an adjudication on the merits.

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2. Defendant Gary Garner was the only defendant who did not file any motions in the instant case.

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted).

"The elements of collateral estoppel . . . are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (2008) (quoting *McDonald v. Skeen*, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211 (2002)). In other words, "[u]nder collateral estoppel, parties are precluded from retrying *fully litigated* issues that were decided in any prior determination, even where the claims asserted are not the same." *McCallum v. N.C. Coop. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001) (emphasis added) (citation omitted). Thus, "even if the subsequent action is based on an entirely different *claim*[,]" collateral estoppel bars "the subsequent adjudication of a previously determined *issue*[.]" *Williams v. City of Jacksonville Police Dep't*, 165 N.C. App. 587, 591–92, 599 S.E.2d 427–28 (2004) (emphasis added) (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)).

Collateral estoppel also applies where, as here, the first adjudication is conducted in federal court and the second in state court. *McCallum*, 142 N.C. App. at 52, 542 S.E.2d at 231 (citation omitted). "Thus, as an initial step, we must determine whether the federal court's dismissal of [p]laintiffs' claims under *Federal* Rule 12(b)(6) was a final judgment on the merits that actually decided the issue of [conversion]." *Fox v. Johnson*, ___ N.C. App. ___, ___, 777 S.E.2d 314, 323 (2015) (emphasis added), *disc. rev. denied*, 368 N.C. 679, 781 S.E.2d 480 (2016).

In *Fox*, this Court held that the dismissal of a federal case for failure to state a claim was not an adjudication on the merits for the purpose of collateral estoppel, as it would have been if it had been dismissed

pursuant to North Carolina Rule 12(b)(6). *Id.* at ___, 777 S.E.2d at 324 ("It is well settled that '[a] dismissal under [North Carolina Rule of Civil Procedure] Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice." (alterations in original) (quoting *Hoots v. Pryor*, 106 N.C. App. 397, 404, 417 S.E.2 269, 274 (1992))). This holding was based in large part on the heightened pleading standard under Federal Rule 12(b)(6), which "is a different, *higher* pleading standard than mandated under our own General Statutes." *Id.* (noting "[t]he purpose of a motion under Federal Rule 12(b)(6) is to test[ ] the sufficiency of a complaint and *not to resolve contests surrounding the facts*, *the merits of a claim*, *or the applicability of defenses*" (alterations in original) (citation omitted)); *see generally Ashcroft v. Iqbal*, 556 U.S. 662, 173 L.Ed.2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 167 L.Ed.2d 929 (2007). This Court also noted in *Fox* that "the federal court explicitly applied the so-called 'plausibility' pleading standard as enunciated . . . in . . . *Twombly*[.]" *Fox*, ___ N.C. App. at ___, 777 S.E.2d at 324.

Thus, this Court noted that

> the "issue actually litigated in the prior suit . . . and . . . actually determined" by the federal court, *see Bluebird Corp.*, 188 N.C. App. at 678, 657 S.E.2d at 61 (citation and internal quotation marks omitted), was whether Plaintiffs' pleadings met the plausibility standard applicable to motions to dismiss pursuant to Federal Rule 12(b)(6). The federal court's opinion simply did not consider or address the issue of whether Plaintiffs' pleadings sufficiently stated a claim to survive a motion to dismiss pursuant to the *notice pleading requirements of North Carolina Rule 12(b)(6)*.

Id. at ___, 777 S.E.2d at 325 (alterations in original) (emphasis added).

Similarly, in the instant case, Judge Cogburn's order did not specifically note it was referencing *Federal* Rule 12(b)(6) in discussing defendants' motion to dismiss. However, just as the federal court did in *Fox*, in citing and explaining the law relating to motions to dismiss for failure to state a claim, Judge Cogburn cited only to federal case law, including *Twombly* and *Iqbal*, the two cases which have become synonymous with the federal heightened-pleading standard. *See id.* at ___, 777 S.E.2d at 324. Furthermore, the federal court in the instant case declined to exercise its supplemental jurisdiction over the state law claims, including the conversion claim, "[i]n the interest of avoiding needless decisions of state law[.]" In so doing, it dismissed the claim "without prejudice,"

essentially choosing "not to resolve contests surrounding the facts, the merits of [the] claim, or the applicability of defenses" to the conversion claim. *Id.*

Thus, "[g]iven the difference between the federal and State pleading standards, we must conclude," as this Court did in *Fox*, "that a federal court's dismissal of claims pursuant to Federal Rule 12(b)(6) is not an adjudication on the merits for purposes of collaterally estopping . . . plaintiff[s] from raising the same or related claim[] under State law in our State's courts." *Id.* at ___, 777 S.E.2d at 325 (citation omitted). Accordingly, the trial court erroneously granted defendants' motion to dismiss based upon their assertion of collateral estoppel as plaintiffs' claim for conversion was not "fully litigated" in federal court. *See McCallum*, 142 N.C. App. at 51, 542 S.E.2d at 231.

II. Defendants' Cross-Appeal

On cross-appeal, defendants contend the trial court erred in denying defendants' motions for Rule 11 sanctions against John Bishop and his counsel. Specifically, defendants contend Bishop's complaint lacked legal sufficiency as the statute of limitations barred all of his claims, or alternatively, his claims were barred by res judicata, collateral estoppel, and other well-established law. We disagree.

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

North Carolina Rule of Civil Procedure 11(a) provides as follows:

> The signature of an attorney or party [on a pleading] constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing

> law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2015). "A pleading lacking in any of [the three above-mentioned areas—legal sufficiency, factual sufficiency, or proper purpose—]is sufficient to support sanctions under Rule 11." *Golds v. Central Express, Inc.*, 142 N.C. App. 664, 668, 544 S.E.2d 23, 27 (2001) (citation omitted).

"A court's failure to enter findings of fact and conclusions of law on this issue is error which generally requires remand in order for the trial court to resolve any disputed factual issues." *McClerin v. R-M Indus., Inc.*, 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995) (citation omitted). "However, remand is not necessary when there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper." *Id.* (citation omitted). Here, defendants' challenge to the court's ruling mainly concerns the legal sufficiency of the complaint.

> Whether a motion is legally sufficient requires this Court to look at "the facial plausibility of the pleading and only then, if the pleading is implausible under existing law, to the issue of whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by existing law."

In re Thompson, 232 N.C. App. 224, 230, 754 S.E.2d 168, 173 (2014) (quoting *Polygenex Int'l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 249, 515 S.E.2d 457, 460 (1999)).

A. Statute of Limitations

When supplemental state law claims are within a federal court's jurisdiction because the action was brought pursuant to federal or constitutional law, "a voluntary dismissal under the Federal Rules in a non-diversity case in federal court does not toll the statute of limitations or invoke a savings provision." *Bockweg v. Anderson*, 328 N.C. 436, 439, 402 S.E.2d 627, 629 (1991).

After a state claim is dismissed in federal court, the state period of limitations is "tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period." *Harter v. Vernon*, 139 N.C. App. 85, 94, 523 S.E.2d 836, 841–42

(2000) (quoting *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 435, 538 S.E.2d 911, 914 (2000)). Defendants contend that John Bishop had until 22 July 2012—thirty days after the 2012 Fourth Circuit order—to refile his state claims to avoid the statute of limitations, and that by filing on 18 November 2014, his claims were barred. Defendants' argument relies on the initial 22 August 2011 order dismissing John Bishop's state law claims, which order was affirmed by the Fourth Circuit on 22 June 2012. However, John Bishop's state law claims were dismissed without prejudice and, in the 29 September 2014 order, the federal court resolved the issue regarding the status of John Bishop's state law claims by addressing them as well as those of Donna Bishop:

> "The Court finds that public official immunity stands in bar to the claims against Holland and Lau based on negligence and bailment in their individual capacities. The same reasoning bars any such claim by *Mr. Bishop* against Holland and Lau in their individual capacities.
>
> . . .
>
> 2. The Third Claim for Relief asserted by *John Bishop* . . . based on negligence are [sic] hereby **DISMISSED** with prejudice as to Holland and Lau in their individual capacities;
>
> 3. The Seventh Claim for Relief asserted by *John Bishop* . . . based on bailment are [sic] hereby **DISMISSED** with prejudice as to Holland and Lau in their individual capacities[.]

(Emphasis added).

Pursuant to the express terms of this order, some, if not all, of John Bishop's state law claims survived in the federal court proceedings at least until the entry of the federal court's 29 September 2014 order. Therefore, at a minimum, John Bishop had thirty days to refile in state court, which deadline he met on 29 October 2014 by filing an application for extension of time. Accordingly, his claims were not barred by the statute of limitations.

B. Res Judicata or Collateral Estoppel

[2] Defendants also argue the trial court erred in imposing sanctions as John Bishop's conversion claim was barred by res judicata and collateral estoppel as the 29 September 2014 order determined that the seizures were lawful and "[o]ne of the essential elements of conversion

is wrongful possession by the defendants." For the reasons stated in Section I and those that follow, we disagree.

Under the doctrine of res judicata, "a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993) (citation omitted). Under the doctrine of collateral estoppel, "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Williams*, 165 N.C. App. at 589, 599 S.E.2d at 427 (quoting *Whitacre P'ship*, 358 N.C. at 15, 591 S.E.2d at 880).

Here, defendants contend that because defendants Macon County and the Macon County Sheriff's Department were dismissed as parties in the federal lawsuit, res judicata barred any claims against them in this lawsuit. Defendants' argument is supported almost entirely by federal district court cases, none of which are from North Carolina or even the Fourth Circuit, and one North Carolina state case which is inapplicable here.

Here, the controlling 29 September 2014 order, which defendants contend bars John Bishop's state claims based on res judicata, addressed the merits of both plaintiffs' state law claims for negligence and bailment, addressed the liability of Macon County in the course of dismissing Donna Bishop's federal claims, and declined to exercise supplemental jurisdiction over all remaining state law claims. John Bishop responded to this order by (1) appealing to the Fourth Circuit the issue of whether the federal court acted properly in addressing the merits of some of plaintiffs' state law claims once the federal claims were dismissed; (2) filing the instant state court action within the thirty-day tolling period, but then obtaining a stay pending appeal; and (3) voluntarily dismissing the claims the federal court addressed on the merits once that order was affirmed by the Fourth Circuit Court of Appeals on 29 June 2015.

Thus, the only state law claims that could conceivably be barred by res judicata or collateral estoppel based on the federal court's decision are the claims for negligence and bailment, even assuming the federal court's dismissal of these claims for failure to state a claim pursuant to Rule 12(b)(6) functioned as "a final judgment on the merits that actually decided the issue[s] . . . ." *Fox*, ___ N.C. App. at ___, 777 S.E.2d at 323;

see also supra Section I. Accordingly, defendants' argument that the trial court erred in failing to impose sanctions on John Bishop based on the filing of claims barred by res judicata is overruled.

Defendants' argument regarding collateral estoppel—that the federal court's ruling that the seizures were lawful precludes relitigating the issue of conversion because "wrongful possession" is a necessary element of conversion—is without merit. To the contrary, a conversion claim requires wrongful possession *or conversion*, *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (citation omitted), and the latter element can occur through a wrongful failure to hold property as required by law after the defendant lawfully came into possession of the property. *See Heaton-Sides v. Snipes*, 233 N.C. App. 1, 3–5, 755 S.E.2d 648, 650–51 (2014) (reversing the trial court's conclusion of law that the plaintiff failed to prove her conversion claim in a foreclosure action where the defendants provided the plaintiff with only one opportunity to remove personal property from foreclosed property once defendants were placed in lawful possession of the same). Like Donna Bishop's claim for conversion, John's claim alleged the element of wrongful conversion based on defendants' alleged "dispos[al] of evidence seized in execution of the subject search warrants" or defendants' failure to "preserve[] the evidence seized in the execution of the search warrants . . . ." Accordingly, for the reasons stated here and in Section I, John Bishop's conversion claim appeared to be well grounded in fact and law.

Lastly, defendants contend John Bishop wrongfully asserted claims seeking to hold nonsuable entities, defendants Macon County and Macon County Sheriff's Department, responsible for alleged wrongdoings of deputy sheriffs, despite precedent which holds otherwise. We disagree.

It is true that "[t]here is no North Carolina statute authorizing suit against a county's sheriff's department." *Efird v. Riley*, 342 F. Supp. 2d 413, 420 (M.D.N.C. 2004). However, where, as here, "[p]laintiffs took voluntary dismissals on all claims asserted in the Complaint except conversion" prior to the 14 September 2015 hearing, and there is no evidence that the voluntary dismissals were taken in "bad faith," *see Stocum v. Oakley*, 185 N.C. App. 56, 65, 648 S.E.2d 227, 234 (2007) ("[V]oluntary dismissals must be taken in good faith and with the intent to pursue the action." (citation omitted)), and defendants put forth no evidence to show the existence of an improper purpose, defendants' argument is overruled.

Accordingly, because "there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper[,]" we affirm the trial court's denial of the motion for sanctions.

In conclusion, based on all of the foregoing, the trial court erred in dismissing Donna Bishop's conversion claim based on collateral estoppel as "a federal court's dismissal of claims pursuant to Federal Rule 12(b)(6) is not an adjudication on the merits for purposes of collaterally estopping . . . plaintiff[s] from raising the same or related claim[] under State law in our State's courts." *Fox*, ___ N.C. App. at ___, 777 S.E.2d at 325 (citation omitted). In addition, the trial court did not err by denying defendants' motion to impose sanctions on John Bishop where the record does not contain evidence to support sanctions on the basis asserted by defendants.

REVERSED IN PART; AFFIRMED IN PART.

Judges STEPHENS and DILLON concur.

WILLIAM L. DAISY, PLAINTIFF
v.
BEULAH LESTER YOST, DEFENDANT

No. COA16-324

Filed 6 December 2016

Negligence—contributory—auto collision at stoplight

The evidence at trial was not sufficient to show that plaintiff was contributorily negligent in a case in which plaintiff proceeded straight through an intersection while defendant turned left at the same time in the same intersection. There was nothing in the record to suggest that plaintiff acted unreasonably in assuming that defendant would yield and would not turn her vehicle into plaintiff's path after he entered the intersection.

Appeal by Plaintiff from judgment entered 3 September 2015 and order entered 7 December 2015 by Judge Eric C. Morgan in Guilford County Superior Court. Heard in the Court of Appeals 20 September 2016.

Carruthers & Roth, PA., by Richard L. Vanore, Norman F. Klick, Jr., and Mark K. York, for the Plaintiff-Appellant.

Law Office of William T. Corbett, Jr. PLLC, by William T. Corbett, Jr., for the Defendant-Appellee.

DILLON, Judge.

I. Background

William L. Daisy ("Plaintiff") and Beulah Lester Yost ("Defendant") were involved in an automobile collision in Greensboro. The uncontested evidence at trial established that the collision occurred as follows: Plaintiff was approaching an intersection at the posted speed limit intending to continue straight. Defendant was approaching the same intersection from the opposite direction intending to make a left-hand turn across Plaintiff's lane of travel.

When Plaintiff arrived at the intersection, his light had turned from green to yellow. When Defendant arrived at the intersection in her left turn lane, her light had turned from a flashing yellow arrow to a solid yellow arrow. As Plaintiff proceeded *straight through the intersection*, Defendant made a left turn across Plaintiff's lane of travel, causing the front of Defendant's turning vehicle to strike the side of Plaintiff's vehicle, pushing it into a light post at the corner of the intersection.

Plaintiff commenced this action against Defendant seeking compensatory damages for personal injuries and property damage resulting from the collision.[1] Plaintiff moved for a directed verdict on the issue of contributory negligence. The trial court denied the motion and submitted the issue to the jury. The jury returned a verdict finding that (1) the collision was proximately caused by the negligence of Defendant, but that (2) Plaintiff was contributorily negligent in causing the collision. Based on the jury's verdict, the trial court entered judgment for Defendant. Plaintiff subsequently filed a motion for judgment notwithstanding the verdict ("JNOV"), and alternatively, motion for a new trial. The trial court denied Plaintiff's motion, and Plaintiff timely appealed.

II. Analysis

On appeal, Plaintiff makes a number of arguments, including the argument that there was no evidence to support the jury instruction on the issue of Plaintiff's contributory negligence. We conclude that the evidence presented at trial was not sufficient to warrant a jury instruction

1. Because the parties stipulated to the amount of damages prior to trial, this issue was not submitted for determination by the jury.

on the issue of contributory negligence and therefore reverse the ruling of the trial court on this issue. Based on this conclusion, we need not address Plaintiff's remaining arguments.

Contributory negligence is defined as "negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967).

With respect to contributory negligence as a matter of law, "[t]he general rule is that a directed verdict for [the moving party] on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to [the non-moving party] establishes the [non-moving party's] negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom." *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976). "If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied." *Whisnant v. Herrera*, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004). The non-moving party must be given "the benefit of every inference which may reasonably be drawn in [her] favor." *Hicks v. Food Lion, Inc.*, 94 N.C. App. 85, 88, 379 S.E.2d 677, 679 (1989).

In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: "(1) [a] want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *West Constr. Co. v. Atlantic Coast Line R.R. Co.*, 184 N.C. 179, 180, 113 S.E.2d 672, 673 (1922).[2] A plaintiff may move for a directed verdict on the issue of contributory negligence at the close of all the evidence. *Hawley v. Cash*, 155 N.C. App. 580, 583, 574 S.E.2d 684, 686 (2002). Here, the motion should have been granted if there was not "more than a scintilla of evidence" supporting each element of Defendant's claim that Plaintiff was contributorily negligent. *Id.*

In the present case, we conclude that there was not more than a scintilla of evidence that Plaintiff was contributorily negligent in causing the collision. Plaintiff testified that he was approximately one-hundred (100) feet from the center of the intersection and traveling at the posted speed limit of thirty-five (35) miles per hour when he first noticed

2. Because contributory negligence is an affirmative defense, the burden of proof on the issue of contributory negligence rests with the defendant. *Clary v. Alexander County Bd. Of Ed.*, 286 N.C. 525, 532, 212 S.E.2d 160, 165 (1975).

Defendant's vehicle and when his traffic signal changed from green to yellow. After determining that he could not safely bring his vehicle to a stop before the light turned red, Plaintiff proceeded through the intersection at thirty-five (35) miles per hour while his light was still yellow.

Defendant did not put on any evidence. On appeal, Defendant points to the testimony of a witness who was at the accident scene, who stated on cross-examination that "it seemed like [Plaintiff] was going fast" as evidence of Plaintiff's negligence. However, this witness actually testified that she was not looking at the intersection prior to the collision and "didn't see [Plaintiff's] car driving" or "going into the intersection." The witness's statement regarding Plaintiff's speed was solely in reference to "the way [Plaintiff's] car bounced off [the light post]" *after* Defendant's car had collided with Plaintiff's car. We conclude that the testimony of this witness does not amount to "more than a scintilla" of evidence showing that Plaintiff was contributorily negligent in causing the collision. Even viewed in a light most favorable to Defendant, *Green v. Rouse*, 116 N.C. App. 647, 650, 448 S.E.2d 846, 847 (1994), the evidence fails to raise even a "mere conjecture" of contributory negligence on the part of Plaintiff. *See Jones v. Holt*, 268 N.C. 381, 384, 150 S.E.2d 759, 762 (1966) (holding that if the evidence "merely raises a conjecture" of contributory negligence, the issue must not be submitted to the jury).

In addition, N.C. Gen. Stat. § 20-155(b) provides that "[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." N.C. Gen. Stat. § 20-155(b) (2015). While Plaintiff certainly had a duty to drive no faster than was safe under the circumstances, to keep his vehicle under control, to maintain a reasonably careful lookout, and to take reasonably prudent steps to avoid a collision, "he [was] entitled to assume, even to the last moment," that Defendant, "[would] comply with the law . . . before entering [Plaintiff's lane of travel]." *Snider v. Dickens*, 293 N.C. 356, 358, 237 S.E.2d 832, 834 (1977); *see also Penland v. Greene*, 289 N.C. 281, 283, 221 S.E.2d 365, 368 (1976) (holding that a person has no duty to anticipate negligence on the part of others and "has the right to assume and to act on the assumption that others will observe the rules of the road and obey the law"). The right to rely on this assumption, though, is not absolute. *Id.* Where circumstances which exist at the time are such that a reasonable person would be on notice that he cannot rely on the assumption that other drivers would yield to his right of way, he is under a duty "to exercise that care which a reasonably careful and prudent person would exercise under

all the circumstances then existing." *Id.* However, here, there is nothing in the record which suggests that Plaintiff failed to act reasonably in assuming that Defendant would yield and would not turn her vehicle into his path after he entered the intersection.

In conclusion, we find that the evidence at trial was not sufficient to show that Plaintiff was contributorily negligent in causing the collision. Plaintiff's motion for directed verdict should have been granted and the issue of contributory negligence should not have been submitted to the jury. Therefore, we reverse the judgment of the trial court. Further, because the jury determined that Defendant was negligent in causing Plaintiff's damages, we direct the trial court on remand to enter judgment in favor of Plaintiff for the amount of damages already stipulated to by the parties.

REVERSED AND REMANDED.

Judges BRYANT and STEPHENS concur.

ELI GLOBAL, LLC AND GREG LINDBERG, PLAINTIFFS
v.
JAMES A. HEAVNER, DEFENDANT

No. COA16-186

Filed 6 December 2016

1. Libel and Slander—defamation—libel—slander per se—motion to dismiss

The trial court erred by dismissing plaintiffs' complaint for failure to state a claim for defamation. Plaintiffs stated a claim for libel and slander *per se* sufficient to withstand defendant's motion to dismiss.

2. Unfair Trade Practices—motion to dismiss—defamation—attorney fees

The trial court erred by dismissing plaintiffs' claim for unfair and deceptive practices. The trial court's dismissal of this claim was predicated on its erroneous determination that plaintiffs had failed to state a claim for defamation. Further, the court erred by awarding attorney fees to defendant under N.C.G.S. § 75-16.1.

Appeal by plaintiffs from orders entered 24 July 2015 and 13 August 2015 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 24 August 2016.

Smith Moore Leatherwood, LLP, by Matthew Nis Leerberg and Kip David Nelson, and Anderson Tobin, PLLC, by Kendal B. Reed (pro hac vice), for plaintiff-appellants.

Hoof Hughes Law, PLLC, by James H. Hughes, and Hutson Law Office, P.A., by Richard M. Hutson, II, for defendant-appellee.

CALABRIA, Judge.

Plaintiffs appeal from the trial court's dismissal of their action. Because plaintiffs' complaint stated claims for defamation and unfair and deceptive practices, we reverse and remand.

I. Background

Greg Lindberg manages Eli Global, LLC (collectively, "plaintiffs"), which maintains its principal office in Durham, North Carolina. Plaintiffs' business involves purchasing and investing in other companies and their assets. James A. Heavner ("defendant") owns the following affiliated companies: University Directories, LLC; Vilcom, LLC; Vilcom Interactive Media, LLC; Vilcom Properties, LLC; and Vilcom Real Estate Development, LLC (collectively, "the UD Entities"). The UD Entities are based in Chapel Hill, North Carolina.

In 2013, defendant retained an investment banker for the purpose of selling the UD Entities as a going concern. Defendant and Eli Global engaged in preliminary sale negotiations, during which Eli Global was permitted to conduct a due diligence analysis of the companies. However, due diligence revealed that the UD Entities were performing poorly and would require a significant capital investment in order to become financially viable. As a result, Eli Global did not make a purchase offer.

Thereafter, another one of Lindberg's companies, UDX, LLC ("UDX"),[1] purchased and acquired from the lender-bank certain commercial loans that had been executed by defendant and the UD Entities. As owner of the loans, UDX then provided written notices of default and demanded

1. UDX is not a party to this action.

payment. Since the UD Entities were unable to pay, they filed for Chapter 11 bankruptcy protections on 24 October 2014.

That day, defendant published a press release, which stated in full:

> CHAPEL HILL, N.C. October 24, 2014–University Directories, LLC filed for protection today under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Middle District of North Carolina to ward off a hostile takeover of the company.
>
> Prior to filing the petition, University Directories had retained an investment banker and after negotiating with a number of potential purchasers, had chosen Eli Global, LLC and signed a letter of intent with Greg Lindberg, Eli Global [sic] president. University Directories' lender, Harrington Bank, was aware of the impending sale and expected the loans to be paid in full at closing–a normal course of events.
>
> During the due diligence phase of the sales transaction, Harrington Bank was acquired by Bank of North Carolina. BNC immediately sold its University Directories loans and other loans to entities related to University Directories to UDX, LLC, a new entity created by Lindberg.
>
> UDX LLC, having acquired the loans, suddenly and without warning gave notice of default and disposition of collateral, demanding ownership of University Directories for its own operations. In addition, Lindberg and UDX, LLC gave notice that it [sic] intended to declare other loans in default, jeopardizing assets owned by companies related to University Directories.
>
> While the business court might provide relief from such a hostile takeover, it does not do so quickly. In order to protect the business and its employees, University Directories made the decision to file a Chapter 11 petition, along with its related entities obligated on the various notes. Thus, the company will be in protective custody of the courts so that it can continue business operations and pursue a sale of the 40-year-old business to a qualified buyer, thereby protecting its employees, customers, and creditors.
>
> University Directories is owned by James A. Heavner and several of the company's managers. Heavner said of the

> filing, "This Company has never missed a bank payment and is current on every loan. We chose to take this action with reluctance because it may cause anxiety among our stakeholders. Yet, in 50 years of owning, operating and selling over three dozen companies, mostly in the media business, we have never encountered anything like this. We will certainly litigate this matter and, in the meantime, the courts are here to protect it. It is an extraordinary situation when potential business partners turn out to be predators."
>
> University Directories, LLC; Print Shop Management, LLC; Vilcom LLC; Vilcom Interactive Media, LLC; Vilcom Properties, LLC; and Vilcom Real Estate Development are all companies in this filing and are located at 88 Vilcom Center Drive, Suite 160, Chapel Hill, NC. James A. Heavner is a principal of each company. University Directories, founded in 1974, is a collegiate marketing and media company. Vilcom Interactive Media owns and operates WCHL, a radio station broadcasting from Chapel Hill and "Chapelboro," an on-line [sic] news and marketing service. Vilcom Real Estate Development owns properties in North Carolina and South Carolina. Print Shop operates a retail store in Chapel Hill.

Several local media outlets, including *The News & Observer*, *The Triangle Business Journal*, and *Chapelboro*, subsequently published articles based on defendant's press release. Defendant also told a *Chapelboro* writer that he "was surprised when the potential partnership with Eli Global turned from a sale to a takeover[,]" and "[w]hat we thought were going to be honorable purchasers of a good company turned out to be predatory in ways none of us could have imagined."

On 23 April 2015, plaintiffs filed a complaint against defendant, asserting claims for defamation, libel, libel *per se*, slander, slander *per se*, and unfair and deceptive acts or practices. Without filing an answer, on 18 June 2015, defendant moved to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015). On 24 July 2015, the trial court entered an order dismissing plaintiffs' complaint and granting defendant's oral motion for attorneys' fees. *See* N.C. Gen. Stat. § 75-16.1 (allowing the judge presiding over an action for unfair and deceptive acts to award "reasonable" attorneys' fees to the "prevailing party" upon a finding that the party asserting the claim "knew, or should have known,

the action was frivolous and malicious"). On 3 August 2015, plaintiffs filed a motion for new trial, motion for reconsideration, and request for ruling on objections to defendant's motion to dismiss, pursuant to N.C. Gen. Stat. § 1A-1, Rules 59 and 60. Following a hearing, on 13 August 2015, the trial court entered: (1) an amended dismissal order awarding additional attorneys' fees to defendant and including further findings of fact on that issue; and (2) an order denying plaintiffs' motion for new trial, motion for reconsideration, and request for ruling on objections. Plaintiffs timely appealed from all three of the trial court's orders.

II. Analysis

A. Sandard of Review

"A motion made pursuant to Rule 12(b)(6) tests the legal sufficiency of the plaintiff's complaint." *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993) (citation omitted). "Dismissal under Rule 12(b)(6) is proper when on its face the complaint reveals either no law supports the plaintiff's claim or the absence of fact sufficient to make a good claim, or when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Id.* (citation omitted). Accordingly, a plaintiff's complaint should not be dismissed "unless it affirmatively appears [the] plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Id.* (citations and quotation marks omitted).

B. Defamation

[1] Plaintiffs first contend that the trial court erred in dismissing their complaint for failure to state a claim for defamation. We agree.

An action for defamation may be maintained by a person or a business entity. *See R.H. Bouligny, Inc. v. United Steelworkers of Am.*, 270 N.C. 160, 168, 154 S.E.2d 344, 352 (1967) (explaining that a corporation may "be injured in its credit, in its business good will, or in its relations with its employees . . . [and] its corporate nature is not a bar to its recovery of damages from the wrongdoer"). "In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 29, 568 S.E.2d 893, 897 (2002) (citation omitted), *appeal dismissed and disc. review denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965, 157 L. Ed. 2d 310 (2003). "[D]efamation includes two distinct torts, libel and slander." *Tallent v. Blake*, 57 N.C. App. 249, 251, 291 S.E.2d 336, 338 (1982). Generally,

written defamation constitutes libel, while oral defamation is slander. *Id.* But "when defamatory words are spoken with the intent that the words be reduced to writing, and the words are in fact written, the publication is both slander and libel." *Clark v. Brown*, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137 (citation omitted), *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675-76 (1990).

North Carolina recognizes three categories of libel: (1) libel *per se*, which covers publications that are "obviously defamatory"; (2) "publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not"; and (3) libel *per quod*, which includes publications that are "not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances." *Ellis v. Northern Star Co.*, 326 N.C. 219, 223, 388 S.E.2d 127, 129-30 (citation omitted), *reh'g denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). "Slander is actionable either *per se* or *per quod*." *Mkt. Am., Inc. v. Christman-Orth*, 135 N.C. App. 143, 151, 520 S.E.2d 570, 577 (1999) (citation omitted), *disc. review denied*, 351 N.C. 358, 542 S.E.2d 213 (2000).

In the instant case, the complaint alleged that defendant made the following false statements "concerning [p]laintiffs":

> i. "In addition, Lindberg and UDX, LLC gave notice that it [sic] intended to declare other loans in default, jeopardizing assets owned by companies related to University Directories."
>
> ii. That [p]laintiffs attempted "a hostile takeover."
>
> iii. "It is an extraordinary situation when potential business partners turn out to be predators."
>
> iv. "What we thought were going to be honorable purchasers of a good company turned out to be predatory in ways none of us could have imagined."
>
> v. "[I] was surprised when the potential partnership with Eli Global turned from a sale to a takeover."

The full press release was also included in the body of the complaint. Plaintiffs asserted that "[i]n addition to being false, these statements are defamatory in that they tend to impeach [p]laintiffs in their business and otherwise tend to subject [p]laintiffs to ridicule, contempt, or disgrace." The complaint further alleged that defendant's "statements especially harm and disparage [p]laintiffs due to the nature of [p]laintiffs'

business in negotiating the purchase of other businesses and their assets." According to plaintiffs, defendant "intended these statements to be reduced to writing, and such statements were in fact written" and published as a press release "to several media outlets, . . . [which] in turn published articles based" thereon. Plaintiffs alleged that as a result of defendant's statements, "third parties are deterred from negotiating and closing transactions" with them. Thus, the complaint set forth the elements of a *prima facie* case for defamation. *See Boyce & Isley*, 153 N.C. App. at 29, 568 S.E.2d at 897.

On appeal, plaintiffs argue that defendant's statements are actionable as defamation *per se*, defamation *per quod*, and under the second class of libel. However, the complaint contained no allegation that defendant's statements are "susceptible of two meanings, one defamatory, and that the defamatory meaning was intended and was so understood by those to whom the publication was made." *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 317, 312 S.E.2d 405, 408, *reh'g denied*, 310 N.C. 749, 315 S.E.2d 704, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984). Consequently, plaintiffs' complaint "failed to bring the [statements] complained of within the second class of libel[.]" *Id.* at 316, 312 S.E.2d at 408 (citations omitted). We next consider whether plaintiffs' complaint stated a claim for defamation *per se*.

Whether a statement is defamatory *per se* is a question of law to be decided by the trial court. *See Ellis*, 326 N.C. at 224, 388 S.E.2d at 130. The court must consider the full context of the statement, viewing the words "within the four corners" of the publication and interpreting them "as ordinary people would understand" them. *Renwick*, 310 N.C. at 319, 312 S.E.2d at 410. In order to be actionable *per se*, the words "must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Boyce & Isley*, 153 N.C. App. at 30-31, 568 S.E.2d at 898-99 (citation omitted). "In an action for libel or slander *per se*, malice and damages are deemed presumed by proof of publication, with no further evidence required as to any resulting injury." *Id.* at 30, 568 S.E.2d at 898 (citation omitted).

"It is well settled that false words imputing to a merchant or business man conduct derogatory to his character and standing as a business man and tending to prejudice him in his business are actionable, and words so uttered may be actionable *per se*." *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 468 (1955). Our Supreme Court has explained that

> in order to be actionable without proof of special damage, the false words (1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business. That is to say, it is not enough that the words used tend to injure a person in his business. To be actionable *per se*, they must be uttered of him in his business relation. Defamation of this class ordinarily includes charges made by one trader or merchant tending to degrade a rival by charging him with dishonorable conduct in business.

Id. (citations omitted); *see also Ellis*, 326 N.C. at 224, 388 S.E.2d at 130 (holding that a letter accusing the plaintiff-company of committing "an unauthorized act" on behalf of the defendant-company was libelous *per se* because it "impeache[d the plaintiff] in its trade as a food broker"); *Ausley v. Bishop*, 133 N.C. App. 210, 215, 515 S.E.2d 72, 76 (1999) (determining that the plaintiff's allegations that the defendant, a former employee who "was launching his own business as an appraiser," had engaged in theft and loan fraud "undoubtedly had the capacity to harm [the] defendant in his trade or profession").

As stated in their complaint, plaintiffs' business is "to invest in companies as a going concern, which at times includes negotiating to purchase other businesses or their assets." Indeed, Eli Global was a prospective buyer of the UD Entities before due diligence revealed their poor financial health. Accordingly, defendant's characterization of plaintiffs as "potential business partners [who] turn[ed] out to be predators" impugned them in their "special trade or occupation." *Badame*, 242 N.C. at 757, 89 S.E.2d at 468.

Defendant asserts that pursuant to this Court's decision in *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 659 S.E.2d 483 (2008), his statements are not defamatory *per se* because they do not allege any "illegal or wrongful activity" by plaintiffs. *See id.* at 737, 659 S.E.2d at 487 (distinguishing *Ellis* and *Ausley* on the grounds that those cases involved allegations of "specific wrongful acts," whereas "here, no specific acts on the part of [the] plaintiff have been alleged"). In *Nucor*, the plaintiff-manufacturer alleged that the following statements, published by the defendant-financial company in an email sent to investors nationwide, were libelous *per se*:

> Alienated customers may encourage Nippon Steel, Brazil's CSN or some of Nucor's sixteen plant managers to build new steel companies in addition to Thyssen, Severcorr,

> or reborn Weirton Steel adding ten million tons. Alienated customers may file antitrust lawsuits as has been done in the electrode, container board OSB, or other sectors. A clever attorney could make hay from trebled damages on Nucor's $2.6 billion pre-tax earnings[, and] Nucor needs to wake up from its monopoly dreams and get back to reality in our view.

Id. (alteration in original). The trial court granted the defendants' motion to dismiss, and we affirmed on appeal.

Defendant's reliance on *Nucor* is misplaced for several significant reasons. First, not only did the *Nucor* publication fail to assert "any illegal or wrongful activity" by the plaintiff, it failed to assert *any* statement of verifiable fact. We explained,

> as to "alienated customers" the publication notes that "[a] clever attorney could make hay from trebled damages on Nucor's $2.6 billion pre-tax earnings." We do not find any part of this statement, which does not allege specific wrongful conduct on the part of the plaintiff and uses such rhetorical language as "could make hay[,]" to be defamatory. The second statement, "Nucor needs to wake up from its monopoly dreams and get back to reality in our view[,]" is also an opinion statement without any alleged facts on which we could find grounds for a claim of libel *per se*.

Id. at 737-38, 659 S.E.2d at 487 (alterations in original) (internal citations omitted). By contrast, defendant's assertion that Lindberg and UDX "gave notice that [they] intended to declare other loans in default, jeopardizing assets owned by companies related to University Directories" is a statement of verifiable fact which may be proven true or false. *Cf. Daniels v. Metro Magazine Holding Co.*, 179 N.C. App. 533, 539, 634 S.E.2d 586, 590 (2006) ("If a statement cannot reasonably be interpreted as stating actual facts about an individual, it cannot be the subject of a defamation suit." (citation, brackets, and quotation marks omitted)), *appeal dismissed and disc. review denied*, 361 N.C. 692, 654 S.E.2d 251 (2007). Although some of defendant's remarks may appear to express an opinion, a person "cannot preface an otherwise defamatory statement with 'in my opinion' and claim immunity from liability[.]" *Id.*

Second, in *Nucor*, we declined to consider paragraphs of the plaintiff's complaint that provided further details about the antitrust lawsuits filed in other sectors because such "explanatory circumstances" may

not be considered on a claim for libel *per se*. 189 N.C. App. at 737, 659 S.E.2d at 487 ("Words which are libelous *per se* do not need an innuendo, and, conversely, words which need an innuendo are not libelous *per se*." (citation omitted)). Defendant's press release requires no such explanation. By stating "[w]hat we thought were going to be honorable purchasers of a good company . . . [,]" defendant clearly means that plaintiffs are *not*, a harmful imputation given that plaintiffs' particular trade is buying and investing in other businesses. *See Badame*, 242 N.C. at 757, 89 S.E.2d at 468 (noting that defamation *per se* in the business context "ordinarily includes charges made by one trader or merchant tending to degrade a rival by charging him with dishonorable conduct").

Third, viewing the *Nucor* publication "as a whole," we concluded that the "overall import of the document was not derogatory of [the] plaintiff." 189 N.C. App. at 738, 659 S.E.2d at 487 (observing that "[t]he publication also states that 'We believe Nucor is a fine company, and we are not aware of any "company-specific" flaw or blemish.' "). The same cannot be said here. "One does not have to 'read between the lines' to discover the [press release's] defamatory content." *Boyce & Isley*, 153 N.C. App. at 32, 568 S.E.2d at 899 (citing *Renwick*, 310 N.C. at 318, 312 S.E.2d at 409).

Defendant, citing several business dictionaries for support, argues that "predator" and "hostile takeover" are "recognized business terms" that accurately describe plaintiffs and the parties' business transaction; therefore, he contends that his statements are true and cannot serve as the basis of a defamation claim. However, defendant's reliance on extrinsic sources is premature, given that "on a Rule 12(b)(6) motion, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims[.]" *Andrews*, 109 N.C. App. at 275, 426 S.E.2d at 432 (citation, quotation marks, and brackets omitted).

Viewing defendant's remarks "within the four corners" of the press release and "as ordinary people would understand" them, *Renwick*, 310 N.C. at 319, 312 S.E.2d at 410, we do not believe that the average readers of *Chapelboro* and *The News & Observer* would read "predator" to mean "a company that buys or tries to buy another company that is in a weaker financial position," as defendant contends on appeal. Even assuming, *arguendo*, that readers of *The Triangle Business Journal* might immediately recognize this business definition, defendant's defamatory meaning is nevertheless revealed by his statements that he has "never encountered anything like this" and "will certainly litigate this matter." *Cf. Boyce & Isley*, 153 N.C. App. at 31, 568 S.E.2d at 899

(rejecting the defendants' assertion that "the average person is familiar with the concept of contingency fees in the context of large class-action lawsuits" and holding that their television advertisement alleging that a political opponent "charg[ed] . . . more [per hour] than a policeman's salary" was defamatory *per se*).

We are similarly unpersuaded by defendant's alternative argument that his remarks are protected as "rhetorical hyperbole," a statement so exaggerated or outlandish that "no reasonable reader would believe [it] to be literally true." *Craven v. Cope*, 188 N.C. App. 814, 818, 656 S.E.2d 729, 733 (2008). Defendant's press release was plainly intended to assuage stakeholders' anxiety after the UD Entities filed for Chapter 11 bankruptcies. Considering defendant's statements in this context, their defamatory tenor is even more evident. *See Renwick*, 310 N.C. at 319, 312 S.E.2d at 410.

We hold that plaintiffs stated a claim for libel and slander *per se* sufficient to withstand defendant's motion to dismiss. Notably, "[w]hether or not plaintiffs may ultimately prevail on these claims is not a matter before this Court." *Boyce & Isley*, 153 N.C. App. at 35, 568 S.E.2d at 901. At this early stage in the proceedings, however, they have met their low burden of proving that they are "entitled to offer evidence to support the[ir] claims[.]" *Andrews*, 109 N.C. App. at 275, 426 S.E.2d at 432.

C. Unfair and Deceptive Practices

[2] Plaintiffs next contend that the trial court erred by dismissing their claims for unfair and deceptive practices. We agree.

N.C. Gen. Stat. § 75-1.1(a) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." A claim for unfair and deceptive practices requires proof of: "(1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant." *Nucor*, 189 N.C. App. at 738, 659 S.E.2d at 488 (quoting *Craven*, 188 N.C. App. at 819, 656 S.E.2d at 733). "[A] libel *per se* of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of [N.C. Gen. Stat.] § 75-1.1, which will justify an award of damages . . . for injuries proximately caused." *Ellis*, 326 N.C. at 226, 388 S.E.2d at 131 (citation omitted).

As previously discussed, plaintiffs stated a claim for defamation *per se* based on defendant's statements impeaching their business reputation. Regarding plaintiffs' claim for unfair and deceptive practices, the

complaint further alleges that defendant's "false and defamatory statements constitute an unfair or deceptive act or practice in or affecting commerce which proximately caused actual injury to [p]laintiffs in violation of section 75-1.1 of the North Carolina General Statutes." Because the trial court's dismissal of this claim was predicated on its determination that plaintiffs had failed to state a claim for defamation, we conclude that the trial court also erred in dismissing plaintiffs' claim for unfair and deceptive practices.

Additionally, N.C. Gen. Stat. § 75-16.1 provides that a judge presiding over an action for unfair and deceptive practices may, in certain instances, award "reasonable" attorneys' fees to "the prevailing party." Having determined that the trial court erred by dismissing plaintiffs' claim for unfair and deceptive practices, we necessarily conclude that the court also erred by awarding attorneys' fees to defendant.

III. Conclusion

Plaintiffs' complaint set forth the elements and necessary factual allegations to support claims for defamation *per se* and unfair and deceptive practices; therefore, the trial court erred by granting defendant's motion to dismiss and in awarding attorneys' fees to defendant. Having so concluded, we need not consider plaintiffs' remaining arguments.

REVERSED AND REMANDED.

Judges DAVIS and TYSON concur.

IN RE A.H.

[250 N.C. App. 546 (2016)]

IN THE MATTER OF A.H. & C.H.

No. COA16-581

Filed 6 December 2016

1. Termination of Parental Rights—hearing—right to present evidence

The trial court did not abuse its discretion in a termination of parental rights case by allegedly restricting respondent mother's right to present evidence at the termination hearing. The trial court applied the same evidentiary standards to all parties and respondent had the right to participate and present relevant evidence at the disposition hearing.

2. Termination of Parental Rights—best interests of children—findings of fact

The trial court did not abuse its discretion in a termination of parental rights case by determining that termination of the mother's parental rights was in the best interests of the two minor children. The trial court made the requisite findings and respondent failed to show that the court's decision was so arbitrary that it could not have been the result of a reasoned decision.

Appeal by Respondent from orders entered 8 June 2015, 19 October 2015, and 19 January 2016 by Judge William A. Marsh, III in Durham County District Court. Heard in the Court of Appeals 19 October 2016.

Senior Assistant County Attorney Bettyna Belly Abney, for petitioner-appellee Durham County Department of Social Services.

Mobley Law Offices PA, by Marie H. Mobley, for guardian ad litem.

Peter Wood for respondent-appellant mother.

INMAN, Judge.

Respondent-mother ("Mother") appeals from an order terminating her parental rights as to her minor children C.H. ("Clark")[1] and A.H. ("Andrew"). On appeal, Mother contends that the trial court abused its

1. We use the pseudonyms adopted by the parties to protect the juveniles' identities.

discretion by restricting her right to present evidence at the termination hearing and by determining that termination of her parental rights was in the best interests of Clark and Andrew. After careful review, we hold that the trial court did not abuse its discretion.

Factual and Procedural History

On 5 June 2002, Mother gave birth to Andrew. On 5 November 2006, Mother gave birth to Clark. The children's biological father passed away on 2 October 2010.

On 20 April 2013, Mother, Andrew, and Clark were at a Food Lion in Durham, North Carolina. Andrew attempted to steal candy from the store, but was caught. Upon hearing of Andrew's attempted theft, Mother hit Andrew in the face, grabbed him around the neck in a choke hold position, and caused Andrew's head to hit a bank card swipe machine. Food Lion security personnel and other bystanders immediately intervened and stepped in between Mother and Andrew. Mother then exited the store with Clark, leaving Andrew behind. Mother did not leave any contact information. As Mother left, her car's license plate number was noted.

The Durham County Police Department was notified and located Mother shortly after her exit. Mother claimed she left the Food Lion to go to the police department. Mother was charged with misdemeanor child abuse, misdemeanor assault on a child under twelve, and misdemeanor assault on a handicapped person.

At the Durham Police Station, Mother told a social worker that she wanted Andrew and Clark to be placed in foster care, because she did not think her family members in Durham were good placements for the children. Andrew and Clark were immediately placed in a rapid response therapeutic home.

The Durham County Department of Social Services ("DSS") filed petitions alleging that both Andrew and Clark were neglected. At the adjudication hearing on 6 June 2013, Mother stipulated to all of the court's findings of fact and the adjudication that both juveniles were neglected. At the conclusion of the disposition hearing on 2 July 2013, the trial court placed the children in the legal custody of DSS, allowed Mother supervised visitation, and ordered Mother to follow all recommendations resulting from a psychological evaluation, including anger management.

At the time of the grocery store incident and initial placement, Andrew was ten years old and Clark was six years old. Both children

suffered from behavioral and developmental disorders. Andrew had been diagnosed with Attention Deficit Hyperactivity Disorder, developmental delay, and Major Depressive Disorder, and was receiving services for autism, behavioral issues, and anxiety. Additionally, Andrew received occupational therapy. Clark had been diagnosed with developmental delay, speech impairment, and epilepsy, and suffered from seizures. Like his brother, Clark also received occupational therapy. Although it was unknown if a formal diagnosis had been made, Clark demonstrated symptoms of autism and Attention Deficit Hyperactivity Disorder.

On 15 July 2013, Andrew was hospitalized after running away from his foster home and expressing suicidal tendencies. Andrew was admitted to the Duke Medical Center Emergency Department, where he expressed that he was upset he did not get to speak with Mother and stated he wanted to live with her and his brother. Mother attempted to visit Andrew while he was in the emergency department, but hospital policies did not allow visitation. Andrew's mental health medical team recommended he be placed in a therapeutic foster home that could provide Intensive Alternative Family Therapy. The team also recommended that Andrew be placed in a home where he would be the only child and that the foster parent(s) have prior experience or special training with parenting autistic children.

On 5 September 2013, after conducting a hearing to review the custody and placement of Andrew and Clark, the trial court entered a Review Order. The court found that Clark had remained in the same foster care placement since 4 June 2013 and that Mother had participated in autism support groups, reviewed the children's care with social workers, and attended medical appointments for the children. The court concluded that it was in the best interest of the children to remain in the legal custody of DSS, with DSS having placement authority. The court ordered Mother to continue in individual therapy for anger management and parenting skills, maintain visitation with the children, and participate in other services or therapy as recommended.

On 5 October 2013, Andrew was re-hospitalized after running away again from his foster home. While at the hospital, Andrew expressed, again, that he wanted to live with his mother. Andrew continued to express suicidal thoughts. Clark had been moved from his previous foster home, and was placed in a new foster home.

On 4 and 6 December 2013, the trial court held an initial permanency planning hearing. On 6 January 2014, the trial court entered a

Permanency Planning Order concluding that "it is in the best interest[s] of the children that the permanent plan of care be reunification with the mother[.]" The court's findings of fact noted Andrew's second hospitalization, his move to a new foster care home, and his ongoing condition. The court also found that Mother had attended supervised visits, medical appointments, treatment team meetings, Child and Family Team meetings, and individual weekly therapy sessions. The court ordered Mother to continue with the same services and to participate in and complete a forensic parental evaluation.

Two months later, on 10 March 2014, Andrew ran away from school and, when found, expressed to officers that that he wanted to be run over by a car. Andrew's medical team recommended a stay at Spring Brook Behavioral Healthcare ("Spring Brook"), and Andrew was placed at Spring Brook on 27 March 2014. Mother participated in family therapy at Spring Brook. During a family therapy session, Mother expressed to Andrew her hatred towards Brianna Dearing ("Dearing"), a social worker. Mother stated she wanted to beat Dearing "bad." When Andrew explained Dearing was trying to help them, Mother said, "no[,] she is not helping us," and spoke for about three minutes about how she could beat Dearing to death. Due to Mother's statements regarding Dearing, the therapist redirected Mother out of the room.

On 3 June 2014, after conducting a permanency planning review hearing on 2 May 2014, the trial court entered a Permanency Planning Review Order. The trial court found that as of the 2 May 2014 hearing, Mother had completed all services with the Autism Society of North Carolina and had begun a parenting program. The court further found that while the children could not return home immediately, reunification was possible within the following six months.

On 25 September 2014, the court held another permanency planning review hearing. In an order entered in open court that same day, the court found that Andrew had shown improvement while at Spring Brook and had stopped inflicting and threatening self-harm. Andrew's therapist reported that Andrew recounted spankings by his older brother and an incident where Mother duct-taped Andrew's feet together. The therapist indicated that Andrew expressed a desire for revenge and anger towards his family. Mother had visited Andrew at Spring Brook, until her visitation was suspended because of her disruptive behavior during two visits. Once she was allowed to resume supervised visitation, Mother was unable to do so due to a staff shortage. Clark was doing well with his foster family and in school. Mother was attending parenting classes and visitations but had "not consistently demonstrated positive parenting

skills during visitation[s]." The court changed the permanent plan of care, adding guardianship by a court-approved caretaker as an alternative to reunification with Mother. The court directed Mother to continue participating in individual therapy.

On or about 4 November 2014, DSS filed a motion to modify visitation. The motion alleged that on 23 October 2014, Clark attended supervised visitation with Mother in her home. During this visit, Clark had a "melt down" and Mother dragged Clark to a time out. The supervisor found it "difficult" to redirect Mother during visits, as Mother had refused to change her behavior. DSS requested that all visitation be supervised and located at DSS.

On 8 June 2015, more than two years after Andrew and Clark were removed from Mother's custody and initially adjudicated neglected, the trial court entered a Permanency Planning Review Order changing the permanent plan of care to adoption, with an alternate plan of guardianship by a court-approved caretaker. The court's findings noted, *inter alia*, a report by Andrew's therapist that Mother "consistently minimizes [Andrew]'s feelings about past incidents and that she often becomes angry" during the phone conversations and a report by Clark's social worker that his "most disruptive days continue to be the days when he has visits with his mother."

The court found that Mother had not completed all recommended services, had refused to participate in family therapy for Andrew, and had not changed her parenting behavior. The court found that "[Mother] continues to have unrealistic expectations for [Andrew's and Clark's] behaviors and is unwilling to work on managing their mental health issues. She continues to insist their behaviors arise solely from residing in foster care and not due to her own parenting approach." The court found that the permanent plan of reunification could not be implemented at that time because Mother "ha[d] not completed all of the recommended services, nor ha[d] she consistently demonstrated positive parenting skills during visitation." The court concluded that reunification efforts with Mother would be either futile or inconsistent with the children's health, safety, and need for a safe permanent home within a reasonable period of time.

On or about 1 June 2015, DSS filed a Motion/Petition for Termination of Parental Rights. DSS alleged Mother's parental rights were subject to termination pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) (neglect), (2) (failure to make reasonable progress), (3) (failure to pay a reasonable portion of the cost of the children's care), and (6) (dependency).

On 5 August 2015, Mother subpoenaed Andrew to appear and testify at Mother's termination of parental rights hearing.

On 11 August 2015, Mother personally filed with the trial court a ten-page report entitled "Respondent Parent's Court Summary" ("the Parent Report"). Mother attached to the Parent Report documents that she intended to submit at the termination proceeding.

On 13 August 2015, the Guardian Ad Litem Attorney Advocate ("GAL") filed a motion to quash Mother's subpoena for Andrew's testimony. The motion to quash alleged that Andrew "will likely experience significant emotional distress and regress from his recent progress in therapy, if required to appear and testify in this proceeding." The GAL argued the subpoena was unreasonable and oppressive. The GAL attached a letter from Andrew's therapist, which provided, in pertinent part:

> This letter is to inform the court in the case of [Andrew] and his inability to provide testimony in court proceedings. The KidsPeace clinical team have staffed this case and determined that [Andrew]'s presence in court and testimony would be detrimental to his treatment progress and stability.
>
> . . .
>
> Should [Andrew] be required to testify[,] he will likely experience an emotional and behavioral regression as indicated by previous exposure to this topic when talking with [Mother] during supervised phone calls. The team has observed [Andrew] experience mood disturbances, behavioral regression, and an increase in symptoms of trauma after these conversations. Although the origin of this regression is unclear, it appears closely related to the topic of court. After requesting that these conversations cease, symptoms and behaviors subsided. It is therefore clinically recommended that [Andrew] not provide testimony in court to maintain treatment gains and promote well-being.

On 14 August 2015, Mother filed a response opposing the GAL's motion to quash. Mother's response focused on Andrew's competency and that Andrew's testimony would be relevant to the termination proceeding.

On 19 August 2015, the trial court held a hearing on the motion to quash. In an order entered 19 October 2015, the court found that

according to Andrew's therapist, he would "likely experience significant emotional distress and regress from his recent progress in therapy, if required to appear and testify in this proceeding." Additionally, the court found that Mother "could not clearly articulate any factual issues within the child's knowledge that were necessary to her defense of the termination action, and unavailable from other sources." The court concluded: "1. Any testimony of the child would be of little probative value[;] 2. The experience of testifying is likely to cause the child significant emotional harm [; and] 3. The best interests of the child are this court's paramount concern." Based on its findings and conclusions, the court quashed Mother's subpoena.

On 14 August 2015, Mother's counsel delivered to the Guardian ad Litem Durham Office and the DSS County Attorney all of the documentary evidence that she sought to admit at the termination proceeding in a multi-pronged file folder (the "Green Folder"). The Green Folder contained numerous documents, including the Parent Report, which Mother had filed *pro se* with the trial court. On 6 October 2015, the GAL filed a "GAL's Response to Mother's Proposed Evidence & Motion in Limine," seeking to exclude from evidence the contents of the Green Folder. The GAL provided specific responses regarding the relevancy of each document contained in the Green Folder, specifically noting that the Parent Report "[s]hould not have been filed, [] needs to be struck from the court file[,]" and "[s]hould not be introduced prior to [the] best interests phase, if reached."

On 19 October 2015, prior to the commencement of the adjudication phase of the termination proceeding, the trial court conducted a hearing on the GAL's motion *in limine*. On that day, the trial court granted the GAL's motion with respect to the Parent Report, noting that it was filed without the signature of counsel. The trial court also granted the GAL's motion to exclude from evidence the other contents of the Green Folder.

The court held hearings to determine whether grounds existed to terminate Mother's parental rights beginning on 19 October, and continuing on 20 October, 21 October, and 19 November 2015. On 19 November 2015, the adjudication phase of the termination hearing (the "adjudication hearing") ended and the trial court found in open court "clear and convincing evidence that grounds exist for termination of parental rights." Later that same day, the trial court conducted the disposition phase of the termination hearing (the "disposition hearing") and determined in open court that termination of Mother's parental rights was in the best interests of the children. A written order on the termination proceeding was entered 19 January 2016. In the order, the court found

clear, cogent, and convincing evidence of N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), (2) (failure to make reasonable progress), (3) (failure to pay a reasonable portion of the cost of care for Andrew and Clark), and (6) (dependency) as grounds for termination of Mother's parental rights. The court also concluded that "it is in the best interests of [Andrew] and [Clark] that the parental rights of their mother be terminated."

Mother filed a Notice of Appeal from the 8 June 2015 Permanency Planning Review Order, the 19 October 2015 Order Quashing Subpoena, and the 19 January 2016 Order Terminating Parental Rights. However, in her brief filed with this Court, Mother does not challenge the 8 June 2015 Permanency Planning Review Order, which ceased reunification efforts.

Standard of Review

"The court's determination of the juvenile's best interest will not be disturbed absent a showing of an abuse of discretion." *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 630 (2010) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

The trial court's evidentiary decisions, including a decision granting a motion to quash a subpoena on grounds that it is unduly burdensome, also will not be disturbed absent a showing of abuse of discretion. *See State v. Hurt*, 235 N.C. App. 174, 182, 760 S.E.2d 341, 348, *review denied*, 367 N.C. 807, 766 S.E.2d 679 (2014) ("A motion to quash a subpoena is addressed to the sound discretion of the trial court and is not subject to review absent a showing of an abuse of discretion.").

Analysis

Mother contends that the trial court abused its discretion by restricting her right to present evidence at the termination proceeding. Additionally, Mother asserts that the trial court abused its discretion in determining that termination of her parental rights was in the best interests of Andrew and Clark. For the reasons discussed below, we disagree with Mother's arguments.

A termination of parental rights proceeding consists of a two-step process: an adjudication phase and a disposition phase. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudication phase, "the court must take evidence, find the facts, and adjudicate the existence or nonexistence of any of the circumstances set forth in N.C. Gen. Stat.

§ 7B–1111, which authorizes the termination of the respondent's parental rights." *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005) (citation omitted); *see also* N.C. Gen. Stat. § 7B–1111 (2015).

"After finding that grounds for termination exist, the trial court moves to the disposition phase." *In re A.R.H.B.*, 186 N.C. App. 211, 218, 651 S.E.2d 247, 253 (2007) (citation omitted). In the disposition phase or the "best interest" phase, the trial court "must determine whether termination of parental rights is in the best interests of the child." *In re R.B.B.*, 187 N.C. App. 639, 643, 654 S.E.2d 514, 518 (2007). At this phase, "[t]he court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile." N.C. Gen. Stat. § 7B-1110(a) (2015). The North Carolina Supreme Court has held that

> [w]henever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony. Without hearing and considering such evidence, the trial court cannot make an informed and intelligent decision concerning the best interest of the child.

Matter of Shue, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984).

I. Right To Present Evidence

[1] Mother contends that the trial court abused its discretion by restricting her right to present evidence at the termination hearing. Specifically, Mother argues that the trial court erred in: (1) quashing her subpoena for Andrew's testimony, (2) not allowing her to make an offer of proof as to what Andrew would have said if he testified, (3) not allowing her to present the Parent Report, and (4) applying one set of evidentiary rules to Mother and a more lenient set of evidentiary rules to other parties. We disagree.

A. Quashing of the Subpoena

As an initial matter, we must clarify the specific phase of the termination proceeding during which, by quashing her subpoena, Mother contends the trial court restricted her right to present evidence. At the hearing on the motion to quash, when questioned about which phase of the termination proceeding she sought to present Andrew's testimony in, Mother responded "[t]hat's my decision. That's my attorney's decision." However, on appeal, Mother does not challenge the adjudication phase

of the termination proceeding, noting "[a]dmittedly, the court correctly found grounds to terminate parental rights[.]" Accordingly, we review whether the trial court's quashing of the subpoena restricted Mother's right to present evidence at the disposition or "best interest" phase of the termination proceeding.

The GAL requested the trial court quash Mother's subpoena on the basis that compelling Andrew to appear and testify during either phase of the termination proceeding would be "unreasonable and oppressive." *See* N.C. Gen. Stat. § 1A-1, Rule 45(c)(3) and (5) (2015) (providing that a trial court may modify or quash a subpoena if the subpoenaed person demonstrates the existence of certain grounds, including that the subpoena is otherwise unreasonable or oppressive). As support for the notion that the subpoena was unreasonable and oppressive, the GAL noted the following pertinent facts:

> 6. In a phone conversation in early July, 2015, mother told [Andrew] that she was going to have her attorney interview him, and that she wanted him to testify at the TPR hearing. In the days that followed, [Andrew] was agitated, and observed to be walking in his sleep. Mother was warned that this topic was upsetting to [Andrew]. . . .
>
> 7. The child ha[d] not expressed any desire to participate in the hearing on termination of his mother's parental rights.
>
> 8. According to the child's therapist, he will likely experience significant emotional distress and regress from his recent progress in therapy, if required to appear and testify in this proceeding.

Additionally, the GAL attached a letter from Andrew's therapist stating "[t]he Kidspeace clinical team have staffed this case and determined that [Andrew's] presence in court and testimony would be detrimental to his treatment progress and stability."

The motion to quash the subpoena came on for hearing on 19 August 2015. Andrew's therapist, Stephanie Batchelor ("Batchelor"), and Mother testified at the hearing. Batchelor testified that Andrew had not, in their conversations, expressed any interest in participating in the termination proceeding. On cross examination, counsel for Mother and Batchelor engaged in the following exchange:

> MOTHER'S COUNSEL: So, it is correct that you do believe that [Andrew] could participate in a limited capacity in this hearing?

> BATCHELOR: If it was so required I think that you would probably not get what you hope to because of his level of anxiety and that he does have some limited insights.

Following Batchelor's testimony, Mother testified. Mother's counsel inquired as to what topics Mother expected Andrew to testify about, which resulted in the following exchange:

> [MOTHER]: Well there are a number of things uhm, that he could potentially tell you. Uhm, about his life with me and uhm, his life in foster care and how different the two are and whether it be a positive or a negative uhm, change being in foster care. Uhm, the experiences being institutionalized for nine months and being hospitalized three times in nine [months] under DSS's custody. Uhm, he's been through a traumatic time. He's been out of school for most of the two years. His IEP was out of compliance for most of the two years that he's been in foster care. He could tell you a number of things but his experience has not been positive. His uhm, experience in foster care has been a detriment.
>
> THE COURT: Okay, [Mother], I'm going to interrupt you. I don't want you to testify about what you perceive his experience to be. I think the question was what did you expect him, the subject matter that you expected to elicit from him.
>
> [MOTHER]: Okay.
>
> THE COURT: And I believe that question's been answered.

Mother testified that Andrew's "wants and needs from his perspective need[] to be presented to the [c]ourt." Furthermore, Mother testified that "I'm aware that [Andrew] could [testify] in chambers or he could [testify] off site, or remotely, but he still needs that opportunity. It doesn't absolutely have to be in the courtroom." Thereafter, the trial court concluded:

> All right, the [c]ourt has heard testimony as well as reviewed the uhm, GAL Exhibits and Petitioner's Exhibits and the [c]ourt finds that given the burdens of proof in a hearing to terminate parental rights, that the testimony of one of the two minor children which are the subject of these hearings would be of extremely limited prohibitive [sic] value and in fact in a balancing test of concerns it

> would overwhelmingly . . . be detrimental to his well-being and the guiding star in this courtroom is the best interests of minor children and having so concluded that it would be of limited prohibitive [sic] value and detrimental, the [c]ourt quashes the subpoena issue in this matter.

The trial court memorialized the order quashing the subpoena on 19 October 2015, finding the following:

> 1. [Andrew] is thirteen years old, and under the care of therapist, Stephanie Batchelor.
>
> . . .
>
> 3. [Andrew] has had little face-to-face contact with his mother since March, 2015, and no visitation. Mother participated in one session of family therapy with [Andrew], but then refused to attend further sessions. Said family therapy was made a precondition to resumed supervised visitation by this court's order, entered March 17, 2015.
>
> 4. The conditions that led to the removal of [Andrew] have already been adjudicated, and those findings of fact and conclusions of law are beyond appeal. The hearing on terminating mother's parental rights will focus on mother's progress in completing the things this court determined were necessary to correct the conditions that led to removal, and mother's present mental health. [Andrew] has little direct knowledge of these things.
>
> 5. In a phone conversation in early July, 2015, mother told [Andrew] that she was going to have her attorney interview him, and that she wanted him to testify at the TPR hearing. In the days that followed, [Andrew] appeared agitated. Mother was warned that this topic was upsetting to [Andrew]. Mother subsequently requested the address of the child's foster home, in order to mail a subpoena directly to the child. DSS did not provide the address. Mother's attorney served the subpoena upon the attorney for the GAL program.
>
> 6. According to the child's therapist, he will likely experience significant emotional distress and regress from his recent progress in therapy, if required to appear and testify in this proceeding.

> 7. The burden of proof in the termination of parental rights is upon the petitioner, Durham County DSS. Mother could not clearly articulate any factual issues within the child's knowledge that were necessary to her defense of the termination action, and unavailable from other sources.

Based on these findings, the trial court made the following conclusions:

> 1. Any testimony of the child would be of little probative value.
>
> 2. The experience of testifying is likely to cause the child significant emotional harm.
>
> 3. The best interests of the child are this court's paramount concern.

Mother argues that the trial court "failed to adequately consider the relevancy of any testimony by Andrew." After careful review of the transcript of the hearing and the written order, we disagree with Mother's contention and hold that the trial court sufficiently considered the relevancy of Andrew's testimony as to the termination proceeding in determining whether to quash Mother's subpoena.

Mother did not specify before the trial court that she was requesting Andrew's testimony at the disposition hearing. Several of the trial court's findings of fact in the subpoena order relate to the relevance of Andrew's testimony as to the adjudication hearing. However, the record reflects that the trial court also considered the relevance of Andrew's testimony to the disposition hearing. At the hearing on the GAL's motion to quash the subpoena, Mother outlined the topics she expected Andrew to testify about, including his life with Mother and his life in foster care, and his experiences in foster care. The trial court found that Andrew "has had little face-to-face contact with his mother since March, 2015, and no visitation." This finding is relevant to the bond between the parent and child – one of the six factors the relevant statute directs the trial court to consider in determining the best interests of the child. *See* N.C. Gen. Stat. § 7B–1110(a). The trial court's conclusion that "[a]ny testimony of the child would be of little probative value" demonstrates that it adequately considered the relevancy of Andrew's testimony as to the termination proceeding as a whole, including the disposition hearing.

In determining whether to quash the subpoena, the trial court also considered if testifying was in Andrew's best interest. The court admitted into evidence and considered a letter written by Batchelor on

12 August 2015. The court also heard the opinion of Batchelor that testifying "could potentially pose a risk factor for [Andrew] to emotionally and behaviorally regress and cause increased anxiety." Batchelor testified that "it's my understanding based on two phone calls in which [Mother] discussed court testimony with [Andrew], . . . he appeared distressed and with a labile mood and some behavioral regression afterwards." The trial court concluded that "[t]he experience of testifying is likely to cause the child significant emotional harm" and "[t]he best interests of the child are this court's paramount concern."

By presenting comprehensive evidence regarding Andrew's mental health condition and his extreme distress during and following contacts with Mother regarding her desire that he testify, the GAL properly demonstrated that the subpoena for Andrew was "unreasonable or oppressive." Mother has failed to show that the trial court abused its discretion in quashing the subpoena. We therefore affirm the trial court's decision.

B. Offer of Proof

Mother contends that the trial court erred during the disposition hearing by denying her request to make an offer of proof as to what Andrew would have said if he were allowed to testify. We disagree.

Mother alleges error based on the following exchange at the disposition hearing between Mother, her attorney, and the trial court:

> MOTHER'S COUNSEL: And why did you want to have [Andrew] testify in this hearing?
>
> MOTHER: I wanted him to speak for himself.
>
> MOTHER'S COUNSEL: Okay.
>
> MOTHER: Because Ms. Dearing has been speaking for him.
>
> MOTHER'S COUNSEL: Okay. Uhm, what do you believe [Andrew] would have said if he, if he would have testified, regarding your relationship?
>
> THE COURT: Sustained.
>
> MOTHER'S COUNSEL: Your Honor, this is something that's actually required uhm, for the record and for the higher courts that whenever a subpoena for a child is quashed there has to be, this has to be on the record what the child would have testified to—

> THE COURT: No, I don't think that's a correct statement of the law. I think the person may be required to submit a proffer about the subject matter but to have someone else and speak and say that if this person came they would have said XYZ, uhm, is rather preposterous.
>
> MOTHER'S COUNSEL: Okay.
>
> THE COURT: The objection is sustained.
>
> MOTHER'S COUNSEL: Okay, thank you, [y]our Honor.
>
> MOTHER: Can I provide a proffer?
>
> THE COURT: No, you may not.

The trial court's statement that "I think the person may be required to submit a proffer about the subject matter but to have someone else and speak and say that if this person came they would have said XYZ . . . is rather preposterous" misstated North Carolina statute and precedent. The North Carolina Code of Evidence provides that a litigant cannot obtain relief on appellate review from a ruling excluding evidence unless, "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." N.C. Gen. Stat. § 8C-103(a)(2) (2015). The North Carolina Supreme Court has held that

> in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. . . . [T]he essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

State v. Simpson, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) (citation omitted).

The trial court's misstatement of the law was not, however, an abuse of discretion in this case, because the essential content or substance of testimony that Mother sought to elicit from Andrew had been previously made known to the trial court. Prior to the disposition hearing, during the hearing on the GAL's motion to quash Mother's subpoena of Andrew, Mother testified:

> Well there are a number of things uhm, that he could potentially tell you. Uhm, about his life with me and uhm, his life in foster care and how different the two are and whether it be a positive or a negative uhm, change being in foster care. Uhm, the experiences being institutionalized for nine months and being hospitalized three times in nine [months] under DSS's custody. Uhm, he's been through a traumatic time. He's been out of school for most of the two years. His IEP was out of compliance for most of the two years that he's been in foster care. He could tell you a number of things but his experience has not been positive. His uhm, experience in foster care has been a detriment.

This Court has held that "[t]hough a *formal* offer is the preferred method, there are reasons where a trial court may deem an informal offer to be appropriate." *State v. Martin*, __ N.C. App. __, __,774 S.E.2d 330, 333 (2015), *review denied*, __ N.C. __, __, 775 S.E.2d 844 (2015). This Court has explained that

> an informal offer is only sufficient when the attorney making the offer demonstrates a specific forecast of what the testimony would be, rather than merely his guess as to what the witnesses might say. A specific forecast would typically include the substance of the testimony (as opposed to merely stating what he plans to ask the witness), the basis of the witness' knowledge, the basis for the attorney's knowledge about the testimony, and the attorney's purpose in offering the evidence.

Id. at __,774 S.E.2d at 333 (internal quotation marks, citations, and alterations omitted).

At the hearing on the GAL's motion to quash the subpoena, Mother represented to the court a "specific forecast" of Andrew's testimony. Mother stated that Andrew could testify about his life with her and his life in foster care and the difference between the two; his experience being institutionalized for nine months and hospitalized three times while in DSS custody; his IEP being out of compliance during his time in foster care; and his experience in foster care being a detriment. In addition to forecasting the substance of Andrew's testimony, Mother represented the basis of Andrew's knowledge as being his own personal knowledge and the basis of her knowledge about Andrew's testimony as being her opinion. Finally, Mother represented that her purpose in offering Andrew's testimony was so his "wants and needs from his

perspective" could be presented to the court. We hold that Mother's testimony at the subpoena hearing provided a sufficient informal offer of proof that the trial court could, in its discretion, rely upon in excluding a formal offer of proof because Mother's prior testimony "establish[ed] the essential content or substance of the excluded testimony." *State v. Walston*, 229 N.C. App. 141, 145,747 S.E.2d 720, 724 (2013), *reversed on other grounds*, 367 N.C. 721, 766 S.E.2d 312 (2014).

At the disposition hearing, following the trial court's statement indicating that an offer of proof must be limited to the subject matter of anticipated testimony, Mother's counsel did not attempt to make a further or different offer. Mother, not her counsel, then asked the trial court to allow her to testify about what she expected Andrew's testimony to be, and the trial court rejected Mother's personal request. We note that the better practice for Mother's counsel would have been to announce to the trial court the intention to make an offer of proof before seeking testimony from Mother about what Andrew would say if called to testify, so that it would be clear to the trial court that Mother was not offering into evidence testimony that was hearsay or lacking foundation. We also note that the better practice for the trial court would have been to allow Mother's counsel to proceed in making a formal offer of proof. However, we cannot conclude that the trial court, after having heard and considered Mother's proffered information at a prior hearing, abused its discretion in rejecting Mother's proffer at the disposition hearing. In the context of all the evidence presented, we cannot hold that the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

C. Parent Report

Mother contends that the trial court abused its discretion when it did not allow her to introduce her Parent Report and other documents into evidence at the disposition hearing. We reject this argument because Mother failed to preserve the issue for appellate review.

Prior to the start of the adjudication hearing, on 19 October 2015, the trial court conducted a hearing on the "GAL's Response to Mother's Proposed Evidence & Motion in Limine." Counsel for all parties were present and had the opportunity to be heard. The trial court focused on the impropriety of Mother's filing of the Parent Report and the other documents contained in the Green Folder independent of her counsel, in violation of the North Carolina Rules of Civil Procedure. The trial court granted the GAL's motion *in limine*, and ordered that the documents be stricken "in their entirety from the [c]ourt file."

The court's ruling excluding the documents from evidence and striking them from the record prior to the adjudication hearing did not prevent Mother's counsel from seeking to properly introduce them as evidence during the disposition hearing. Mother's counsel failed to proffer the Parent Report and all contents of the Green Folder during the disposition hearing, and, as such, Mother has not preserved this issue for appellate review. *See State v. McCall*, 162 N.C. App. 64, 68, 589 S.E.2d 896, 899 (2004) (holding that where a motion *in limine* is granted, "[i]n order to preserve the underlying evidentiary issue, a party . . . is required . . . to attempt to introduce the evidence at the trial") (internal quotation marks, citations, and alterations omitted). The reason for this requirement is that the trial court's ruling on a motion *in limine* is preliminary to any evidence, and the court may reconsider the admissibility of challenged evidence based on other evidence presented at trial. *Heatherly v. Indus. Health Council*, 130 N.C. App. 616, 619-20, 504 S.E.2d 102, 105 (1998) (holding that "the court's ruling is not a final ruling on the admissibility of the evidence in question, but only interlocutory or preliminary in nature. Therefore, the court's ruling on a motion *in limine* is subject to modification during the course of the trial[]"). For example, during the disposition hearing, Mother's counsel introduced in evidence a 2015 letter from Dr. Morris at Duke Medicine that Mother had attached to the Parent Report and included in the Green Folder. Over the GAL's objection, the trial court admitted the document into evidence.

D. Different Evidentiary Rules

Mother contends the trial court abused its discretion by applying a different set of evidentiary rules to her than it did to other parties. We disagree.

Mother testified and presented evidence during the disposition hearing, the only phase of the termination proceeding at issue in her appeal. Mother argues that "[t]he trial court's refusal to allow the [Parent Report] was just another example of its double standard during the best interest phase." We reject this argument because, as discussed *supra*, Mother's counsel did not seek to introduce the Parent Report during the disposition hearing.

Mother also argues that the trial court violated her due process rights by quashing her subpoena for Andrew's testimony. One purpose of the Juvenile Code is "[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]" N.C. Gen. Stat. § 7B-100 (2015); *see also In re L.D.B.*, 168 N.C. App. 206, 209, 617 S.E.2d 288, 290 (2005)

(holding that a respondent father's right to present evidence in a termination hearing "is inherent in the protection of due process[]").

As explained above, we hold that the trial court did not abuse its discretion in quashing the subpoena for Andrew's testimony. The trial court's decision to quash Mother's subpoena was based on a reasonable weighing by the trial court of the relevance of Andrew's testimony and the detrimental effect that testifying would have on Andrew. A careful review of the record demonstrates that the trial court's evidentiary rulings "assure[ed] fairness and equality" and provided Mother with a meaningful opportunity to participate in the termination proceeding.

At the disposition hearing, the trial court admitted the following exhibits presented by Mother: a 12 May 2014 letter from Dr. Alexander Myers and Louise Southern at the Autism Society of North Carolina; letters dated 21 July 2015 and 22 September 2015 from Dr. Beatriz Morris at Duke Children's Primary Care; an evaluation report sent from the diagnostic team to the IEP Committee of Clark's school; and a letter dated 17 August 2015 from Dr. Barbara Keith Walter with Duke University Medical Center. Moreover, prior to the disposition hearing, Mother was provided with reports putting her on notice of the theories of DSS and the GAL regarding the best interests of the children. Mother could have subpoenaed witnesses to come and testify regarding these reports in the disposition hearing, but failed to do so.

Because the trial court applied the same evidentiary standards to all parties and because Mother had the right to participate and present relevant evidence at the disposition hearing, we reject Mother's argument.

II. Best Interest Determination

[2] Finally, Mother contends that the trial court abused its discretion by determining that termination of her parental rights was in the best interests of the children. Specifically, Mother challenges Dispositional Findings of Fact[2] Numbers 4, 5, 6, 7, and 8 as not supported by competent evidence, and challenges the court's conclusion that termination was in the best interests of the children. For the reasons discussed below, we conclude that each of the challenged findings of fact were supported by competent and sufficient evidence introduced during the termination proceeding, and that the trial court's conclusion was supported by its findings of fact.

2. Mother's brief mistakenly refers to these dispositional findings as conclusions of law.

"We review the trial court's conclusion that a termination of parental rights would be in the best interest of the child on an abuse of discretion standard." *In re R.B.B.*, 187 N.C. App. 639, 648, 654 S.E.2d 514, 521 (2007).

A. Challenged Findings

Mother challenges Dispositional Finding of Fact 4, which reads: "[Andrew] loves his mother, but is wary of her anger. He does not mention her, or ask about her present circumstances. [Clark] shows affection towards his mother during visits, but parts from her without distress." Dearing, Andrew's social worker, testified that Andrew "definitely loves his mother very much, . . . it's you know, apparent . . . in his conversations with her on the phone from what I've heard. I've not participated in those. . . . [B]ut he, you know, definitely is receptive to talking to her." However, Dearing also testified that "in conversations with [Andrew's] previous therapist and his present therapist, he does have some concerns about her anger. . . . [A]nd you know, whether or not she would still be angry with him if he returned home." Furthermore, Dearing testified that "other than the phone calls, [Andrew] does not really talk about [Mother]." Dearing testified that Clark "does have a bond with his mother as well. . . . [H]e is affectionate towards her . . . usually when he comes in for visits, although does want to . . . end the visit at certain times, . . . he, you know, responds to her attention . . . but then is just as willing to leave [] when the visit is over." This evidence was competent and sufficient to support the challenged finding.

Mother also challenges Dispositional Finding of Fact 5, which reads: "[t]he permanent plan is adoption. Mother declined to relinquish. Termination of parental rights will promote the prompt achievement of the plan for permanence." During the adjudication hearing, at DSS's request, the trial court took judicial notice of the decretal portions of each review hearing, including the oral order entered 17 March 2015, memorialized to writing 8 June 2015. In that Permanency Planning Review Order, the trial court changed the permanent plan of care for the children to adoption, with an alternative plan of guardianship with a court-appointed caretaker. At the disposition hearing, Dearing testified that if Andrew becomes "legally free" for adoption, there will be "a lot more" available placement options for him. The trial court noted that termination of Mother's parental rights will "aid in the accomplishment of a permanent plan for [Andrew] . . . now that he has blossomed relatively speaking . . . so that he can be in a stable home . . . and search for that home[.]" This evidence was competent and sufficient to support the challenged finding.

Mother also challenges Dispositional Finding of Fact 6, which reads: "[t]he likelihood of adoption for [Andrew] is good. His present foster parents do not wish to adopt. [Andrew] is already listed on a 'legal risk placement' website, but legal clearance will enable the social worker to reach out to far more candidates to provide [Andrew] with a permanent home." Dearing testified that, in the past school year, Andrew had transitioned to "more mainstream classes" and "was able to pass all of his classes this past quarter," with the exception of one "D." Dearing testified that Andrew is "doing well with the foster parents," has shown a decrease in self-injurious behavior, "is very likeable," and is "very adaptable to [] our family unit." Dearing further testified that "while he does have the diagnosis of autism[,] he is very high functioning . . . and would be considered adoptable." Dearing testified that Andrew's "current caretakers have stated that they are not interested in adopting him, not because they don't care for him but just because they [] don't want to have the commitment of adopting any child. It's not just [Andrew] specifically." This evidence was competent and sufficient to support the challenged finding.

Mother challenges Dispositional Finding of Fact 7, which reads: "[t]he likelihood of adoption for [Clark] is high, because his present foster family wants to adopt him, and has demonstrated strong ability to meet his needs." Dearing testified that Clark's foster family has "stated very strongly that they want to adopt him." Dearing testified that Clark "has certainly shown a lot more progress in this home than he has in any of the placements that he has been in previously[,]" noting that his speech and behavior had both improved. Dearing further testified that Clark's foster mother has worked with children with autism for over twenty years and "has a great deal of . . . experience in the field of working with children and adults with autism." This evidence was competent and sufficient to support the challenged finding.

Finally, Mother challenges Dispositional Finding of Fact 8, which reads: "[t]here are no present viable candidates for guardianship or custody, and adoption is far more likely than either of those to result in true permanence and repose for these children." Dearing testified that "in order to give the children permanence, [] given [Mother's] difficulty interacting with foster placements in the past, there is not really [] a possibility that there would be a stable placement that either child could go to." Dearing testified that "in order to have a permanent placement for either child, the parental rights would need to be terminated." This evidence was competent and sufficient to support the challenged finding.

B. "Best Interest" Factors

Mother contends that the termination order did not adequately consider three of the six factors a trial court is instructed to consider in making its best interest determination. In determining the issue of best interest, N.C. Gen. Stat. § 7B-1110(a) directs the trial court to consider and make written findings regarding the following relevant criteria:

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

Mother argues the trial court did not consider "the likelihood of adoption," "whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile," and "the bond between the juvenile and the parent." Because the record reflects that the trial court considered evidence as to each relevant ground listed in N.C. Gen. Stat. § 7B–1110(a) and made adequate findings, we disagree with Mother's contention.

The trial court's dispositional findings demonstrate that the court considered the relevant criteria in determining that termination was in the best interests of Andrew and Clark. Specifically, as discussed *supra*, the trial court made findings, supported by competent evidence, concerning the likelihood of adoption for Andrew and Clark, concerning whether termination of Mother's parental rights would aid in the accomplishment of the permanent plan of adoption, and concerning the bond between Mother and each of the children.

Mother contends that the trial court abused its discretion in concluding that termination of her parental rights was in the best interest of Andrew because "[r]ealistically[,] Andrew was not going to be adopted by anyone." Mother argues that Andrew's situation is comparable to the juvenile in *In re J.A.O.*, 166 N.C. App. 222, 227-28, 601 S.E.2d 226, 230 (2004).

In *J.A.O.*, this Court held that the trial court abused its discretion in determining that termination of the mother's parental rights was in the best interest of the juvenile, where the GAL "argued at trial[that] it is highly unlikely that a child of [the juvenile's] age and physical and mental condition would be a candidate for adoption, much less selected by an adoptive family." *Id.* at 228, 601 S.E.2d at 230. This Court recognized that a small possibility of the juvenile's adoption remained, but, held, "we are unconvinced that the remote chance of adoption in this case justifies the momentous step of terminating respondent's parental rights." *Id.*

This case is distinguishable from *J.A.O.* Dearing testified that "while [Andrew] does have the diagnosis of autism[,] he is very functioning" and "would be considered adoptable." Furthermore, Dearing testified that if Andrew were to become "legally free," *i.e.*, if Mother's rights were terminated, there will be a "lot more . . . options available for him." This testimony provided competent evidence to support the trial court's finding that "[t]he likelihood of adoption for [Andrew] is good." Moreover, this Court has held that "the absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights." *In re D.H.*, 232 N.C. App. 217, 223, 753 S.E.2d 732, 736 (2014) (citation omitted). Therefore, we reject Mother's argument that the trial court did not adequately consider the adoptability of Andrew.

Mother also contends that the trial court did not adequately consider her bond with her children. Specifically, Mother argues that "[b]oth children had great relationships with their mother."

In determining the best interests of the children, in addition to the evidence presented at the disposition hearing and previously addressed *supra*, the trial court also considered evidence from the adjudication hearing. The trial court made the following pertinent findings of fact based on the evidence presented at the adjudication hearing:

> 30. . . . Mother's visits were transferred from her home to the observation room at DSS after an October 23, 2015 incident in which [M]other admitted to dragging [Clark] to his time-out spot during a tantrum. . . .
>
> 31. . . . [Mother] once told [Andrew] it was his fault he was in foster care. These things were upsetting to [Andrew], who had a long-standing pattern of excessive self-blaming and self-harm, known to his mother.
>
> . . .

> 33. . . . In his individual therapy, [Andrew] had shared memories of incidents in his mother's home that were painful to him, such as his being locked out of his home at night, or occasions in which [Mother] allowed [Andrew's] older brother [] to give [Andrew] "whoopings" for bad behavior. When these issues were raised in family therapy, [Mother] was defensive and dismissive, and refused to validate the child's memories or feelings, to the child's detriment.

These findings are unchallenged by Mother on appeal. "Unchallenged findings of fact are binding on appeal." *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) (citation omitted).

As support for Mother's contention that the trial court did not adequately consider her bond with her children, Mother points to evidence tending to show that Andrew wanted to live with his mother, that Mother attempted to visit and contact her children often, and that Mother was committed to the care and needs of her children. Mother's argument, however, disregards the well-established principle that "[f]indings of fact supported by competent evidence are binding on appeal, despite evidence in the record that might support a contrary finding." *In re C.I.M.*, 214 N.C. App. 342, 345, 715 S.E.2d 247, 250 (2011). Here, the trial court made ample findings of fact regarding the bond between Mother and her children.

Mother has failed to show that the court's decision that the termination of her parental rights as being in the best interests of Andrew and Clark was "so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Accordingly, we hold that the trial court made the requisite findings under N.C. Gen. Stat. § 7B–1110(a) and these findings reveal a reasoned decision within the court's discretion.

III. Conclusion

We hold that the trial court did not improperly restrict Mother's right to present evidence at the disposition hearing. Additionally, we hold that the trial court made the necessary and relevant findings in determining that termination of her parental rights was in the best interests of Andrew and Clark. Accordingly, the trial court did not abuse its discretion and we affirm the decision of the trial court.

AFFIRMED.

Judges DAVIS and ENOCHS concur.

IN RE D.M.O.

[250 N.C. App. 570 (2016)]

IN THE MATTER OF D.M.O.

No. COA16-575

Filed 6 December 2016

Termination of Parental Rights—grounds—abandonment—findings of fact—willfulness

The trial court erred by terminating respondent mother's parental rights on the ground of abandonment where the trial court failed to make findings of willfulness. The trial court's order was vacated and remanded for further findings of fact and conclusions of law regarding N.C.G.S. § 7B-1111(a)(7).

Appeal by respondent-mother from order entered 16 March 2016 by Judge Beverly A. Scarlett in Orange County District Court. Heard in the Court of Appeals 19 October 2016.

H. Wood Vann for petitioner-appellee father.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Joyce L. Terres, for respondent-mother.

No brief filed for guardian ad litem.

ELMORE, Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights to D.M.O. ("David")[1] on the ground of abandonment. We vacate and remand.

I. Background

Respondent-mother and petitioner-father are the biological parents of David. The parties resided together with David as a family unit from the date of his birth in March 2007 until the parties separated in July 2010 due to escalating conflict between the parties that resulted in respondent-mother committing acts of domestic violence against petitioner-father. After the parties separated, petitioner-father took physical custody of David and filed a custody action in Durham County.

After a hearing, the trial court entered a permanent custody order on 25 January 2011, which granted petitioner-father legal and physical

1. A pseudonym is used to protect the minor's identity.

custody of David and respondent-mother unsupervised visitation on Tuesdays, Thursdays, and Saturdays. Respondent-mother and petitioner-father made agreements over the years to change the times of visitation, based on mutual convenience and changes in David's school and extracurricular activity schedules.

For several years, respondent-mother has struggled with drug addiction and substance abuse and has been incarcerated multiple times at multiple jails and prisons for issues related to drugs and other crimes. Relevant to this appeal, she was incarcerated at Wake County jail from 10 December 2014 to 7 January 2015. She was incarcerated at Durham County jail, participating in a drug treatment program, from 23 January to 2 March 2015. She returned to Wake County jail on 9 March and then was transferred in late July to a prison within the North Carolina Department of Adult Correction, where she remained until the termination hearing.

On 28 May 2015, petitioner-father filed a petition to terminate respondent-mother's parental rights to David alleging, *inter alia*, that she "willfully abandoned [David] for at least six (6) consecutive months immediately preceding the filing of the petition," pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). From jail, respondent-mother handwrote a letter to the clerk of court stating that she did not want her parental rights terminated, that she had been incarcerated for most of the year, and that she wanted an attorney. Respondent-mother also stated that "she ha[d] contacted [petitioner-father] many, many times[, and she] had either gotten [n]o response or [petitioner-father responding] 'No' & 'Busy' on multiple occasions[.]" On 30 June 2015, respondent-mother filed a formal response denying the allegations that she willfully abandoned David. At some point in July 2015, respondent-mother was transferred from Wake County jail to Eastern Correctional Institution in Maury, North Carolina. On 26 August 2015, a guardian ad litem ("GAL") was appointed for David.

On 29 January 2016, the district court held a termination hearing. On 16 March 2016, the trial court entered an order concluding that grounds existed to terminate respondent-mother's parental rights based on willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) and that termination was in David's best interests. Respondent-mother appeals.

II. Analysis

Respondent-mother argues the trial court erred by concluding she willfully abandoned David pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) because there was insufficient evidence and findings of her "willfulness." In addition, respondent-mother contends the trial court erred by not

requiring David's GAL to perform his statutory duties of "offer[ing] evidence and examin[ing] witnesses at adjudication," as well as "explor[ing] options with the court at the dispositional hearing." *See* N.C. Gen. Stat. § 7B-601(a) (2015).

A. Standard of Review

" 'This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law.' " *In re C.J.H.*, __ N.C. App. __, __, 772 S.E.2d 82, 88 (2015) (quoting *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000)). "If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary." *Id.* (citation omitted). We review *de novo* whether a trial court's findings support its conclusions. *See In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008) (citation omitted), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

However, meaningful appellate review requires that trial courts make "*specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation and quotation marks omitted). The court's order must include "specific ultimate facts to support the judgment, and the facts found must be sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156–57, 231 S.E.2d 26, 28 (1977) (citations omitted).

B. Willful Abandonment

Respondent-mother asserts "the trial court erred in concluding that [her] parental rights should be terminated solely on the basis of N.C. Gen. Stat. § 7B-1111(a)(7) when there were no findings of willfulness."

N.C. Gen. Stat. § 7B-1111(a)(7) (2015) (emphasis added) establishes grounds for terminating parental rights when "[t]he parent has *willfully* abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." In the context of abandonment, "[w]illfulness is 'more than an intention to do a thing; there must

also be purpose and deliberation.' " *In re S.R.G.*, 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009) (quoting *In re Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986)). Because "[w]ilful[l] intent is an integral part of abandonment and . . . is a question of fact to be determined from the evidence[,]" *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962), a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent. *See In re T.M.H.*, 186 N.C. App. 451, 452, 652 S.E.2d 1, 1 (2007) (remanding for further findings "[w]here the trial court failed to make findings of fact and conclusions of law concerning the willfulness of respondent's conduct"). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (citation and quotation marks omitted).

Although "the trial court may consider [a parent's] conduct outside [the six-month] window in evaluating [a parent's] credibility and intentions[,]" *C.J.H.*, __ N.C. App. at __, 772 S.E.2d at 91 (citations omitted), the "determinative" period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition. *Young*, 346 N.C. at 251, 485 S.E.2d at 617. Thus, termination based on abandonment requires findings that "show more than a failure of the parent to live up to [his or her] obligations as a parent in an appropriate fashion." *In re S.R.G.*, 195 N.C. App. at 87, 671 S.E.2d at 53. The findings must "demonstrate that [a parent] had a 'purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims' to [the child]." *In re S.Z.H.*, __ N.C. App. __, __, 785 S.E.2d 341, 347 (2016) (quoting *S.R.G.*, 195 N.C. App. at 87, 671 S.E.2d at 53) (reversing a termination order based on abandonment for insufficient findings).

Here, respondent-mother's behavior between 28 November 2014 and 28 May 2015 is determinative. The trial court's relevant findings as to respondent-mother's conduct during this period follow:

> A. From 2012 to early 2015, when [respondent-mother] was not incarcerated, she showed up late for visits and over time the visits decreased in frequency. [Respondent-mother] was in custody from December 10, 2014 through January 7, 2015, and January 23, 2015 through March 2, 2015, and March 9, 2015 through present.
>
> B. [David] participates in baseball and basketball. [Petitioner-father] notified [respondent-mother] of [David's] game schedule. [Respondent-mother] attended

few of the games. She has not attended any games over the last year.

C. To the knowledge of [petitioner-father] and his wife, [respondent-mother] last saw [David] in March or April of 2014. [Respondent-mother] has a history of asking to see [David] and now [sic] showing up or calling to cancel the visitation.

. . . .

G. [Respondent-mother] did not visit with [David] or contact [David] during November 2014 or December 2014.

. . . .

I. On or about January 7, 2015, [respondent-mother] texted [petitioner-father] telling [petitioner-father] that she loves and misses [David]. [Respondent-mother] did not ask to speak to [David] or ask that a message be conveyed to [David]. [Respondent-mother] did not exercise Court ordered visits with [David] during January 2015.

J. [Respondent-mother] failed to exercise Court ordered visitation during February 2015.

K. [Respondent-mother] failed to exercise Court ordered visitation during March 2015.

L. [Respondent-mother] failed to exercise Court ordered visitation during April 2015.

M. [Respondent-mother] failed to exercise Court ordered visitation during May 2015.

N. [Respondent-mother] has called in the past and requested to speak to [David]. Her request was honored (see [petitioner-father's] Exhibit 2).

O. [Respondent-mother] has requested visits in the past and those visits were allowed by [petitioner-father]. (see [petitioner-father's] Exhibit 2).

P. [Respondent-mother's] sister has requested visits with [David] and phone calls. Requests were granted (see [petitioner-father's] Exhibit 2).

Q. [Respondent-mother] testified that she had made attempts to call and sent letters but did not keep track of

> when she did so because she did not think she would need them. Her recollection was that she sent a letter in April and May of 2015. Furthermore, she also sent a small number of texts during times she was not in custody.

Respondent-mother argues these findings are inadequate to establish that she willfully abandoned David. Specifically, she contends that despite findings that she was incarcerated for all but 33 of the determinative 180 days preceding the filing of the termination petition, the court found that she failed to exercise visitation and attempted to make contacts during this period, yet failed to make "findings that any of [respondent-mother's] conduct was willful or manifested a willful intent to abandon her son." We agree.

"[I]ncarceration, standing alone, neither precludes nor requires a finding of willfulness [on the issue of abandonment,]" *In re McLemore*, 139 N.C. App. 426, 431, 533 S.E.2d 508, 511 (2000) (citation omitted), and "[d]espite incarceration, a parent failing to have any contact can be found to have willfully abandoned the child[.]" *In re D.J.D.*, 171 N.C. App. 230, 241, 615 S.E.2d 26, 33–34 (2005) (citation omitted). However, the circumstances attendant to a parent's incarceration are relevant when determining whether a parent willfully abandoned his or her child, and this Court has repeatedly acknowledged that the opportunities of an incarcerated parent to show affection for and associate with a child are limited. *See*, *e.g.*, *In re B.S.O.*, 234 N.C. App. 706, 711, 760 S.E.2d 59, 64 (2014) ("[A] parent's opportunities to care for or associate with a child while incarcerated are different than those of a parent who is not incarcerated. The opportunities of an incarcerated parent are even more limited than those of a deported parent . . . ."); *In re Shermer*, 156 N.C. App. 281, 290, 576 S.E.2d 403, 409 (2003) ("*Because respondent was incarcerated*, there was little involvement he could have beyond what he did—write letters to [his children] and inform DSS that he did not want his rights terminated." (emphasis added)); *In re Adoption of Maynor*, 38 N.C. App. 724, 726–27, 248 S.E.2d 875, 877 (1978) ("[T]he fact that the respondent was unable to locate his son and was unable to make support payments *as a result of his incarceration*, is inconsistent with a willful intent to abandon his son." (emphasis added)); *see also D.J.D.*, 171 N.C. App. at 240, 615 S.E.2d at 33 (affirming termination of parental rights based in part upon abandonment, "acknowledg[ing] that incarceration limited [the parent's] ability to show affection"); *In re J.L.K.*, 165 N.C. App. 311, 318–19, 598 S.E.2d 387, 392 (2004) (upholding a termination order based upon neglect, stating that "[a]lthough his options for showing affection [while incarcerated] are greatly limited,

the respondent will not be excused from showing interest in his child's welfare by whatever means available"). Additionally, the effects of a parent's addiction may be relevant when considering evidence related to willfulness on the issue of abandonment. *See*, *e.g.*, *S.R.G.*, 195 N.C. App. at 86, 671 S.E.2d at 52 (analyzing findings relating to a parent's failure to comply with her case plan and continued substance abuse, explaining that "[t]hese are failings that do not inherently suggest a willful intent to abandon, as they are subject to other explanations—uncontrolled addiction, for example" (citations omitted)); *Bost v. Van Nortwick*, 117 N.C. App. 1, 18, 449 S.E.2d 911, 921 (1994) ("Our review of respondent's inability to pay child support *due to his dependency on alcohol* and related financial problems does not support a finding of willful abandonment.").

Furthermore, our cases have consistently recognized that the finding of willful intent for abandonment under N.C. Gen. Stat. § 7B-1111(a)(7) is something greater than that of the willful intent for leaving a child in foster care without making reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2). *See*, *e.g.*, *In re J.L.H.*, 224 N.C. App. 52, 54, 741 S.E.2d 333, 335 (2012) ("The willful leaving of the juvenile in foster care is 'something less than willful abandonment' and 'does not require a showing of fault by the parent.' (citation omitted)); *S.N.*, 194 N.C. App. at 146, 669 S.E.2d at 59. Under N.C. Gen. Stat. § 7B-1111(a)(2), "[w]illfulness is established when [a parent] had the *ability* to show reasonable progress, but was unwilling to make the effort." *In re D.C.*, 225 N.C. App. 327, 330, 737 S.E.2d 182, 185 (2013) (emphasis added) (citation and quotation marks omitted). In determining willfulness in this context, "[i]t is significant that the tasks assigned . . . were within [a parent's] ability to achieve, and did not require financial or social resources beyond [a parent's] means." *In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001); *see also In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002) ("Evidence showing *a parents' ability, or capacity to acquire the ability*, to overcome factors which resulted in their children being placed in foster care *must be apparent for willfulness to attach*." (emphasis added) (citation omitted)).

In *D.J.D.*, this Court considered the termination of parental rights under willful abandonment when the parent was incarcerated during the relevant six-month period. 171 N.C. App. at 241, 615 S.E.2d at 33–34. In that case, the trial court found that, *inter alia*, while the respondent had been in custody, "he . . . had absolutely no contact with his children"; "[h]e ha[d] made no telephone calls, sent any cards, written any letters, nor arranged for any gifts"; "no one acting on his behalf (family member or friend) had contacted the Department of Social Services [DSS] requesting

a visit with or attempting to communicate with [his] children"; and he had paid "no child support . . . but . . . was not employed at the time." *Id.* at 235, 615 S.E.2d at 30. The trial court also found that although the respondent "did have contact with his mother, sister, and the children's mother," he never requested those individuals, or any other family member or friend, to contact DSS to check on the welfare of his children nor to ascertain an address where he could send letters to his children. *Id.* Additionally, the court found that "[a]lthough respondent is limited as to what he can do at this time to provide for his children while he is incarcerated, he has failed to provide any contact, love, or affection for his children," *id.* at 236, 615 S.E.2d at 30, and, therefore, terminated his parental rights under abandonment. On appeal, we held that these findings were sufficient to terminate the respondent's parental rights based on abandonment, since they established that the respondent, although able to while incarcerated, "ha[d] taken none of the steps to develop or maintain a relationship with his children." *Id.* at 241, 615 S.E.2d at 34.

In *B.S.O.*, this Court considered a parent's deportation to another country in the context of termination based on abandonment and analogized deportation with incarceration, noting that "[t]he opportunities of an incarcerated parent are even more limited than those of a deported parent, . . . [who] would be free to work, send funds to support a child, or communicate with a child by phone, internet, or mail from his own country." 234 N.C. App. at 711–12, 760 S.E.2d at 64. The *B.S.O.* Court noted several findings made by the trial court, including that the deported parent failed to "provide[ ] any financial support for the children *although [he had] the ability to do so*," had "no known disabilities," and had on one occasion contacted his social worker while in Mexico but otherwise made no effort to keep updated on his children while they were in custody. *Id.* at 711, 760 S.E.2d at 63. The *B.S.O.* Court explained that "[b]oth the evidence and the court's findings reflect that *respondent-father's arrest and subsequent deportation did not prevent him from communicating* with his children and [the agency that retained custody of his children]." *Id.* at 713, 760 S.E.2d at 65 (emphasis added). Accordingly, we upheld the termination based upon abandonment because the findings "show[ed] that, during the relevant six-month period, respondent-father 'made no effort' to remain in contact with his children or their caretakers and neither provided nor offered anything toward their support" although able. *Id.* at 711, 760 S.E.2d at 64.

Here, despite finding that respondent-mother had a history of substance abuse and was incarcerated for multiple periods spanning across each of the determinative six months, the court also found that, during

those months, respondent-mother failed to exercise visitation and to attend David's sports games, and failed to contact David during three of those months. Yet the court never made findings addressing how respondent-mother's periodic incarceration at multiple jails, addiction issues, or participation in a drug treatment program while in custody might have affected her opportunities to request and exercise visitation, to attend games, or to communicate with David. The trial court made no findings establishing whether respondent-mother had made any effort, had the capacity, or had the ability to acquire the capacity, to perform the conduct underlying its conclusion that respondent-mother abandoned David willfully. Unlike in *D.J.D.*, the trial court here made no findings indicating that it considered the limitations of respondent-mother's incarceration, or that respondent-mother was able but failed to provide contact, love, or affection to her child while incarcerated. Unlike in *B.S.O.*, the trial court here made no findings related to respondent-mother's ability but failure to provide financial support or her abilities but failures to make efforts to communicate with her child or her child's caretakers.

We conclude that the trial court's findings (subparts B, I-M) are inadequate to support its conclusion of willful abandonment, as these findings fail to address respondent-mother's efforts or ability to request and exercise visitation, to attend David's sports games, or to communicate with David, particularly in light of the incomplete findings relating to her history of substance abuse and periodic incarcerations at multiple jails spanning each of the determinative six months, as well as the evidence of her participation in drug rehabilitation program while in custody and petitioner-father's testimony that he was not as receptive to her having a relationship with David while she was in and out of custody.

The trial court's remaining findings, identified as subparts A–S, are inadequate to support a conclusion on the issue of abandonment. Subparts C and Q are recitations of testimony without the force of a finding of fact. *See In re M.R.D.C.*, 166 N.C. App. 693, 699, 603 S.E.2d 890, 894 (2004) ("Recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge . . . ." (citations and quotation marks omitted)). Subparts A, G, H, N, O, and P are insufficiently specific, in that these findings fail to identify specific conduct within the determinative period. Subparts D, E, F, P, R, and S fail to address factual grounds which could support a conclusion that respondent-mother willfully abandoned David. Thus, the trial court's findings do not demonstrate that respondent-mother had a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to

[David]." *S.Z.H.*, __ N.C. App. at __, 785 S.E.2d at 348 (citation and quotation marks omitted).

Nonetheless, "when a court fails to make appropriate findings or conclusions, this Court is not required to remand the matter if the facts are not in dispute and only one inference can be drawn from them." *In re J.K.C.*, 218 N.C. App. 22, 39, 721 S.E.2d 264, 276 (2012) (citation and quotation marks omitted). Here, however, there are material conflicts in the evidence relating to the issue of respondent-mother's willfulness that were not resolved by the trial court's order.

C. Conflicts in Evidence

According to petitioner-father's testimony, respondent-mother never sent any letters addressed to him or David during the relevant six-month period; he was receptive to respondent-mother having a relationship with David, except "[he] wasn't as receptive" "when [he] was getting text messages from the jail that [respondent-mother] was in jail every other week or every other month"; respondent-mother never called him from Durham County jail between 23 January and March 2015; she never asked him in January 2015 if David could participate in her birthday; she never called him on 3 March 2015 for David's birthday; and she never texted him between 2 and 9 March 2015, when she was temporarily released from jail.

According to respondent-mother's testimony, however, she called petitioner-father on 7 January when she was released from jail and texted him about seeing David, but he "texted [her] back saying that they had plans"; she called petitioner-father "several times" between 7 and 23 January and he failed to answer; she called him twice when she was in Durham County jail between 23 January and 2 March, but he never accepted the calls; she called petitioner-father several times on 3 March to speak with David on his birthday but petitioner-father never answered; she then sent text messages asking to see David for his birthday sometime that week "[a]nd when [petitioner-father] didn't response to any of those texts, [she] sent one [requesting that he] . . . at least tell [David she] love[s] him and happy birthday." Respondent-mother testified that she made several phone calls and wrote several letters "but when [petitioner-father] didn't call [her] back, . . . there was nothing [she] could do." When asked why she did not exercise visitation when she was released from jail in late November 2014, she replied: "Because [petitioner-father] had cut off the visits. He was not allowing me to see [David]." Respondent-mother stated that between 9 March and 28 May, she tried to contact petitioner-father about David by sending letters

to petitioner-father's address, "sen[ding] one [letter] every month" but "[she] never got any response."

We recognize that the power to observe and listen to all the witnesses in a termination hearing "allows the trial court to 'detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges.' " *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted). Although it was certainly within the court's discretion to discredit respondent-mother's testimony regarding her attempts to contact petitioner-father about David and to attempt to request and exercise visitation, the current findings are inadequate or fail to resolve conflicts in the evidence material to a conclusion that respondent-mother abandoned David willfully, particularly: whether and to what extent respondent-mother called, texted, and mailed letters during the relevant period; whether and to what extent respondent-mother was able to participate in exercising parental duties on account of her periodic incarceration at multiple jails; and whether and to what extent petitioner-father hindered respondent-mother from communicating with David or exercising visitation; among other evidentiary findings relevant to determining the ultimate finding of willfulness in the context of abandonment.

Without further fact-finding, we cannot determine whether the trial court's conclusions are supported by its findings. Accordingly, we vacate the termination order and remand to the trial court for further findings and conclusions relating to the issue of the willfulness of respondent-mother's conduct during the relevant six-month period, in order for the trial court to determine whether petitioner-father proved the ground of willful abandonment. *See, e.g.*, *In re F.G.J.*, 200 N.C. App. 681, 694, 684 S.E.2d 745, 754 (2009) (vacating a termination order and remanding for further fact-finding to address when "the trial court's current findings [were] insufficient to permit this Court to review its decision under N.C. Gen. Stat. § 7B-1111(a)(2)"). The trial court must resolve material conflicts in the evidence related to the willfulness of respondent-mother's conduct and may, in its discretion, receive additional evidence in order to do so. *In re D.R.B.*, 182 N.C. App. 733, 738–39, 643 S.E.2d 77, 81 (2007) (vacating and remanding termination order for entry of adequate findings of fact and conclusions of law to demonstrate grounds for termination and permitting the trial court to receive additional evidence on remand).

We have considered respondent-mother's remaining argument that the trial court erred by failing to require the GAL to perform his statutory duties of "offer[ing] evidence and examin[ing] witnesses at

adjudication," as well as "explor[ing] options with the court at the dispositional hearing." *See* N.C. Gen. Stat. § 7B-601(a) (2015). Although the record and transcript as developed do not permit us to engage in a meaningful review, the record demonstrates that the GAL presented his best-interests report, listened to respondent-mother's testimony during adjudication, and participated during the dispositional phase of the termination hearing but is unclear as to when the GAL arrived and left the court room during the proceedings. We emphasize that adherence to the GAL program by both the GAL and the trial court is critically important to ensure minors' best interests are protected and served.

III. Conclusion

The trial court failed to enter adequate findings of fact and conclusions of law to demonstrate grounds for termination regarding N.C. Gen. Stat. § 7B-1111(a)(7). In addition, the trial court's order fails to resolve material conflicts in the evidence relevant to a conclusion that respondent-mother willfully abandoned David. Accordingly, we vacate the trial court's order and remand for further findings of fact and conclusions of law regarding N.C. Gen. Stat. § 7B-1111(a)(7). The trial court may hear and receive additional evidence.

VACATED AND REMANDED.

Judges HUNTER, JR. and DILLON concur.

IN THE MATTER OF D.T.N.A.

No. COA16-542

Filed 6 December 2016

Termination of Parental Rights—care and supervision of child—findings

An order terminating the respondent's parental rights was reversed and the matter was remanded for further proceedings. Respondent's parental rights were terminated on the ground that he was incapable of providing the proper care and supervision of the child. The court's finding to that effect was based on drug use, the inability to care for the child's daily needs, poor decision-making, failure to comply with the case plan, and the lack of an appropriate child care placement arrangement. Those findings were not supported by the evidence and did not support the conclusion that respondent was incapable of providing proper care and supervision.

Appeal by respondent from order entered 22 February 2016 by Judge Betty J. Brown in Guilford County District Court. Heard in the Court of Appeals 21 November 2016.

Mercedes O. Chut, for Guilford County Department of Health and Human Services, petitioner-appellee.

Amanda Armstrong for guardian ad litem.

Appellate Defender Glen Gerding, by Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant.

McCULLOUGH, Judge.

Respondent, the father of D.T.N.A. (hereafter "Danny"[1]), appeals from an order terminating his parental rights on grounds (1) he is incapable of providing proper care and supervision such that the child is a dependent juvenile and lacks an appropriate alternative child care arrangement; and (2) during the six months immediately preceding the filing of the petition to terminate parental rights, he willfully abandoned Danny. Because the evidence and findings of fact do not support the

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

court's conclusions of law that these two grounds exist for termination of respondent's parental rights, which the appellee and the guardian *ad litem* candidly concede in their briefs, we reverse the order.

I. Procedural History

On 10 February 2014, Guilford County Department of Health and Human Services ("Petitioner") filed a juvenile petition seeking an adjudication that the infant Danny was a neglected and dependent juvenile. Petitioner took nonsecure custody of Danny on that date. On 9 April 2014, the court held a hearing and filed an order on 5 May 2014 adjudicating Danny to be a dependent juvenile and continuing custody with petitioner. The court found that Danny's mother was arrested on 7 February 2014 on charges of multiple criminal offenses in this state and South Carolina, including armed robbery. Respondent had pending charges in Guilford County of possession of marijuana and driving while impaired, and he was on probation.

The court thereafter conducted several review hearings. At a permanency planning and review hearing on 31 July 2015, the court changed the permanent plan from reunification to adoption with a concurrent plan of reunification. On 28 September 2015, petitioner filed a petition to terminate the parental rights of both parents. The court conducted a hearing on 19 January 2016 and filed an order on 22 February 2016 terminating the parental rights of both parents. Respondent filed notice of appeal on 23 March 2016.

II. Standard of Review

During the adjudication phase of a termination of parental rights proceeding, the trial court "examines the evidence and determines whether sufficient grounds exist under N.C. Gen. Stat. § 7B-1111 to warrant termination of parental rights." *In re T.D.P.*, 164 N.C. App. 287, 288, 595 S.E.2d 735, 736 (2004), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005). The focus is upon "whether the parent's individual conduct satisfies one or more of the statutory grounds which permit termination." *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007). On appeal, our review is limited to a determination of whether the findings of fact are supported by clear, cogent and convincing evidence and whether the findings of fact support the adjudicatory conclusions of law. *In re Shepard*, 162 N.C. App. 215, 221, 591 S.E.2d 1, 6, *disc. review denied sub nom. In re D.S.*, 358 N.C. 543, 599 S.E.2d 42 (2004). The conclusions of law are reviewable *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009). We accordingly determine whether the court's findings of fact

support the court's conclusions of law that grounds existed to terminate respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), incapability of providing for proper care and supervision, and N.C. Gen. Stat. § 7B-1111(a)(7), willful abandonment.

III. Discussion

A. Incapability of Providing Proper Care and Supervision

We first address termination of respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(6) on the ground that he is incapable of providing for the proper care and supervision of Danny and the incapability will continue for the foreseeable future. N.C. Gen. Stat. § 7B-1111(a)(6) (2015). The incapability under this statute "may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement." *Id.* To terminate parental rights on this ground, the court's findings must address (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements. *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

In finding of fact number 30, the trial court stated:

> Within the meaning of N.C.G.S. § 7B-1111(a)(6), the father is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is dependent within the meaning of N.C.G.S. § 7B-101, there is reasonable probability that such incapability will continued [sic] for the foreseeable future and his incapability is due to conditions that render him unable to parent the juvenile because of his drug use, inability to care for [Danny's] daily needs, poor decision making that affected the well-being of his juvenile and lacks an appropriate alternative child care arrangement. [Respondent] has visited with [Danny], but the juvenile has been in care since he was two or three days old and now he is fast approaching his second birthday. [Respondent] has failed to comply with his case plan.

The court thus based its finding that respondent is incapable of providing proper care and supervision on four bases: (1) respondent's drug use; (2) his inability to care for Danny's daily needs; (3) his poor decision making; and (4) his failure to comply with the case plan. We examine each basis to determine whether it is supported by evidence and

whether it supports a conclusion that respondent is incapable of providing proper care and supervision. We also examine the finding that he lacks an appropriate alternative child care placement arrangement.

(1) Respondent's Drug Use. The court made only one finding of fact concerning respondent's usage of drugs, as follows:

> 23. [Respondent] admitted to the use of illegal substances and smoked "pot" as recently as New Year's Eve. Further, [respondent] refused to submit to drug testing by the Department of Health and Human Services and the Court considers these refusals as a positive drug screen. [Respondent] testified that he had to work and on November 10, 2015, when he was given the documents for the drug screen he said "It'll be good[.]"[] The Court considered this test positive because [respondent] failed to take the drug screen as no test results were received. [Respondent] admitted using marijuana on or about New Year's [E]ve.

Other than respondent's admission to smoking marijuana on the one occasion on New Year's Eve three weeks before the hearing, we can find no evidence in the record affirmatively showing that respondent engaged in substance abuse after the child was born. At best, the court's finding assumes, without basis, that by not taking a drug test, respondent would have tested positive for controlled substances. The record, however, tends to suggest otherwise. The preamble to the court's order terminating respondent's parental rights states that the court took judicial notice of the court file. Among other things, the court file contained permanency planning orders in which the court found as facts that respondent has had multiple drug screens as part of his criminal probation during the pendency of this matter, all of which have been negative. The court report prepared by petitioner for the permanency planning hearing on 18 November 2015 showed that since Danny has been in foster care, respondent has tested negative for all illegal substances, that the social worker had not asked respondent to undergo a drug screen for several months until 10 November 2015, and that respondent was on criminal probation until July 2015, during which time he never tested positive for any illegal substances.

Even if respondent had used drugs, the burden is upon the petitioner to show that the parent's substance abuse would prevent the parent from providing for the proper care and supervision of the child. *In re A.G.M.*, __ N.C. App. __, __, 773 S.E.2d 123, 133 (2015). A mere showing that a

parent has abused alcohol or drugs is insufficient to terminate parental rights. *In re Phifer*, 67 N.C. App. 16, 25, 312 S.E.2d 684, 689 (1984). We can find no evidence to indicate that respondent's alleged drug or substance abuse would prevent him from providing for the proper care and supervision of Danny. Petitioner thus has not satisfied this burden.

(2) Inability to provide for child's daily needs. Respondent challenges the court's finding number 20 in which the court found that "[respondent] knows how to care for [Danny] but could not demonstrate the techniques he learned through the Healthy Start Program on the juvenile. Further, [respondent] failed to pay attention to [Danny] and played video games instead of caring for his child."

The other findings made by the court, and the report of the lead caseworker for Healthy Start, contradict this finding. For example, in finding of fact number 18, the court narrates parenting issues or deficiencies but then notes that respondent rectified the issues or addressed the deficiencies when they were called to his attention. The report of the Healthy Start lead caseworker dated 27 April 2015 shows that respondent engages Danny during visits "with play, literacy and displays of affection," responds to cues from Danny, provides "appropriate redirection for unwanted behavior," and "demonstrate[s] an understanding of child milestones[,] often referencing the material presented during past sessions and with Fathers Matters [sic]." The caseworker noted "[t]here have not been any presented concerns during the supervised visits" and respondent "has maintained compliance with Healthy Start and will be transitioned to closing in May 2015 having completed his service goals with the program."

(3) Poor decision making. Respondent challenges finding of fact number 25 in which the court found respondent "made poor decisions regarding [Danny] and clearly chooses his girlfriend over his child." The finding does not specify the "poor decisions" made by respondent, and other findings made by the court do not demonstrate that respondent "clearly chooses his girlfriend over his child." The court found that respondent moved out of the home he shared with the girlfriend so he could have unsupervised visits with Danny. The court further found that although respondent did subsequently move back in with the girlfriend, respondent reported that after he moved out of the apartment someone shot at the windows and doors of the apartment, which suggests that the apartment was not located in a neighborhood that was safe for Danny.

(4) Non-compliance with case plan. Finding of fact number 16 shows that the case plan required respondent to obtain and maintain

stable employment, provide copies of his paycheck stubs and employment updates within 48 hours, obtain suitable and stable housing for a minimum of six months, complete a parenting assessment and follow the recommendations, attend all visits, participate in shared parenting, participate in Healthy Start services, participate in Fathers Matter Group, participate in "CC4C" when requested, and meet with the JCITI coordinator and attend all JCITI court reviews. Other findings show that respondent worked at a college two days per week earning $750 per month, supplemented by playing music, and that respondent stayed current in his child support obligation of $50.00 per month. Respondent cleaned his house, and relinquished his pit bull dogs, to make the home appropriate for the child. Respondent was permitted visits twice per week, which started in March 2015. Although he did miss eight visits between March and late July 2015, he attended the majority of them and he successfully completed the Healthy Start parenting program. Other than a finding that respondent failed to participate in "shared parenting," the court's findings do not indicate that respondent failed to comply with participation in CC4C, meetings with the JCITI coordinator, and attendance of JCITI reviews.

(5) Lack of Alternative Child Care Arrangement. In finding of fact number 27, the court found that respondent never offered another child care placement for Danny, other than himself and his girlfriend. This finding is contradicted by the case file, which showed respondent had recommended a cousin for placement, that a home study was conducted and placement with this relative was recommended by petitioner, and that the court approved this placement on 28 February 2014. In addition, at the termination hearing the social worker testified that relatives were identified by respondent as a placement option, that a home study of these relatives was conducted, and that placement with the relatives was approved but that placement with this relative was not utilized because respondent believed it was better for Danny to remain in the current foster placement.

B. Willful Abandonment

One's parental rights may be terminated if the court determines that a parent "has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion" to terminate parental rights. N.C. Gen. Stat. § 7B-1111(a)(7) (2015). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). "[I]f a parent withholds his presence,

his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent . . . abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962).

In finding of fact number 32, the court found

> Within the meaning of N.C.G.S. § 7B-1111(a)(7), during the six months immediately preceding the filing of the Petition to Terminate the Parental Rights, that is, from March 28, 2015 to September 28, 2015, [Respondent] has willfully abandoned the juvenile in that the father has failed to provide a plan for [Danny] and comply with his case plan.

As with finding of fact number 30, the finding that respondent failed to provide a case plan and comply with it is directly contradicted by the court's other findings of fact which we have discussed above and is not supported by evidence. The court's findings of fact show that respondent did enter into a case plan and that he substantially complied with the case plan.

We further conclude that the court's findings of fact do not support the conclusion of law that respondent has willfully abandoned the child. The court's findings demonstrate that respondent is current in his child support obligation, regularly visits the child and interacts with him, attends parenting classes to become a better parent to the child, and participates in the child's medical appointments. These findings do not portray a parent who "manifests a willful determination to forego all parental duties and relinquish all parental claims to the child[]" or "withholds his presence, his love, his care, [and] the opportunity to display filial affection, and willfully neglects to provide support and maintenance[]" within the accepted definitions of abandonment.

The order terminating respondent's parental rights is accordingly reversed and the matter is remanded to Guilford County District Court for further proceedings.

REVERSED AND REMANDED.

Judges BRYANT and TYSON concur.

IN RE P.T.W.

[250 N.C. App. 589 (2016)]

IN THE MATTER OF P.T.W., D.O.B.: 4/7/2013

No. COA16-632

Filed 6 December 2016

1. Termination of Parental Rights—cessation of reunification efforts—sufficiency of findings of fact

The trial court did not err by entering an order ceasing reunification efforts and an order terminating respondent mother's parental rights. Although the trial court's finding that respondent had not reengaged in therapy since moving to Pitt County was not supported by the evidence presented at the hearing, the remaining findings of fact supported the trial court's ultimate decision to cease reunification efforts.

2. Appeal and Error—preservation of issues—failure to object at trial—guardian ad litem

Respondent mother failed to object to the lack of a guardian ad litem (GAL) for her minor child during the parental termination proceedings, and the issue was therefore not preserved for appellate review. Further, there was nothing to suggest it was unreasonable for the trial court to forego GAL assistance in determining the minor child's best interests.

Appeal by Respondent-Mother from orders entered 31 August 2015 and 18 April 2016 by Judge Keith Gregory in District Court, Wake County. Heard in the Court of Appeals 17 October 2016.

Wake County Attorney's Office, by Deputy County Attorney Roger A. Askew and Senior Assistant County Attorney Allison Pope Cooper, for Wake County Human Services.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender J. Lee Gilliam, for Respondent-Appellant Mother.

McGEE, Chief Judge.

K.W. ("Respondent-Mother") appeals an order entered 31 August 2015 ceasing reunification efforts ("CRO") and an order entered 18 April 2016 terminating her parental rights ("TPR order"). After careful review, we affirm.

I. Background

Respondent-Mother's sixth child, P.T.W., was born on 7 April 2013. Respondent-Mother received no prenatal care throughout her pregnancy, and P.T.W. was born with a medical condition that caused his intestines to be outside his body. As a result, P.T.W. required multiple corrective surgeries and remained in the Neonatal Intensive Care Unit at Wake Medical Center ("WMC") until 15 May 2013. At the time of P.T.W.'s birth, Respondent-Mother did not have custody of any of her five other children.

Wake County Human Services Child Protective Services ("WCHS") received an assist request from Vance County Department of Social Services ("VCDSS") on 22 April 2013 reporting conditions that had led to the removal of Respondent-Mother's five other children from her custody. The report cited Respondent-Mother's confirmed alcohol and drug abuse, past threats to harm her children, and sustained lack of employment. WMC staff later informed WCHS that, prior to the 22 April 2013 report, Respondent-Mother

> had been inconsistent with visit[ing P.T.W.] at the hospital, reported not having supplies for the baby, and was not prepared to provide appropriate care for her special needs infant. In addition . . . [Respondent-Mother] appeared to have slurred speech and oppositional behaviors when talking to [WMC] staff, indicative of substance abuse.

At WMC, Respondent-Mother identified Lynn Williams ("Williams") as P.T.W.'s father, but subsequently informed a WCHS social worker that she was unsure of P.T.W.'s paternity. DNA testing later confirmed Williams as P.T.W.'s father.[1] Respondent-Mother told WCHS she had recently secured her own housing, but could not afford to have the electricity turned on.

WCHS filed a juvenile petition on 3 May 2013 alleging P.T.W. was dependent and in need of alternative placement by the State. WCHS was given non-secure custody of P.T.W. that same day.

Respondent-Mother appeared at a child planning conference on 9 May 2013. WCHS recommended that Respondent-Mother "complete a mental health assessment and a substance abuse assessment and follow all recommendations, . . . obtain/maintain stable and suitable housing and lawful income sufficient to meet the needs of her family, and follow

1. Williams's parental rights were terminated by the same order Respondent-Mother appeals, but Williams is not a party to the present appeal.

the court orders from Vance County." Respondent-Mother reported she had obtained full-time employment and had completed her case plan with VCDSS. WCHS also recommended that Respondent-Mother be granted a one-hour supervised visit with P.T.W. once a week.

Respondent-Mother underwent a mental health assessment on 24 May 2013 that resulted in a diagnosis of Adult Antisocial and Antisocial Personality Disorder. She also submitted to a substance abuse assessment on 3 June 2013 and was diagnosed with "Alcohol Abuse in partial remission." Respondent-Mother alleged that, on or around 1 June 2013, Williams slammed her against a wall and threatened to kill her. Respondent-Mother was granted an *ex parte* domestic violence protective order ("DVPO") against Williams on or around 3 June 2013.

Following a review hearing on 12 June 2013, P.T.W. was adjudicated dependent by order entered 25 June 2013. The trial court ordered that Respondent-Mother

> a) continue to show proof of stable and suitable housing and lawful income to meet the needs of the child; b) complete a psychological evaluation and follow all recommendations; c) follow the recommendations of her substance [abuse] assessment by complying with random drug/alcohol screens; d) demonstrate knowledge learned from anger management and parenting classes in her social interactions and life choices and take a parenting class for infants and toddlers; e) complete SafeChild MOVE [Mothers Overcoming Violence through Education and Empowerment] program and demonstrate knowledge learned; [and] f) maintain contact with WCHS and notify the agency of any change in situation or circumstance within [five] business days.

The court ordered that Respondent-Mother receive at least one hour a week of supervised visitation with P.T.W., and that WCHS "continue to make reasonable efforts to eliminate the need for placement of [P.T.W.] outside the home."

In August 2013, the trial court approved placement of P.T.W. with Letha Richardson ("Richardson"), Respondent-Mother's cousin. However, multiple attempts by WCHS to contact Richardson about placing P.T.W. were unsuccessful and P.T.W. remained in WCHS custody. Respondent-Mother moved from Raleigh to Lillington, in Harnett County, on 3 September 2013. At the request of VCDSS, Harnett County Department of Social Services ("HCDSS") conducted a home study of

Respondent-Mother's residence in Lillington. HCDSS informed VCDSS that it did not recommend placement of Respondent-Mother's children with her as of 27 November 2013.[2] Respondent-Mother moved to Fuquay-Varina, in Wake County, in January 2014.

Between August 2013 and July 2015, the trial court held approximately eight review hearings to evaluate Respondent-Mother's compliance with P.T.W.'s case plan and WCHS's continuing efforts at reunification. Following a hearing on 16 May 2014, the trial court found that, since February 2014, Respondent-Mother had missed five of eleven scheduled visits with P.T.W. and, during the visits she did make, she was "not able to demonstrate skills taught in her parenting class." The trial court further found Respondent-Mother "d[id] not recognize how her mental health problems . . . affect her ability to parent, and ha[d] not really begun any therapy as ordered." It further found Respondent-Mother had not "demonstrated that she can control her anger, as she continue[d] to demonstrate impulsive tendencies, making derogatory statements to . . . her therapist, foster parents, and social workers." Additionally, the court found Respondent-Mother "continue[d] to have contact with [Williams] despite a DVPO that [was] in place and . . . had . . . call[ed] the police for [Williams] violating the order." The court ordered WCHS to cease reunification efforts with respect to Williams, but "continue to make reasonable efforts to work towards the reunification of [P.T.W.] with [Respondent-Mother]."

At a hearing on 4 November 2014, the trial court found Respondent-Mother had (1) completed several court-ordered services, (2) enrolled herself in an anger management class, (3) demonstrated a better attitude in working with WCHS, (4) secured suitable housing in Fuquay-Varina, (5) obtained two part-time jobs, (6) had not had any positive drug screens, and (7) was "complying with the treatment recommendations of her psychological [assessment]." The court further found that if Respondent-Mother "continue[d] the progress in correcting the conditions which led to [P.T.W.'s] removal, it [would] be possible for the Court to return [P.T.W.] to a safe environment with her in the next [six] months."

At a hearing on 17 December 2014, based on Respondent-Mother's continued progress, the trial court granted her two hours a week of unsupervised visitation with P.T.W. Following a hearing on 28 January 2015,

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2. In a court summary dated 14 July 2015, WCHS indicated "[this] denial was due to numerous concerns in regards to [Respondent-Mother], not the physical structure of the home."

the trial court increased Respondent-Mother's visitation with P.T.W. to one twenty-four hour unsupervised visit a week.

Several weeks later, VCDSS informed WCHS that Respondent-Mother's five-year-old child had reported witnessing Respondent-Mother engaging in a sexual act with Respondent-Mother's oldest son. Upon receiving this information, WCHS reinstated supervised visitation between Respondent-Mother and P.T.W. Respondent-Mother filed a motion for review of the change in visitation on 13 April 2015. Following a hearing on 6 May 2015, the trial court found Respondent-Mother's behavior during visits with P.T.W. had become "inappropriate"[3] and that she had "presented zero evidence . . . that remotely show[ed] that [P.T.W.] would be safe in her care." The court suspended Respondent-Mother's visitation with P.T.W. "indefinitely." Respondent-Mother moved to Farmville, in Pitt County, on or about 22 May 2015.

WCHS submitted a court summary on 14 July 2015 in which it recommended that the trial court cease reunification efforts with Respondent-Mother and change the permanent plan for P.T.W. to adoption. Following a review hearing on 22 July 2015, the trial court ceased reunification efforts by order entered 31 August 2015. The trial court concluded that reunification efforts with Respondent-Mother would be inconsistent with P.T.W.'s "safety and need for a safe home within a reasonable time," and ordered WCHS to "make reasonable efforts aimed at achieving a permanent plan of adoption."

WCHS filed a petition to terminate Respondent-Mother's parental rights with respect to P.T.W. on 9 October 2015. WCHS alleged that Respondent-Mother had "willfully abandoned [P.T.W.] for at least six months immediately preceding the filing of the Petition." Following a review hearing on 3-4 March 2016, the trial court terminated Respondent-Mother's parental rights by order entered 18 April 2016. Respondent-Mother appeals both the CRO and TPR order.[4]

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3. Specifically, the trial court found that, during visits with P.T.W., Respondent-Mother "ma[de] phone calls instead of interacting with [P.T.W.], call[ed] the social worker derogatory names, and ma[de] comments that [were] inappropriately sexual in nature."

4. Respondent-Mother appeals the TPR order only insofar as it failed to correct alleged deficiencies in the CRO.

II. Sufficiency of CRO Findings

A. *Standard of Review*

[1] Respondent-Mother first argues that certain "crucial" findings of fact in the trial court's CRO were not supported by the evidence and, as a result, the totality of the evidence did not support the trial court's ultimate finding that reunification efforts "would be inconsistent with [P.T.W.'s] safety and need for a safe home within a reasonable time." "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re I.R.C.*, 214 N.C. App. 358, 361, 714 S.E.2d 495, 497 (2011) (citation and quotation marks omitted); *see also In re N.G.*,186 N.C. App. 1, 10-11, 650 S.E.2d 45, 51 (2007) ("An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." (citation and quotation marks omitted)); *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003) ("In a permanency planning hearing held pursuant to Chapter 7B, the trial court can only order the cessation of reunification efforts when it finds facts based upon credible evidence *presented at the hearing* that support its conclusion of law to cease reunification efforts." (citation omitted) (emphasis added)). "The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) (citation omitted) (emphasis added); *see also Forehand v. Forehand*, 238 N.C. App. 270, 273, 767 S.E.2d 125, 128 (2014) ("Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." (citation and quotation marks omitted)). This is true "even where some evidence supports contrary findings." *In re A.J.M.*, 177 N.C. App. 745, 748, 630 S.E.2d 33, 35 (2006) (citation and quotation marks omitted). Unchallenged findings "are deemed to be supported by sufficient evidence and are [also] binding on appeal." *In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

B. *Analysis*

Our Juvenile Code provides that

> [i]n any order placing a juvenile in the custody or placement responsibility of a county department of social services, . . . the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:

> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]

N.C. Gen. Stat. § 7B-507(b)(1) (2013).[5] *See In re I.R.C.*, 214 N.C. App. at 362, 714 S.E.2d at 498 ("When a trial court is required to make findings of fact, it must make the findings of fact specially. . . . [It] may not simply recite allegations, but must through processes of logical reasoning from the evidentiary facts find the ultimate facts essential to support the conclusions of law." (citation and quotation marks omitted)). In the present case, in accordance with N.C.G.S. § 7B-507(b)(1), the trial court found that reunification efforts with Respondent-Mother would be "inconsistent with [P.T.W.'s] health, safety and need for a safe, permanent home within a reasonable time." This finding followed numerous, more specific findings of fact.

We consider whether the specific findings of fact Respondent-Mother challenges were supported by competent evidence presented at the cease reunification hearing and whether, considered together, the findings supported the trial court's ultimate statutory finding that reunification efforts would be inconsistent with P.T.W.'s health, safety, and need for a safe, permanent home within a reasonable time.[6]

1. Alleged Sexual Abuse by Respondent-Mother

Respondent-Mother first contends there was no credible evidence to support "the existence of a sexual relationship between" Respondent-Mother and her oldest son. Respondent-Mother characterizes the alleged sexual abuse as "the gravamen of the cease reunification order."

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5. As the parties observe, the General Assembly amended N.C.G.S. § 7B-507 in 2015, and cessation of reunification is now governed by other statutory provisions. However, those amendments became effective after Respondent-Mother's cease reunification hearing and entry of the CRO at issue in this case. Accordingly, for purposes of this opinion, citation is made to the statute applicable at the time of the cease reunification hearing and entry of the CRO.

6. We note that N.C.G.S. § 7B-507(b) permitted the court to order that reunification efforts shall *either* "not be required *or* shall cease." (emphasis added). We underscore this because, at Respondent-Mother's cease reunification hearing, the trial court stressed it was only directing that WCHS would no longer be required to make reasonable efforts at reunification, and that it was not terminating Respondent-Mother's parental rights or foreclosing her ability to take steps toward reunification.

The trial court found that

> [Respondent-Mother's] visits were suspended . . . in May 2015 due to allegations that she and her [eighteen]-year old son had a sexual relationship. This inappropriate relationship was disclosed by another child of [Respondent-Mother]. Vance County Department of Social Services substantiated the abuse.

As an initial matter, we disagree with Respondent-Mother's assertion that the alleged sexual abuse was the "gravamen"[7] of the trial court's decision to cease reunification efforts. The CRO explicitly incorporated by reference a court summary prepared by WCHS, submitted to the trial court on 14 July 2015 and admitted into evidence without objection at the hearing on 22 July 2015. *See In re R.A.H.*, 182 N.C. App. 52, 60, 641 S.E.2d 404, 409 (2007) (holding that "[DSS] reports constitute competent evidence, and the trial court properly relied upon them in reaching its finding of fact."). The WCHS report reviewed the case history extensively, including reunification efforts undertaken by WCHS, and listed the following factors in support of ceasing reunification:

> [Respondent-Mother] [1] has not provided documentation of lawful income[;] . . . [2] has been evicted from her last address in Wake County[;] . . . [3] caused significant damage to the rental home at the time of the eviction[;] . . . [4] has not followed the recommendations of her psychological [assessment][;] . . . [5] is unable to consistently demonstrate skills learned in parenting class during her interactions with [P.T.W.][;] . . . [6] did not start anger management class until 8/2014[;] [7] has been unable to demonstrate skills learned in Anger Management [classes][;] [8] has not complied with [her] Vance County DSS [case plan], [and] that agency is in the process of terminating her parental rights[;] . . . [9] has not maintained an environment conducive to the safety and protection of [P.T.W.][;] . . . [10] did not attend an initial mental health appointment until 4/7/14[;] . . . [11] stated to the clinicians at Monarch that she did not need mental health treatment[;] . . . [12] has not demonstrate[d] skills learned in the MOVE program in her life choices and interactions with others[;]

7. *Black's Law Dictionary* defines "gravamen" as "[t]he substantial point or essence of a claim, grievance, or complaint." *Black's Law Dictionary* 721 (8th ed. 2004).

> . . . [13] continued to visit with . . . Williams while he was in jail despite a DVPO in place[;] . . . [14] [Respondent-Mother] and . . . Williams were seen together following [Respondent-Mother's] visitation with [P.T.W.] on 2/15/14 despite [Respondent-Mother] having a DVPO against . . . Williams[;] [and] [15] Substantiated CPS case for sex abuse by Vance County DSS 6/2015.

Additionally, when the trial court orally reviewed its findings in support of ceasing reunification at the conclusion of the CRO hearing on 22 July 2015, it made *no mention* of the sexual abuse allegations. Thus, it is clear the alleged sexual abuse was merely one among many circumstances the trial court considered in rendering its ultimate decision to cease reunification efforts.

The WCHS report prepared in advance of the cease reunification hearing stated that on 25 February 2015,

> WCHS was made aware of a new allegation in regards to sex abuse between [Respondent-Mother] and her oldest son. The allegations of sex abuse were substantiated at the conclusion of the Child and Family Evaluation [conducted by Vance County DSS]. Vance County DSS has made the steps to put [Respondent-Mother] on the . . . Responsible Individuals List. In addition, the police investigation is currently on-going with an outcome in regards to charges being filed to be made in the next week or two.

At the cease reunification hearing, WCHS social worker Mary Torr ("Torr) testified that, in June 2015, "Vance County [DSS] substantiated a case for sex abuse against [Respondent-Mother]." Torr told the court that "the allegations were that one of [Respondent-Mother's] younger children was forced to watch [Respondent-Mother] inappropriately touch her oldest son. . . . And a CME and [Child and Family Evaluation ("CFE")] were done. Vance County did substantiate and the police are still currently completing their investigation."

Torr was then asked to explain the process of "CME/CFE substantiation." Torr told the court that in Respondent-Mother's case,

> Vance County [DSS] [was] the one [who made the determination]. It's not an opinion-based decision. [It is] [a]lso based on all of the evidence that was collected during the actual investigation. That included interviews with various people, it included what happened during the

> CME and what information was provided during the CFE that was completed, and then based on all of that information, then that case would have been staffed in Vance County, and they . . . made a decision that, based on all the evidence that they had, that the allegations were in fact true. . . . The social workers don't make the decisions independently. Everything is a decision that comes with a discussion, a staffing with additional social workers, with supervisors, sometimes people that are higher up in the chain of command.

Torr's testimony and the DSS report constituted sufficient evidence to support the trial court's finding that "[VCDSS] substantiated abuse." Importantly, the trial court did *not* find that sexual abuse in fact occurred or was committed by Respondent-Mother, or, as Respondent-Mother phrases it, "the existence of a sexual relationship between [Respondent-Mother and her oldest son]." The trial court found only that VCDSS "substantiated abuse," a process Torr described at length during the hearing.[8]

2. Respondent-Mother's Parenting Skills

Respondent-Mother also argues the evidence did not support the trial court's finding that she "ha[d] not demonstrated sustained parenting improvements during the last two years." In support of this argument, Respondent-Mother points to court orders from November 2014, December 2014, and January 2015 that indicated Respondent-Mother was making progress during her visits with P.T.W. and which increased her visitation rights. However, Respondent-Mother did not offer these specific examples at the cease reunification hearing.

On the other hand, the WCHS court summary introduced without objection at the cease reunification hearing indicated the following:

> [Respondent-Mother] has been unable to show sustained changes in her parenting over the past two years. Early on, [Respondent-Mother] would use her cell phone throughout visits instead of paying attention to [P.T.W.]. During an office visit, [P.T.W.] cried for nearly [two] hours and [Respondent-Mother] did not respond to directions to comfort [him]. . . . [Respondent-Mother] has used her visitation as an opportunity to [make unrelated phone calls]. [Respondent-Mother] has made numerous inappropriate

8. The subsequent TPR indicated no criminal charges were ever filed against Respondent-Mother related to the sex abuse allegations.

> comments in visitations including asking her oldest son if he wanted to kiss [P.T.W.'s] behind while she was changing the diaper, talking about sexual relationships, telling her other son that she was going to dress him up in an adult diaper and take pictures, discussing whooping's [sic], and needing to get her sex look on for a picture to be taken.

The report also documented Respondent-Mother's "sporadic" visitation attendance throughout the previous two years. Torr testified that Respondent-Mother had "been unable to consistently demonstrate skills learned in parenting classes during her interactions with [P.T.W.]" Torr also testified that, between the time WCHS reinstated supervised visitation in February 2015 and the time Respondent-Mother's visitation was suspended altogether in May 2015, "the visits [with P.T.W.] did not go well[.]" Respondent-Mother did not offer contrary evidence at the cease reunification hearing. *See In re M.J.G.*, 168 N.C. App. 638, 643-44, 608 S.E.2d 813, 816-17 (2005). Thus, the evidence was sufficient to support the trial court's finding that Respondent-Mother had not "demonstrated sustained parenting improvements during the last two years."

3. History of Family Violence

Respondent-Mother next argues there was insufficient evidence to support the trial court's finding that she "display[ed] zero awareness of or insight into her own past of domestic violence with [P.T.W.'s] father." Respondent-Mother does not challenge the court's finding that she "continued to visit [Williams] in jail despite filing a [DVPO] against him," and admits as much in her brief to this Court.

The WCHS court summary indicated the following:

> [Respondent-Mother] had had [sic] a pattern of violence in her relationship with [Williams]. [Respondent-Mother] took out a DVPO against [Williams] on [4 June 2013]. In that DVPO, [Respondent-Mother] described a [domestic violence] incident that took place between her and [Williams] where he pushed her against the wall and twisted her arm back. [Respondent-Mother] had several of her children in the home with her for a visitation when this incident happened. In the DVPO complaint, [Respondent-Mother] also stated that [Williams] was "always threatening to kill [her]," that [Williams] went to jail in October of 2012 for assaulting [her], that she was going to get a DVPO in December of 2012 but that [Williams] had talked her out of it, and that [Williams] had strangled [her] when she was pregnant with [P.T.W.].

> [Respondent-Mother] did complete the MOVE program. However, [Respondent-Mother] reported that she "loved going to the classes because she was fascinated by women that allow men to beat on them[.]"
>
> Despite having a DVPO in place against [Williams], [Respondent-Mother] would visit with [Williams] while he was in jail. [A social worker] observed [Respondent-Mother] and [Williams] walking to the bus stop together after a visitation at Millbrook. During a visitation on [10 June 2014], [Respondent-Mother] reported that she and [Williams] were going to be getting married, possibly before the end of the year.

Torr testified at the cease reunification hearing that Respondent-Mother "continued to visit with [Williams] . . . while he was in jail and after he was in jail, despite [a] domestic violence protection order being in place."

Respondent-Mother presented no evidence at the cease reunification hearing tending to contradict the foregoing testimony. Respondent-Mother does not dispute evidence of domestic violence with Williams, or that she maintained contact with Williams while the DVPO was in effect. Respondent-Mother's only argument is that "there was no evidence [she] had seen [Williams] since May 2014, other than possibly 'walking to the bus stop together,' " which she does not explicitly deny. However, the trial court did *not* find that Respondent-Mother had in fact seen Williams since May 2014, nor did it imply, as Respondent-Mother suggests, that she and Williams "were currently involved in domestic violence[.]" It found only that Respondent-Mother lacked "awareness of or insight into her own *past* of domestic violence with [Williams]." This finding was supported by the WCHS court summary as well as Torr's testimony at the hearing.

4. Therapy Engagement

Respondent-Mother also challenges the trial court's finding that she "ha[d] not reengaged in therapy" since moving to Pitt County. We agree this finding was not supported by evidence presented at the cease reunification hearing.

The WCHS court summary contained no information regarding Respondent-Mother's therapy (or lack thereof) since her move to Pitt County, which Respondent-Mother testified occurred on or about 22 May 2015. The report detailed Respondent-Mother's therapy participation while she was still residing in Wake County, and noted that

Respondent-Mother had worked with the same mental health provider for approximately one year while living in Fuquay-Varina.

Respondent-Mother was evicted from her home in Fuquay-Varina on or about 21 May 2015. Respondent-Mother testified she notified Torr by voicemail that she had left the home, although it is unclear whether Respondent-Mother indicated she would be moving to Pitt County or if she provided a new address. Torr testified she could not understand a lot of Respondent-Mother's voicemail due to poor cell phone reception, but that she "did hear that [Respondent-Mother] had left . . . Wake County." Torr did not testify at the cease reunification hearing regarding Respondent-Mother's involvement in therapy after leaving Wake County.

Respondent-Mother did testify about efforts she made to resume the court-ordered therapy after moving to Pitt County:

> Q: Okay. Let's see. Are you still working with your [Wake County] therapist?
>
> [Respondent-Mother]: No. When I moved to Pitt County, I called Mary Torr and I left her a voicemail because I knew I had five days to report my move. I called her on the fourth day, and . . . I told [her] that . . . I ha[d] moved to . . . Farmville, North Carolina, and I had set an appointment up in Pitt County Mental Health and I asked [Torr] on that voice call could she please help me with [therapy] service there. I said, you do know, in order for me to have my son, I have to continue with therapy. Will you please help me find a therapist there. [Torr] never returned my call.
>
> . . .
>
> Q: So the reason that you're changing therapists is because of your change of address to a different address?
>
> [Respondent-Mother]: Yes.
>
> Q: And what you're doing is you're looking to get some help for a referral to [a] particular person over in Pitt County?
>
> [Respondent-Mother]: Yes, I went one time. My appointment was [in] June. . . . [The therapist's] name is Ms. Jennifer, and I went to see her and she told me, because I had been in outpatient therapy for over a year, she is not going to recommend seeing me . . . [more than] once a

> month, and I had an appointment with her last week and I missed that appointment.

When Respondent-Mother was asked whether she was "able to set up the appointment with the Pitt County therapist on [her] own," Respondent-Mother testified: "Yes, ma'am, because I called [Torr] and she never returned my call, so I did it on my own." Thus, the only evidence presented at the cease reunification hearing regarding Respondent-Mother's therapy since moving to Pitt County indicated Respondent-Mother had made some effort to continue therapy, and that she had met with a provider in Pitt County on at least one occasion. In the absence of any evidence to the contrary, the trial court's finding that Respondent-Mother "ha[d] not reengaged in therapy" since moving to Pitt County was not supported by the evidence. *See In re M.J.G.*, 168 N.C. App. at 646, 608 S.E.2d at 818.

Notwithstanding this conclusion, we hold that the remaining findings of fact support the trial court's ultimate decision to cease reunification efforts. *Id.*; *see also In re K.S.*, 183 N.C. App. 315, 329-30, 646 S.E.2d 541, 549 (2007) (holding that, although one of the trial court's findings was not supported by competent evidence, "the remaining findings of fact . . . [were] sufficient to support the trial court's conclusion that . . . reasonable efforts to reunify should be suspended.").

5. Anger Management

Respondent-Mother argues the trial court erroneously found that, despite attending anger management classes, Respondent-Mother "[had] consistently demonstrate[d] that she cannot control her emotions." However, Respondent-Mother does not challenge the trial court's related findings that she had "call[ed] social workers names, yell[ed], use[d] profanity, abruptly end[ed] telephone conversations with the social worker and [was] generally combative," or that the trial court "ha[d] observed [Respondent-Mother's] combative demeanor in court." Respondent-Mother concedes she expressed "anger at the May [2015] hearing where her visits had been suspended[.]" Additionally, the WCHS court summary indicated Respondent-Mother's previous therapist had reported that, despite working on anger management issues for more than a year, Respondent-Mother "still had a lot of work to do." The trial court's finding that Respondent-Mother "consistently demonstrate[d] that she cannot control her emotions" was supported by competent evidence.

6. Failure to Maintain Stable Housing

Respondent-Mother lastly challenges the trial court's finding that she "does not maintain stable housing." Respondent-Mother concedes

she was evicted from her home because the landlord obtained an eviction judgment against her on or about 11 May 2015. The WCHS court summary indicated that

> [t]he landlord reported [Respondent-Mother] caused significant damage to the home at a cost of several thousand dollars. Some of the damage included breaking all the windows in the house, pouring paint all over floors of the home and then pouring a [fifty] pound bag of dog food over the paint on the floors.

Respondent-Mother did not offer any evidence to the contrary. On appeal, she notes only that "[t]he landlord did not testify at the cease reunification hearing and [Respondent-Mother] was not questioned about any damages to the property."

In addition to the evidence regarding Respondent-Mother's recent eviction, Torr testified at the cease reunification hearing that Respondent-Mother had not provided a new address to WCHS since leaving Wake County, and Torr did not know where Respondent-Mother was then residing. We conclude there was competent evidence to support the trial court's finding that Respondent-Mother had failed to maintain stable housing.

7. VCDSS Termination Proceedings

Respondent-Mother alleges the trial court erroneously believed it was required to cease reunification efforts with respect to P.T.W., based on a statutory provision enacted shortly before the cease reunification hearing and which became effective 1 October 2015. N.C. Gen. Stat. § 7B-901(c)(2), which applies to initial dispositional hearings only, provides that

> [if] the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification . . . shall not be required if the court makes written findings of fact pertaining to any of the following: . . . A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent.

N.C. Gen. Stat. § 7B-901(c)(2) (2015).[9]

9. N.C. Gen. Stat. § 7B-901(c) was amended by S.L. 2016-94, § 12C.1.(g) (eff. 1 July 2016) to provide that "the court shall direct that reasonable efforts for reunification . . . shall not be required if the court makes written findings of fact pertaining to any of the following, *unless the court concludes that there is compelling evidence warranting continued reunification efforts* . . . ." (emphasis added).

Respondent-Mother's argument is without merit. There is no indication in the record that the trial court based its decision to cease reunification efforts on a finding or belief that Respondent-Mother's parental rights had been terminated with respect to any of her other children. On the contrary, the trial court *explicitly* stated that any VCDSS proceedings had no bearing on its decision to cease reunification with respect to P.T.W. After summarizing numerous factual findings supporting its decision to cease reunification, the court said:

> I know that Wake County mentioned that [Respondent-Mother] has a pending matter in Vance County where [a] termination [hearing], I believe, is set [for] today. However, I will say that the Court, given the fact that [that] may be something that's pending and has not occurred, I don't think, respectfully, the Court would use that as a reason to cease.

The trial court was clearly not acting under a mistaken belief that it was required to cease reunification because Respondent-Mother's rights to any of her other children had already been terminated (much less pursuant to a statute that was not even in effect at the time). This argument is overruled.

8. Findings in TPR Order

Respondent-Mother contends that, because "the termination of parental rights order did not correct the deficiencies in the cease reunification order," the TPR order must be reversed along with the CRO. We disagree.

In *In re L.M.T.*, our Supreme Court held that, because a CRO and TPR order must be reviewed together on appeal, "*incomplete* findings of fact in [a] cease reunification order may be cured by findings of fact in the termination order." 367 N.C. at 170, 752 S.E.2d at 457 (emphasis added). Thus, "[e]ven if [a] cease reunification order *standing alone* had been *insufficient*," a reviewing court may look to the subsequent TPR order to determine whether, considered together, the trial court has made sufficient findings of fact under the former N.C.G.S. § 7B-507(b). *Id.*, 367 N.C. at 169-70, 752 S.E.2d at 456 (emphases added); *see also In re A.E.C.*, 239 N.C. App. 36, 45, 768 S.E.2d 166, 172 (2015) (holding "termination order, taken together with the earlier [permanency planning and cease reunification] orders, [did] not contain sufficient findings of fact to cure the defects in the earlier orders.").

Respondent-Mother's argument that the TPR order failed to correct certain deficiencies in the CRO is premised upon a conclusion that there

were deficiencies in the CRO which required correcting. Respondent-Mother essentially reasserts her arguments about the insufficiency of evidence at the cease reunification hearing with respect to three factual issues: (1) her ability to maintain stable housing, (2) the alleged sexual abuse of her oldest son, and (3) her alleged contact with Williams. However, as discussed above, we have already concluded that the evidence presented at the cease reunification hearing was sufficient to support the trial court's findings with respect to each of those issues. Thus, the CRO was not "deficient" on those grounds, and we need not consider whether the TPR "corrected" CRO findings which were based on competent evidence presented at the cease reunification hearing.

III. Failure to Appoint Guardian *Ad Litem*

A. *Standard of Review*

[2] Respondent-Mother argues the trial court abused its discretion by failing to appoint a guardian *ad litem* ("GAL") to represent P.T.W. at the termination hearing. She concedes that the trial court was not mandated by statute to appoint a GAL for P.T.W., either when WCHS first filed the dependency petition or at the termination hearing. *See* N.C. Gen. Stat. § 7B-601(a) (2015) (providing in part that "when a juvenile is alleged to be *dependent*, the court *may* appoint a guardian ad litem to represent the juvenile." (emphases added)); N.C. Gen. Stat. § 7B-1108(b) (2015) (requiring appointment of GAL in a termination proceeding "[i]f [a respondent files] an answer or response den[ying] any material allegation of the [termination] petition or motion[.]"). Because the appointment of a GAL in the present case was discretionary, the trial court's decision is reviewable for abuse of discretion only. *See In re M.H.B.*, 192 N.C. App. 258, 261, 664 S.E.2d 583, 585 (2008). We note, however, that a trial court's complete failure to exercise discretion constitutes reversible error. *Id.*

B. *Analysis*

1. Preservation of Error

In certain instances, a trial court must appoint a GAL for a juvenile, including where a petition alleges a juvenile is abused or neglected, *see* N.C.G.S. § 7B-601(a), or, in a termination proceeding, if a respondent files a written answer or response to the termination petition and "[the] answer or response denies any material allegation of the petition or motion," *see* N.C.G.S. § 7B-1108(b). If a GAL was previously appointed pursuant to N.C.G.S. § 7B-601, and if appointment of a GAL "could also be made under [N.C.G.S. § 7B-1108]," the GAL appointed under N.C.G.S.

§ 7B-601 "shall also represent the juvenile in all [termination] proceedings . . . unless the court determines that the best interests of the juvenile require otherwise." N.C. Gen. Stat. § 7B-1108(d) (2015). However, if appointment of a GAL is not statutorily required, "the court may, in its discretion, appoint a [GAL] for a juvenile, either before or after determining the existence of grounds for termination of parental rights, in order to assist the court in determining the best interests of the juvenile." N.C. Gen. Stat. § 7B-1108(c) (2015).

"This Court has previously held that in order to preserve for appeal the argument that the trial court erred by failing to appoint [a] child a GAL, a respondent must object to the asserted error below." *In re A.D.N.*, 231 N.C. App. 54, 65-66, 752 S.E.2d 201, 209 (2013) (citing *In re Fuller*, 144 N.C. App. 620, 623, 548 S.E.2d 569, 571 (2001); *In re Barnes*, 97 N.C. App. 325, 326, 388 S.E.2d 237, 238 (1990)). *In In re A.D.N.*, the respondent-mother filed a response to a termination petition in which she denied many of the petition's material allegations. Accordingly, the trial court was required to appoint a GAL under the plain language of N.C.G.S. § 7B-1108(b). Despite the trial court's failure to do so, this Court held the respondent-mother did not preserve the issue for appeal because she "failed to object at trial to the failure of the trial court to appoint the child a GAL." *Id.*; *see also* N.C.R. App. P. 10(a)(1) (2016) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . [and have] obtain[ed] a ruling upon the party's request, objection, or motion."). Similarly, in the present case, Respondent-Mother failed to object to the lack of a GAL for P.T.W. during the termination proceedings, and the issue was therefore not preserved for appellate review.

As we observed in *In re A.D.N.*, in both *Fuller* and *Barnes*, "this Court invoked Rule 2 of the [North Carolina] Rules of Appellate Procedure in order to reach the [unpreserved] issue [of] whether the trial court erred by failing to appoint a GAL for the child and, in both cases, found prejudicial error in the failure to appoint a GAL." 231 N.C. App. at 66, 752 S.E.2d at 209. Under Rule 2, we may suspend the Rules of Appellate Procedure if necessary "[t]o prevent manifest injustice to a party[.]" N.C.R. App. P. Rule 2 (2016); *see also Stann v. Levine*, 180 N.C. App. 1, 10-11, 636 S.E.2d 214, 220 (2006) ("Our Supreme Court has described appropriate opportunities for the invocation of Rule 2 as 'rare occasions' and 'in exceptional circumstances,' and a thorough review of the Court's Rule 2 jurisprudence supports such characterizations." (citations omitted)).

In *In re A.D.N.*, in declining to invoke Rule 2, our Court found *Fuller* and *Barnes* factually distinguishable. We noted that "there [was] no indication in [*Fuller* and *Barnes*], as there [was] here, that the appealing respondent had repeatedly chosen substance abuse over the child's welfare throughout the child's life and had almost entirely abdicated responsibility for the child[.]" *In re A.D.N.*, 231 N.C. App. at 66, 752 S.E.2d at 209.

We find Respondent-Mother's case more akin to *In re A.D.N.* than either *Fuller* or *Barnes*.[10] The CRO set forth a number of steps Respondent-Mother could take in order to reunify with P.T.W. There was evidence at the termination hearing that Respondent-Mother failed to meet many of those terms, including the requirements that she maintain suitable housing; maintain sufficient legal income; maintain regular contact with WCHS; demonstrate learned anger management skills; demonstrate learned parenting skills; and comply with her VCDSS case plan. Torr testified that, at the time of the termination hearing, WCHS "ha[d] not received any documentation [from Respondent-Mother] of safe or suitable housing." Although Respondent-Mother brought a copy of a lease with her to the termination hearing, she acknowledged she had never provided a copy to WCHS. Torr testified that Respondent-Mother had not provided any proof of income to WCHS since on or about 19 August 2013, shortly after P.T.W. was adjudicated dependent. There was evidence of Respondent-Mother's continuing issues with anger management, including during her last visitation with P.T.W., on 5 May 2015, when she "referred to [Torr] as a cracker and slammed the door . . . while [Torr] was holding [P.T.W.]." There was evidence that Respondent-Mother had not demonstrated learned parenting skills over the preceding two years. Torr testified that during a 21 April 2015 visitation with P.T.W., Respondent-Mother

> was yelling in an open room about sex abuse allegations with both [P.T.W.] present and the child who was the subject of the allegation present, and she proceeded to spend the first [twenty] minutes of the visit kissing [P.T.W.] on the lips, despite him trying to get away from her and turning his face, and then told him that he needed to kiss her in order to get a toy back after she took the toy away from him.

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10. We also observe that, in contrast to Respondent-Mother's case, in *Fuller*, *Barnes*, and *In re A.D.N.*, the trial courts' failure to appoint a GAL expressly violated N.C.G.S. § 7B-1108(b) or its statutory predecessor. Respondent-Mother acknowledges that she "filed no answer to the [termination] petition, so no GAL was automatically triggered under [N.C.G.S.] § 7B-1108(b)."

Respondent-Mother also did not maintain regular contact with WCHS following the cease reunification hearing. Respondent-Mother testified at the termination hearing that, despite earning "about $600" per week, she had not sent any financial support, clothing, or gifts for P.T.W. since her visitation was suspended in May 2015. Although the CRO ordered Respondent-Mother to "[f]ollow all recommendations of her psychological assessment," which included individual counseling, Respondent-Mother testified at the termination hearing that she last visited a therapist in late December 2015. Additionally, although the CRO ordered Respondent-Mother to "[c]omply with [her] Vance County DSS foster care case plan," both Respondent-Mother and her mother, Shirley Adams ("Adams"), testified at the termination hearing that they were actively violating a Vance County court-ordered custody arrangement with respect to another of Respondent-Mother's minor children.

At the cease reunification hearing on 22 July 2015, the trial court stressed to Respondent-Mother that it was not terminating her parental rights, and that she could still take steps to reunify with P.T.W. Addressing Respondent-Mother directly, the trial court stated:

> You can still do what you need to do, and if in fact you do what you need to do and then something is presented to the Court where I have to make a decision about whether or not to terminate or continue this relationship [with P.T.W.], trust me, I'm going to be fair and impartial. . . . I have not terminated your parental rights. It's up to you. If you want to reunify [with P.T.W.] and do what you need to do, you know what you need to do.

Notwithstanding these instructions, and the requirements specified in the CRO, Respondent-Mother failed in a number of ways to "do what [she] need[ed] to do" to reunify with P.T.W.

At the termination hearing, the trial court asked Respondent-Mother: "Do you accept responsibility for any of the situations that you are in now?" She responded: "No, I don't. No, I don't, no, no." In light of Respondent-Mother's willful failure to make progress on her WCHS case plan, both before and after reunification efforts were ceased, and because a GAL appointment was not statutorily required, we do not find it necessary to invoke Rule 2 "to prevent manifest injustice" to either Respondent-Mother or P.T.W. *See In re H.D.*, ___ N.C. App. ___, ___, 768 S.E.2d 860, 865 (2015) ("Willfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort.); *In re C.M.*, 183 N.C. App. 207, 211-12, 644 S.E.2d 588, 593

(2007) (observing that as "[r]espondent mother had over two years . . . to work on a case plan with DSS, she had ample time to follow through with the services designed to assist her in learning to parent."); *In re O.C.*, 171 N.C. App. 457, 464, 615 S.E.2d 391, 395 (2005) (finding that, "even if respondent was entitled to a GAL for the . . . earlier dependency proceedings, there [could not] be prejudice to her in the termination proceedings because she was not even entitled to the appointment of a GAL for the termination proceedings.").

2. Abuse of Discretion

Even if we were to reach the merits of this issue, Respondent-Mother's argument fails. As noted above, because appointment of a GAL for P.T.W. was entirely discretionary in this case, review is limited to determining whether the trial court abused its discretion. We find no indication that the trial court's non-appointment of a GAL to represent P.T.W. at the termination hearing was "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." *See In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015).

Respondent-Mother maintains that, although appointment of a GAL was discretionary under N.C.G.S. § 7B-1108(b), "the trial court still had an obligation to consider whether appointment of a GAL was in [P.T.W.'s] best interest [pursuant to N.C.G.S. § 7B-1108(c)]."[11] The purpose of a discretionary GAL appointment in a termination proceeding is "to assist the court in determining the best interests of the juvenile." N.C.G.S. § 7B-1108(c). As with the GAL appointment itself, the question of whether a GAL would "assist the court in determining the best interests of the juvenile" is a matter for the trial court to decide. On the record before us, Respondent-Mother has shown no reason to second-guess the

11. Although not cited by Respondent-Mother, N.C. Gen. Stat. § 7B-1108.1 provides that, in a TPR proceeding, the trial court "*shall* conduct a pretrial hearing" (either separately or in combination with the adjudicatory hearing) and shall consider, *inter alia*, "[w]hether a guardian ad litem should be appointed for the juvenile, if not previously appointed." N.C. Gen. Stat. § 7B-1108.1(a)(2) (2015) (emphasis added). Thus, while N.C.G.S. § 7B-1108(c) uses permissive language (*i.e.*, "the court may, in its discretion, appoint a guardian ad litem for a juvenile . . . ."), N.C.G.S. § 7B-1108.1 requires the trial court to affirmatively consider whether a GAL should be appointed for the termination hearing. *See In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300 (2005) ("The use of the word 'shall' by our Legislature has been held by this Court to be a mandate, and the failure to comply with this mandate constitutes reversible error."). We are unable to discern from the record on appeal whether the trial court conducted a hearing, pursuant to N.C.G.S. § 7B-1108.1, at which it considered whether a guardian ad litem should have been appointed for P.T.W. at the termination hearing. However, Respondent-Mother has not alleged the trial court violated N.C.G.S. § 7B-1108.1, and we do not decide the issue.

trial court's apparent belief that a GAL was not necessary to assist it in determining P.T.W.'s best interests. During the best interests phase of the termination hearing, the trial court heard testimony from Torr, Respondent-Mother, and Adams. Torr testified about P.T.W.'s current foster care placement, his relationship with his foster parents, and his emotional and developmental needs. Torr also testified about WCHS efforts to investigate placing P.T.W. with a family member, including a visit Torr made to Adams's home in Henderson several months prior.

The trial court heard testimony from Respondent-Mother about her current living arrangement, employment, drug and alcohol abstinence, and family support system. Finally, the trial court heard testimony from Adams about her desire and ability to assume P.T.W.'s care and custody. The trial court's comments at the conclusion of the termination hearing clearly demonstrate that P.T.W.'s best interests were carefully weighed against the evidence presented. There is nothing to suggest it was unreasonable for the trial court to forego GAL assistance in determining P.T.W.'s best interests.

We conclude Respondent-Mother failed to preserve this argument for appellate review. Even if the issue was reviewable, we find no abuse of discretion occurred.

IV. Conclusion

We affirm the trial court's 31 August 2015 order ceasing reunification efforts with Respondent-Mother and the 18 April 2016 order terminating Respondent-Mother's parental rights.

AFFIRMED.

Judges DIETZ and TYSON concur.

JUDITH M. DALY ATTORNEY AT LAW, P.A., D.B.A. DALY LAW FIRM, PLAINTIFF
v.
ALESSANDRA L. MCKENZIE, DEFENDANT

No. COA16-466

Filed 6 December 2016

1. Appeal and Error—interlocutory orders and appeals—failure to give notice of appeal—no substantial right

Defendant failed to preserve for appellate review the denial of her motion for consolidation of cases where she failed to give notice of appeal from the denial of her motion. Further, the denial did not involve the merits of plaintiff's claim for money owed and did not affect the judgment in that case in order to allow immediate appeal from the interlocutory order.

2. Discovery—motion for continuance—no request for 11 months

The trial court did not abuse its discretion by denying defendant's request for a continuance. Even if defendant had informed the trial court of specific relevant and admissible matters on which she wanted to conduct discovery, defendant failed to file any motion or request for discovery during the 11 months that the case was pending.

Appeal by defendant from order entered 2 October 2015 by Judge Richard Halloway in Iredell County District Court. Heard in the Court of Appeals 20 October 2016.

Gottholm, Ralston & Benton, PLLC, by Matthew L. Benton, for plaintiff-appellee.

Defendant-appellant Alessandra McKenzie, pro se.

ZACHARY, Judge.

Alessandra McKenzie (defendant) appeals from an order requiring her to pay Judith M. Daly Attorney at Law, P.A., d.b.a. Daly Family Law Firm (plaintiff) the sum of $17,509.63 plus costs. On appeal, defendant argues that the trial court erred and abused its discretion by denying her oral motion for a continuance and her motion to consolidate this case with a case that defendant had filed in superior court. After careful consideration of defendant's arguments, we conclude that the issue of the

trial court's denial of defendant's motion to consolidate is not properly before us, and that the trial court did not abuse its discretion by denying defendant's motion for a continuance.

I. Factual and Procedural Background

On 4 January 2012, defendant hired plaintiff to represent her in a contested family law case involving issues of child custody, child support and equitable distribution. Defendant paid plaintiff approximately $56,475 for legal services rendered by plaintiff between January and September, 2012. In October, 2012, plaintiff informed defendant that she owed plaintiff $17,509.63 for legal services and that plaintiff would not continue to represent defendant until this amount was paid. Defendant failed to remit the amount owed to plaintiff, who then ceased her representation of defendant. On 8 March 2013, plaintiff sent defendant a letter stating that plaintiff intended to initiate legal action against defendant to collect the debt she owed to plaintiff. The letter also informed defendant that, if she disputed the fees or expenses that plaintiff was claiming, defendant could contact the North Carolina State Bar. Plaintiff never received any communication from the State Bar concerning the matter.

On 8 October 2014, plaintiff filed a complaint against defendant seeking to recover $17,509.63 from defendant for plaintiff's legal services. On 6 November 2013, defendant filed a *pro se* answer denying the material allegations of plaintiffs' complaint and asserting counterclaims for breach of contract, negligence and gross negligence, malpractice, and intentional infliction of emotional distress. The matter was referred to arbitration, which was scheduled for 5 February 2015. The arbitration was rescheduled until 16 February 2015, due to defendant's scheduling conflict with another court appearance, and was rescheduled again until 31 March 2015. During the arbitration conducted on 31 March 2015, defendant took a voluntary dismissal of her counterclaims. Following arbitration, plaintiff was awarded $17,509.63, the amount of defendant's debt to plaintiff.

On 30 April 2015, defendant appealed from the arbitration award and sought a trial *de novo*. The matter was scheduled for a bench trial during the week of 8 June 2015; however on 10 June 2015, the trial was continued until the week of 29 June 2015 at plaintiff's request. On 26 June 2015, defendant filed a new answer, denying the material allegations of plaintiff's complaint and asserting counterclaims for which defendant sought damages in excess of $50,000. The case was continued from 29 June 2015 until 13 July 2015, and again from 13 July 2015 until 31 August 2015, both times at defendant's request.

On 22 July 2015, defendant filed a complaint against plaintiff in Iredell County Superior Court. Defendant (although defendant is the named plaintiff in her lawsuit, we refer to her as the defendant throughout this opinion to avoid confusion) asserted claims for breach of contract, malpractice, intentional infliction of emotional distress, and violation of the Unfair and Deceptive Trade Practices Act. Defendant did not assert that she had suffered damages in excess of $50,000; however, she did allege that she had paid plaintiff more than $50,000 and that plaintiff had breached the contract for plaintiff's provision of legal services. On 24 August 2015, defendant filed a motion in district court, seeking consolidation of plaintiff's claim with the case defendant had filed in superior court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 42.

Plaintiff's claim for money owed by defendant came on for a bench trial in Iredell County District Court on 31 August 2015. Plaintiff was represented by counsel at the hearing, and defendant appeared *pro se*. At the outset of the trial, defendant asked the trial court to rule on her motion to consolidate the complaint that defendant had filed in superior court with plaintiff's claim, so that the cases would be tried together in superior court. Plaintiff's counsel argued that under N.C. Gen. Stat. § 1A-1, Rule 42(a), only a superior court judge could rule on defendant's Rule 42 motion. The trial court agreed with plaintiff and denied defendant's motion to consolidate.

After the trial court denied defendant's Rule 42 motion, defendant made an oral motion to continue because she needed "time for discovery." Plaintiff objected on the grounds that the case had been continued several times and plaintiff had already provided defendant with the file in her case. Defendant contended that she was entitled to discovery in order to prepare for her superior court case, but admitted that she had not filed any written requests for discovery. The trial court denied defendant's continuance motion.

During the trial, plaintiff testified under oath that she and defendant had a contract for legal representation under the terms of which defendant owed plaintiff $17,509.63, and introduced documents in support of her testimony. When plaintiff sought to introduce a billing document, defendant "objected" on the grounds that she wanted a continuance in order to hire an attorney and refile her motion for consolidation in superior court. The trial court admitted the bill into evidence, but took a short recess in order to allow defendant to contact an attorney. After the recess, defendant again argued that she needed a continuance in order to obtain discovery. Plaintiff objected and argued that defendant had failed to seek discovery for eleven months and that defendant's

last-minute request for another continuance was made for an "improper purpose." When the trial court denied defendant's requests for a continuance, defendant stated that she would "just appeal whatever."

After plaintiff rested her case, defendant called plaintiff as a witness. Her examination of plaintiff focused upon instances during plaintiff's representation of defendant when, in defendant's opinion, plaintiff was unprepared. Defendant did not testify at the trial or present any other witnesses.

On 2 October 2015, the trial court entered two written orders. In an "Order on Motion to Consolidate" the court denied defendant's Rule 42 motion for consolidation of cases. In a separate order, the trial court entered findings of fact and conclusions of law concerning the merits of plaintiff's claim. The trial court found that defendant owed plaintiff $17,509.63, and ordered defendant to pay that amount, plus costs. On 30 October 2015, defendant filed a notice of appeal "from Judge Richard Holloway's decision in Daly v. Alessandra McKenzie, 14-CVD-2186, heard in the District Court of Iredell County on August 31, 2015."

II. Scope of Appeal

[1] N.C.R. App. P. 3(d) (2015) provides in relevant part that a notice of appeal "shall designate the judgment or order from which appeal is taken[.]" In this case, defendant's notice of appeal stated that she was appealing "from [the trial court's] decision in Daly v. Alessandra McKenzie, 14-CVD-2186[.]" Although defendant did not use the word "order," we may reasonably infer that the "decision" to which defendant referred was the trial court's decision in favor of plaintiff on plaintiff's claim for money owed by defendant. However, defendant neither gave notice from the trial court's denial of her motion to consolidate cases, nor used language that could be interpreted to refer to the denial of her consolidation motion. We hold that defendant failed to give notice of appeal from the denial of her motion to consolidate.

Although N.C.R. App. P. 3(d) requires an appellant to designate the judgment or order from which an appeal is taken, N.C. Gen. Stat. § 1-278 (2015) provides that "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment."

> This Court has held that even when a notice of appeal fails to reference an interlocutory order, in violation of Rule 3(d), appellate review of that order pursuant to N.C. Gen. Stat. § 1-278 is proper under the following

> circumstances: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment. All three conditions must be met.

Tinajero v. Balfour Beatty Infrastructure, Inc., 233 N.C. App. 748, 757, 758 S.E.2d 169, 175 (2014) (citing *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 641, 535 S.E.2d 55, 59 (2000)). An interlocutory order is "one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). The denial of defendant's motion for consolidation was interlocutory as it did not resolve the issues raised by plaintiff's complaint. However, even if we treat defendant's statement to the court that she intended to appeal as an objection, the denial of defendant's motion to consolidate does not meet the third requirement for review of an interlocutory order from which appeal is not taken, which is that the interlocutory order "must have involved the merits and necessarily affected the judgment." "An order involves the merits and necessarily affects the judgment if it deprives the appellant of one of the appellant's substantive legal claims." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 348, 666 S.E.2d 127, 133 (2008). The denial of defendant's motion to consolidate cases did not involve the merits of plaintiff's claim for money owed, and did not affect the judgment in that case. We conclude, therefore, that defendant has failed to preserve for appellate review the denial of her motion for consolidation of cases.

III. Standard of Review

As a general rule, "when 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." *Lyons-Hart v. Hart*, 205 N.C. App. 232, 235, 695 S.E.2d 818, 821 (2010). "[A] trial court's findings of fact in a trial without a jury will be upheld if supported by any competent evidence[,] . . . even when evidence to the contrary is present." *North Carolina Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 702, 412 S.E.2d 318, 322 (1992) (citation omitted). We note that defendant asserts, incorrectly, that the standard of review of the trial court's factual determinations is "plain error." "In North Carolina, plain error review has no application to appeals in civil cases." *State v. Lawrence*, 365 N.C. 506, 507 fn1, 723 S.E.2d 326, 327 fn1 (2012).

" 'The standard of review for denial of a motion to continue is generally whether the trial court abused its discretion.' " *HSBC Bank USA Nat. Association v. PRMC, Inc.*, __ N.C. App. __, __, 790 S.E.2d 583, 586 (2016) (quoting *Morin v. Sharp,* 144 N.C. App. 369, 373, 549 S.E.2d 871, 873 (2001)). As a result, we review the ruling that defendant challenges for abuse of discretion. "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

IV. Denial of Defendant's Request for a Continuance

[2] At the beginning of the trial on plaintiff's claim, defendant asked the trial court to rule on her Rule 42 motion for consolidation of cases. When the court denied her motion, defendant then asked for a continuance, stating that "I am not ready to proceed today. . . . I need to have time for discovery, Your Honor." However, defendant admitted that during the 11 months since plaintiff had filed her complaint, defendant had not filed any written requests or motions seeking discovery. In addition, the record establishes that the case had previously been continued on three occasions, once at plaintiff's request and twice upon defendant's request. Based upon these facts, the trial court denied defendant's motion for a continuance.

During the trial, defendant "objected" to the introduction of a bill for plaintiff's legal services to defendant on the grounds that defendant was "asking for a continuance so I can get -- so I can get an attorney for this matter[.]" The trial court ruled that the billing document was admissible, but took a recess in order to allow defendant to contact an attorney. After the recess, during which defendant was unable to hire an attorney, plaintiff testified that she had provided defendant with the file of her case. The trial court asked defendant what discovery she was seeking, in addition to what had already been provided. Defendant answered that she wanted to obtain "deposition, notes -- definitely notes. . . . [and] also, I would like to see the appointment book. . . ." Plaintiff argued that defendant's answer showed that she sought discovery for her superior court case, which was not before the court. The trial court denied defendant's second motion for a continuance.

The record thus establishes that: (1) as of 31 August 2015, the case had been continued three times, twice at defendant's request; (2) during the eleven months in which the case was pending, defendant did not file any written requests or motions for discovery; (3) plaintiff had

provided defendant with a copy of her file; (4) defendant did not offer any explanation for her failure to hire an attorney and admitted that she was represented by counsel on the family law matters for which she had originally hired plaintiff; and (5) defendant failed to present her Rule 42 motion to a superior court judge. On these facts, we hold that the trial court's decision to deny defendant's request for a continuance was not an abuse of discretion.

We have considered defendant's arguments to the contrary, insofar as they are based on the record. "Pursuant to the North Carolina Rules of Appellate Procedure, our review is limited to the record on appeal . . . and any other items filed with the record in accordance with Rule 9(c) and 9(d)." *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (2008). "Our appellate courts 'can judicially know only what appears of record.' " *Hampton v. Scales*, __ N.C. App. __, __, 789 S.E.2d 478, 487 (2016) (quoting *State v. Price*, 344 N.C. 583, 593-94, 476 S.E.2d 317, 323 (1996)). In this regard, we observe that defendant makes certain assertions that she "fail[s] to support . . . by citation to sworn testimony, affidavit, documentary evidence, or any other record evidence" and that "[i]t 'is axiomatic that the arguments of counsel are not evidence.' " *Basmas v. Wells Fargo Bank N.A.*, 236 N.C. App. 508, 513, 763 S.E.2d 536, 539 (2014) (quoting *State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004)).

For example, in her statement of facts, defendant contends that on 29 June 2015 she "requested that the trial be continued for 11-12 months to allow her to conduct discovery" and that the court "did not rule on Appellant's discovery request, but instead recused himself, and continued the case to 13 July 2015." Defendant cites page 28 of the record for this statement. However, the continuance order on page 28 contains no reference to the reason for defendant's continuance motion or to the court's recusal. Nor do defendant's arguments at trial constitute "evidence" of the matters asserted.

In support of her argument that the trial court erred by denying her request for a continuance, defendant challenges the evidentiary support for the trial court's Finding No. 10 in its order, which addresses defendant's continuance request:

> 10. The Defendant today testified that she was unprepared to proceed today and was asking for a continuance. The case had been continued three prior times, twice for the Defendant and once for the Plaintiff, but the file does not reflect why. The Defendant also asked for a continuance

> to obtain discovery, but could not state which discovery she was wishing to obtain. The Plaintiff testified that discovery was already issued to the Defendant in the form of her file. The Defendant attempted to contact an attorney for today's hearing and the Court in fact took breaks for her to do that, but the Defendant stated she could not do that.

Defendant contends that the "trial transcript plainly demonstrates that [the trial court's] statement that reasons for the prior grants of continuances in proceedings were unknown is belied by testimonial evidence offered by the parties." However, the "testimonial evidence" to which defendant refers consists only of the unsworn statements or arguments of defendant and counsel for plaintiff, which we do not consider. Defendant also contends that "it is clear from the testimony and undisputed facts that all prior continuances were for good cause" and that "[c]ontrary to representations made by counsel for [plaintiff], the continuances were not merely to delay." Plaintiff's argument at trial regarding defendant's motive for seeking a continuance is not evidence, and we do not consider it. Nor do we consider defendant's contentions regarding the reasons for the previous continuances, as the continuance orders do not themselves provide a reason for the continuance. Moreover, defendant fails to identify any evidence indicating that the trial court denied her request for a continuance on the grounds that the earlier continuances were not for good cause. Accordingly, the reasons for these earlier continuances are not relevant to our analysis of whether the trial court abused its discretion in denying her motion on the day of trial.

Defendant further asserts that the trial court's finding that defendant was unable to identify the discovery she sought for the trial on plaintiff's complaint was contradicted by defendant's statements that she sought "documents and things . . . including case notes and legal research in this matter, her appointment book, and the ability to conduct further discovery that would expand into issues related to her counterclaims." The trial of plaintiff's claim for money owed by defendant presented the straightforward question of whether, under the terms of the parties' contract, defendant owed a debt to plaintiff for legal services. Defendant articulates no relationship between this trial and the discovery of the above-listed items, which she candidly admits were sought in the hopes that they "would expand into issues related to her counterclaims." In addition, defendant does not identify any discoverable material to which she was entitled that could have had an effect on the outcome of the trial on plaintiff's complaint. We conclude that the trial court's finding

is supported by competent evidence. We further conclude that, even if defendant had informed the trial court of specific relevant and admissible matters on which she wanted to conduct discovery, it would not have been an abuse of discretion for the trial court to deny her continuance motion, given that she had failed to file any motion or request for discovery during the 11 months that the case was pending.

For the reasons discussed above, we conclude that the trial court did not abuse its discretion by denying defendant's request for a continuance, and that the orders of the trial court should be

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

KELLY F. LEWIS, EMPLOYEE, PLAINTIFF
v.
TRANSIT MANAGEMENT OF CHARLOTTE, EMPLOYER, SELF-INSURED
(COMPENSATION CLAIMS SOLUTIONS, THIRD-PARTY ADMINISTRATOR), DEFENDANT

No. COA16-69

Filed 6 December 2016

1. Workers' Compensation—additional medical compensation—expiration of statute of limitations—correction of underpayment

The trial court did not err by denying plaintiff's request for additional medical compensation for expiration of the statute of limitations where a corrective payment was made for underpayment of indemnity compensation after the original statute of limitations had expired. Although plaintiff argued that the corrective payment was actually the last payment, so that the statute of limitations had not run, the corrective payment had not yet been made at the time of the Industrial Commission's decision and could not have been the last payment.

2. Workers' Compensation—indemnity compensation corrected—request for additional medical payments

It was not clear whether the Industrial Commission erred by denying plaintiff's request for additional medical benefits following a corrective payment for indemnity compensation. Because the corrective payment had not yet been made to restart the limitations,

the issue of how to treat such corrective payments under N.C.G.S. § 97-25 did not need to be decided and was left to the legislature.

3. Workers' Compensation—corrective payment—laches—remedy at law

The doctrine of laches was not available as an alternative in a workers' compensation case where a corrective payment for an underpayment was ordered after the statute of limitations had initially run. Equitable doctrines are not available in a workers' compensation case where there is a remedy at law; here, both N.C.G.S. § 97-25.1 and 97-47 supplied remedies at law to bar claims where there had been a delay in the case.

Appeals by plaintiff and defendant from Opinion and Award entered 20 November 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 June 2016.

The Sumwalt Law Firm, by Vernon Sumwalt, Mark T. Sumwalt, and Lauren H. Walker, for the plaintiff-appellant.

The Smith Law Firm, by John Brem Smith and Elizabeth N. Binion, for the defendant-appellant.

McCULLOUGH, Judge.

Kelly Lewis ("plaintiff"), an employee of Transit Management of Charlotte ("defendant"), appeals from the opinion and award of the North Carolina Industrial Commission (the "Commission") denying his claim for additional medical compensation. Defendant also appeals from the Commission's opinion and award. For the following reasons, we affirm.

I. Background

Plaintiff, a bus operator for defendant, suffered an admittedly compensable injury on 15 June 2009 when an SUV rear-ended the bus plaintiff was driving. Defendant completed a Form 19 dated 16 June 2009 reporting plaintiff's injury to the Commission. Later that year, a physician completed a Form 25R dated 17 November 2009 indicating plaintiff was at maximum medical improvement and suffered a 0% impairment to his back. A Form 28 dated 2 December 2009 reported that plaintiff had returned to work as of that date and a Form 28B, completed at the same time as the Form 28, indicated that plaintiff had received a total of $22,631.71 from defendant and administrator Compensation Claims

Solutions as a result of his injury – $13,875.84 in temporary total disability compensation and $8,755.87 in medical compensation.

Years later, plaintiff completed a Form 18 notice of accident to employer and claim of employee dated 28 April 2014 related to the 15 June 2009 accident. Following defendant's denial of plaintiff's claim based on the expiration of the statute of limitations in a Form 61 dated 2 May 2014, plaintiff filed a Form 33 request that his claim be assigned for hearing dated 5 May 2014. In the Form 33, plaintiff indicated his claim was for additional temporary total disability compensation owed due to defendant's underpayment because of a miscalculation of plaintiff's average weekly wage, and for compensation for additional medical treatment of injuries. Defendant responded by completing a Form 33R dated 19 May 2014, in which defendant elaborated on its assertion that plaintiff's claim was barred by the statute of limitations as follows: "The Form 28B was filed on December 2, 2009 showing the last check being forwarded December 2, 2009. Accordingly, Plaintiff's claim is barred by Section 97-47 and Section 97-25.1."

Prior to the case coming on for hearing before a deputy commissioner, the parties entered into a pre-trial agreement in which they stipulated to the above facts. The parties also stipulated to the following:

> 9. . . . Although the Form 28B shows that the last medical compensation was paid on November 24, 2009, the claims payment history shows a payment by Defendant for "medical expense" on April 22, 2010, to "Electrostim Med Services" for $253.06 in Plaintiff's workers' compensation claim.
>
> 10. Plaintiff settled his third-party action and executed a release on April 14, 2010.
>
> 11. Defendant agreed to accept $11,500.00 in full satisfaction of its workers' compensation subrogation lien under N.C. Gen. Stat. § 97-10.2 and received a check in that amount dated April 14, 2010.
>
> . . . .
>
> 13. On Apri1 30, 2014, Plaintiff, through counsel, asked for a claims payment history and a payroll history from Defendant covering the 52 weeks before Plaintiff's injury on June 15, 2009. Plaintiff received the claims payment history from Defendant on April 30, 2014.

> 14. As also shown on the Form 28B, Defendant's claims payment history indicates payments [of] temporary total disability at a weekly compensation rate of $578.16 for a period of twenty-four and 3/10 (24.3) weeks for a total of $13,875.84. The average weekly wage corresponding to this compensation rate is $867.24. As shown by the Form 28B and the claims payment history, Defendant has not paid any temporary partial or permanent partial disability compensation to Plaintiff since he returned to his job at Defendant on December 2, 2009.
>
> 15. On 2 May 2014, Plaintiff received the wage information covering the 52 weeks before his injury on June 15, 2009, from Defendant.
>
> 16. Plaintiff's wage information with Defendant-Employer shows that Plaintiff's average weekly wage was $906.83, resulting in a compensation rate of $607.58 during the 52 weeks before his injury in this case. These figures indicate that Defendant has underpaid Plaintiff by $887.92 during the 24.3 weeks represented on the Form 28B.

The matter was submitted for consideration by a deputy commissioner on stipulated facts and exhibits after the parties agreed to waive a hearing scheduled for 28 October 2014. Pursuant to the pre-trial agreement, the deputy commissioner considered only "the procedural issue of whether [p]laintiff [was] time-barred from seeking additional benefits under N.C. Gen. Stat. § 97-25.1 or § 97-47 or both." Deputy Commissioner Wanda Blanche Taylor filed her opinion and award in favor of plaintiff on 8 April 2015. Defendant gave notice of appeal from the deputy commissioner's opinion and award to the Full Commission on 13 April 2015 and then completed a Form 44 application for review dated 21 April 2015.

The matter was heard by the Full Commission on 11 August 2015 and the Commission filed its opinion and award modifying the deputy commissioner's opinion and award on 20 November 2015. The Commission concluded that "[p]laintiff is entitled to payment by defendant of $714.90 to correct the underpayment of the amount owed for temporary total disability benefits during the period from 16 June 2009 through 1 December 2009[,]" "[a]s the last payment of compensation occurred on 22 April 2010, plaintiff's right to additional medical treatment terminated two years later, in 2012, and his request for additional medical treatment filed 5 May 2014 is barred by the two-year statute of limitations contained in N.C. Gen. Stat. § 97-25.1[,]" and "[t]here has not been a 'final

award' in this case that would trigger the limitations period contained in N.C. Gen. Stat. § 97-47." The Commission also concluded that case law relied upon by defendant and the doctrines of estoppel and laches did not apply in the present case. Based on its findings and conclusions, the Commission issued the following award:

> 1. Defendant shall pay plaintiff $714.90 to correct the underpayment of the amount owed for temporary total disability benefits during the period from 16 June 2009 through 1 December 2009.
>
> 2. Plaintiff's claim for additional medical treatment is time-barred under N.C. Gen. Stat. § 97-25.1.

Plaintiff gave notice of appeal from the Commission's opinion and award on 2 December 2015. Defendant gave notice of appeal from the Commission's opinion and award on 8 December 2015, after defendant issued a check to plaintiff for $714.90 dated 7 December 2015. Defendant's records of the $714.90 payment list the payment type as "Indemnity TTD[,]" the claim status as "Open[,]" and indicate the check was "Per Full Commission O&A 11 20 15[.]"

II. Discussion

Review of an opinion and award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This '[C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). The Commission's conclusions of law are reviewed *de novo*. *Busque v. Mid-America Apartment Communities*, 209 N.C. App. 696, 706, 707 S.E.2d 692, 699 (2011).

Plaintiff's Appeal

[1] As clearly stated in plaintiff's brief, plaintiff "appeals the Full Commission's determination that the limitations period for more medical treatment expired before 5 May 2014, when he applied for that treatment." The period for medical compensation is limited by N.C. Gen. Stat. § 97-25.1, which provides as follows:

> The right to medical compensation shall terminate two years after the employer's last payment of medical or

> indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. If the Commission determines that there is a substantial risk of the necessity of future medical compensation, the Commission shall provide by order for payment of future necessary medical compensation.

N.C. Gen. Stat. § 97-25.1 (2015). Plaintiff now contends the Commission erred in concluding that the two-year limitations period in N.C. Gen. Stat. § 97-25.1 had expired and that plaintiff was barred from seeking additional medical compensation. This issue presents a question of law which we review *de novo*.

Based on the stipulated facts, the Commission issued the following unchallenged findings:

> 1. The Form 28B filed by defendant on 2 December 2009 reflects that temporary total disability compensation was paid from 16 June 2009 through 1 December 2009, that the last compensation check was forwarded on 2 December 2009, and that this check represented final payment.
>
> 2. The Form 28B further reflects that the last medical compensation was paid on 24 November 2009, and that this payment represented final payment. However, as stipulated by the parties, defendant's claims payment history reflects that the actual last payment by defendant of medical compensation was made on 22 April 2010.
>
> 3. Because defendant paid plaintiff temporary total disability benefits based on an incorrect average weekly wage, plaintiff has been underpaid a total of $714.90 in temporary total disability benefits.

Plaintiff acknowledges the above findings of fact, and also that his request for additional medical compensation was made in the Form 33 request for a hearing that was filed on 5 May 2014. Nevertheless, plaintiff contends that his application for additional medical compensation was not barred by the two-year limitations period because the "last" payment of medical or indemnity compensation occurred on 7 December 2015, almost a year and a half after plaintiff's application, when defendant paid plaintiff what it owed due to the underpayment of temporary total

disability compensation. In support of his contention, plaintiff asserts various arguments. Yet, just as the Commission identified, the critical inquiry in this case is what constitutes the "last payment" under N.C. Gen. Stat. § 97-25.1. The Commission relied on *Busque*, 209 N.C. App. 696, 707 S.E.2d 692, and *Harrison v. Gemma Power Systems, LLC*, 234 N.C. App. 664, 763 S.E.2d 17, 214 WL 2993853 (July 2014) (unpub.). We, too, now look to those decisions for guidance.

In *Busque*, the plaintiff suffered a compensable injury on 18 January 2003 and was paid medical expenses for treatment received through 21 April 2013. *Busque*, 209 N.C. at 696-97, 707 S.E.2d at 694. The last check was issued to the plaintiff on 31 July 2003. *Id.* at 700, 707 S.E.2d at 696. Approximately four years later, on 18 July 2007, the plaintiff filed a Form 33 in which she sought additional medical compensation. *Id.* at 697, 707 S.E.2d at 694. On appeal, this Court addressed whether the plaintiff was barred from further recovery by the limitations period in N.C. Gen. Stat. § 97-25.1 and, based on a "straight-forward" reading of the statute, held that the plaintiff was barred. *Id.* at 706-707, 707 S.E.2d at 699-700. This Court explained as follows:

> Applying the statute to the present case, the "last payment of medical or indemnity compensation" for the 18 January 2003 fall was a check issued to [the plaintiff] dated 31 July 2003. [The plaintiff's] application for additional medical compensation was not filed until 18 July 2007-more than two years beyond 31 July 2003. Thus, [the plaintiff's] right to medical compensation for that injury has terminated.

Id. at 707, 707 S.E.2d at 700. This Court further addressed the plaintiff's argument that "the term 'last payment of . . . compensation' can only refer to a 'final award[,]' " and disagreed with the plaintiff's application of the statute, finding there was no continuing denial of compensability in the case as the plaintiff filed her only request for coverage on 18 July 2007, more than two years after the 31 July 2003 check. *Id.*

In *Harrison*, the plaintiff suffered a compensable injury on 2 March 2001 and received payments for medical treatment until 18 May 2009, the date of the last recorded payment. *Harrison*, 214 WL 2993853, at *1-3. On 25 January 2012, the plaintiff filed a Form 33 "alleging that [the d]efendant 'failed to authorize [the] plaintiff's request for further treatment . . .' and raised the issue of [the p]laintiff's right to indemnity benefits as a result of the 2 March 2001 injury." *Harrison*, 214 WL 2993853, at *3. Among the issues on appeal, this Court addressed whether the Commission erred in denying the plaintiff additional medical compensation benefits

for medical expenses incurred after 18 May 2009. *Harrison*, 214 WL 2993853, at *4. Relying on *Busque*, this Court again applied a straightforward reading of the statute and held that "because the last payment of medical compensation made by [the d]efendant was more than two years prior to [the p]laintiff's current Form 33 filing, . . . [the p]laintiff's right to additional medical compensation [was] time-barred pursuant to N.C. Gen. Stat. § 97–25.1." *Id.* Yet, in so holding, this Court addressed the plaintiff's argument that " 'the last payment of compensation in the claim has not yet taken place' because '[the p]laintiff is still owed payment for temporary total disability and/or permanent partial impairment.' " *Id.* This Court explained that, "[s]tated differently, [the p]laintiff argues that the two-year statute of limitations period found in N.C. Gen. Stat. § 97-25.1 has not yet begun and will not begin until [the p]laintiff receives a payment from [the d]efendant for indemnity benefits." *Id.* This Court rejected that argument as misguided for the following reasons:

> First, [the p]laintiff's argument ignores the plain language of the statute. "The right to medical compensation shall terminate two years after the employer's *last* payment of medical or indemnity compensation . . . ." N.C. Gen. Stat. § 97–25.1 (emphasis added). In context, the word "last" does not refer to a hypothetical future payment that [the p]laintiff may be entitled to receive after presenting a claim to the Industrial Commission. On its face, the "last" payment refers to the most recent payment of medical or indemnity benefits that has actually been paid. Second, [the p]laintiff's argument assumes the certainty of a future indemnity payment before the right to such payment has been decided by the Industrial Commission. Third, accepting Plaintiff's interpretation of the statute would allow claimants seeking additional medical compensation to obviate the statute of limitations in any case by asserting a valid claim for indemnity benefits alongside a claim for additional medical compensation. Such an expansive interpretation ignores the clear intent of our legislature to limit claims for additional medical compensation to a specified time period.

Id. Although the *Harrison* decision is unpublished, we find the Court's analysis persuasive and now adopt it as our own.

As the Commission found in the present case based on the stipulations of the parties, the last payment of temporary total disability compensation was paid on 2 December 2009 and the last payment of medical

compensation was paid on 22 April 2010. Applying a straight-forward reading of N.C. Gen. Stat. § 97-25.1, the two-year limitations period for additional medical compensation expired two years after 22 April 2010 and years before plaintiff filed his request for additional compensation for medical treatment in the Form 33 on 5 May 2014.

Plaintiff argues that the present case is distinguishable from both *Busque* and *Harrison* because defendant's payment on 7 December 2015 of the $714.90 that was owed to plaintiff due to the underpayment of temporary total disability benefits was an indemnity payment. Thus, plaintiff asserts the last payment for purposes of N.C. Gen. Stat. § 97-25.1 was on 7 December 2015 and the two-year limitations period did not begin to run until 7 December 2015, more than a year and a half after his request for additional medical compensation. Plaintiff further contends that the Commission's order is inconsistent because it orders the corrective payment by defendant but holds plaintiff's claim for additional medical treatment is time-barred. We are not convinced by plaintiff's arguments.

While the 7 December 2015 payment may be for the underpayment of indemnity compensation, that corrective payment had not been made at the time of the Commission's decision and, therefore, could not have been the "last payment" under a straight-forward application of N.C. Gen. Stat. § 97-25.1. At the time the Commission reviewed the evidence, made its findings, and issued its conclusions, the last actual payment of medical or indemnity compensation was paid on 22 April 2010. Thus, the evidence supports the Commission's findings and the findings support the Commission's conclusions, which correctly apply N.C. Gen. Stat. § 97-25.1.

[2] Although we hold the Commission did not err in denying plaintiff's request for additional medical compensation in its 20 November 2015 opinion and award, the question remains whether plaintiff could seek additional medical benefits following defendant's payment of the amount of temporary total disability benefits owed to plaintiff due to the miscalculation in the average weekly wage on 7 December 2015. Stated differently, the issue is whether a payment to correct an earlier error in medical or indemnity payments to make an employee whole restarts the limitations period in N.C. Gen. Stat. § 97-25.1. Defendant argues such a corrective payment is not the type of medical or indemnity payment that would restart the statute of limitations because "[t]he check was not for any new compensation, medical or indemnity, but rather to correct the underpayment that occurred four years ago."

When the corrective payment is considered in light of the purpose of the limitations period explained in *Harrison*, plaintiff's argument seems reasonable-for as the Commission noted,

> applying plaintiff's interpretation of "last payment" would thwart the legislatures' intent in enacting N.C. Gen. Stat. § 97-25.1 to limit claims for medical compensation to a specific time period recognized by the Court in *Harrison*, as well as the general aim of the Workers' Compensation Act to provide not only a swift and certain remedy to injured workers, but also to ensure a limited and determinate liability for employers.

We further agree with the Commission that plaintiff's interpretation could result in increased litigation in cases where honest miscalculations resulting in indemnity benefits could lead to a reset of the two-year limitations period and additional liability in cases where the last medical or indemnity payment was otherwise made years earlier. Yet, there is no such distinction between medical and indemnity payments in the normal course of a workers' compensation case and subsequent corrective payments in the statute. Since we need not decide the issue in the present case because the corrective payment had not yet been paid to restart the limitations period, we simply note that N.C. Gen. Stat. § 97-25.1 is not entirely clear as to how such corrective payments are to be treated and leave the matter for the legislature to address.

Defendant's Appeal

[3] In defendant's appeal, defendant contends the Commission "erred in holding that [there is] a remedy at law under N.C. Gen. Stat. § 97-47 and not applying the equitable doctrine of laches to bar plaintiff's claim." In raising this issue, defendant challenges the Commission's order requiring the corrective payment of temporary total disability compensation owed to plaintiff due to the miscalculation of plaintiff's average weekly wage. This issue, like the first issue, presents a question of law which we review *de novo*.

N.C. Gen. Stat. § 97-47 provides that "on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . . ." N.C. Gen. Stat. § 97-47 (2015). Yet, similar to N.C. Gen. Stat. § 97-25.1, N.C. Gen. Stat. § 97-47 restricts the period of time during which the Commission's review and modification of an award may take place. It provides,

> [n]o such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in

> cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article.

N.C. Gen. Stat. § 97-47 (2015). Also limiting the application of N.C. Gen. Stat. § 97-47, "[o]ur case law defines a 'change in condition' under [N.C. Gen. Stat.] § 97-47 as a condition occurring after a final award of compensation that is 'different from those existent when the award was made' and results in a substantial change in the physical capacity to earn wages." *Pomeroy v. Tanner Masonry*, 151 N.C. App. 171, 179, 565 S.E.2d 209, 215 (2002) (internal citations and alterations in original omitted). Thus, N.C. Gen. Stat. § 97-47 is not applicable when there has been no final award. *See Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 666, 75 S.E.2d 777, 782 (1953).

In the present case, the Commission relied on *Biddix* to reach the conclusion that "[t]here has not been a 'final award' in this case that would trigger the limitations period contained in N.C. Gen. Stat. § 97-47." The Commission further concluded that "the equitable doctrines of estoppel and laches do not apply to bar plaintiff's claim in the instant matter as defendant has a remedy at law under N.C. Gen. Stat. §§ 97-25.1 and 97-47, namely, the ability to plead the affirmative defense of lapse of the limitations periods set forth in these statutes."

Defendant does not challenge the Commission's conclusion that the limitations period in N.C. Gen. Stat. § 97-47 had not been triggered, and even concedes that there has not been a final award. Defendant instead claims the Commission's conclusions are inconsistent because the remedy at law under N.C. Gen. Stat. § 97-47 would be that the limitations period had run from a final award. Defendant asserts there can be no remedy at law without a final award and contends equity should prevent plaintiff's claim from remaining open. Defendant relies on *Miller v. Carolinas Medical Center-Northeast*, 233 N.C. App. 342, 756 S.E.2d 54 (2014) to support his argument that waiting 4 years to challenge the average weekly wage is too long and not within a "reasonable time." We are not persuaded.

While equitable doctrines are available in workers' compensation cases, they may not be applied where there is a remedy at law. *Daugherty v. Cherry Hospital/N.C. Dept. of Health and Human Services*, 195 N.C. App. 97, 101-103, 670 S.E.2d 915, 919-20 (2009). Upon review, it is clear that both N.C. Gen. Stat. §§ 97-25.1 and 97-47 supply remedies at law to bar claims where there has been a delay in the case. Simply because

the limitations period has not run in the present case to bar plaintiff's recovery of the underpaid amount of disability compensation owed to him does not mean the doctrine of laches is available as an alternative. If that were the case, any time a limitations period has not expired, the doctrine of laches may be asserted as an alternative bar to recovery. Furthermore, as the Commission concluded, the *Miller* case, relied on by defendant for what is a "reasonable time," is distinguishable from the present case. In *Miller*, there was a Form 21 agreement at issue in which the average weekly wage was recorded and the Court, based on principles of contract law, held that "a party to a Form 21 agreement which contains a verification provision but no provision regarding the time by which verification must be sought cannot assert a right to seek verification once a 'reasonable time' has passed." 233 N.C. App. at 349, 756 S.E.2d at 59. In the present case, there was no agreement and, therefore, no requirement that plaintiff seek verification of the average weekly wage within a reasonable time, as required in *Miller*.

Where N.C. Gen. Stat. §§ 97-25.1 and 97-47 provide remedies at law for the delay in seeking benefits, the Commission did not err in rejecting the application of the doctrine of laches in this case.

III. Conclusion

For the reasons discussed, we affirm the opinion and award of the Commission.

AFFIRMED.

Judges STEPHENS and ZACHARY concur.

TED B. LOCKERMAN, ADMINISTRATOR D.B.N. OF THE ESTATES OF ELLEN DUDLEY SPELL, DECEASED, AND SULIE DANIEL SPELL, DECEASED, ON BEHALF OF THE ESTATES AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

SOUTH RIVER ELECTRIC MEMBERSHIP CORPORATION, A NORTH CAROLINA ELECTRIC MEMBERSHIP COOPERATIVE, DEFENDANT

No. COA15-1113

Filed 6 December 2016

1. Corporations—electrical cooperative—fiduciary duty—capital credits

The trial court did not err by granting defendant electric cooperative's second motion for summary judgment. Defendant did not owe plaintiff members a fiduciary duty with regard to the discounting of capital credits.

2. Statutes of Limitation and Repose—conversion—unjust enrichment—unfair or deceptive trade practices—breach of contract—equitable estoppel

The trial court did not err by granting defendant electric cooperative's third motion for summary judgment on the issues of conversion, unjust enrichment, unfair or deceptive trade practices, breach of contract, and equitable estoppel. Plaintiffs' claims were barred by the statute of limitations or were released pursuant to N.C.G.S. § 28A-25-6(e).

Appeal by plaintiffs from orders entered 8 August 2012 and 8 June 2015 by Judge James L. Gale in Sampson County Superior Court. Heard in the Court of Appeals 10 May 2016.

Andrew M. Jackson and Stevens Martin Vaughn & Tadych, PLLC, by K. Matthew Vaughn and Michael J. Tadych, for plaintiff-appellants.

Smith and Christensen, L.L.P., by Aaron M. Christensen and W. Britton Smith, Jr., for defendant-appellee.

BRYANT, Judge.

Where defendant, an electric cooperative, did not owe plaintiffs a fiduciary duty with regard to the discounting of capital credits and plaintiffs' claims are otherwise barred by the statute of limitations or were

released pursuant to N.C. Gen. Stat. § 28A-25-6(e), the trial court did not err in granting defendant's motions for summary judgment, and we affirm the orders of the trial court.

Defendant South River Electric Membership Corporation ("SREMC", or "the Cooperative"), is a nonprofit electric membership cooperative organized and existing pursuant to the laws of the North Carolina Rural Electrification Authority. Headquartered in Harnett County, North Carolina, SREMC provides electric service to members in Sampson, Harnett, Cumberland, Johnston, and Bladen Counties.

SREMC sets a retirement cycle for capital credits, "annually allocat[ing] to each Member . . . Operating Margins from the Cooperative Service in proportion to the value or quantity of the Cooperative Service used, received, or purchased by each member during the applicable fiscal year ('Capital Credits')." SREMC makes capital credit retirements nineteen years after the year in which the credits were assigned. SREMC's Board (the "Board") "determine[s] the method, basis, priority, and order of retiring and refunding Capital Credits . . . ." There is no fixed time by which capital credits must be retired and all members and former members have a personal property interest in their accumulated capital credits.

When a member or former member dies owning capital credits, that member's accumulated capital credits become property of the deceased member's estate. A deceased member's personal representative may request, and the Board may authorize, a special retirement of the deceased member's accumulated capital credits. Prior to a 2001 resolution, SREMC had made special retirements of capital credits to the estates of deceased former members on a non-discounted basis. In March 2001, the Board unanimously passed a resolution "that all capital credits to estates of members dying after June 30, 2001, shall be calculated based on a 6% discount rate and a discount period equal to the number of years of patronage capital then outstanding." On 4 June 2001, the Board amended the Cooperative's bylaws (the "2001 bylaws") and approved a policy of discounting special retirements to the estates of deceased former members, to be "calculated on a discount rate equal to the Wall Street Journal Prime Rate as of December 31 of each applicable year . . . ." As a result, from August 2001 until December 2002, SREMC discounted special or early retirements of capital credits using a 6% annual discount rate. Then, in January 2003, SREMC began using a discount rate based on the Wall Street Journal Prime Rate as of 31 December of the previous year.

The 2001 bylaws allowed the Board to authorize the Cooperative to wholly or partially retire and refund capital credits to members and former members. SREMC does not notify members on each occasion when changes are made to the bylaws and it did not provide notice concerning the 4 June 2001 changes.

On 4 May 1976, J.J. (Jay) Faircloth died intestate, a citizen and resident of Cumberland County, North Carolina, survived by his widow, Lillie M. Faircloth, who inherited Jay's capital credits. Lillie M. Faircloth McLelland ("McLelland") died testate on 8 December 1999, prior to the changes made to SREMC's discounting policy. At the time of her death in 1999, McLelland, then citizen and resident of Lenoir County, North Carolina, owned accumulated capital credits of $1,117.17.

On 8 October 2002, SREMC paid the sum of $1,117.17 to the Lenoir County Clerk of Court for McLelland. SREMC did not apply a discount to McLelland's capital credits, nor did it retain any portion of them. This is the only instance in which a deceased former member's capital credits were not discounted once SREMC began its discounting program.

From January 2003 onwards, the annual discount rate was based on the WSJ Prime Rate as of December 31 of the previous year. During calendar year 2003, SREMC used a 4.25% annual discount rate for discounting capital credits to the estates of deceased members.

Ellen Dudley Spell ("Ellen"), deceased, was a citizen and resident of Sampson County and a member of SREMC at the time of her death on 3 October 2002. She owned $695.22 of capital credits. On 22 October 2002, Ellen's daughter applied for Ellen's capital credits. SREMC prepared a form titled "Request for Refund of Capital Credit Allocation to Estate of Deceased Member," which stated as follows:

> I understand that this Application represents a request for an early retirement of the stated capital credits and that a discount factor (as approved by the Cooperative's Board of Directors) will apply to this requirement and refund. The present discount factor is 6%.

SREMC discounted the $695.22 in capital credits by $398.66 at retirement, using the 6% annual discount rate in effect at that time. As a result, SREMC returned $296.56 of the $695.22 in accumulated capital credits to Ellen's estate (the "EDS Estate"), and accrued $398.66 to its "net savings."

Sulie Daniels Spell ("Sulie"), also deceased, was a citizen and resident of Sampson County and a member of SREMC at the time of her

death on 28 April 2009. She owned $221.55 of capital credits. Sulie's son applied for Sulie's capital credits, using the same form described above, except the "present discount factor" was listed as "3.25%." SREMC discounted Sulie's capital credits by $94.79, leaving $126.76 to be paid to the clerk of court for Sulie's estate (the "SDS Estate"). As a result, SREMC accrued $94.79 to its "net savings."

On 7 February 2011, plaintiff Andrew M. Jackson, a citizen and resident of Sampson County, North Carolina, was appointed Administrator of both the EDS and SDS Estates by the Clerk of Superior Court of Sampson County, North Carolina. On 9 February 2011, Jackson filed a complaint in Sampson County against SREMC. Styled as a class action, plaintiffs are the EDS and SDS Estates. The complaint included claims for declaratory judgment, breach of fiduciary duty, conversion, unjust enrichment, unfair or deceptive trade practices ("UDTP"), and breach of contract,[1] all related to SREMC's retirement of capital credits. On 25 August 2011, Ted B. Lockerman was substituted as Administrator of the EDS and SDS Estates and as plaintiff in this action. Thereafter, SREMC removed the case to the Business Court, where it was assigned to the Honorable James L. Gale. On October 21, 2011, Judge Gale entered a Phase One Case Management Order.

In December 2011, SREMC filed and served two motions for partial summary judgment, both of which were granted. In granting its first motion, the trial court acknowledged that SREMC could legally discount capital credits of deceased members when the credits are retired early. Plaintiffs do not appeal this ruling.

In granting SREMC's second motion, the trial court concluded that SREMC has no "fiduciary duty" to its members when retiring capital credits. Plaintiffs' initial appeal of that ruling was dismissed as interlocutory per opinion of this Court on 6 August 2013. *Lockerman v. S. River Elec. Membership Corp.*, No. COA12-1450, 2013 WL 4006997 (N.C. Ct. App. Aug. 6, 2013) (unpublished).

SREMC filed a third summary judgment motion, seeking a ruling on all remaining claims. Plaintiffs filed their response, and the trial court heard the pending motions on 6 October 2014. In its Opinion and Final Judgment, the trial court granted SREMC's third motion for summary judgment, dismissing with prejudice all of plaintiffs' remaining claims based on the statutes of limitations. Plaintiffs appeal.

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1. Claims for *ultra vires* and *intra vires* corporate acts have been voluntarily dismissed.

On appeal, plaintiffs argue that the trial court erred in granting defendant SREMC's (I) second and (II) third motions for summary judgment.

I

[1] Plaintiffs first argue that the trial court erred in granting SREMC's second motion for summary judgment by ruling that, as a matter of law, SREMC owes no fiduciary duties to plaintiffs' estates and those similarly situated regarding the "retirement" of capital credits. Specifically, plaintiffs contend that SREMC owes fiduciary duties based either upon its legal relationship with its members (*de jure)* or upon evidence sufficient to allow a finder of fact to find a special relationship of trust and confidence (*de facto*). We disagree.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)).

A "fiduciary relation" is one that "may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). "In less clearly defined situations the question whether a fiduciary relationship exists is more open and depends ultimately on the circumstances. Courts have historically declined to offer a rigid definition of a fiduciary relationship in order to allow imposition of fiduciary duties where justified." *HAJMM Co. v. House of Raeford Farms, Inc. (HAJMM Co. II)*, 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991) (citation omitted). "Thus, the relationship can arise in a variety of circumstances, and may stem from varied and unpredictable facts." *Id.* (internal citation omitted).

In North Carolina, a fiduciary duty can arise by operation of law (*de jure*) or based on the facts and circumstances (*de facto*):

> [The fiduciary duty] not only includes all legal relations [(*de jure*)], such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust*, but it extends to any possible case in which a fiduciary relation exists in

> fact, and in which there is a confidence reposed on one side, and resulting domination and influence on the other [(*de facto*)].

Abbitt, 201 N.C. at 598, 160 S.E. at 906 (citation omitted).

As plaintiffs and SREMC do not stand in a legal relationship which imposes a *de jure* fiduciary relationship, we must determine whether plaintiffs have adequately asserted a *de facto* fiduciary relationship. "Whether such a relationship exists is generally a question of fact for the jury." *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 178, 684 S.E.2d 41, 53 (2009) (citation omitted). However, this Court can determine the adequacy of the evidence to support such a jury finding as a matter of law. *See Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 452, 579 S.E.2d 505, 510 (2003) ("Determination of whether a particular set of facts establishes the existence of a fiduciary duty may present a question of law for the court." (citations omitted)).

"Common to [a *de jure* fiduciary] relationship[] is a heightened level of trust and the duty of the fiduciary to act in the best interests of the other party." *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014). By contrast, other relationships, like those of debtor-creditor, *Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 95, 143 S.E.2d 270, 276 (1965) ("There was no fiduciary relationship; the relation was that of debtor and creditor."), and employer and employee, *Dalton v. Camp*, 353 N.C. 647, 651–52, 548 S.E.2d 704, 707–08 (2001) (holding that "the nature of virtually all employer-employee relationships[,] without more . . . [is] inadequate to establish [an at-will employee's] obligations as fiduciary in nature"), will not typically give rise to fiduciary duties.

Accordingly, we must determine whether plaintiffs have presented sufficient facts that indicate the relationship between plaintiffs and SREMC was "one in which 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . .' " *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707 (quoting *Abbitt*, 201 N.C. at 598, 160 S.E. at 906).

The standard for finding a *de facto* fiduciary relationship is a demanding one: "Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*,

189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008) (quoting *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 348 (4th Cir. 1998)).

In *HAJMM Co. II*, the plaintiff, a limited partnership and for-profit corporation, sought damages for, *inter alia*, breach of fiduciary duty based on the defendants' (an agricultural cooperative) allegedly improper refusal to redeem "revolving fund certificates" issued by the defendant-co-op to the plaintiff. 328 N.C. at 579–80, 403 S.E.2d at 485. The defendant-co-op in *HAJMM Co. II* was capitalized in part when the plaintiff and two other turkey producers sold to the defendant-co-op all their stock in Raeford Turkey Farms, Inc. ("RTF"). *Id.* at 580, 403 S.E.2d at 485. As part of the consideration for selling their interests in RTF to the defendant-co-op, the plaintiff received revolving fund certificates, which became part of the defendant's capital structure and were categorized as stockholder's equity. *Id.* The certificates noted they were subject to the company's bylaws, and were "retirable in the sole discretion of the board of directors, either fully or on a pro rata basis." *Id.* at 581, 430 S.E.2d at 485–86. The plaintiff's $387,500 certificate was not retired and continued to be carried on the defendant's books as part of its capital structure. *Id.* at 581, 430 S.E.2d at 486. When the plaintiff demanded payment on the certificate, the defendant refused, even though the plaintiff's evidence showed that the defendant-co-op had been profitable during the relevant time period, held $3.4 million in outside securities, and had $922,000 cash on hand. *Id.* at 582, 430 S.E.2d at 486. At the close of evidence at trial, the trial court submitted issues to the jury and received, *inter alia*, the following answer: "Do the defendants . . . owe a fiduciary duty to the plaintiff, HAJMM? Yes." *Id.*

On appeal to this Court, the defendants argued the trial court erred in submitting to the jury the issue of whether the defendants owed plaintiff a fiduciary duty. *HAJMM Co. v. House of Raeford Farms, Inc. (HAJMM Co. I)*, 94 N.C. App. 1, 11, 379 S.E.2d 868, 874 (1989), *aff'd in part as modified, rev'd in part by HAJMM Co. II*, 328 N.C. 578, 403 S.E.2d 483 (1991). This Court disagreed and, in affirming in part and reversing in part this Court's decision in *HAJMM Co. I*, the N.C. Supreme Court noted as follows:

> The jury's determination on the fiduciary relationship issue rested on *substantial and compelling competent evidence that plaintiff placed special confidence and trust in [the] defendants when it agreed to accept the revolving fund certificate in return for its interest in RTF and that with regard to the certificate, [the] plaintiff justifiably*

> *expected [the] defendants to deal fairly.* It rested also on the factual characteristics of the certificate itself, about which there is little or no dispute. The dispute regarding the certificate has revolved around the legal effect to be given its characteristics.

HAJMM Co. II, 328 N.C. at 590, 430 S.E.2d at 491 (emphasis added). Our Supreme Court also noted that the legal dispute regarding the certificate had been resolved by the Court of Appeals favorable to the plaintiff who "contended the certificate evidenced enough of an equity interest in [the defendant-co-op] to lead as a matter of law to the creation of a fiduciary relation between the parties[,]"and, because the Supreme Court chose not to review this issue, it "thus bec[ame] the law of the case." *Id.*; *see also HAJMM Co. I*, 94 N.C. App. at 11–12, 379 S.E.2d at 874.

Here, SREMC's decisions regarding discounting early-retired capital credits do not support a finding that SREMC owed plaintiffs a fiduciary duty. Unlike the plaintiff in *HAJMM Co. I & II*, plaintiffs in the instant case cannot show that SREMC "figuratively [held] all the cards[.]" *Broussard*, 155 F.3d at 348 (citation omitted).

First, no member or representative of a deceased member is required to have a capital credit retired early: "Upon the death of any Member . . . *and pursuant to a written request from the Deceased Member's legal representative*, the Board may retire the Deceased Member's Capital Credits . . . under the terms and conditions agreed upon by the Deceased Member's legal representative and the Cooperative." Indeed, plaintiffs shared some control with SREMC over the retirement transaction as SREMC "currently makes general capital credit retirements on a dollar for dollar basis 19 years after the year for which the operating margins were allocated." Plaintiffs retained the right to choose whether to receive an early payout or wait for payout when the credits reached their date of maturity.

Thus, as plaintiffs were required to submit a written request on behalf of their deceased members in order to receive capital credits before their date of maturity, plaintiffs' participation in early capital credit retirement was entirely voluntary. Furthermore, SREMC's members have no guarantee that their credits will be retired early, even upon written request—the bylaws provide for redeeming capital credits only where "the financial condition of the Cooperative will not be impaired thereby." *See Four Cnty. Elec. Membership Corp. v. Powers*, 96 N.C. App. 417, 420, 425, 386 S.E.2d 107, 109, 112 (1989) ("Unlike funds received from the sale of stocks and bonds, monies ultimately termed

patronage capital by [a federal tax-exempt entity] are merely part of the gross receipts received for the sale of electricity when billings are rendered. Patronage capital ultimately owed to . . . members is at the time of receipt uncertain as to both amount and fact of liability.").[2]

Unlike the issuance of the certificate in *HAJMM Co. I*, which was held to be more indicative of a corporation/shareholder relationship, 94 N.C. App. at 11, 379 S.E.2d at 874, here, members of SREMC "receive no interest or dividends on their capital credits" and retained some control over the capital credit retirement process. The plaintiff in *HAJMM Co.*, on the other hand, retained no control over the issuance of his certificate—his certificate was retirable only at the discretion of the defendant-co-op board. *HAJMM Co. II*, 328 N.C. at 581, 430 S.E.2d at 486.

Second, plaintiffs cannot show evidence that SREMC exerted such "dominion and control" such that it must be held accountable as a fiduciary where plaintiffs were sufficiently on notice regarding SREMC's discounting program. The request form submitted by plaintiffs disclosed on its face that a discount factor would be applied in determining the amount of capital credit to be refunded. Each application signed by plaintiffs included this notice, even if the amount to be discounted was not filled in until after plaintiffs signed and returned their applications. Additionally, the Bylaws outlining the discount policy were available to plaintiffs at any time upon request, even if SREMC does not generally provide notification to its members on each occasion when there are changes made to the bylaws, and it did not do so concerning the 4 June 2001 changes.

Thus, as plaintiffs retained some control over the retirement transaction and were sufficiently on notice that early-retired capital credits would be subject to discounting, plaintiffs here have not presented adequate evidence such that a jury could find there was "substantial and compelling competent evidence that plaintiff[s] placed special confidence and trust in defendant[]," nor that they "justifiably expected

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2. Other courts have recognized that patron credits cannot be considered an "indebtedness" which is presently due and payable. *In re E. Me. Elec. Coop., Inc.*, 125 B.R. 329, 336 (Bankr. D. Me. 1991) (noting that "the directors of a cooperative are free to refuse to pay value to retire a patron's account" and that "patronage dividends allocated cooperative patrons' accounts do not constitute an indebtedness" (citations omitted)); *Evanenko v. Farmers Union Elevator*, 191 N.W.2d 258, 261 (N.D. 1971) (noting that other courts have held that "patronage credits are not such an indebtedness on the part of the cooperative due the patron which can be collected at any time" and concluding that "patronage credits constitute an interest of the patron in the cooperative which is contingent and not immediately payable").

defendant[] to deal fairly." *Id.* at 590, 430 S.E.2d at 491. Thus, the trial court did not err in concluding that the facts established by the record "did not create a special relationship that rise[s] to the level necessary to impose fiduciary duties on SREMC" with respect to plaintiff's estates and those similarly situated regarding the retirement of their capital credits. Plaintiffs' argument, that the trial court erred by granting SREMC's second motion for summary judgment, is overruled.

II

[2] Plaintiffs lastly argue that the trial court erred in granting SREMC's third motion for summary judgment, ruling that plaintiffs' remaining claims were barred by the statutes of limitations or were otherwise not supported by a sufficient forecast of the evidence. Specifically, plaintiffs contend that (1) the EDS Estate's claims for conversion, unjust enrichment, UDTP, and breach of contract are not time barred and (2) the SDS Estate's claims are not barred by the clerk's acceptance of payment and are otherwise supported by sufficient evidence. We disagree.

This Court reviews an appeal from a summary judgment order *de novo*. *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

1. Plaintiff EDS Estate's Claims

This action was initiated on 9 February 2011. The discounted balance of plaintiff EDS Estate's capital credits was paid out by SREMC more than eight years prior to that date on 9 December 2002. "After a defendant pleads the statute of limitations, the plaintiff has the burden of demonstrating she brought the action within the applicable limitation period." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 81, 712 S.E.2d 221, 226 (2011) (citation omitted). "Whether a claim is time-barred is a mixed question of law and fact." *Id.* (citation omitted). "If a plaintiff's claim is barred by the running of the applicable statute of limitations, summary judgment in favor of a defendant is appropriate." *ABL Plumbing & Heating Corp. v. Bladen Cnty. Bd. of Educ.*, 175 N.C. App. 164, 168, 623 S.E.2d 57, 59 (2005) (citation omitted).

A. Conversion

Plaintiffs assert that discounting capital credits to their present value constitutes conversion. We disagree.

Conversion claims are subject to a three-year statute of limitations running from the date of the alleged wrongful conduct. N.C. Gen. Stat. § 1-52(4) (2015).

A claim for conversion "requires (1) an unauthorized assumption and exercise of right of ownership over property belonging to another and (2) a wrongful deprivation of it by the owner, regardless of the subsequent application of the converted property." *N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 324, 663 S.E.2d 1, 4 (2008) (citation omitted). Generally, a claim for conversion accrues when "some act is done which is a denial or violation of the plaintiff's dominion over or rights in the property." *Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., Inc.*, 192 N.C. App. 74, 86, 665 S.E.2d 478, 489 (2001) (quoting *Lake Mary Ltd. P'ship v. Johnston*, 145 N.C. App. 525, 532, 551 S.E.2d 546, 552 (2001)). However, where a person or entity has lawfully obtained possession, the true owner must demand return of the goods and receive an absolute refusal to surrender them. *See Hoch v. Young*, 63 N.C. App. 480, 483, 305 S.E.2d 201, 203 (1983) (citation omitted).

Here, plaintiff EDS Estate applied for a refund of its capital credits on 22 October 2002. On 9 December 2002, SREMC discounted the capital credit balance and paid the EDS Estate the discounted amount of $215.79. In connection with the special retirement of these capital credits, SREMC accrued $398.66 to its "net savings." Plaintiff EDS Estate made no further request that SRMEC refund the amount it retained at that time.

On these facts, a conversion claim would have accrued when and if SREMC had retained (or refused to surrender) the discounted portion of retired capital credits in response to plaintiff's demand for the same. Accordingly, the three-year statute of limitations had run by 9 December 2005, well before the initiation of this action on 9 February 2011, and plaintiff EDS Estate's claim for conversion is time-barred.

B. Unjust Enrichment

"A claim for unjust enrichment must be brought within three years of accrual under subsection 1 of [N.C. Gen. Stat. §] 1-52." *Stratton*, 211 N.C. App. at 85, 712 S.E.2d at 228 (citing *Housecalls Home Health Care, Inc. v. State*, 200 N.C. App. 66, 70, 682 S.E.2d 741, 744 (2009)). To the extent plaintiff EDS Estate's unjust enrichment claims are premised upon its conversion theories, this claim is also subject to a three-year statute of limitations. *See id.* at 85, 712 S.E.2d at 228–29 (holding that statute of limitations for unjust enrichment and conversion claims applied, rather than statute of limitations that applied to claims seeking relief on the ground of fraud or mistake where heir of estate was in essence pursuing a conversion claim). As such, plaintiff EDS Estate's claim for unjust enrichment is time-barred.

C. Unfair or Deceptive Trade Practices ("UDTP")

A UDTP claim must be brought within four years of the accrual of the cause of action. N.C. Gen. Stat. § 75-16.2 (2015); *see* N.C. Gen. Stat. § 75-1.1(a) (2015) ("[U]nfair or deceptive acts or practices in or affecting commerce, are declared unlawful."). A UDTP claim based on fraud accrues only "at the time the fraud is discovered, or *should have been discovered* with the exercise of reasonable diligence." *Trantham v. Michael L. Martin, Inc.*, 228 N.C. App. 118, 126, 745 S.E.2d 327, 334 (2013) (quoting *Nash v. Motorola Commc'ns & Elecs., Inc.*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989)). Applying that limitations period here, all UTDP claims based on payment of capital credits prior to 9 February 2007 are time-barred.

D. Breach of Contract

Claims based upon a contract are subject to a three-year statute of limitations. N.C.G.S. § 1-52(1). "It is a well-settled rule in North Carolina that a cause of action for breach of contract accrues, and the statute of limitations period begins to run, '[a]s soon as the injury becomes apparent to the claimant or should reasonably become apparent[.]' " *ABL Plumbing*, 175 N.C. App. at 168, 623 S.E.2d at 59 (alteration in originals) (quoting *Liptrap v. City of High Point*, 128 N.C. App. 353, 355, 496 S.E.2d 817, 819 (1998)).

Plaintiffs' brief asserts only that its varying claims, including breach of contract, should not be time-barred based on the doctrine of equitable estoppel, *see infra* Section 1.E., and the trial court's order notes that plaintiffs' brief to the trial court "pose[d] no opposition to SREMC's assertion that the [EDS] [E]state's breach of contract claim should be time-barred." Accordingly, we affirm the trial court's ruling that the breach of contract claim is also time-barred.

E. Equitable Estoppel

Plaintiffs claim that SREMC should be equitably estopped from asserting the statute of limitations as a defense to the above claims on behalf of the EDS Estate. For the following reasons, we disagree.

"[A] defendant may properly rely upon a statute of limitations as a defensive shield against 'stale' claims, but may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit." *Friedland v. Gales*, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998) (citations omitted).

> The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Id. at 807, 509 S.E.2d at 796–97 (quoting *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628–29 (1990)).

Here, plaintiffs would need to show the EDS Estate lacked knowledge and the means of ascertaining the real facts, in 2002, concerning the discount rate established by the Board in the Bylaws. However, the EDS Estate's representative was on notice of the discounting by virtue of the application form itself, had both the opportunity and the capacity to review the bylaws, and could ask questions like any other estate representative was able to do.[3] *See Dallaire*, 367 N.C. at 369, 760 S.E.2d at 267 ("A party cannot establish justified reliance on an alleged misrepresentation if the party fails to make reasonable inquiry regarding the alleged statement." (citation omitted)). Further, there is no evidence in the record which would support a finding that SREMC affirmatively concealed facts regarding the discounting program, even if it did not advertise the amendments made in 2001. Accordingly, plaintiff EDS Estate cannot overcome the statute of limitations defenses through equitable estoppel and its argument on this point is overruled.

(2) Plaintiff SDS Estate's Claims

By application dated 28 May 2009, Sulie's son applied for decedent Sulie's capital credits. Following the Board's approval, SREMC tendered the sum of $126.76 to the Sampson County Clerk of Court pursuant to N.C. Gen. Stat. § 28A-25-6.

Plaintiff SDS Estate contends the Clerk of Court's acceptance of SREMC's payment on behalf of the SDS Estate is limited to the amount paid the Clerk and does not extend to the amounts SREMC retained

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3. Upon request of the representative for the Orpah Blanche Scott and Lee Ivey Williams Estates, SREMC provided the following formula used for retiring capital credits: Accumulated Capital Credits – Discount Factor = Net Capital Credit Amount – Outstanding Bad Debt = Capital Credit check amount OR Bad Debt Balance Remaining.

as "net savings." Plaintiff asserts this payment does not constitute a "release of indebtedness" which would bar plaintiff's claims for declaratory judgment, conversion, unjust enrichment, breach of contract, and UDTP. We disagree.

"The receipt from the clerk of the superior court of a payment purporting to be made pursuant to this section [of Chapter 28A, Administration of Decedents' Estates] is a full release to the debtor for the payment so made." N.C. Gen. Stat. § 28A-25-6(e) (2015). Here, the trial court held that this language operated to release SREMC from further liability to plaintiffs regarding the SDS Estate, "not only to the amount paid, but also to the amount withheld by SREMC as a result of discounting." While plaintiff argues the release should not apply as SREMC did not advise the Clerk of the discount, the SDS Estate received and accepted without protest precisely what it was due pursuant to the Cooperative's Bylaws. As we find that SREMC's payment to the Clerk constituted a release of indebtedness pursuant to N.C. Gen. Stat. § 28A-25-6(e), we need not address the remaining claims made on behalf of the SDS Estate.

In conclusion, as the facts of this case do not compel a finding that SREMC owed plaintiffs a fiduciary duty with regard to the discounting of capital credits and plaintiffs' claims are otherwise barred by the statute of limitations or were released pursuant to N.C. Gen. Stat. § 28A-25-6(e), the trial court did not err in granting SREMC's second and third motions for summary judgment. Accordingly, the orders of the trial court are

AFFIRMED.

Judges STROUD and DIETZ concur.

SETTLERS EDGE HOLDING COMPANY, LLC; MOUNTAIN AIR DEVELOPMENT CORPORATION; VIRGINIA A. BANKS; WILLIAM R. BANKS; JEANI H. BANKS; MICHAEL R. WATSON; SHEREE B. WATSON; VIRGINIA A. BANKS, WILLIAM R. BANKS, AND SHEREE B. WATSON IN THEIR CAPACITY AS TRUSTEES OF WILLIAM A. BANKS REVOCABLE TRUST; MORRIS ATKINS IN HIS CAPACITY AS TRUSTEE OF WILLIAM BANKS FAMILY IRREVOCABLE TRUST NUMBER 1; AND MORRIS ATKINS IN HIS CAPACITY AS TRUSTEE OF WILILAM BANKS FAMILY IRREVOCABLE TRUST NUMBER 2, Plaintiffs-Appellants

v.

RES-NC SETTLERS EDGE, LLC, Defendant-Appellee

No. COA15-1055

Filed 6 December 2016

Damages and Remedies—recoupment—breach of contract

The trial court's order granting summary judgment was reversed and remanded to determine the amount of recoupment, if any, defendant may recover from plaintiffs on its claim for breach of contract after deduction of any damages proven by plaintiffs.

Appeal by plaintiffs from orders entered 4 November 2013 and 28 May 2015 by Judges Mark Powell and Marvin P. Pope in Superior Court, Yancey County. Heard in the Court of Appeals 10 February 2016.

Rayburn Cooper & Durham, P.A., by G. Kirkland Hardymon, Ross R. Fulton, and Benjamin E. Shook, for plaintiffs-appellants.

Nelson Mullins Riley & Scarborough, LLP, by Christopher J. Blake and D. Martin Warf, for defendant-appellee.

STROUD, Judge.

Plaintiffs appeal from the trial court's 4 November 2013 order granting defendant RES-NC Settlers Edge, LLC's motion for partial summary judgment and from the order entered 28 May 2015 granting defendant's motion for lack of subject matter jurisdiction and denying plaintiffs' motion for summary judgment. On appeal, plaintiffs argue that the trial court erred in striking their affirmative defenses for lack of subject matter jurisdiction, not granting collateral estoppel effect to a prior foreclosure order, and in granting summary judgment in favor of defendant while denying summary judgment in favor of plaintiffs. After review, we find that in this case, the FDIC effectively repudiated the loan contract by refusing to fund the draw requests yet failed to give plaintiffs proper

notice of the repudiation. With proper notice, plaintiffs could have asserted an administrative claim for damages. Although the trial court would lack jurisdiction for any affirmative claim by plaintiffs for damages, plaintiffs did not bring any claim for damages, and the trial court does have jurisdiction to consider defendant's counterclaim and thus plaintiffs' affirmative defenses to that counterclaim.

Although plaintiffs cannot recover damages from defendant, plaintiffs' affirmative defenses raise the issue of recoupment. Defendant has not demonstrated any genuine issue of material fact and all of the evidence, taken in the light most favorable to defendant, shows that the FDIC effectively repudiated plaintiff Settlers Edge's loan contract, but this does not necessarily require judgment forgiving the loan entirely. Instead, there are genuine issues of material fact as to the amount of recoupment, if any, plaintiffs are entitled to, based upon defendant's repudiation of the loan contract. Accordingly, plaintiffs' affirmative defense of repudiation raised the issue of recoupment based upon defendant's repudiation of the loan contract. Because there are questions of material fact as to recoupment, we reverse and remand for further proceedings to determine the amount of damages, if any, defendant may recover from plaintiffs on its claim for breach of contract after deduction of any damages proven by plaintiffs.

I. Background

Plaintiffs' complaint set forth the following facts. Plaintiff Settlers Edge ("Settlers Edge") is a limited liability company organized in 2007 to develop and maintain Mountain Air Country Club and residential lots on a parcel of real property ("the Property") in Yancey County, North Carolina. In June 2007, Settlers Edge secured a $15,500,000.00 loan from Integrity Bank in Georgia to finance the construction of Mountain Air Country Club on the Property. A material term of the financing agreement between Settlers Edge and Integrity Bank was that "Settlers Edge would receive funding for the approximately $7 million in construction and carrying expenses necessary to develop the Property into marketable lots with utilities and amenities. This funding took the form of monthly loan draw requests submitted by Settlers Edge to Integrity Bank."

Integrity Bank funded the development of the Property with the monthly loan draws as agreed from 20 June 2007 through 28 August 2008, but then on 29 August 2008, Integrity Bank was placed under the receivership of the Federal Deposit Insurance Corporation ("FDIC"), which assumed all of its assets and obligations. On 19 September 2008, Settlers Edge submitted a draw request for the month of August for

$41,677.20. The FDIC refused to disburse the requested funds. After several attempts to get the FDIC to pay the loan draw, Settlers Edge sent a formal written notice and demand through counsel to the FDIC stating that it was in "material breach" of its obligations and demanding performance. The FDIC never responded. At some point before 27 October 2009, "the FDIC caused a substitute trustee to be appointed to institute foreclosure proceedings on the Deed of Trust."

In the foreclosure proceeding, plaintiffs herein raised the defense of material breach of the loan agreement by the FDIC. The Yancey County Clerk of Superior Court entered an order on 11 February 2010 denying the FDIC's request for foreclosure, finding plaintiffs were "not in default under the Loan Documents," so the FDIC did not "have the right to institute foreclosure proceedings against the property described in the Deed of Trust." The FDIC then "appealed the ruling, then claimed to have assigned all of its rights, title and interest in the Development Financing to a new entity, Multibank 2009-1 RES-ADC Venture, LLC ('Multibank')." Multibank eventually "claim[ed] to have assigned its right, title and interest in the Development Financing to defendant RES-NC." The FDIC, through RES-NC[1], after being assigned the rights to the Development Financing from Multibank, dismissed the FDIC's appeal to the Yancey County Superior Court on 6 May 2010.

On 15 October 2010, plaintiffs filed this action for a declaratory judgment, claiming:

> that (a) the FDIC committed a material breach of the terms of the Construction Loan Agreement; (b) that pursuant to North Carolina law, this material breach excused their further performance under the various component agreements which comprise the Development Financing; (c) that this issue has been previously litigated and actually adjudicated and that RES-NC is collaterally stopped from re-litigating this issue; and (d) that Plaintiffs have no obligation to pay RES-NC any funds.

Defendant filed its answer and counterclaim on 31 July 2013, denying the allegations in plaintiffs' complaint and asserting as affirmative defenses that the Yancey County Clerk of Court's order has no preclusive effect and that the Yancey County Clerk of Court lacked jurisdiction

1. We use the FDIC and defendant RES-NC interchangeably throughout the body of this opinion, as defendant RES-NC eventually stepped in the shoes of the FDIC when it was assigned the FDIC's rights, title, and interest in the Development Financing agreement.

or authority to enter an order excusing plaintiffs' performance under the loan agreement. Defendant also alleged a counterclaim for breach of contract against plaintiffs to recover the full amount of the loan, plus fees and interest.

Defendant filed a motion for partial summary judgment on 19 September 2013 asserting that there were "[n]o genuine issues of material fact" regarding plaintiffs' material breach and collateral estoppel claims and defendant's affirmative defenses. Furthermore, defendant stated that the claims and defenses "are legal issues that require no discovery and are ripe for adjudication by the Court." On 30 September 2013, plaintiffs filed their reply to defendant's counterclaim, arguing that defendant's counterclaim fails to state a claim upon which relief can be granted and asserting the following affirmative defenses: 1) material breach of contract; 2) counterclaim barred under Equal Credit Opportunity Act ("ECOA"); 3) laches; 4) estoppel; 5) waiver; 6) release; 7) unclean hands; 8) repudiation; 9) material modification and release; 10) failure to mitigate damages; 11) collateral estoppel and res judicata; 12) lack of standing and not the real party in interest; 13) lack of consideration; and 14) reservation of any additional defenses that may be revealed during discovery or after receiving additional information.

After a hearing on 7 October 2013, the trial court entered an order on 4 November 2013 granting defendant's motion for partial summary judgment. The court concluded that defendant's claim was not precluded by the Yancey County Clerk of Court's order denying foreclosure and that the order "does not have preclusive effect with respect to the issues of (a) whether the FDIC breached the loan documents; (b) whether the FDIC's breach was material; and (c) whether Plaintiffs' obligations to Defendant under the loan documents are excused." Plaintiffs filed a notice of appeal from the court's order on 4 December 2013, but their appeal was dismissed as interlocutory by this Court on 16 December 2014.

On 14 May 2015, defendant filed a motion to dismiss plaintiffs' declaratory judgment for lack of subject matter jurisdiction and motion for summary judgment as to defendant's counterclaim. In support of the motion to dismiss for lack of subject matter jurisdiction, defendant argued that the trial court lacked jurisdiction "over Plaintiffs' claims as a matter of federal law under the requirements of 12 U.S.C. § 1821(d)(13)(D)." Defendant also asked for summary judgment, alleging that there was no genuine issue of material fact regarding (a) plaintiffs' default of the loan, (b) plaintiffs' failure to repay any amounts borrowed under the loan, and (c) plaintiffs indebtedness to defendant "in the total outstanding amount of $20,523,921.31."

On 15 May 2015, plaintiffs also filed a motion for summary judgment, noting that:

> 1. Plaintiffs commenced this action by filing their Complaint against Defendant . . . on October 15, 2010 seeking a declaratory judgment that, due to the prior material breach by the Defendant's predecessor-in-interest, Plaintiffs were excused from further performance under the loan documents at issue in this case.
>
> 2. Following consolidation of this action with a separate action commenced by Defendant in the Superior Court for Alexander County, North Carolina, Defendant filed its Answer and Counterclaim on July 31, 2013 seeking to recover from Plaintiffs based on Plaintiffs' alleged breach of the Loan Documents at issue.
>
> 3. On or about September 30, 2013, Plaintiffs filed their Reply to Defendants Counterclaims and asserted, among others, affirmative defenses based on (1) the prior material breach of the loan documents by Defendant's predecessor-in-interest, (2) the repudiation of the loan documents by Defendant's predecessor-in-interest, and (3) the material modification of the underlying loan obligation.
>
> 4. Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, "the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits . . . show that there is no genuine issue as to any material fact," and that Defendant is entitled to judgment dismissing Defendant's Counterclaim in its entirety as a matter of law based on the aforementioned defenses. N.C.R. Civ. P. 56 (2015).

The trial court heard the parties respective motions at a hearing on 25 May 2015 and subsequently entered an order and judgment on 28 May 2015 granting defendant's motion to dismiss for lack of subject matter jurisdiction and defendant's motion for summary judgment. Specifically, the court concluded:

> 1. As a matter of federal law, under the requirements of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 1821(d)(13)(D), this Court lacks subject matter jurisdiction over: (a) Plaintiffs' claim for declaratory relief set forth in Plaintiffs'

> Complaint in this action; and (b) Plaintiffs' First, Sixth, Eighth, Ninth, Tenth, and Eleventh Affirmative Defenses set forth in Plaintiffs' Reply to Counterclaim in this action. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is, therefore, GRANTED, and Plaintiffs' Complaint and the First, Sixth, Eighth, Ninth, Tenth, and Eleventh Affirmative Defenses set forth in Plaintiffs' Reply to Counterclaim are hereby DISMISSED.
>
> 2. Defendant has established that there are no genuine issues of material fact with respect to its Counterclaim for breach of contract, and that Defendant is entitled to judgment as a matter of law. Plaintiffs have failed to raise any genuine issue of material fact with respect to Defendant's Counterclaim for breach of contract, or with respect to Plaintiffs' Second, Third, Fourth, Fifth, Seventh, Twelfth and Thirteenth Affirmative Defenses set forth in Plaintiffs' Reply to Counterclaim in this action. Defendant's Motion for Summary Judgment on its Counterclaim for breach of contract is, therefore, GRANTED.
>
> 3. Plaintiffs are not entitled to summary judgment as a matter of law. Plaintiffs' Motion for Summary Judgment is, therefore, DENIED.

The court denied plaintiffs' motion for summary judgment and entered final judgment against plaintiffs on defendant's counterclaim, jointly and severally, for $20,523,921.31. Plaintiffs filed a notice of appeal on 26 June 2015.

II. FIRREA and Affirmative Defenses

Plaintiffs first argue on appeal that the trial court erred in striking their affirmative defenses for lack of subject matter jurisdiction and denied plaintiffs due process. Specifically, plaintiffs contend that the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C.A. § 1821(d)(13)(D) (2014), upon which defendant and the trial court relied, does not bar affirmative defenses.

FIRREA sets out the authority and procedures for the FDIC to follow when a depository institution, such as Integrity Bank, becomes insolvent and grants the FDIC broad powers and duties as a "conservator or receiver" of the depository institution. *See* 12 U.S.C.A. § 1821(d)(2)(A). Generally, the FDIC becomes the "Successor to institution" and has "by operation of law":

> (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and
>
> (ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

Id.

The FDIC is granted authority, among other things, to "[o]perate the institution" (B); exercise the functions of any member, stockholder, director, or officer of the institution (C); take any actions "necessary to put the insured depository institution in a sound and solvent condition" (D); to liquidate the depository institution and "proceed to realize upon the assets of the institution" (E); and to pay "all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter." (H). 12 U.S.C.A. § 1821(d)(2)(B)-(E), (H). In a case "involving the liquidation or winding up of the affairs of a closed depository institution," the receiver is required to

> (i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and
>
> (ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

12 U.S.C.A. § 1821(d)(3)(B).

FIRREA also sets out the administrative process for a debtor to bring "any claim against a depository institution[.]" *See* 12 U.S.C.A. § 1821(d)(4)(A)- rulemaking authority. Thus, FIRREA contemplates that the claims arising out the failure of a depository institution will be resolved by the receiver, and if a debtor raises a claim against the institution, that claim will be determined in the federal administrative process established for this purpose. Therefore, judicial review by the courts is quite limited.

> (D) Limitation on judicial review
>
> Except as otherwise provided in this subsection, no court shall have jurisdiction over--

> (i) any claim or *action for payment from*, or any action seeking a *determination of rights* with respect to, the *assets* of any *depository institution* for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to *any act or omission of such institution* or the *Corporation* as receiver.

12 U.S.C.A. § 1821(d)(13)(D) (emphasis added).

Here, the FDIC was appointed as receiver for Integrity Bank on 29 August 2008 and assumed all of Integrity Bank's assets and liabilities at that time -- including the obligation to fund plaintiffs' draw requests. The FDIC sent a letter on 2 September 2008 informing Settlers Edge that Integrity Bank had been closed and the FDIC had taken over as receiver. The FDIC suggested Settlers Edge seek refinancing of the loan documents. Settlers Edge submitted a draw request for August 2008 on 19 September 2008 for $41,677.20 and received no response from the FDIC. The FDIC sent additional letters on 20 October 2008 to the guarantors of Integrity Bank's loan to Settlers Edge notifying the guarantors that they had 30 days to strictly comply with the terms and provisions of the loan agreement. On 4 December 2008, Settlers Edge sent written notice to the FDIC of material breach.

Further, the exhibits submitted with the record on appeal include the "Supplemental Brief in Opposition to Foreclosure Proceeding" filed by Settlers Edge, which contains facts indicating that "the FDIC never took the good faith step of acknowledging the obligations it assumed from Integrity Bank, nor did it exercise its statutory right to 'repudiate' those obligations. Instead, the FDIC took a 'heads I win, tails you lose' position leaving Settlers Edge in limbo." Settlers Edge noted that in this case, "the FDIC made unsuccessful efforts to quickly sell off the Loan Documents with the goal of making the draw request funding the loan purchaser's problem. Doubtless, the FDIC also acted on the hope that Settlers Edge would either quietly accept this situation or that it would go bankrupt and that an appointed trustee would lack the resources to bring the estate's claims to recover for the breach."

In a deposition on 6 March 2015, William R. Banks, plaintiffs' representative, was asked whether Settlers Edge understood "that there was a deadline by which to submit claims against the FDIC in connection with the receivership of Integrity Bank?" Mr. Banks replied, "Not to my knowledge." The record on appeal does not contain documents from

that time period regarding when or whether plaintiffs received notice of the receivership or whether plaintiffs filed any claim as provided by statute. Plaintiffs filed this lawsuit on 31 July 2013.

Plaintiffs' declaratory judgment claim in this case does "seek[ ] a determination of rights," 12 U.S.C.A. § 1821(d)(13)(D), regarding the assets of the depository institution so this portion of Plaintiffs' claim would be barred by FIRREA. But plaintiffs argue that even if the declaratory judgment action is barred by FIRREA, their affirmative defenses to defendant's counterclaims are not. Plaintiffs sought to raise affirmative defenses of material breach and material modification to defendant's counterclaims seeking recovery *against Plaintiffs* for breach of contract.

Thus, plaintiffs contend that while the limitation of judicial review in 12 U.S.C.A. § 1821(d)(13)(D) applies to *claims* for payment or for a determination of rights against the receiver, it does not apply to plaintiffs' *affirmative defenses*. Although this issue has not been specifically addressed by a court in North Carolina, other states have dealt with similar cases. The results vary depending upon the facts and procedural postures of the cases, including rules which may be unique to the particular state. We have therefore sought to find cases which address the issue in a context which is most similar to this case. The Nevada Supreme Court considered this issue in a similar context and determined that affirmative defenses are not barred. *See Schettler v. Ralron Capital Corp.*, 275 P.3d 933 (Nev. 2012). In *Schettler*, the defendant borrower and Silver State Bank

> executed a Business Loan Agreement (the Loan) and a Promissory Note (the Note), under which Silver State provided Schettler with a $2,000,000 revolving line of credit. Schettler agreed to pay interest on the loan monthly until the loan's maturity date, at which time he would be required to pay all outstanding principal and any remaining unpaid accrued interest. The original maturity date of the Loan and the Note was September 15, 2007. On that date, Schettler and Silver State entered into a Change in Terms Agreement that modified the maturity date to September 15, 2008. That same day, Schettler also executed a Commercial Guaranty in his capacity as Trustee for the Vincent T. Schettler Living Trust, guaranteeing to pay all of the Loan obligations. It is undisputed that the Loan, the Note, and the Commercial Guaranty (loan agreement) were valid and enforceable contracts at their inception.

Id. at 934-35.

On 14 August 2008, Silver State notified Schettler that it had frozen the funds remaining on the line of credit because of a change in his financial condition or that Silver State believed his "prospect of performance on the Note was impaired." *Id.* at 935. Silver State also informed Schettler that

> it had decided to cancel any current commitments until Schettler cured the defaults, but that until that time, Schettler was responsible for payment of interest on the loan. At the time of the default notice, however, Schettler was current on his payments, and the loan had an outstanding principal balance of $1,114,000.

Id. (quotation marks and brackets omitted).

A few weeks later, Silver State went into receivership and the FDIC was appointed as receiver. *Id.* RalRon later acquired Schettler's loan agreement and demanded full payment of principal, interest, and late fees from Schettler; upon Schettler's failure to pay, RalRon filed a lawsuit in Nevada state court seeking recovery upon the loan agreement. *Id.* Schettler filed an answer which raised several counterclaims and affirmative defenses for "breach of contract, breach of the implied covenant of good faith and fair dealing, and estoppel." *Id.* RalRon filed a motion for summary judgment on its claims for breaches of contract and personal guaranty, claiming that Schettler's counterclaims and affirmative defenses "were barred because Schettler failed to file any administrative claims with the FDIC as required by FIRREA, and that RalRon was a holder in due course immune from Schettler's defenses." *Id.* The trial court agreed and

> granted summary judgment in favor of RalRon on its claims for breach of contract and breach of personal guaranty. In so doing, the district court barred Schettler's affirmative defenses and dismissed his counterclaims, reasoning that, because they were all essentially claims against the FDIC and Schettler had failed to follow the claims administration process, they were barred by FIRREA.

Id. at 935-36.

Schettler appealed, and the Nevada Supreme Court reversed because it determined that Schettler's affirmative defenses were not barred by FIRREA and that genuine issues of material fact remained as to the determination of damages. *Id.* at 942. We find the Nevada court's rationale to be persuasive.

Convincingly, a majority of courts addressing this issue have held that while FIRREA's jurisdictional bar applies to claims and counterclaims, it does not apply to defenses and affirmative defenses.

The Third Circuit Court of Appeals, which has examined this issue in detail, has explained that FIRREA's jurisdictional bar only applies to four categories of actions:

> (1) claims for payment from assets of any depository institution for which the FDIC has been appointed receiver; (2) actions for payment from assets of such depository institution; (3) actions seeking a determination of rights with respect to assets of such depository institution; and (4) a claim relating to any act or omission of such institution or the FDIC as receiver.

The court held that these categories did not include a defense or an affirmative defense because those are neither an action nor a claim, but rather a *response* to an action or a claim. Therefore, it held, the jurisdictional bar contained in § 1821(d)(13)(D) does not apply to defenses or affirmative defenses. To support its conclusion, the court explained that interpreting FIRREA's jurisdictional bar to include defenses and affirmative defenses would, in a substantial number of cases, result in an unconstitutional deprivation of due process. Specifically, if parties were barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would not only be unconstitutionally deprived of their opportunity to be heard, but they would invariably lose on the merits of the claims brought against them. Beyond constitutional concerns, the court also explained that because a defendant is unable to know what his or her defense will be before hearing the claim, it seems that it would be nearly impossible for a party to submit future hypothetical defenses to the administrative claims procedure -- defenses to lawsuits which may not yet have been brought against a party or which may never be brought at all. We join in the majority's reasoning and conclude that while FIRREA's jurisdictional bar applies to claims and counterclaims, it does not apply to defenses or affirmative defenses.

Id. at 939-40 (citations, quotation marks, brackets, and ellipses omitted). *See also*, *e.g.*, *Nat'l Union Fire Ins. Co. v. City Savings*, *F.S.B.*, 28 F.3d 376, 393 (3d. Cir. 1994) ("[T]he plain meaning of the language contained in § 1821(d)(13)(D) indicates that the statute does not create a jurisdictional bar to defenses or affirmative defenses which a party seeks to raise in defending against a claim."); *Resolution Trust Corp. v. Love.*, 36 F.3d 972, 977-78 (10th Cir. 1994) ("[I]f Congress had intended to remove from the jurisdiction of the courts any and all actions, claims or defenses which might diminish the assets of any depository institution . . . or [which might] diminish or defeat any claims of the [FDIC] in any capacity, it would [have] been simple to so provide. But Congress did not so provide. Instead, the act gives the [FDIC] authority over any claim by a creditor or claim of security, preference or priority. *Clearly, an affirmative defense asserted by a defendant in an action brought by the [FDIC] is none of these.*" (Citations and quotation marks omitted) (Emphasis added)).

But plaintiffs argue that the FDIC's refusal to pay the monthly draws was essentially a repudiation of the agreement, although the FDIC did not formally repudiate the loan, even if it had a statutory right to repudiate the loan. Although the lender in *Schettler* similarly failed to fund his loan, repudiation was not specifically addressed in *Schettler*.[2] Under 12 U.S.C.A. § 1821, plaintiffs would have a limited right to recover in the administrative forum for repudiation of the loan. FIRREA provides the FDIC or a receiver does have "Authority to repudiate contracts":

> In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease--
>
> (A) to which such institution is a party;
>
> (B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

2. In *Schettler*, Silver State announced that it would no longer perform under the contract on 14 August 2008, even before going into receivership, claiming concern over Schettler's ability to pay. 275 P.3d at 935. At the time of Silver State's default notice to Schettler, however, "Schettler was current on his payments, and the loan had an outstanding principal balance of $1,114,000." *Id.* Silver State was not placed into receivership until 5 September 2008, a few weeks after the default notice. *Id.* Here, the repudiation at issue occurred after Integrity Bank failed and the FDIC did have a right to repudiate plaintiffs' loan.

> (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C.A. § 1821(e)(1)(A)-(C).

The conservator or receiver for an insured depository institution is required to "determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment." 12 U.S.C.A. § 1821(e)(2). Damages in a claim for repudiation are generally

> (i) limited to actual direct compensatory damages; and
>
> (ii) determined as of--
>
> (I) the date of the appointment of the conservator or receiver; or
>
> (II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

12 U.S.C.A. § 1821(e)(3)(A). The claimant cannot recover any "(i) punitive or exemplary damages; (ii) damages for lost profits or opportunity; or (iii) damages for pain and suffering." 12 U.S.C.A. § 1821(e)(3)(B). For repudiation of a "qualified financial contract[,]" compensatory damages are

> (i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and
>
> (ii) paid in accordance with this subsection and subsection (i) of this section except as otherwise specifically provided in this section.

12 U.S.C.A. § 1821(e)(3)(C).

In the present case, the FDIC did not *formally* repudiate the plaintiffs' loan but by its actions the FDIC repudiated the agreement by refusing to honor the terms of the loan agreement and to pay the monthly draws as required by the agreement. *See* 12 U.S.C.A. § 1821(e) ("Provisions relating to contracts entered into before appointment of conservator or receiver"). *In Westberg v. F.D.I.C.*, 741 F.3d 1301 (D.C.

Cir. 2014), the D.C. Circuit Court of Appeals addressed a situation somewhat similar to the one before us. The appellants, husband and wife, obtained a residential construction loan from a bank that soon collapsed. *Id.* at 1302. The FDIC was appointed as receiver and repudiated their loan agreement, "but notified the Westbergs that they were obligated to continue making payments on the portion of the loan that had been disbursed to them before [the bank]'s failure." *Id.* The D.C. Circuit found that "the Westbergs' claim for declaratory relief is inextricably related to the FDIC's act of repudiation. Although it is formally brought against Multibank, it is functionally against the FDIC. It is therefore a 'claim' . . . that must first be resolved in the administrative claims process." *Id.* at 1308. Therefore, while *Westberg* addresses repudiation, it involved a claim brought by the debtor against the bank, not an affirmative defense. Also, in *Westberg*, the FDIC *did* formally repudiate the contract, and the formal repudiation was important to the D.C. Circuit's holding that the claim should have been in the administrative process. *Id.* Here, by contrast, the FDIC never gave any notice of repudiation of the contract and plaintiffs have raised it as an affirmative defense to defendant RES-NC's counterclaim.

The FDIC did, however, effectively repudiate it by refusing to fund Settlers Edge's draw requests, which is quite similar to Silver State's action in *Schettler*. 275 P.3d at 935. *See also Lawson v. F.D.I.C.*, 3 F.3d 11, 15 (1st. Cir. 1993) ("In other words, the FDIC did not transfer the Lawsons' CD contracts intact to a new obligor; it effectively *repudiated* those contracts when it declined either to pay the promised interest itself or to oblige anyone else to do so. The repudiation may have been informal but there was certainly no ambiguity[.]"). Here, Settlers Edge submitted a draw request on 19 September 2008 for $41,677.20 for August 2008 and received no response from the FDIC. The FDIC refused to fill that request, and on 4 December 2008, Settlers Edge sent written notice to the FDIC of material breach. Thus, the question is whether the plaintiffs' rights are limited to those under 12 U.S.C.A. § 1821(e) where the FDIC has effectively repudiated the contract by its actions, although it failed to formally notify plaintiffs of repudiation. As in *Lawson*, the FDIC's actions here, though informal, clearly constituted a repudiation. *Id.* ("At the same time, it was a repudiation and breach of the contracts represented by the CDs since the FDIC, which had inherited the contracts, effectively declined to pay the promised interest in the future or commit Fleet Bank to do so.").

As no formal repudiation appears in the record on appeal and defendant seeks to recover damages from plaintiffs for breach of contract,

plaintiffs were free to raise repudiation as an affirmative defense to defendant's counterclaim. The receiver cannot use FIRREA as both a sword and shield at the same time; if it wants the benefit of the limited damages and administrative procedure that FIRREA provides, then it must "determine whether or not to exercise the rights of repudiation" under 12 U.S.C.A. § 1821(e)(2) "within a reasonable period" of its appointment and give notice of repudiation. Once the receiver has given notice of repudiation, then the debtor must proceed under FIRREA or lose its rights to assert any claims. The facts regarding the FDIC's actions as noted herein are undisputed, and the record does not show, nor does defendant argue, that any formal repudiation was ever made. It is also undisputed that the FDIC effectively repudiated the contract by its failure to pay the loan draw requests, so the trial court erred when it denied plaintiffs the opportunity to raise repudiation as an affirmative defense.

Although we have determined that the FDIC effectively repudiated the contract and that plaintiffs are entitled to raise the repudiation as an affirmative defense, the question remains of the proper remedy. Plaintiffs argue that the repudiation is a material breach which excuses them from any performance whatsoever under the loan contract and thus requires dismissal of defendant's counterclaim for breach of contract. But this argument ignores the fact that the FDIC did have a right to repudiate the loan contract and that a debtor's right to recover damages, even if properly brought as an administrative claim under FIRREA, is limited.

In *Schettler*, the Nevada court addressed how the debtor's affirmative defense may be used to offset any claim by the lender and determined that on remand the trial court must consider recoupment. 275 P.3d at 941-42. Neither plaintiffs nor defendant specifically requested recoupment here, but the same was true in *Schettler*. *Id.* at 941, n. 7. The Nevada court noted that fair notice of the defense was raised by the pleadings in *Schettler*, and the same is true here. *Id.* ("Although Schettler did not specifically allege that he was entitled to 'recoupment' in his answer to RalRon's complaint, when construed as a whole, his answer sufficiently encompassed the concept of recoupment. Recoupment must be plead affirmatively, and if it is not raised it is ordinarily deemed waived. However, if a plaintiff had notice that a defendant was relying on recoupment, the affirmative defense will be allowed. Fair notice was given because it was specifically raised on reconsideration, which is a part of the issues on appeal. Accordingly, we will not treat recoupment as waived." (Citations, quotation marks, and brackets omitted)).

> Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages, for the

> reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract. Recoupment must arise out of the same transaction and involve the same parties; thus, it does not apply when the defendant's allegations arise out of a transaction extrinsic to the plaintiff's cause of action. While the defendant may thus defend against the plaintiff's claim by asserting competing rights arising out of the same transaction and thereby extinguish or reduce any judgment awarded to the plaintiff, recoupment does not allow the defendant to pursue damages in excess of the plaintiff's judgment award. Thus, by its very nature and regardless of whether the same facts could constitute a separate claim for damages, recoupment seeks to challenge the foundation of the plaintiff's claim and, consequently, we recognize recoupment as an affirmative defense not barred by FIRREA. Here, based on his allegations, Schettler may be able to demonstrate that he is entitled to recoup against any amount awarded RalRon on its claims, up to the amount awarded.

Id. at 941 (citations, quotation marks, and brackets omitted).

Recoupment has not been addressed as extensively or recently in North Carolina as in Nevada, but North Carolina's law of recoupment is essentially the same.

> A recoupment is a defence by which a defendant, when sued for a debt or damages, might recoup the damages suffered by himself from any breach by the plaintiff of the *same contract*. And . . . it [has been] held that where a justice has jurisdiction of the principal matter of an action, he also has jurisdiction of incidental questions necessary to its determination, and hence may even admit an equity to be set up as a defence.
>
> There are many resemblances and dissimilarities between these several defences. In a counter-claim to an action upon a contract, where a judgment is prayed against the defendant, he may recover the excess, if any. If no judgment or relief is prayed, it is a set-off, if it is a claim distinct from and independent of the action. But if it is a matter growing out of or connected with the subject of the action, then it is recoupment.

> In our case the defendants pleaded "set-off and counter-claim," but they demanded no relief against the plaintiffs, and the defense set up arose out of the contract set forth in the complaint, and their defence therefore fell under the head of recoupment.

Hurst v. Everett, 91 N.C. 399, 404-05 (1884) (citations omitted).

Recoupment is limited to a set-off against the defendant's counterclaim, so plaintiffs cannot recover any damages, even if they were to present evidence of greater damages than what they would owe on defendant's counterclaim for breach of contract. In addition, since defendant had a legal right to repudiate the loan agreement, the measure of damages which plaintiffs may assert as recoupment should be limited by the compensatory damages which they would have been allowed to prove under a FIRREA claim, as set forth in 12 U.S.C.A. § 1821(e)(3)(A). Depending upon the amount of compensatory damages shown by plaintiffs, the recoupment could offset all of the damages claimed by defendant, but cannot exceed the amount of defendant's damages. Because the trial court erred by barring plaintiffs' affirmative defense and there are genuine issues of material fact regarding the amount of recoupment plaintiffs may be entitled to as an offset against defendant's claim for breach of the loan agreement, we reverse the trial court's order granting summary judgment and remand for further proceedings consistent with the opinion.

III. Collateral Estoppel Effect

Next, plaintiffs argue that the trial court erred in not granting collateral estoppel effect to the foreclosure order entered by the Clerk of Court which found that Settlers Edge was not in default of the loan. Plaintiffs contend:

> Here, it is undisputed that Defendant dismissed the appeal of the Foreclosure Order, rendering it a final, binding order. It is also undisputed that the Clerk determined that Settlers Edge was not in default, that the parties to the Foreclosure and this action are the same or are in privity with each other, and that entering the Second Order necessarily required finding Settlers Edge in default.
>
> Moreover, there is no dispute that, at the time of the Foreclosure, the maturity date of the Note had passed, Settlers Edge had not repaid amounts otherwise due under the Note, and the Note had been declared in default

> by the FDIC. In Defendant's Motion and materials submitted in support, Defendant states no basis for default other than Settlers Edge's failure to pay the Note in full prior to the maturity date. . . . This case has remained substantially static, factually and legally, since the Foreclosure Order, and the Trial Court's determination that Settlers Edge was in default is inconsistent with the Foreclosure Order. The Trial Court erred, first, by entering the First Order denying collateral estoppel effect to the Foreclosure Order, and, second, by finding Settlers Edge in default in the Second Order despite the prior, contrary finding by the Clerk in the Foreclosure Order.

But based upon the prior appeal to this Court, we cannot find that the Clerk's foreclosure order may have any collateral estoppel effect. The issue actually decided by the Yancey County Clerk of Court is not clear from the foreclosure order, which contains conclusions that seem to go both ways. Nevertheless, we are bound by this Court's prior opinion regarding the foreclosure order:

> The application of the preclusive doctrines of collateral estoppel and *res judicata* must be narrowly construed and cannot be left to uncertain inference. Here, given that the order denying foreclosure (1) did not include specific findings expressly determining that a material breach had occurred; and (2) did find that a valid debt existed between Plaintiffs and the FDIC, *we are unable to conclude that the Clerk actually determined that a material breach had occurred.* Such a conclusion would force us to speculate as to the Clerk's thought processes in rendering its findings, which we are not permitted to do.

Settlers Edge Holding Co., LLC, v. RES-NC Settlers Edge, LLC ("Settlers Edge I"), 238 N.C. App. 198, 768 S.E.2d 66, 2014 WL 7149116, *5, 2014 N.C. App. LEXIS 1291, *12-13 (2014) (unpublished) (citations and quotation marks omitted) (emphasis added). This Court previously decided that the basis for the Clerk's order is unclear, and we are bound by that ruling. In addition, even assuming that a material breach occurred, as discussed above, this breach was a repudiation and plaintiffs are limited to asserting their affirmative defense and offsetting defendant's damages by recoupment. We therefore decline to address this issue further.

IV. Summary Judgment

Finally, plaintiffs contend that the trial court erred in granting summary judgment in favor of defendant and denying summary judgment in favor of plaintiffs "due to its failure to consider the legal and undisputed factual merits of plaintiffs' affirmative defenses." As we have already concluded that the trial court had jurisdiction to consider plaintiffs' affirmative defenses and that the contract was effectively repudiated, we agree that the trial court should not have granted summary judgment in favor of defendants, and we reverse its order doing so. But this does not mean that we can grant summary judgment in favor of plaintiffs, since on remand the trial court must consider the proper measure of offset for the defendant's breach of contract in recoupment.

V. Conclusion

In sum, while we decline to find any collateral estoppel effect from the Clerk's prior order and cannot grant summary judgment in favor of plaintiffs at this time, we conclude that the FDIC effectively repudiated the contract and plaintiffs are entitled to raise the repudiation as an affirmative defense. But because the FDIC had a right to repudiate, plaintiffs' right to recover damages is limited. Since we have concluded that the trial court erred by barring plaintiffs' affirmative defense, and since there are genuine issues of material fact remaining in regards to the amount of recoupment plaintiffs may be entitled to as an offset against defendant's claim for breach of the loan agreement, we reverse the trial court's order granting summary judgment and remand for further proceedings consistent with this opinion to determine the amount of damages defendant may recover from plaintiffs, if any, for its breach of contract claim.

REVERSED AND REMANDED.

Judges ELMORE and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CALVIN LAMAR ADAMS

No. COA15-1384

Filed 6 December 2016

Search and Seizure—investigatory stop—motion to suppress evidence—driving while impaired—resisting public officer—driving while license revoked—exigent circumstance—hot pursuit

The Court of Appeals invoked Rule 2 and held that the trial court did not err by denying defendant's motion to suppress. Hot pursuit is an exigent circumstance sufficient to justify a warrantless entry and arrest. The officers here were in hot pursuit when they initiated an investigatory stop for driving while license revoked in front of defendant's residence and then pursued defendant into his residence to arrest him for resisting a public officer when he did not obey their orders to stop.

Appeal by defendant from judgments entered 19 August 2015 by Judge Robert T. Sumner in Gaston County Superior Court. Heard in the Court of Appeals 26 May 2016.

Attorney General Roy Cooper, by Associate Attorney General Paige Phillips, for the State.

Jeffrey William Gillette for defendant-appellant.

McCULLOUGH, Judge.

Calvin Lamar Adams ("defendant") appeals the denial of his motion to suppress following the entry of judgments on his convictions for driving while impaired ("DWI") and resisting a public officer. For the following reasons, we find no error.

I. Background

On 7 October 2011, defendant was arrested and citations were issued for driving while license revoked ("DWLR"), DWI, resisting a public officer, and possession of less than one-half ounce of marijuana. Officers then sought and obtained a search warrant for defendant's house, vehicle, and person. Defendant's vehicle was seized during the execution of

the search warrant on 8 October 2011. On 10 October 2011, defendant successfully petitioned for the pretrial release of his vehicle pursuant to N.C. Gen. Stat. § 20-28(e2) on the ground that any period of license revocation had expired prior to the date of the alleged offense. In an order striking the storage fees for defendant's vehicle, the district court noted that defendant's vehicle was seized in error because, although the DMV system showed defendant's license was revoked from 27 July 2011, defendant's license was in fact active from 29 August 2011 when defendant paid the civil revocation fee, even though it was not sent to the DMV.

After several motions to continue the matter, defendant's case came on for trial in Gaston County District Court before the Honorable Richard B. Abernathy. On 9 December 2014, the DWLR charge was dismissed, defendant was found not guilty of possession of marijuana, and defendant was found guilty of impaired driving and resisting a public officer. Defendant gave notice of appeal.

Prior to his case coming on for trial in superior court, on 6 March 2015, defendant filed a motion to suppress all evidence obtained during and subsequent to his seizure on the bases that his seizure was unlawful, entry into his home was unlawful, and his arrest was unlawful – all in violation of defendant's constitutional rights. Defendant elaborated as follows: "[s]pecifically, law enforcement officers unlawfully seized [defendant] without the requisite reasonable suspicion and unlawfully entered his residence without a warrant or probable cause to arrest him. Moreover, those officers arrested him without probable cause."

Defendant's motion to suppress came on for hearing in Gaston County Superior Court before the Honorable Todd Pomeroy on 22 April 2015. The evidence presented at the suppression hearing tended to show as follows: Gastonia Police Officer C. Singer was on routine patrol with Officer R. Ghant on 7 October 2011 when, at approximately 11:00 p.m., Officer Singer observed defendant driving a vehicle eastbound on Meade Avenue in the opposite direction the officers were traveling. Officer Singer was familiar with defendant and defendant's vehicle because he had stopped defendant and charged defendant with DWI on 27 July 2011, approximately three months prior. Officer Singer knew defendant's license had been suspended as a result of the July DWI and turned around to follow defendant in time to observe defendant pull into his driveway from Meade Avenue. Officer Singer then had Officer Ghant run defendant's tag and license information through DCI, which confirmed that defendant's license was revoked.

Upon the belief that defendant was driving while his license was suspended, Officer Singer pulled into defendant's driveway directly behind defendant's vehicle and initiated a traffic stop by activating his blue lights. By the time Officer Singer activated his lights, defendant had exited from the driver's seat of his vehicle and was approximately 15-20 feet away from the front door of his residence, walking toward the front door. At that time, Officer Ghant instructed defendant to stop and to get back inside his car. Despite having a boot on one of his feet as the result of an injury, defendant picked up his pace toward the front door and Officer Singer advised him to stop running. Officer Ghant pursued defendant while Officer Singer grabbed the in-car camera mic. Defendant entered the front door and then attempted to close the front door on Officer Ghant. Officer Ghant was able to keep the front door from shutting and held the door open until Officer Singer arrived. The officers were then able to force the front door open and made physical contact with defendant just inside the front door. Officer Singer then patted defendant down for a safety check and found what he believed was a bag of marijuana in defendant's pocket. Defendant was arrested and charged with DWLR, possession of marijuana, and resisting a public officer. Further observation of defendant after his arrest led Officer Singer to believe defendant was impaired. Consequently, another officer was called to perform field sobriety tests. Defendant was then additionally charged with DWI.

Following the evidence, defendant focused his argument for suppression on the officer's alleged illegal entry into defendant's residence. The State argued the officers were in hot pursuit. Upon consideration of the facts and arguments, the trial judge denied defendant's motion to suppress, concluding there was reasonable suspicion to stop defendant's vehicle for DWLR and probable cause to arrest for resisting a public officer once defendant ignored the blue lights and verbal commands to stop and entered his residence.

Defendant's DWI and resisting a public officer charges came on for trial in Gaston County Superior Court before the Honorable Robert T. Sumner on 17 August 2015. Prior to jury selection, the trial court addressed additional pretrial matters. Upon consideration of those matters, the trial court overruled defendant's objection to the introduction of a chemical analyst's affidavit into evidence, granted defendant's motion to exclude mention of prior DWI and DWLR charges against defendant, and denied defendant's motion to exclude marijuana evidence. The defense then alerted the trial judge that defendant's motion to suppress had been denied and, consequently, the defense may object when certain evidence or testimony was introduced. The trial then proceeded.

On 19 August 2015, the jury returned verdicts finding defendant guilty of DWI and resisting a public officer. The convictions were consolidated and an impaired driving judgment was entered. Defendant received a 60-day sentence that was suspended on condition that defendant serve 24 months of unsupervised probation. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant argues the trial court erred in denying his motion to suppress because the officers' entry into his residence to arrest him was unlawful. Thus, defendant contends all evidence of his impairment obtained as a result of the alleged unlawful entry was tainted and must be suppressed.

Yet, as an initial matter, we address the State's contention that defendant waived the argument now asserted on appeal. It has long been the rule that "[i]n order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see also* N.C. R. App. P. 10(a)(1) (2015). In this case, the State contends defendant waived his argument on appeal by failing to include the precise argument on appeal in his pretrial motion to suppress and by failing to object when evidence of his impairment was introduced at trial. We disagree that defendant failed to adequately include the argument on appeal in his pretrial motion, but agree that defendant failed to object to evidence offered at trial.

N.C. Gen. Stat. § 15A-977 governs motions to suppress evidence in superior court and provides, in pertinent part, that "[a] motion to suppress evidence in [S]uperior [C]ourt made before trial must be in writing and . . . must state the grounds upon which it is made." N.C. Gen. Stat. § 15A-977(a) (2015). The State asserts that the only grounds for suppression identified by defendant in the pretrial motion were that there was no reasonable suspicion for the initial stop of defendant and there was no probable cause to believe defendant was involved in criminal activity. The State then contends that defendant abandoned those two grounds during the suppression hearing and argued only that there were no exigent circumstances warranting hot pursuit. The State contends the lack of exigent circumstances is the argument now asserted on appeal and that it was not contained in defendant's pretrial motion to suppress. We are not convinced. It is clear from defendant's motion that defendant asserts there was an unlawful entry into his residence to arrest

him "without a warrant and without exigent circumstances." While the motion does not mention "hot pursuit," the motion was sufficient to preserve the issue now on appeal.

Concerning preservation of the issues at trial, "[t]he law in this State is now well settled that 'a trial court's evidentiary ruling on a pretrial motion [to suppress] is not sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.' " *State v. Hargett*, __ N.C. App. __, __, 772 S.E.2d 116, 119 (2015) (quoting *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (citations omitted; emphasis in original)). In defendant's motion, defendant sought to suppress all evidence obtained subsequent to the officers' entry into defendant's residence to arrest defendant. As indicated above, all evidence of impairment necessary to prove the DWI charge was obtained after defendant was arrested. It is evident defense counsel was aware of the need to renew objections to the evidence at trial as defense counsel informed the judge prior to jury selection that defendant's motion to suppress had been denied and, consequently, the defense may object when certain evidence or testimony was introduced. Defense counsel, however, failed to do so when evidence of impairment was admitted at trial. Specifically, Officer Singer testified that after defendant was detained, he noticed defendant had slurred speech and bloodshot eyes. Officer Singer also testified that he found an empty bottle of hydrocodone and a bag of what he believed to be marijuana in defendant's pocket. Officer Ewers, who was called to perform field sobriety tests on defendant, testified that defendant appeared lethargic, defendant's eyelids were droopy, and defendant's eyes were bloodshot. Officer Ewers then explained that defendant had trouble following directions during a horizontal gaze nystagmus test, leading him to believe defendant was impaired. Linda Farren, a forensic scientist supervisor with the State Crime Laboratory who was admitted as an expert in forensic toxicology, testified that defendant's blood samples tested positive for benzodiazepines, specifically alprazolam or Xanax, and cannabinoids. The chemical analyst's report was then admitted into evidence without objection. Defendant does not dispute that the above evidence of impairment was admitted without objection, but instead points out that defense counsel objected when the State sought to admit the bag of marijuana found on defendant as State's Exhibit 1. Defendant contends it is clear from the "object[ion] on the Fourteenth Amendment" that defense counsel intended to preserve the suppression motion and "it would be wrong to assume [defendant] intended to waive his objection[.]" We disagree. Defendant's objection to the marijuana evidence does not preserve for appellate review the admissibility

of all evidence of impairment obtained following defendant's arrest. In fact, despite defendant's objection to the admission of the bag of marijuana, other evidence of defendant's possession of the marijuana was introduced into evidence without objection. *See State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995) ("Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost."). By failing to object to the other evidence obtained subsequent to his arrest, defendant waived review.

Defendant, however, seeks to have this Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review the merits of his case if his arguments are not otherwise preserved. That rule allows this Court to "suspend or vary the requirements or provisions of any of [the appellate rules] in a case pending before it upon application of a party or upon its own initiative[]" in order to prevent manifest injustice to a party. N.C. R. App. P. 2 (2016). In our discretion, we invoke Rule 2 and reach the merits of this case.

Generally, our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "When findings of fact are not challenged on appeal, 'such findings are presumed to be supported by competent evidence and are binding on appeal.' " *State v. Washington*, 193 N.C. App. 670, 672, 668 S.E.2d 622, 624 (2008) (quoting *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (internal quotation marks omitted)), *disc. review denied*, 363 N.C. 138, 674 S.E.2d 420 (2009). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). " '[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000) (quoting *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

However, because there was no objection to the evidence below, defendant asserts the proper standard of review in the present case upon invoking Rule 2 is plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To

> show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks and citations omitted).

While we agree plain error review is proper, it makes no difference in this case because if the trial court erred in denying defendant's motion to suppress, it is certain that the error was fundamental because there would be no evidence of impairment to support the DWI charge if defendant's motion to suppress had been allowed. Thus, in the present case, where there is no dispute as to the relevant facts, we address only the application of search and seizure law.

"Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). The Supreme Court has emphasized that "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Welsh v. Wisconsin*, 466 U.S. 740, 748, 80 L. Ed. 2d 732, 742 (1984) (quoting *United States v. United States District Court*, 407 U.S. 297, 313, 32 L. Ed. 2d 752 (1972)). Therefore, "the Court has recognized, as 'a "basic principle of Fourth Amendment law[,]" that searches and seizures inside a home without a warrant are presumptively unreasonable.' " *Id.* at 749, 80 L. Ed. 2d at 742 (quoting *Payton v. New York*, 445 U.S. 573, 586, 63 L. Ed. 2d 639 (1980)). Yet, there are exceptions to the warrant requirement, which the Court has noted are "few in number and carefully delineated." *Id.* at 749, 80 L. Ed. 2d at 743 (citation omitted). A warrantless arrest in the home may be reasonable where there is probable cause and exigent circumstances. *Id.* (citing *Payton*, 445 U.S. at 583-90, 63 L. Ed. 2d 639).

> With respect to exigent circumstances, this Court has explained: Exigent circumstances exist when there is [a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures. . . . The United States Supreme Court has approved the following exigent circumstances justifying warrantless searches and seizures: (1) where law enforcement officers are in "hot pursuit" of a suspect; (2) where there is immediate and present danger to the public or to law enforcement officers; (3) where destruction of evidence is imminent;

> and (4) where the gravity of the offense for which the suspect is arrested is high.

State v. Jordan, __ N.C. App. __, __, 776 S.E.2d 515, 519 (internal quotation marks and citations omitted), *disc. review denied*, 368 N.C. 358, 778 S.E.2d 85 (2015). "A determination of whether exigent circumstances are present must be based on the 'totality of the circumstances.' " *State v. Nowell*, 144 N.C. App. 636, 643, 550 S.E.2d 807, 812 (2001), *aff'd per curiam*, 355 N.C. 273, 559 S.E.2d 787 (2002).

Defendant now contends there were no exigent circumstances warranting entry into defendant's home to arrest defendant. We disagree.

It is undisputed that the officers had reasonable suspicion to initiate an investigatory stop of defendant for DWLR when they pulled into defendant's driveway behind him and activated the blue patrol car lights as defendant was exiting his vehicle and making his way toward his front door. Defendant did not stop for the blue lights and then continued hurriedly toward the front door after the officers told defendant to stop. At that point, the officers had probable cause to arrest defendant for resisting a public officer and began a "hot pursuit" of defendant, one of the exigent circumstances delineated by the courts. The officers arrived at the front door of defendant's residence just as defendant made his way across the threshold and were able to prevent defendant from closing the door. Officers then forced the front door open and detained and arrested defendant just inside the front door. We hold such warrantless entry and arrest was proper under *United States v. Santana*, 427 U.S. 38, 49 L. Ed. 2d 300 (1976).

In *Santana*, the Supreme Court addressed whether hot pursuit justified the warrantless entry into the home of a defendant to arrest that defendant when the defendant retreated from the threshold of the house into the vestibule upon the arrival of the police. Relying on *United States v. Watson*, 423 U.S. 411, 46 L. Ed. 2d 598 (1976) (a warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment), the Court first held that the defendant was in a public place for purposes of Fourth Amendment jurisprudence while standing in the doorway to the house because she was not in an area where she had any expectation of privacy. *Santana*, 427 U.S. at 42, 49 L. Ed. 2d at 305. Relying on *Warden v. Hayden*, 387 U.S. 294, 18 L. Ed. 2d 782 (1967) (police, who had probable cause to believe that an armed robber had entered a house a few minutes before, had the right to make a warrantless entry to arrest the robber and to search for weapons), the Court then held that "a suspect may not defeat an arrest which has been

set in motion in a public place, and is therefore proper under *Watson*, by the expedient of escaping to a private place." *Santana*, 427 U.S. at 43, 49 L. Ed. 2d at 306.

In the present case, defendant does not argue the officers were not in hot pursuit, but instead contends the officers' entry into defendant's residence was unreasonable because there was no threat of violence, no evidence subject to destruction, and no likelihood of defendant fleeing his own home to elude detection. Defendant's assertions, however, fail to recognize that defendant was considered fleeing when he failed to stop upon the activation of the blue lights and the officers' commands to stop. As the Court recognized in *Santana*, "[t]he fact that the pursuit here ended almost as soon as it began did not render it any the less a 'hot pursuit' sufficient to justify the warrantless entry into [defendant's] house." *Id.* at 43, 49 L. Ed. 2d at 305. Moreover, defendant conflates the exigent circumstances recognized by this Court in *Jordan*. While the Court in *Santana* did note that "[o]nce [the defendant] saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence[,]" *id.*, that observation was separate and apart from the hot pursuit justification for the warrantless entry and arrest. Hot pursuit has been recognized as an exigent circumstance sufficient to justify a warrantless entry and arrest when there is probable cause without consideration of immediate danger or destruction of evidence.

Defendant also argues the officers' decision to engage in hot pursuit was unreasonable. Defendant cites *State v. Johnson*, 64 N.C. App. 256, 307 S.E.2d 188 (1983), for the proposition that the reasonableness of hot pursuit is based on the presence of exigent circumstances before the chase begins. Upon review, it is clear *Johnson* is not instructive here.

In *Johnson*, officers obtained arrest warrants for two individuals believed to be located at the defendant's residence, went to the defendant's residence to serve the arrest warrants, and, upon arrival, chased an individual falsely believed to be identified in one of the arrest warrants into the defendant's residence, whereupon the officers discovered controlled substances. *Johnson*, 64 N.C. App. at 258-59, 307 S.E.2d at 189-90. Upon review of the trial court's denial of the defendant's motion to suppress, this Court reversed, holding that "no exigent circumstances existed that would justify the warrantless entry into [the] defendant's house and the later seizure of the evidence which [the] defendant seeks to suppress." *Id.* at 264, 307 S.E.2d at 193. In so holding, this Court acknowledged that the State relied on hot pursuit to justify the warrantless entry, but explained that "[i]n so doing, the State seeks to focus [the Court's] attention on events that occurred after the point in time

when a judgment as to whether a search warrant was required should already have been made." *Id.* at 262, 307 S.E.2d 191. This Court pointed out that over three and a half hours elapsed between when officers received the arrest warrants and when they attempted to execute the warrants, noting there was ample time to get a search warrant. *Id.* at 263, 307 S.E.2d at 192. This Court then specifically noted that it "need not consider whether [the officer] was in 'hot pursuit' and whether that alone was sufficient to justify his entry into [the] defendant's home. The need for a search warrant should have been anticipated in this case." *Id.* Upon further appeal to our Supreme Court, the Court took issue with this Court's conclusions because the evidence and findings of fact were insufficient to support this Court's conclusions that "it would appear that the arrest raid was in fact a planned raid[,]" "there was ample time to secure a search warrant and ample reason to anticipate the need for one[,]" and "the need for a search warrant should have been anticipated in this case." *State v. Johnson*, 310 N.C. 581, 587-88, 313 S.E.2d 580, 584 (1984) (internal citations and alterations in original omitted). Thus, the Court remanded the case for new *voir dire* proceedings. *Id.* at 589, 313 S.E.2d at 584-85. The Court did, however, reemphasize the issue of hot pursuit was not determinative in the case, explaining that

> while in this case, it is evident that, at the time of entry into defendant's home, [the officer] was engaged in the "hot pursuit" of a person he suspected to be a fugitive, the issue remains as to whether there was an unjustified delay or failure to obtain a search warrant after the existence of probable cause as to the whereabouts of the suspects.

Id. at 586, 313 S.E.2d at 583.

Similarly, other cases relied on by defendant, such as *Welsh*, 466 U.S. 740, 80 L. Ed. 2d 732 (warrantless entry into the defendant's home to arrest him for a noncriminal traffic offense was unconstitutional), which defendant cites for the holding "that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made[,]" *id.* at 753, 80 L. Ed. 2d at 745, are not instructive because they do not involve hot pursuit. *See id.* (noting "the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner").

As described above, in this case, the officers initiated an investigatory stop for DWLR in front of defendant's residence and then pursued defendant into his residence to arrest him for resisting a public officer when he did not obey their orders to stop. By definition, this was hot pursuit.

III. Conclusion

For the reasons discussed, we invoke Rule 2 to reach the merits of defendant's argument and hold there was no error below.

NO ERROR.

Judges STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
ANDREW ROBERT HOLLOWAY

No. COA16-381

Filed 6 December 2016

1. Drugs—constructive possession—presence in home where marijuana burning in oven

Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court erred by denying defendant's motion to dismiss the charges related to possession of marijuana and drug paraphernalia. Defendant did not live or admit to living in the house, no identifying documents of his were found in the house, and the most incriminating circumstance presented by the State, besides defendant's presence in the house on the day of fire, was a photograph of defendant found face down in a plastic storage bin in one of the bedrooms.

2. Drugs—maintaining a dwelling—presence in home where marijuana burning in oven

Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court erred by denying defendant's motion to dismiss the charge of maintaining a dwelling. There was no evidence that defendant was the owner or the lessee of the dwelling, and there was no evidence that defendant paid for its utilities or upkeep. Further, there was no evidence that defendant had been seen in or around the dwelling before or that he lived there.

3. Drugs—acting in concert—presence in home where marijuana burning in oven

Where defendant and another man were present in a house in which marijuana was burning in the oven and causing smoke to come out of the house, the trial court plainly erred by instructing the jury on acting in concert. The State presented no evidence that defendant had a common plan or purpose to possess marijuana or drug paraphernalia with the other man. At most, the State showed that defendant and the man were acquainted and that defendant was present in the house on the day the drugs were found.

Appeal by defendant from judgments entered 18 September 2015 by Judge Jeffrey P. Hunt in Rutherford County Superior Court. Heard in the Court of Appeals 18 October 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Scott Stroud, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

BRYANT, Judge.

Where the trial court erred in denying defendant's motions to dismiss all charges due to the State's failure to present substantial evidence, and where the trial court erred in instructing the jury on acting in concert, a theory not supported by the evidence, we vacate the judgments of the trial court.

On 22 October 2013, Tommy Turner, a police officer with the Forest City Police Department was on duty and heard a report of a breaking and entering at 305 Hardin Road. Officer Turner drove to the address, joining Officer James Greene who was already on the scene. Officer Greene heard a commotion coming from inside the residence and announced the police were there and anyone inside was to come out. After about twenty minutes, Officer Turner, who was stationed at the back of the house, noticed smoke coming from the back of the house. The fire department was called, and around the same time, two men left the house through the front door. Because the officers were responding to a breaking and entering in progress, the two men, identified as Robert McEntire and defendant Andrew Robert Holloway, were placed in custody.

Firemen who responded to the call discovered the source of the smoke in the kitchen to be a quantity of marijuana burning in the oven. The firemen doused the oven's contents with water and handed the marijuana to police officers waiting outside.

Forest City police officers obtained a search warrant for the residence, and in the kitchen, officers found $4,000.00 in cash, McEntire's driver's license, and other items with McEntire's name on them, including a vehicle title. In a bedroom, officers found a gun, gun magazine, digital scales, and a small bag of marijuana. The total amount of marijuana recovered from the residence weighed 19.86 pounds. Officers later learned that McEntire lived at the two-bedroom house on 305 Hardin Road, although the original lessee was one Danielle Taylor. Other than a photograph of defendant found in a container in a bedroom, there were no items found in the residence bearing defendant's name or otherwise connected to defendant.

On 15 September 2014, defendant was indicted on multiple charges, including trafficking in marijuana, possession with intent to sell and deliver marijuana, maintaining a dwelling house for keeping and selling marijuana, and possession of drug paraphernalia. On 17 November 2014, defendant was indicted as an habitual felon.[1]

On 14 September 2015, defendant's case was called for trial before the Honorable Jeffrey P. Hunt, Superior Court Judge presiding. Defendant was also tried on a charge of possession of a firearm by a felon.

At trial at the close of the State's evidence, defendant moved to dismiss all of the charges based on insufficient evidence, arguing that the State's only evidence tying defendant to the residence or the items discovered therein was his presence on the afternoon of 22 October 2013 and the single photograph of him found face down in a plastic storage container in a bedroom. The State countered that once the marijuana was burning and smoke was filling the house, "someone inside the residence is going to know about it. Certainly is going to have the ability to control its disposition and use at that point." According to the State, because there was no evidence of what defendant was doing inside the

1. Defendant was also originally indicted on the following additional charges: trafficking in cocaine, possession with intent to sell and deliver cocaine, and maintaining a dwelling house for keeping and selling cocaine. Prior to the start of trial the State took dismissals on all cocaine charges. Nothing in the record suggests on what basis defendant was originally charged with the cocaine-related offenses. Other than the warrants and indictments themselves, there is no evidence in the record that any cocaine was found in the residence at 305 Hardin Road or on defendant's person.

residence while the officers were knocking at the door, the jury was entitled to infer that defendant constructively possessed the drugs, drug paraphernalia, and the firearm, and that he, in concert with McEntire, kept the dwelling to distribute marijuana. The State also argued that "the photograph is evidence that [defendant] stays there[,]" and thus it was reasonable to infer that defendant was at the house "all the time." The trial court denied defendant's motion.

Defendant's evidence included the testimony of his mother, Serene Holloway, and McEntire. McEntire had pled guilty to and was serving a sentence for trafficking, possession with intent to sell and deliver, possession of drug paraphernalia, and maintaining a dwelling in connection with the 22 October 2013 incident at his residence. Defendant's mother and McEntire explained how McEntire came to have the photograph of defendant. McEntire further testified that defendant was merely visiting on the day his home was searched and that defendant had arrived shortly before the police. McEntire also testified that the marijuana, paraphernalia, and firearm were all his and that defendant did not know about their presence in the home.

At the close of all the evidence, defendant again moved to dismiss all the charges based on insufficient evidence. The court denied the motion.

Without objection, the trial court instructed the jury on the theory of acting in concert generally as to all of the charges, in addition to instructing on actual and constructive possession. The jury convicted defendant of all possession-related charges except the firearm charge, of which he was acquitted. The jury also convicted defendant of knowingly maintaining a dwelling house, the lesser-included offense of intentionally keeping or maintaining a dwelling house. In a subsequent proceeding, the jury found defendant had attained the status of habitual felon. Defendant was sentenced to 120 days for maintaining a dwelling, 97 to 129 months for trafficking in marijuana, 38 to 58 months for possession with intent to sell and distribute marijuana, and 120 days for possession of drug paraphernalia, with all sentences running consecutively. Defendant gave notice of appeal in open court.

On appeal, defendant contends the trial court erred in denying defendant's motion to dismiss for insufficient evidence and, therefore, plainly erred by instructing the jury that it could convict defendant of acting in concert where there was no evidence of a common criminal plan. We agree.

Defendant first argues the trial court erred in denying his motion to dismiss where there was insufficient evidence of possession to prove any of the possessory offenses charged. Specifically, defendant contends the State erroneously relied on the theory of constructive possession and acting in concert and presented insufficient evidence that defendant maintained a dwelling for the purpose of keeping or selling a controlled substance.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)).

The court must also "view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences that can be drawn from the evidence." *Id.* at 378–79, 526 S.E.2d at 455 (quoting *Barnes*, 334 N.C. at 75, 430 S.E.2d at 918). Evidence presented by the State need only provide a reasonable inference of guilt in order for the motion to be denied and the case submitted to the jury. *State v. Shelman*, 159 N.C. App. 300, 305, 584 S.E.2d 88, 92 (2003) (citation omitted). Contradictions and discrepancies in the evidence must be resolved in the State's favor, and defendant's evidence, unless favorable to the State, is not considered. *Id.* at 305, 584 S.E.2d at 92–93 (citations omitted). However, "[w]hen the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citing *State v. Lee*, 348 N.C. 474, 488–89, 501 S.E.2d 334, 343 (1998)).

A. Constructive Possession

[1] Defendant first argues the State failed to present substantial evidence demonstrating defendant's constructive possession of marijuana and drug paraphernalia. We agree.

For possession with intent to sell or deliver marijuana, the State was required to present substantial evidence of three elements: (1) possession, (2) of a controlled substance, (3) with the intent to sell or deliver that controlled substance. N.C. Gen. Stat. § 90-95(a)(1)–(2) (2015).

> (1) Any person who . . . possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:
>
> a. Is in excess of 10 pounds, but less than 50 pounds, such person shall be punished as a Class H felon[.]

Id. § 90-95(h)(1)a.

In order to prevail on a motion to dismiss a possession of drug paraphernalia charge, the State must provide substantial evidence that (1) defendant possessed drug paraphernalia, and (2) defendant had "the intent to use [drug paraphernalia] in connection with controlled substances." *State v. Hedgecoe*, 106 N.C. App. 157, 164, 415 S.E.2d 777, 781 (1992). "It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to . . . store, contain, or conceal a controlled substance . . . ." N.C. Gen. Stat. § 90-113.22(a) (2015). The statute specifically notes that "[s]cales and balances for weighing or measuring controlled substances" constitute drug paraphernalia. N.C. Gen. Stat. § 90-113.21(a)(5) (2015).

The State must prove either "actual or constructive" possession in order to convict a defendant of possession of marijuana or drug paraphernalia. *See State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). When a person lacks actual physical possession, but "nonetheless has the intent and capability to maintain control over a controlled substance[,]" constructive possession occurs. *State v. Givens*, 95 N.C. App. 72, 76, 381 S.E.2d 869, 871 (1989) (quoting *State v. Baize*, 71 N.C. App. 521, 529, 323 S.E.2d 36, 41 (1984)). However, "[w]here possession of the premises is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984) (citation omitted).

" '[C]onstructive possession depends on the totality of the circumstances in each case,' so that '[n]o single factor controls.' " *State v. Ferguson*, 204 N.C. App. 451, 460, 694 S.E.2d 470, 477 (2010) (alterations in original) (quoting *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986)). "Our cases addressing constructive possession have tended to turn on the specific facts presented." *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citations omitted). But "two factors frequently considered are the defendant's proximity to the contraband and indicia of the defendant's control over the place where the contraband is found." *Id.* at 100, 678 S.E.2d at 595.

In *Miller*, the police found the defendant "in a bedroom of the home where two of his children lived with their mother." *Id.* The defendant was discovered sitting on the same end of the bed where cocaine was recovered and, upon sliding to the floor, he was within reach of the cocaine discovered on the floor behind the bedroom door. *Id.* The defendant's birth certificate and state-issued identification were also found in the same bedroom. *Id.* The N.C. Supreme Court reasoned that "[e]ven though [the] defendant did not have exclusive possession of the premises, these incriminating circumstances permit[ted] a reasonable inference that [the] defendant had the intent and capability to exercise control and dominion over cocaine in that room." *Id.*

In *Brown*, the N.C. Supreme Court found sufficient other incriminating evidence in a case of constructive possession when cocaine and other drug packaging paraphernalia were found on a table beside which the defendant was standing when the officers entered the apartment, the defendant had been observed at the apartment multiple times, he possessed a key to the apartment, and he had over $1,700.00 in cash in his pockets. 310 N.C. at 569–70, 313 S.E.2d at 589.

In the instant case, there is no dispute that the marijuana recovered from the house at 305 Hardin Road was in excess of ten pounds, but less than fifty pounds. *See* N.C.G.S. § 90-95(h)(1)a. However, there was no evidence that defendant *actually* possessed the marijuana or drug paraphernalia, and defendant contends there was also insufficient evidence to show *constructive* possession of the same.

Here, the only evidence of defendant's close proximity to drugs was that he was seen by the police emerging from a house in which drugs were ultimately found burning in an oven. "The most the State has shown is that defendant had been in an area where he could have committed the crimes charged." *State v. Minor*, 290 N.C. 68, 74–75, 224 S.E.2d 180, 185 (1976) (reversing the trial court's denial of the defendant's motion for nonsuit because there was no evidence linking the defendant to the marijuana other than the fact that he had been a visitor to an abandoned house located 100 feet from a marijuana field). Nothing other than mere suspicion provides a connection between the drugs and defendant.

Unlike the birth certificate and identification found in *Miller*, the state-issued driver's license and other documents found in the residence belonged to McEntire, not *defendant*. *See* 363 N.C. at 100, 678 S.E.2d at 595. Unlike the cash discovered in *Brown*, here, the $4,000.00 in cash was not discovered on defendant's person, but was discovered in a kitchen drawer. *See* 310 N.C. at 569, 313 S.E.2d at 589. Unlike the drugs

found within arms'-reach of both defendants in *Miller* and *Brown*, here the marijuana was discovered burning in an oven, and as defendant and McEntire exited the house before the marijuana was discovered, the State has not and cannot show where defendant was—defendant's proximity—in relation to the marijuana in order to establish constructive possession. Thus, the State's only evidence tying defendant to the residence or items discovered therein was his presence on the afternoon of 22 October 2013 and the single photograph of defendant found face down in a plastic storage bin located in a bedroom.

The State argues that this Court should follow the reasoning in *State v. Moor*e, in which this Court upheld the convictions of two codefendants for offenses related to the growing of marijuana in a field near their home based on the theory of constructive possession. 79 N.C. App. 666, 669–71, 675–76, 340 S.E.2d 771, 773–75, 777 (1986). However, *Moore* is easily distinguishable from and inapplicable to the instant case. For example, in *Moore*, the fingerprints of both the defendants were found on items within the house near the marijuana field; defendant Moore "had in his possession a key that fit the gate and the door to the house[,]" and defendant "Moore's truck was present on the premises and contained twine identical to the twine used to tie the marijuana plants to the stakes and to twine found within the house." *Id.* at 675, 340 S.E.2d at 777–78.

Here, there was no evidence that linked defendant to the house or the contents therein: (1) no evidence defendant had any possessory interest in the house; (2) no evidence defendant had a key to the residence; (3) no evidence of defendant's fingerprints on any items seized or found in the house; (4) no evidence of any items belonging to defendant (including the photograph of defendant which belonged to McEntire) seized or found in the house; and (5) no evidence of incriminating evidence on defendant's person. *See id.* Therefore, as in *Minor*, here, there is no evidence linking defendant to the house at Hardin Drive or the marijuana and drug paraphernalia found therein other than the fact that defendant had been a visitor to the house and emerged from the house with the main resident. *See* 290 N.C. at 75, 224 S.E.2d at 185.

Furthermore, particularly as regards a defendant's presence and photographs of a defendant at the scene where drugs are discovered, the dissenting opinion in *Miller* offers the following highly instructive example:

> In *State v. McLaurin*, the defendant was convicted of possession of drug paraphernalia under a constructive possession theory. 320 N.C. 143, 144, 357 S.E.2d 636, 637 (1987). Law enforcement searched the defendant's

> residence pursuant to a search warrant and found drug paraphernalia which contained traces of cocaine, throughout the house. *Id.* In a crawl space beneath the dwelling, law enforcement found three marked one hundred dollar bills that were used in a previous drug transaction. 320 N.C. at 145, 357 S.E.2d at 637. *The defendant admitted to living in the residence, and photographs of her were found inside the house along with her Medicaid card. Id.* However, the defendant did not have exclusive control over the premises, leading this Court to conclude that "because there was no evidence of other incriminating circumstances linking her to [the seized paraphernalia], her control was insufficiently substantial to support a conclusion of her possession of the seized paraphernalia." 320 N.C. at 147, 357 S.E.2d at 638.

363 N.C. at 108, 678 S.E.2d at 600 (Brady, J., dissenting) (emphasis added).

Unlike in *McLaurin*, in which there was found to be insufficient substantial evidence to support a conclusion of constructive possession, even where "[t]he defendant admitted to living in the residence, and photographs of her were found inside the house along with her Medicaid card[,]" *see id.* (Brady, J., dissenting), here, there are even fewer "incriminating circumstances." Here, defendant did not live or admit to living in the house at 305 Hardin Road, no identifying documents of his were discovered at the house, and the most incriminating circumstance presented by the State, besides defendant's presence on the day, is a photograph of defendant found face down in a plastic storage bin in one of the bedrooms. This is not substantial evidence because, at most, it "raises no more than a suspicion of guilt[.]" *Id.* at 99, 678 S.E.2d at 594 (citation omitted). In fact, we are unable to find any other case in which a charge was allowed to go to the jury based on such a thin suspicion of guilt and sustain a guilty verdict. As such, defendant's motion to dismiss all possessory-related charges should have been granted.

B. Maintaining a Dwelling

[2] Defendant next argues the trial court erred in denying his motion to dismiss the charge of maintaining a dwelling. We agree.

> (a) It shall be unlawful for any person:
>
> . . .

> (7) To knowingly keep or maintain any . . . dwelling house . . . which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article[.]

N.C. Gen. Stat. § 90-108(a)(7) (2015).

> Whether a person "keep[s] or maintain[s]" a dwelling, within the meaning of N.C. Gen. Stat. § 90-108(a)(7), requires the consideration of several factors, none of which are dispositive. Those factors include: ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses; payment of repair expenses; and payment of rent.

State v. Bowens, 140 N.C. App. 217, 221–23, 535 S.E.2d 870, 873–74 (2000) (internal citations omitted) (concluding the trial court erred in denying the defendant's motion to dismiss the charge of maintaining a dwelling, but affirming the trial court's denial of the defendant's motion to dismiss the charge of possession with intent to sell or deliver marijuana). "General Statute 90-108(a)(7) does not require residence, but permits conviction if a defendant merely keeps or maintains a building for the purpose of keeping or selling controlled substances." *State v. Alston*, 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988).

In *Bowens*, the "[d]efendant was charged with knowingly and intentionally maintaining a dwelling used for keeping or selling controlled substances." 140 N.C. App. at 221, 535 S.E.2d at 873. The defendant argued on appeal that the State failed to present substantial evidence that the defendant "maintained the dwelling" at issue. *Id.* at 222, 535 S.E.2d at 873. The State's evidence showed that the defendant

> was seen in and out of the dwelling 8-to-10 times over the course of 2-to-3 days; nobody else was seen entering the remises during this 2-to-3 day period of time; men's clothing was found in one closet in the dwelling; [and an officer] testified he believed [the] [d]efendant lived at [the dwelling] . . . although he offered no basis for that opinion and had not checked to see who the dwelling was rented to or who paid the utilities and telephone bills.

Id. at 221–22, 535 S.E.2d at 873.

In concluding the State's evidence "[did] not constitute substantial evidence" that the defendant maintained the dwelling in question, this

Court noted that "[t]here [was] no evidence [the] [d]efendant was the owner or the lessee of the dwelling, or that he had any responsibility for the payment of the utilities or the general upkeep of the dwelling." *Id.* at 222, 535 S.E.2d at 873 (citations omitted). Further, in reversing the conviction for maintaining a dwelling, this Court noted that "[t]estimony [the] [d]efendant was present at the dwelling on several occasions and testimony he lived [there] [could] not alone support a conclusion [the] [d]efendant kept or maintained the dwelling." *Id.* (footnote omitted).

In the instant case, there is even less evidence than there was in *Bowens*. Here, there is no evidence that defendant was the owner or the lessee of the dwelling at 305 Hardin Road, nor was there evidence that defendant paid for its utilities or upkeep. *See id.* Further, unlike the evidence presented in *Bowens*, here there was no evidence that defendant had been seen in or around the dwelling before, nor was their evidence that defendant lived there. Accordingly, the trial court erred in denying defendant's motion to dismiss the charge of maintaining a dwelling.

C. Acting in Concert

[3] Defendant also contends the State failed to present substantial evidence demonstrating he was acting in concert with McEntire in the commission of all of the crimes charged and, as such, the trial court committed plain error by instructing the jury on this theory of guilt. We agree.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2015). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve . . . errors in the judge's instructions to the jury . . . ." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

"To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E.2d 390, 395 (1979) (citation omitted).

Under the doctrine of acting in concert, the State is not required to prove actual or constructive possession if it can establish that the defendant was "present at the scene of the crime and the evidence is sufficient to show he [was] acting together with another who [did] the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *Id.* at 357, 255 S.E.2d at 395. "It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle . . . ." *Id.* at 357, 255 S.E.2d 395. However, there must be evidence of a common plan or purpose shared by the accused with one other person. *See State v. Williams*, 299 N.C. 652, 656–57, 263 S.E.2d 774, 777–78 (1980). Where there is "no evidence of joint action other than presence at the scene[,]" such evidence will not be sufficient for the charge to be submitted to the jury. *James*, 81 N.C. App. at 97, 344 S.E.2d at 81 (citations omitted). "Mere presence at the scene of a crime is not itself a crime, absent at least some sharing of criminal intent." *Id.* at 97, 344 S.E.2d at 81–82 (citation omitted).

In *James*, the trial court instructed the jury on both constructive possession and acting in concert, and the defendant was convicted of possession with intent to sell and deliver cocaine. *Id.* at 96–97, 344 S.E.2d at 81–82. In finding the evidence was insufficient for the charge to be submitted on both theories, this Court reasoned that, regarding acting in concert, the only evidence connecting the defendant "to the cocaine was that he was found in the kitchen where the refrigerator containing the drugs was located" and he had a gun in his hand, which was not introduced into evidence, and there was no evidence that it was loaded or usable. *Id.* at 96, 344 S.E.2d at 81. This Court held that this evidence "raise[d] no more than a suspicion that [the defendant] was intentionally involved in the possession of the cocaine." *Id.* at 97, 344 S.E.2d at 82.

Here, the State presented no evidence that defendant had a common plan or purpose to possess marijuana or drug paraphernalia with McEntire. At most, the State proved defendant and McEntire were acquainted and defendant was present on 22 October 2013 when the drugs were found. However, "[m]ere presence at the scene of a crime is not itself a crime," and the State presented no evidence that defendant and McEntire shared any "criminal intent." *Id.* at 97, 344 S.E.2d at 81–82 (citation omitted).

"[A] trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284

N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted). Thus, the trial court erred in instructing the jury on the theory of acting in concert.

In conclusion, having determed that the trial court erred in denying defendant's motions to dismiss, and in givng an instruction on acting in concert, we vacate the judgments of the trial court.

VACATED.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
WILLIAM SHELDON HOWELL

No. COA16-303

Filed 6 December 2016

Sentencing—enhancement based on prior conviction and habitual felon status

The trial court erred by enhancing defendant's sentence for misdemeanor possession of marijuana to a Class I felony based on a prior conviction and then to a Class E felony based on defendant's habitual felon status. Status as a habitual felon cannot be used to further enhance a sentence that is not itself a substantive offense.

Appeal by defendant from judgment entered 9 December 2015 by Judge Mark E. Powell in Transylvania County Superior Court. Heard in the Court of Appeals 4 October 2016.

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

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

BRYANT, Judge.

Where the sentencing statute states that a Class 1 misdemeanor under the Controlled Substances Act "shall be punished as a Class I felon[y]" where the misdemeanant has committed a previous offense

punishable under the Act, the sentencing statute acts to enhance punishment for a misdemeanor offense and is not a separate felony. Accordingly, we reverse the trial court's judgment sentencing defendant as a Class E felon.

On 27 October 2014, a grand jury sitting in Transylvania County indicted defendant William Sheldon Howell on the charge of, *inter alia*, attaining habitual felon status. On 15 June 2015, defendant was further indicted on charges of possession of marijuana over one-half ounce but less than one-and-one-half ounce, a Class 1 misdemeanor, and of having been previously convicted of any offense in violation of the Controlled Substances Act.

On 9 December 2015, defendant entered into a plea agreement with the State: defendant pled guilty to the Class 1 misdemeanor possession of marijuana, acknowledged the prior conviction of a drug offense in violation of the Controlled Substances Act which subjected defendant to an enhanced punishment, and acknowledged attaining habitual felon status. Other pending charges were dismissed. Before accepting defendant's plea, the court engaged defendant in the following discussion regarding his sentencing exposure:

> THE COURT: I had a conference on Monday with [defense counsel] and [the prosecutor] concerning the charges against you. And [defense counsel] was arguing that the way the statute [punishing possession of marijuana greater than one-half ounce but less than one and one-half ounces] was worded . . . [an enhanced sentence due to a prior controlled substance conviction should be interpreted as] a Class 1 misdemeanor punished as a felony, not really a felony but just punished as a felony. . . .
>
> . . .
>
> I'm going to go over the charges. The possession of marijuana greater than one-half ounce but less than one-and-one-half ounces is a Class 1 misdemeanor with a possible maximum sentence of 120 days in prison, but there's no mandatory minimum sentence. Do you understand that charge?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Now, because you have the prior convictions for controlled substances that Class 1 misdemeanor can be punished as a Class I felony. And that has a possible

> maximum sentence of 24 months in prison, but there's no mandatory minimum sentence. Do you understand that, I'll say, enhanced punishment?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: . . . [B]ecause you've obtained the status of habitual felon, the Class I felony can be punished as a Class E felony with a possible maximum sentence of 88 months in prison, but no mandatory minimum sentence. . . .
>
> Do you understand that now?
>
> THE DEFENDANT: Yeah, I understand that. Yes, sir.

Defendant entered a plea of guilty to the Class 1 misdemeanor possession of marijuana offense, admitted he had a prior drug conviction that would enhance the punishment, and acknowledged that he had attained habitual felon status. The trial court accepted defendant's plea and entered a consolidated judgment on the charges.

> THE COURT: All right. Madam Clerk, a Class 1 misdemeanor, but I will say for the record I'm treating it as a Class I felony because of the prior conviction. And that Class I felony because of the habitual felon status is punished as a Class E felony.

Defendant was sentenced to an active term of 29 to 47 months, which the court suspended and placed defendant on supervised probation for a period of 36 months. Defendant appeals.

Pursuant to North Carolina General Statutes, section 15A-1444,

> [a] defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed: . . . (2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 ["Punishment limits for each class of offense and prior record level" (felony)] or G.S. 15A-1340.23 ["Punishment limits for each class of offense and prior conviction level" (misdemeanor)] for the defendant's class of offense and prior record or conviction level[.]

N.C. Gen. Stat. § 15A-1444(a2) (2015). As defendant challenges the sentence imposed on the basis that such is not authorized by G.S. §§ 15A-1340.17 or 15A-1340.23, this appeal is properly before this Court.

On appeal, defendant argues that the trial court erred by enhancing his sentence for misdemeanor possession of marijuana to a Class I felony based on a prior conviction and then to a Class E felony based on defendant's habitual felon status. We agree.

Per his plea agreement, defendant pled guilty to a Class 1 misdemeanor, *see* N.C. Gen. Stat. 90-95(d)(4), and acknowledged a prior conviction for an offense also punishable under the Act. On appeal, defendant contends that the Controlled Substances Act (the Act) does not elevate the *offense* of a Class 1 misdemeanor to a Class I felony. Instead, rather, where a defendant commits a Class 1 misdemeanor and has a prior conviction in violation of the Act, the Class 1 misdemeanor is simply enhanced and the offense sentenced as a Class I felony. In support of his proposition, defendant cites *State v. Priddy*, 115 N.C. App. 547, 445 S.E.2d 610 (1994) (habitual impaired driving), and *State v. Smith*, 139 N.C. App. 209, 533 S.E.2d 518 (2000) (habitual misdemeanor assault).

In *Smith*, the defendant challenged the sentence imposed upon him after being convicted of two counts of habitual misdemeanor assault and attaining habitual felon status. 139 N.C. App. 209, 533 S.E.2d 510. The defendant argued that the habitual misdemeanor assault offense did not create a substantive offense but merely conferred a status upon the defendant for the purpose of enhancing punishment. *Id.* at 212, 533 S.E.2d at 519. The *Smith* Court looked to the wording of the habitual misdemeanor assault statute.

> A person *commits the offense of* habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33(c) or G.S. 14-34 and has been convicted of five or more prior misdemeanor convictions, two of which were assaults. A person convicted of violating this section is guilty of a Class H felony . . . .

Id. at 213, 533 S.E.2d at 520 (alteration in original) (quoting N.C. Gen. Stat. § 14-33.2). The *Smith* Court noted similar language in the habitual impaired driving statute, General Statute section 20-138.5. "A person *commits the offense of* habitual impaired driving if he drives while impaired as defined in G.S. 20–138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20–4.01(24a)

within seven years of the date of this offense." *Id.* (alteration in original) (quoting N.C. Gen. Stat. § 20-138.5(a)). The Court contrasted the language of these two statutes with that of the habitual felon statute: "Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof *is declared to be* an habitual felon . . . ." *Id.* (quoting N.C. Gen. Stat. § 14-7.1). The Court considered the declaration "commits the offense of" used in both the habitual misdemeanor assault statute and the habitual impaired driving statute followed by the series of required acts indicative of a substantive offense, while the phrase " 'declared to be' immediately before 'habitual felon' " in the habitual felon statute, "denot[es] a status, rather than an offense." *Id.*

In *Priddy*, the defendant made a challenge similar to the argument presented in *Smith*: "[T]he habitual impaired driving does not constitute a separate felony offense; rather, it is a mere punishment enhancement statute like . . . the habitual felon statute." *Priddy*, 115 N.C. App. at 548, 445 S.E.2d at 612. As in *Smith*, the *Priddy* Court reasoned that "the legislature clearly intended felonious habitual impaired driving to constitute a separate felony offense," and not a mere punishment enhancement. *Id.* at 550, 445 S.E.2d at 612.

We now turn our attention to the case sub judice. Within Chapter 90, Article 5 of our General Statutes is codified the North Carolina Controlled Substances Act (the Act). Defendant pled guilty to possession of marijuana, a Schedule VI controlled substance, greater than one-half ounce (and less than one and one-half ounces). N.C. Gen. Stat. § 90-94(1) (2015). Pursuant to section 90-95, governing violations of the Act, it is unlawful for any person to possess a controlled substance. *Id.* § 90-95(a)(3). Possession of more than one-half ounce and not in excess of one and one-half ounces of marijuana is punishable as a Class 1 misdemeanor. *Id.* § 90-95(d)(4). Defendant pled guilty to this Class 1 misdemeanor and admitted to receiving a prior conviction that would enhance his sentence to a Class I felony.

> The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:
>
> . . .
>
> (3) If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for

> one or more offenses under any law of North Carolina . . . which offenses are punishable under any provision of this Article, *he shall be punished as a Class I felon.*

Id. § 90-95(e)(3) (emphasis added).

Because section (e) states that the defendant "shall be punished as a Class I felon," it appears that our General Assembly intended that section (e)(3) act as a sentence enhancement rather than a separate offense. *Cf. Smith*, 139 N.C. App. at 213, 533 S.E.2d 520 ("A person *commits the offense of* habitual misdemeanor assault . . . ." (alteration in original) (quoting N.C. Gen. Stat. § 14-33.2)); *Priddy*, 115 N.C. App. 547, 445 S.E.2d 610. Thus, while defendant's Class 1 misdemeanor is punishable as a felony under the circumstances present here, the substantive offense remains a Class 1 misdemeanor. Defendant's status as an habitual felon cannot be used to further enhance a sentence that is not itself a substantive offense. Therefore, because defendant's habitual felon status has no impact on his sentence as a misdemeanant, punishing defendant's offense as a Class E felony is not authorized by sections 15A-1340.17, 15A-1340.23, or 90-95(e)(3). Accordingly, we reverse the trial court order sentencing defendant as a Class E felon due to defendant's habitual felon status and remand for resentencing.

REVERSED AND REMANDED.

Judges CALABRIA and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
DONNA HELMS LEDBETTER

No. COA15-414-2

Filed 6 December 2016

Appeal and Error—writ of certiorari—procedural process—Rule 1—Rule 2—Rule 21

Defendant's petition for writ of certiorari to review her motion to dismiss in a driving while impaired case, prior to entry of her guilty plea, did not assert any of the procedural grounds set forth in Rule 21 to issue the writ. Although the statute provides jurisdiction, the Court of Appeals is without a procedural process under either Rule 1 or 21 to issue the discretionary writ under these facts, other than by invoking Rule 2.

Appeal by defendant from judgment entered 27 October 2014 by Judge Jeffrey P. Hunt in Rowan County Superior Court. Originally heard in the Court of Appeals 8 October 2015, with opinion issued 3 November 2015. The defendant's petition for discretionary review pursuant to N.C. Gen. Stat. § 7A-31 was allowed by the Supreme Court of North Carolina on 22 September 2016, for the limited purpose of remanding to this Court for reconsideration.

Attorney General Roy Cooper, by Assistant Attorney Generals Christopher W. Brooks and Ashleigh P. Dunston, for the State.

Meghan A. Jones, for defendant-appellant.

PER CURIAM.

This case is before the Court on remand by Order of the North Carolina Supreme Court dated 22 September 2016, to be reconsidered in light of that Court's recent decisions in *State v. Thomsen*, __ N.C. __, 789 S.E.2d 639 (2016) and *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2016).

I. Procedural Background

The facts underlying this case are set forth in detail in our previous opinion, *State v. Ledbetter*, __ N.C. App. __, 779 S.E.2d 164 (2015), and are briefly presented here. Donna Helms Ledbetter ("Defendant") was charged with driving while impaired. Defendant filed a motion to

dismiss the charges on 23 December 2013, and argued the State had violated N.C. Gen. Stat. § 20-38.4 (setting forth procedures for magistrates to follow when the arrestee appears to be impaired during the initial appearance) and *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988) (holding a DWI charge is subject to dismissal for magistrate's failure to "inform [the accused] of the charges against him, of his right to communicate with counsel and friends, and of the general circumstances under which he may secure his release.")

Following the court's denial of her motion, Defendant entered a plea of guilty. The plea arrangement stated "[Defendant] expressly retains the right to appeal the Court's denial of her motion to dismiss/suppress her Driving while Impaired charge in this case and her plea of guilty is conditioned based on her right to appeal that decision[.]" Defendant purportedly appealed to this Court from the judgment entered upon her guilty plea, and argued the trial court erred by denying her "motion to dismiss." The State moved to dismiss Defendant's appeal, and to deny her petition for writ of certiorari.

This Court held Defendant did not have a statutory right to appeal the motion to dismiss under either §§ 15A-1444(a)-(d) or 15A-979(b). *Ledbetter*, __ N.C. App. at __, 779 S.E.2d at 170-71. Defendant had petitioned this Court to issue a writ of certiorari to review the denial of her motion to dismiss. This Court held Rules 1 and 21 of the North Carolina Rules of Appellate Procedure governs our appellate procedures and do not set forth the grounds Defendant asserted to issue the requested writ. In the exercise of our discretion, we further declined to invoke Rule 2 to suspend the Rules of Appellate Procedure to exercise our admitted jurisdiction to issue the writ under N.C. Gen. Stat. § 1444(e). We dismissed Defendant's purported appeal. *Id.*

II. *Thomsen* and *Stubbs*

After our initial opinion was issued in this case, the Supreme Court issued its opinion in *Thomsen*. In that case, the defendant pled guilty to rape of a child and sexual offense with a child, both felonies which carry mandatory minimum sentences of 300 months. *Thomsen*, __ N.C. at __, 789 S.E.2d at 641. After it consolidated the convictions and sentenced the defendant to a prison term of 300 to 420 months, the trial court immediately *sua sponte* granted its own motion for appropriate relief ("MAR") and vacated the judgment and sentence. The trial court determined the mandatory sentence violated the Eighth Amendment, and imposed a lower sentence pursuant to the Structured Sentencing Act. *Id.*

The State petitioned this Court to issue the writ of certiorari to review the trial court's order granting its own MAR. This Court allowed the State's petition, addressed the State's argument and held, over a dissent, the mandatory minimum sentence did not violate the Eighth Amendment, and remanded the case for resentencing. *Id.* The Supreme Court addressed the issue raised by the dissenting opinion, whether this Court had subject matter jurisdiction to review, by certiorari, the trial court's grant of its own MAR. *Id.*

In *Thomsen*, the Supreme Court relied upon its decision in *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2016). *Stubbs* was decided and issued while *Ledbetter* was initially pending before our Court, and is addressed and cited within our previous opinion. *See Ledbetter*, __ N.C. App. at __, 779 S.E.2d at 168.

In *Stubbs*, the Court considered whether the Courts in the appellate division have jurisdiction to review, by certiorari, the trial court's grant of a MAR in favor of the defendant. The trial court's *ruling* on a MAR is statutorily subject to review by certiorari. N.C. Gen. Stat. § 15A-1422(c) (2015). The Court noted the statute "does not distinguish between an MAR when the State prevails below and an MAR under which the defendant prevails." *Stubbs*, 368 N.C. at 43, 770 S.E.2d at 76. The Court stated:

> Accordingly, given that our state constitution authorizes the General Assembly to define the jurisdiction of the Court of Appeals, and given that the General Assembly has given that court broad powers "to supervise and control the proceedings of any of the trial courts of the General Court of Justice," *id.* § 7A-32(c), and given that the General Assembly has placed no limiting language in subsection 15A-1422(c) regarding which party may appeal a ruling on an MAR, we hold that the Court of Appeals has *jurisdiction* to hear an appeal by the State of an MAR when the defendant has won relief from the trial court.

Id. at 43, 770 S.E.2d at 76 (emphasis supplied).

The Court noted the Rules of Appellate Procedure are pertinent to its analysis. *Id.* At that time, the language of Rule 21 only permitted appellate review of the issuance of the writ of certiorari to review an " 'order of the trial court *denying* a motion for appropriate relief.' " *Id.* (quoting N.C. R. App. P. 21(a)(1)) (emphasis supplied). The defendant in *Stubbs* argued that under the language of the Rule, the State may not seek review by certiorari of an order of a trial court *granting* a motion for appropriate relief. *Id.*

The Supreme Court disagreed, and held:

> As stated plainly in Rule 1 of the Rules of Appellate Procedure, "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law." [N.C. R. App. P. 1] Therefore, while Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution.

Id. at 43-44, 770 S.E.2d at 76.

Where § 15A-1422(c) contains "no limiting language . . . regarding which party may appeal a ruling on an MAR," the Court held this Court has jurisdiction to hear an appeal by the State of an MAR when defendant has won relief from the trial court. *Id.* at 43, 770 S.E.2d at 76. On the same day the *Stubbs* opinion was filed, and prior to the issuance of its mandate, the Supreme Court specifically amended Rule 21 to set forth a procedure under the appellate rules to permit review of *all rulings* on motions for appropriate relief in accordance with the language of N.C. Gen. Stat. § 15A-1422(c)(3). N.C. R. App. P. 21(a) (2016).

As in *Stubbs*, the Court in *Thomsen* noted "[t]he General Assembly has exercised [its] constitutional authority in N.C.G.S. § 7A-32(c) by giving the Court of Appeals 'jurisdiction . . . to issue the prerogative writs, including . . . certiorari, . . . to supervise and control the proceedings of any of the trial courts of the General Court of Justice.' " *Thomsen*, __ N.C. at __, 789 S.E.2d at 641 (quoting N.C. Gen. Stat. § 7A-32(c) (2015)). The Court explained N.C. Gen. Stat. § 7A-32(c) "empowers the Court of Appeals to review trial court rulings on motions for appropriate relief by writ of certiorari unless some other statute restricts the jurisdiction," and "only the General Assembly can take away the jurisdiction that it has conferred." *Id.* at __, 789 S.E.2d at 641-42.

"Subsection 7A-32(c) thus creates a default rule that the Court of Appeals has *jurisdiction* to review a lower court judgment by writ of certiorari. The default rule will control unless a more specific statute restricts *jurisdiction* in the particular class of cases at issue." *Id.* at __, 789 S.E.2d at 642 (emphasis supplied).

III. Authority Under the Rules of Appellate Procedure

Both *Thomsen* and *Stubbs* address the appellate courts' *jurisdiction* to issue the writ of certiorari upon the State's petition, where statutorily

authorized, after the trial court granted both defendants' MAR. N.C. Gen. Stat. § 15A-1444(e) provides that a criminal defendant who pleads guilty to a criminal offense "may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e) (2015). Our initial opinion in this case neither denies, nor purports to limit, this Court's *jurisdiction* to issue the writ under N.C. Gen. Stat. § 15A-1444(e), or any other statute.

The issue in the present case does not pertain to the existence of appellate *jurisdiction* under the statutes. Rather, the issue pertains to the "govern[ing] procedure" and processes available to properly exercise our jurisdiction and guide our discretion of whether to issue a writ of certiorari, following a defendant's guilty plea. N.C. Rule App. P. Rule 1(b) (2016). Defendant's petition, purportedly under N.C. Gen. Stat. § 15A-1444(e), does not invoke any of the three grounds set forth in Appellate Rule 21 to guide this Court's discretion to issue the writ under this Rule to review her guilty plea.

We are without a procedural basis to do so, without invoking Rule 2 to suspend the Rules. *See Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999) (Appellate Rule 2 "relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances.").

Appellate Rule 1 states the Rules of Appellate Procedure "*govern procedure* in all appeals from the courts of the trial division to the courts of the appellate division . . . *and in applications to the courts of the appellate division for writs and other relief* which the courts or judges thereof *are empowered* to give." N.C. R. App. P. 1(b) (emphasis supplied). Appellate Rules 1, 2 and 21 provide this Court with a procedure and mechanism to guide our discretion to grant or deny a petition to issue the writ of certiorari under the jurisdiction the appellate courts are "empowered" to exercise under our Constitution and statutes. N.C. R. App. P. 1(b), *Stubbs*, __ N.C. __, 789 S.E.2d at 641-42.

Under the current language of Appellate Rule 21, no procedural mechanism exists under that Rule to issue the discretionary writ of certiorari to review the trial court's judgment entered upon Defendant's guilty plea under N.C. Gen. Stat. § 15A-1444(e), without further exercising our discretion to invoke Rule 2 to suspend the Rules. *See State v. Biddix*, __ N.C. App. __, 780 S.E.2d 863 (2015) (declining to exercise Rule 2 to suspend the appellate rules, denying petition for writ of certiorari, and dismissing defendant's purported appeal from guilty plea where the issue is not listed for review to issue a writ of certiorari pursuant to

Appellate Rule 21); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

This Court's jurisdiction to hear and consider issues raised by a party is often broader, but not necessarily synonymous, with the procedural framework under our appellate rules. The appellate rules are replete with circumstances in which this Court possesses jurisdiction, but the rules procedurally do not allow appellate review without invoking Rule 2. For example, although this Court maintains jurisdiction over an appeal, this Court is also bound by Rules 10 and 28 of the Rules of Appellate Procedure, which generally limits review to a only those issues properly preserved and briefed. N.C. R. App. P. 10(a)(1) (2016); N.C. R. App. P. 28(b) (2016).

IV. Conclusion

After further consideration and review of both *Thomsen* and *Stubbs*, and under the jurisdictional authority provided by N.C. Gen. Stat. § 15A-1444(e), Defendant's petition for writ of certiorari to review her motion to dismiss, prior to entry of her guilty plea, does not assert any of the procedural grounds set forth in Rule 21 to issue the writ. Although the statute provides jurisdiction, this Court is without a procedural process under either Rule 1 or 21 to issue the discretionary writ under these facts, other than by invoking Rule 2.

In the further exercise of our discretion under the facts before us, we decline to invoke Rule 2 to suspend the requirements of the appellate rules to issue the writ of certiorari. Appellate Rule 2 sets forth the discretionary basis and restates "the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300. Defendant's petition before us does not meet that threshold.

Upon remand and after reconsideration and further discretionary review, Defendant's petition is denied, and her appeal is dismissed. The prior mandate issued by this court remains undisturbed. *It is so ordered.*

PETITION DENIED AND APPEAL DISMISSED.

Panel Consisting of: McCullough, Dietz, Tyson, JJ.

STATE OF NORTH CAROLINA
v.
DEVONTE SHAWMAR LYONS

No. COA 16-365

Filed 6 December 2016

Jury—statement by trial court—futility of requesting to review witness testimony

The trial court erred in defendant's trial for offenses stemming from a robbery and murder by making comments prior to closing arguments that suggested it would be futile for the jury to request to review witness testimony. The error, however, was not prejudicial, as defendant failed to identify any particular testimony by the accomplice witnesses which, if reviewed by the jury, would suggest a reasonable probability of a different result at his trial.

Appeal by Defendant from judgment entered 30 July 2015 by Judge Forrest D. Bridges in Superior Court, Cleveland County. Heard in the Court of Appeals 19 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Sonya Calloway-Durham, for the State.

Glover and Petersen, P.A., by Ann B. Petersen and James R. Glover, for Defendant.

McGEE, Chief Judge.

Devonte Shawmar Lyons ("Defendant") appeals his convictions for first-degree murder under the felony murder rule, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant contends he was prejudiced by the trial court's failure to exercise its discretion pursuant to N.C. Gen. Stat. § 15A-1233(a) to permit the jury to review certain witness testimony. We find no prejudicial error.

I. Background

The evidence at trial tended to show the following: Defendant, Aryka Roberts ("Roberts"), Rashad Schenck ("Schenck"), and Jessica Edwards ("Edwards") gathered at the residence of their mutual friend, Garrett Frederick ("Frederick"), in Kings Mountain around 6:30 p.m.

on 13 March 2012. Roberts was Defendant's girlfriend. Schenck and Edwards were dating each other. The four of them sat in a sunroom where they smoked marijuana and listened to music. Roberts called a "chat line" used for "meet[ing] men [in the area] who want to talk or do other things." Roberts explained the chat line process at trial: "You just call and [record] a [voicemail] greeting and either [the men] can message you or you message them." Using the speakerphone, Roberts began playing messages men had left for her on the chat line.

One of the messages was from a man with a heavy foreign accent. Roberts decided to send him a message, and she and the man had a brief conversation over the phone making "small talk[]." Roberts told the man she lived in Kings Mountain and asked him to meet her there. Later, when asked why the man was interested in meeting her, Roberts testified "[she] told him for sex." Roberts and the caller exchanged phone numbers. After hanging up, Defendant and Roberts decided to "rob [the man with the accent] and get [his] money."

Defendant, Roberts, Schenck, and Edwards left Frederick's residence together around 9:00 p.m. and drove in a 1998 Toyota Camry ("the Camry") belonging to Roberts to Ebenezer, a small community outside Kings Mountain. During the ten-minute drive to Ebenezer, they discussed whether Roberts should meet the man at a hotel, but it was ultimately decided that Roberts should meet him at 206 Putnam Place, a vacant house where her father used to live. Along the way, they stopped at another home and picked up Schenck's cousin, Sheldon Thompson ("Thompson"). Roberts was "on and off [Defendant's cell phone]" with the man they intended to rob, giving him driving directions to Ebenezer from Charlotte. Roberts testified that

> [t]he plan [they developed while on the way to Ebenezer] was for [Roberts] to go get in [the man's] car. [Edwards] was going to wait in [Roberts's] car . . . at [a neighbor's] house. [Defendant, Schenck, and Thompson] were supposed to hide in the bushes, come up to the car, scare the man and only rob him, and we [were] all supposed to go back to my car and leave.

Roberts "didn't remember . . . having a conversation about who [specifically] was going to take the money."

Schenck testified Defendant was supposed to get the money using a gun, and Schenck was supposed to "watch out [from the Camry] . . . to make sure . . . nothing happen[ed] to [Defendant]." Schenck also

testified it "was not unusual for [him] to back up [Defendant] in a prostitution situation . . . involving [Roberts]."

They next stopped at Schenck's grandmother's house in Ebenezer. Roberts and Schenck went inside and Defendant and Edwards remained in the Camry. The man from the chat line "was calling back and forth on [Defendant's] phone" and Edwards spoke to him while Roberts was inside Schenck's grandmother's house. When Schenck and Roberts returned to the car, Roberts drove "right down the road . . . [about] a minute" and parked at the residence of her family friend, Wayne Bell ("Bell"). Roberts spoke over the phone to the man a final time to give him specific directions to 206 Putnam Place.

At Bell's house, Defendant, Roberts, Schenck and Thompson got out of the Camry and Edwards got into the front seat. Defendant, Roberts, Schenck and Thompson walked through Bell's backyard and approached the back of the house at 206 Putnam Place. Roberts went to the left of the house and the others went to the right. Roberts could see a white Cadillac ("the Cadillac") parked in the driveway of 206 Putnam Place. Roberts got in the Cadillac's passenger side and the driver introduced himself to her as Francis Munufie ("Munufie"). After talking to Munufie briefly, Roberts got out of the Cadillac and went back behind the house, where she spoke with Defendant, who was still with Schenck and Thompson. Roberts testified she was "really nervous and antsy" and told Defendant that Munufie "was . . . touching [her] uncomfortably, and [she] wanted for it to be over." She asked "what the holdup was." Defendant told Roberts: "Shut up. We got this. We're going to do this. We're coming." Roberts had not seen Defendant with a weapon at that point.

Roberts returned to the Cadillac. Defendant came up to the driver's side door and "knocked on the window with a gun." Defendant told Munufie to get out of the Cadillac and tried to open the door, but it was locked. Roberts unlocked the door from inside. Roberts testified she immediately got out and ran to the back of 206 Putnam Place and then to the Camry parked in Bell's driveway. She heard four or five gunshots as she ran.

Schenck testified that Munufie opened the door and Defendant began "reach[ing] for [Munufie's] pockets" while Munufie was still sitting in the Cadillac. Defendant told Munufie to get out of the car and when Munufie did, "[Defendant] had the gun in [Munufie's] face telling him to give [Defendant] the money." Munufie motioned as if he was going to pull something out of his back pocket, but brought his hand up empty.

Defendant was still holding the gun in Munufie's face, demanding money, and Munufie "slapped [at] the gun." Schenck testified that after Munufie slapped the gun a third time, Defendant shot Munufie in his left upper arm. Schenck, Roberts, and Thompson then ran back to the Camry. As he was running, Schenck heard "multiple [gun] shots." Edwards testified that, while waiting in the Camry, she "heard five or six gunshots. And less than a minute later [Schenck, Thompson, and Roberts] were in the back seat [of the Camry] and [Roberts] told me to go."

According to Roberts, Defendant returned to the Camry last, and "jump[ed] in the front seat" as Edwards was pulling out of Bell's driveway. Edwards drove away, but "ran off the side of the road at one point because [she] was shook [up]." Edwards testified "[e]verybody was frantic. [Roberts] was like, 'What happened? What happened? Did you kill him?' And [Defendant] said, 'I don't know. I shot him in the face.' And that's – I think at that point I swerved off the road. [Defendant] said, 'I'm sorry. I'm sorry.' " Schenck testified Roberts was "screaming [at Defendant] . . . [asking] did [Defendant] shoot the dude." According to Schenck, Defendant did not respond at first, but eventually said, "I had to do it." Roberts testified she "was . . . crying really bad and . . . [asking Defendant] 'What happened? What happened?' " and that Defendant simply responded, "I'm sorry."

Roberts switched seats with Edwards and began driving. She drove to the apartment of Schenck's cousin, Angelica Adams ("Adams"), in Gastonia. At Adams's apartment, the group sat in the living room smoking marijuana. According to Roberts, Defendant asked Adams for "[s]ome Comet or some bleach or some kind of stuff to clean with" and went to the bathroom. Around 3:00 a.m., Adams drove Edwards to her home in Galilee and drove Schenck and Thompson back to Ebenezer.

Roberts and Defendant got in the Camry parked outside Adams's apartment and talked for about twenty minutes. Roberts later told police that, after Adams and the others left, Roberts saw Defendant wrap a gun in a yellow t-shirt and hide it under some stairs at the apartment complex. Around 6:00 a.m., Defendant and Roberts went to Defendant's mother's apartment in Kings Mountain. They fell asleep briefly, but were awakened by police knocking on the door of the apartment. Two officers spoke with Roberts and Defendant separately. Roberts testified she "[b]asically gave [the officers] the runaround, a bunch of lies, jumbled up lies." Before leaving, the officers told Roberts they wanted to talk to her again. They also seized the Camry, saying it had been seen near 206 Putnam Place the previous night.

Deputy Jimmy Ellis ("Deputy Ellis") of the Cleveland County Sheriff's Office ("CCSO") testified he responded to a 911 call around 10:55 p.m. on 13 March 2012 reporting five or six gun shots fired near Putnam Place in Ebenezer. Deputy Ellis observed a white Cadillac parked in the driveway at 206 Putnam Place. The vehicle's lights were on, and there was music blaring loudly from inside. As Deputy Ellis approached the Cadillac, he saw the driver's side door was open and found a man, later identified as Francis Munufie, lying on his back with an apparent gunshot wound to his head. Deputy Ellis radioed a request for EMS and backup deputies. A number of officers arrived and began canvassing the neighborhood. Investigators spoke with Bell, who informed them he had seen Roberts and several others in her Camry parked nearby earlier that evening. Police found four spent nine millimeter gun shell casings in the grass and driveway ten to fifteen feet from Munufie's body.[1]

A medical examiner performed an autopsy on Munufie's body on 14 March 2012, and determined Munufie suffered gunshot wounds to the left side of his head, to his upper right, and "graze wounds" to the right side of his abdomen. The examiner collected an intact bullet from behind Munufie's right collarbone, several small bullet fragments from Munufie's arm, and a small bullet fragment located near Munufie's jawbone. The bullet and bullet fragments were packaged as evidence and returned to CCSO. CCSO investigators also discovered a bullet fragment lodged in the interior of Munufie's Cadillac when the vehicle was processed for fingerprints on 16 March 2012. The shell casings, bullet and bullet fragments, and a subsequently recovered firearm were all sealed and delivered to the State Bureau of Investigation's Western Lab by CCSO Detective Gary Lee for ballistics testing.

Throughout the week following Munufie's death, investigators interviewed Defendant, Roberts, Schenck, Thompson, and Edwards. Roberts submitted fingerprint and DNA samples on 20 March 2012. On the way to the Law Enforcement Center for fingerprinting, Roberts told detectives she had been involved with the attempted robbery of Munufie. Roberts also suggested investigators should search Adams's apartment building in Gastonia for the gun used during the robbery attempt. The same day, CCSO Sergeant Mark Craig ("Sgt. Craig") went to Adams's apartment, where he found a nine millimeter, semi-automatic handgun wrapped in a yellow t-shirt underneath a staircase on the outside of the building.

1. Crime scene investigators observed three spent shell casings on the night of the murder before Munufie's body was removed from the scene. A fourth cartridge was found by a detective upon returning to 206 Putnam Place around 4:00 p.m. the next day.

Roberts later agreed to speak to Defendant while wearing a hidden audio recording device. She testified Defendant was "real standoffish" during the conversation and "kept telling her to shut the fuck up, and [saying] he didn't want to talk about [the robbery attempt]."

CCSO Detective Jessica Woosley ("Det. Woosley") testified Defendant was arrested on 23 March 2012 on charges of first-degree murder, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Roberts, Schenck, Edwards, and Thompson were also arrested on the same charges and later entered into plea agreements with the State. A grand jury indicted Defendant on 9 April 2012 for first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon.

Roberts, Schenck, Edwards, and Thompson testified for the State at Defendant's trial on 13 July 2015. Deborah Chancey ("Chancey"), a firearms analyst at the State Crime Lab, testified regarding her analysis of the four fired shell casings, five bullets and/or bullet fragments, and handgun submitted to the Crime Lab for testing. It was Chancey's opinion that the shell casings exhibited "a sufficient amount of agreement" with casings test-fired from the handgun received by the Crime Lab. However, Chancey also testified that although the bullet and bullet fragments received by the Crime Lab "exhibited some agreement of detail with the test-fires, . . . the amount of agreement was not sufficient to identify [them] to any particular firearm."

Erin Ermish ("Ermish"), a DNA analyst at the State Crime Lab, testified about forensic testing she performed on a number of items of evidence in the case, including DNA swabbings from the exterior driver's side door handle of Munufie's Cadillac; the gun recovered from Adams's apartment; and the yellow t-shirt that had been wrapped around the gun. On cross-examination, Ermish testified, "For any of the items that I tested, I did not get a match between [Defendant's] [DNA] profile and the DNA [detected on the item]." Defendant did not testify or present any additional evidence.

At the close of the evidence, but prior to closing arguments, the trial court instructed the jury:

> As jurors you are often referred to as the fact finders, which simply means that it's up to you to find the true facts in this case from the evidence according to what your recollection of the evidence is. When you go back and start deliberating, if six of you say, Well, I remember this witness says things this way and the other six of you say No, I

> don't remember it that way, . . . *you don't have the option of saying*, Well, let's go ask the judge and let the judge tell us what did that witness really say. Because if you ask that question, my response is going to be, That's part of your job, to figure it out and to make that determination based on your recollection and not what I say the evidence is, what [the lawyers] say the evidence is, but what you say the evidence is. That's why you've been listening so carefully, so that you can determine the true facts from the evidence as you find the evidence to be.

After closing arguments, the trial court further instructed the jury, "If you need to review any exhibits or if you have any questions, please write out such request and . . . I will bring you back into the courtroom to address any such questions or requests." Defendant was convicted on 30 July 2015 of first-degree felony murder, attempted robbery with a dangerous weapon,[2] and conspiracy to commit robbery with a dangerous weapon. The trial court arrested judgment on the conviction for attempted robbery with a dangerous weapon and consolidated the remaining convictions into a single judgment. Defendant was sentenced to an active term of life in prison without parole. Defendant gave notice of appeal in open court.

II. Jury Instructions Regarding Witness Testimony

A. *Standard of Review*

Defendant contends the trial court violated a statutory mandate requiring trial courts to exercise discretion in considering jury requests to review witness testimony or other evidence. Specifically, N.C. Gen. Stat. § 15A-1233(a) provides in part:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence.

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2. During the charge conference, following an argument by defense counsel that the robbery was incomplete, the trial court dismissed the charge of robbery with a dangerous weapon and replaced it with attempted robbery.

N.C. Gen. Stat. § 15A-1233(a) (2015). According to Defendant, certain comments made by the trial court to the jury prior to closing arguments demonstrate the court's failure to exercise discretion as directed by the statute. Defendant's argument is reviewable despite the fact that he did not raise this objection at trial. *See State v. Starr*, 365 N.C. 314, 317, 718 S.E.2d 362, 365 (2011) ("When a trial court violates [N.C.G.S. § 15A-1233(a)] by denying the jury's request . . . upon the ground that the trial court has no power to grant the motion in its discretion, the ruling is reviewable, and the alleged error is preserved by law even when the defendant fails to object." (citation and internal quotation marks omitted)). "Alleged violation of a statutory mandate presents a question of law, which we review *de novo* on appeal." *Dion v. Batten*, ___ N.C. App. ___, ___, 790 S.E.2d 844, 852, 2016 WL 4088417 at *8 (2016).

A trial court's failure to exercise its discretion under N.C.G.S. § 15A-1233(a) warrants a new trial only where the error was prejudicial. *See State v. Johnson*, 164 N.C. App. 1, 20, 595 S.E.2d 176, 187 (2004). Accordingly, to prevail in the present appeal, Defendant must show not only a failure by the trial court to exercise its discretion but also "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at [his] trial[.]" *See* N.C. Gen. Stat. § 15A-1443(a) (2015); *State v. Hatfield*, 225 N.C. App. 765, 769, 738 S.E.2d 236, 239 (2013).

As this Court recently held upon its review of relevant case law,

> a trial court's error in failing to exercise its discretion in denying a jury's request to review testimony constitutes prejudicial error when the requested testimony (1) is 'material to the determination of [a] defendant's guilt or innocence'; and (2) involves 'issues of some confusion or contradiction' such that the jury would want to review this evidence to fully understand it.

State v. Chapman, ___ N.C. App. ___, ___, 781 S.E.2d 320, 327 (2016) (quoting *State v. Johnson*, 346 N.C. 119, 126, 484 S.E.2d 372, 377 (1997)).

B. *Analysis*

1. *Exercise of Discretion Under N.C.G.S. § 15A-1233(a)*

Our Supreme Court has observed that N.C.G.S. § 15A-1233(a) codifies "the long-standing common law rule that the decision whether to grant or refuse a request by the jury for a restatement of the evidence lies within the discretion of the trial court." *State v. Barrow*, 350 N.C. 640, 646, 517 S.E.2d 374, 378 (1999). It is error for a trial court to make

statements that, even considered contextually, "suggest[] the trial court [does] not have discretion to grant the jury's request [to review witness testimony]." *See Hatfield*, 225 N.C. App. at 771, 738 S.E.2d at 240. For example, a trial court fails to exercise its discretion to deny a jury's request to review witness testimony by responding that a transcript is "not available," *see State v. Lang*, 301 N.C. 508, 511, 272 S.E.2d 123, 125 (1980), or that the court lacks "the ability" to present the transcript to the jury, *see Barrow*, 350 N.C. at 648, 517 S.E.2d at 379. *See also Johnson*, 346 N.C. at 124, 484 S.E.2d at 376 (holding trial court failed to exercise its discretion to grant jury's request where "[t]he trial court told the jury, 'I'll *need* to instruct you that we *will not be able* to replay or review the testimony for you." (emphases in original)); *Hatfield*, 225 N.C. App. at 771, 738 S.E.2d at 240 (holding trial court failed to exercise its discretion in considering jury's request where, after jury requested review of witness testimony, "the trial court simply told the jury, '[w]e can't do that.' "); *State v. Thompkins*, 83 N.C. App. 42, 45, 348 S.E.2d 605, 607 (1986) (holding trial court failed to exercise its discretion in denying jury request to rehear testimony where the trial court told the jury, "[I]t is not possible to arrange that. . . . I'm sorry that there is no way I can accommodate that request.").

In the present case, the trial court failed to exercise its discretion to grant or deny a request by the jury to review witness testimony. Contrary to the State's contention that the trial court merely made it "clear [to the jurors] that if they asked him for his interpretation [of witness testimony]," the judge would instruct them to "make that determination based on [their own] recollection[s]," the court did not inform the jury it would refuse to *interpret the meaning* of any particular testimony or "recapitulate the facts" of the case. Rather, the court made comments prior to closing arguments that suggested it would be futile for the jury to request to review witness testimony whatsoever:

> When you go back and start deliberating, if six of you say, Well, I remember this witness says things this way and the other six of you say, No, I don't remember it that way . . . you don't have the option of saying, Well, let's go ask the judge and let the judge tell us what did that witness really say. Because if you ask that question, my response it going to be, That's part of your job, to figure it out and to make that determination based on your recollection[.]

Although the trial court's surrounding comments may have emphasized the jury's fact-finding role, its unequivocal statement that jurors "[*would not*] *have the option*," during deliberations, to ask the court "what . . .

[a] witness really [said]" suggested the court lacked the ability to even consider such a request. This was error. *See State v. Long*, 196 N.C. App. 22, 40, 674 S.E.2d 696, 706 (2009) (citing "cases in which our courts have concluded that although the trial court admonished the jury to rely upon their recollections, the trial court did not exercise its discretion because of accompanying language which indicated the trial court did not believe it had the discretion to grant the request." (citation and internal quotation marks omitted)); *see also Johnson*, 164 N.C. App. at 20, 595 S.E.2d at 187 ("While [§ 1233(a)] refers solely to requests made by the jury for review of certain testimony or evidence, we nonetheless find that the purpose and intent of the statute are violated . . . [where] the trial court's pretrial comments *could have foreclosed* the jury from making a request for such testimony or evidence. Thus, we find error even without a request by the jury." (emphasis added)).

2. *Prejudicial Error*

Even when a trial court fails to exercise its discretion to grant or deny a jury's request to review evidence, a defendant must demonstrate he was prejudiced by the trial court's failure to exercise discretion. *See* N.C.G.S. § 15A-1443(a) (providing in part that "[t]he burden of showing . . . prejudice . . . is upon the defendant."). This Court has held it is not necessarily prejudicial error to preemptively deny a jury an opportunity to request to review witness testimony even where "a [defendant's] conviction hinges in large part on the credibility of an alleged accomplice who testifies at trial[.]" *Johnson*, 164 N.C. App. at 20, 595 S.E.2d at 187. The defendant must show that certain testimony involved issues of some confusion and contradiction such that it is likely a jury would want to review the testimony. *See id.* (citation and internal quotation marks omitted).

This Court has also distinguished "cases where *material* evidence was requested [by the jury], [as opposed to] cases where the evidence requested was *not determinative of guilt or innocence*." *Long*, 196 N.C. App. at 40, 674 S.E.2d at 707 (citations omitted) (emphases added). We thus consider whether, in the present case, Defendant has identified specific witness testimony involving issues of such confusion and contradiction that the jury would have likely wanted to review it or that was material to the determination of Defendant's guilt or innocence. We conclude he has not.

Defendant alleges he was prejudiced by the trial court's failure to exercise its discretion because "[t]he only evidence linking [Defendant] to the homicide" came from four accomplice witnesses who "gave

conflicting testimony about [1] the alleged plan to commit a robbery and how and when it developed[;] . . . [2] the details of what happened during the robbery attempt[;] . . . [3] what Defendant . . . allegedly said during the drive to Gastonia[;] and . . . [4] what allegedly happened at the apartment of [Adams] in Gastonia." As Defendant bears the burden of showing prejudice, we limit our review to the specific areas of purportedly "conflicting [witness] testimony" Defendant identifies. We address each in turn.

a. *The alleged plan to commit a robbery*

Defendant first contends that Roberts, Schenck, and Edwards "gave contradictory testimony about the alleged discussions prior to the homicide concerning the plan to rob [Munufie after] lur[ing him] to the scene by [Roberts] through the chat line connection[.]" Beyond this general assertion, Defendant does not point to any specific testimony by the individual witnesses which he characterizes as "conflicting" on this subject. Our review of the record indicates that, in fact, the accomplice witnesses gave largely consistent accounts of the planning stage leading up to the attempted robbery. For example, Roberts, Schenck, and Edwards all testified that, while they were at Frederick's house, Roberts was talking on the chat line in order to select a person to rob. Roberts, Schenck, and Edwards all testified the original plan was to lure Munufie to a hotel, but after group discussion, they settled on 206 Putnam Place. It was undisputed that Roberts gave Munufie driving directions to Kings Mountain and later to Putnam Place specifically. Roberts testified that, after picking up Thompson in Ebenezer, the plan that emerged

> was for [Roberts] to go get in [Munufie's] car. [Edwards] was going to wait . . . in the Camry . . . . [Defendant, Schenck, and Thompson] were supposed to hide in the bushes [behind 206 Putnam Place], come up to the [Cadillac], scare [Munufie] and only rob him, and we [were] all supposed to go back to [the Camry] and leave.

Roberts testified she could not recall whether there was any discussion of who would actually take Munufie's money. Schenck also testified that the plan was for Roberts to get in the Cadillac, but that Defendant was supposed to "get the money . . . with a gun." However, both Roberts and Schenck testified they did not see Defendant with a gun during the planning stage. Edwards testified that "[t]he plan was that [Munufie would] come down [to Kings Mountain] and [Roberts] was going to get in the car with him and then he was going to get robbed, I guess." We are unable to discern any material contradictions among the accomplice witnesses'

testimony on this issue, and Defendant has not pointed to any specific conflicts in support of his argument.

b. *The details of what happened during the robbery attempt*

Defendant next argues the accomplice witnesses "gave conflicting testimony about the details of what happened during the robbery attempt." Specifically, Defendant contends that "[t]he testimony of [Schenck] and [Roberts] that [Defendant] was seen holding a gun when he allegedly encountered . . . Munufie at the driver's side door of [the] Cadillac was both confusing and contradicted." Defendant offers two reasons why the testimony of Schenck and Roberts on this point was "confusing and contradicted." First, Defendant maintains the evidence showed that during the attempted robbery, Defendant "was wearing loose-waisted pajama pants, the kind of clothing . . . unlikely to provide a means for holding and concealing a . . . firearm." Second, Defendant notes that, while Schenck and Roberts both testified Defendant touched the driver's side door handle of Munufie's Cadillac, Defendant's DNA was not discovered anywhere on the vehicle's exterior.

The factual details Defendant identifies did not contradict the testimony of Schenck and Roberts about their own observations of Defendant holding a gun during the robbery attempt. Although Schenck testified Defendant was wearing "pajama pants" during the attempted robbery, he did not testify they were "loose-waisted." Schenck also did not testify that he saw Defendant pull the gun from his waistband; he testified only that, by the time Defendant approached the driver's side door of the Cadillac, "[Defendant] had pulled out a gun[.]" Roberts testified that, when she got out of the Cadillac the first time and went to the back of the house to ask Defendant what was taking so long, she did not see Defendant with a gun. Roberts then returned to the Cadillac, with her back to Defendant as he approached the driver's side door, and testified she could only see "shadows out of [her] peripheral view." Like Schenck, Roberts testified that Defendant "knocked on the [driver's side] window with a gun." Roberts testified she did not actually see a gun in Defendant's possession "[until] he knocked on the window with the gun." Neither witness testified about when or how Defendant obtained the gun; where he concealed it on his person, if at all; or when he first pulled out the gun.

Roberts and Schenck both testified Defendant tried to open the driver's side door of Munufie's Cadillac. Thus, the State offered consistent testimony on this issue from multiple eyewitnesses to the actual robbery attempt, and Defendant did not offer contradictory testimony.

Cf. Hatfield, 225 N.C. App at 773, 738 S.E.2d at 241 (holding trial court's failure to exercise its discretion under N.C.G.S. § 15A-1233(a) was prejudicial where requested testimony was that of the sole eyewitness to the defendant's alleged crimes, and defendant directly contradicted the witness's testimony at trial.). The jury heard expert testimony regarding the lack of Defendant's DNA on Munufie's Cadillac, against which it could weigh the testimony of Roberts and Schenck that Defendant in fact touched the Cadillac's door handle. Defendant has failed to show some confusion or contradiction that would make it likely that the jury would have wanted to review the testimony of Roberts or Schenck on this issue.

c. *Defendant's alleged statements during the drive to Gastonia*

Defendant next contends that Roberts, Schenck, and Edwards "gave contradictory testimony about the statements allegedly made by [Defendant] during the drive to Gastonia after the homicide." Once again, Defendant does not direct us to specific testimony by the individual witnesses.

Thompson testified that, during the car ride to Gastonia, "[n]obody said anything." Thompson was the only accomplice witness to deny ever having gone to 206 Putnam Place on 13 March 2012. He also testified he had a "bad memory" and remembered very little about the night of the attempted robbery or the days that followed. However, Roberts, Schenck, and Edwards all testified about statements Defendant made during the drive. The statements attributed to Defendant by these witnesses, although not identical, were not inconsistent. Roberts testified she "was . . . crying really bad and [asking Defendant], 'What happened? What happened?' . . . [and after a couple of minutes Defendant] just said, 'I'm sorry.' " Roberts also testified that she said, "Damn, we're going to get in trouble," and that Defendant replied, "No, we ain't." According to Schenck, Roberts

> kept asking [Defendant] why – "Did you shoot him? Why did you shoot him? How many times did you shoot him?" [Defendant] wasn't really saying nothing [sic] [at first]. . . . And while we [were] driving [Roberts] just kept asking [Defendant] like, "Why did you do it?" And [Defendant] was just like, "I had to do it."

Edwards testified that, during the drive to Gastonia, "[e]verybody was frantic. [Roberts] was like, 'What happened? What happened? Did you kill him? And [Defendant] said, 'I don't know. I shot him in the face.' . . . [Defendant] said, 'I'm sorry. I'm sorry.' "

This testimony from Roberts, Schenck, and Edwards about Defendant's alleged statements during the drive to Gastonia was mutually reinforcing, not mutually exclusive. Each witness described a similar sequence of events: Roberts pressing Defendant to explain what happened; Defendant's initial silence; and an eventual statement by Defendant suggesting some level of culpability. Defendant has not shown any direct contradictions among the witness accounts. Further, as the State presented testimony from multiple eyewitnesses to the actual robbery attempt, the statements Defendant allegedly made after the fact were not material to the determination of defendant's guilt or innocence.

d. *What allegedly happened at Adams's apartment in Gastonia*

Finally, Defendant contends he was prejudiced by the trial court's error because the accomplice witnesses "gave conflicting testimony about what allegedly happened at the apartment of Angelica Adams in Gastonia." Defendant makes this assertion generally but, in arguing prejudice, does not point to specific examples of "conflicting [witness] testimony" about what transpired at Adams's apartment. We find nothing in the relevant witness testimony on this topic that was either material to a determination of Defendant's guilt or innocence or involved issues of such confusion or contradiction that the jury would likely have needed to review the testimony in order to understand it.

Adams and the four accomplice witnesses testified about what happened while they were at the apartment, and certain details differed among the witnesses. Schenck, Edwards, and Thompson all testified that, at some point while they were at Adams's apartment, Defendant and the four accomplices went outside and talked. Schenck and Edwards testified that while they were outside, they discussed possible alibis. Thompson testified that they didn't "talk[] about too much of [anything]" while outside the apartment. Adams testified that, "[a]s far as [she could] remember," the group remained in her apartment for their entire visit and the only person who left her presence was Defendant, who used a bathroom in the apartment. Roberts testified that the group was only at the apartment for approximately ten minutes before Adams drove Schenck, Edwards, and Thompson home; Edwards testified the group stayed for approximately one hour; and Adams testified the group stayed for several hours.

Roberts was the only one of the four accomplice witnesses who testified Defendant used the bathroom at Adams's apartment. Roberts was also the only witness to testify that Defendant asked Adams for some

cleaning products before going into the bathroom. Adams testified that Defendant used her bathroom, and that when she returned home later she found "dirt, [and] black stuff all over [the bathroom] sink." Adams and all four accomplice witnesses testified consistently that, at some point, Adams drove Schenck, Edwards, and Thompson home, leaving Roberts and Defendant alone together. No witness testified he or she saw Defendant with a gun while the group was together inside or outside Adams's apartment. Thus, there was no "conflicting" witness testimony on any of these issues.

Roberts testified that, after the others left, she and Defendant sat in the Camry talking for approximately twenty minutes. According to Roberts, she again asked Defendant what happened during the attempted robbery, and Defendant replied, "Sorry, I had to." Roberts testified that, while they were still sitting in the car, she saw Defendant wrap a gun in a t-shirt and then go "hide it up under the [apartment] stairs." Although Roberts was the only eyewitness to testify about Defendant hiding a gun at Adams's apartment after the attempted robbery, Defendant was not prejudiced by the jury's lack of opportunity to review that specific testimony.

Roberts's testimony was corroborated by several investigating officers who testified at trial. Det. Woosley testified Roberts told investigating officers they might find the gun at Adams's apartment on 20 March 2012.[3] Det. Woosley testified she relayed that information to other CCSO officers who then acted upon it. CCSO Lieutenant Mark Craig ("Lt. Craig") testified he went to Adams's apartment on 20 March 2012 "[t]o look for a yellow shirt and a gun . . . [after] receiv[ing] a call from [his CCSO] captain[.]" CCSO Officer John Kaiser ("Officer Kaiser") testified he was with Lt. Craig on 20 March 2012 when Lt. Craig received a call indicating they should search Adams's apartment. Officer Kaiser testified they "were looking for a yellow cloth or [t]-shirt. And the information we had was that there would be a gun inside this yellow cloth or [t]-shirt. That's what we were looking for." Upon arriving at Adams's apartment complex, Lt. Craig immediately "noticed something yellow under a staircase. And I was there to retrieve something yellow and . . . thought surely it couldn't be this easy." Taken together, these officers' testimony established that, based on information received from Roberts, CCSO officers found a gun

3. The jury also heard an audio recording of portions of Roberts's 20 March 2012 interview with Det. Woosley and CCSO Detective Amy Stroupe. The State offered the recording into evidence as a prior consistent statement, and the trial court received it "for the purposes [sic] of corroboration and only for that purpose."

at Adams's apartment wrapped in a yellow t-shirt and placed beneath a staircase, consistent with Roberts's eyewitness testimony.

Additionally, Roberts's testimony about Defendant hiding a gun at Adams's apartment was not the only evidence linking Defendant to the *crime of attempted robbery*. *Cf. Hatfield*, 225 N.C. App. at 772, 738 S.E.2d at 241 ("Our Supreme Court has previously held that a jury is likely to want to review testimony that is the only evidence directly linking [a] defendant to the alleged crimes." (citation and internal quotation marks omitted)). Instead, Roberts's testimony was the only evidence linking Defendant to the subsequent possession of a gun possibly used in the robbery attempt. Both Schenck and Roberts testified they saw Defendant committing the attempted robbery. *Cf. Thompkins*, 83 N.C. App. at 46, 348 S.E.2d at 607 (finding trial court's failure to exercise its discretion was prejudicial where "[t]he jury requested a review of the testimony of . . . the only witness to identify defendant as the perpetrator. Whether the jury fully understood [that witness's] testimony was material to the determination of defendant's guilt or innocence.") Accordingly, we cannot conclude Roberts's testimony about Defendant hiding a gun at the apartment complex was "determinative of [Defendant's] guilt or innocence." *See Long*, 196 N.C. App. at 40, 674 S.E.2d at 707.

Defendant has failed to identify any particular testimony by the accomplice witnesses which, if reviewed by the jury, suggests "a reasonable possibility . . . [of] a different result . . . at [Defendant's] trial[.]" *See* N.C.G.S. § 15A-1443(a). Accordingly, we find Defendant received a trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA
v.
JOHN EDDIE MANGUM, DEFENDANT

No. COA16-344

Filed 6 December 2016

Search and Seizure—intoxicated driver—totality of circumstances

Where the Grifton Police Department received an anonymous tip regarding an intoxicated driver; a police lieutenant subsequently observed a car matching the description from the tip; and the lieutenant followed the car and observed it driving well below the speed limit, stopping for an unusual period of time before making a right turn, and stopping for fifteen or twenty seconds before crossing railroad tracks, the trial court properly denied defendant's motion to suppress evidence obtained as a result of the stop of his vehicle. The trial court's findings of fact were supported by competent evidence, its conclusions of law were supported by the findings of fact, and, based on the totality of the circumstances, the police lieutenant had reasonable, articulable suspicion to stop defendant.

Appeal by defendant from order entered 8 October 2015 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 7 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Robert T. Broughton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

ZACHARY, Judge.

Where the trial court's findings of fact were supported by competent evidence, and its conclusions of law were supported by the findings of fact, the trial court properly denied defendant's motion to suppress the stop of his vehicle.

I. Factual and Procedural Background

On 1 March 2013 at approximately 6:55 p.m., Lieutenant James Andrews of the Grifton, North Carolina Police Department received an anonymous phone call about an intoxicated person driving a black,

four-door Hyundai leaving a Dollar General store and traveling north on Highland Boulevard. Shortly thereafter, Lt. Andrews saw a black Hyundai drive north on Highland Boulevard, past the police station. Lt. Andrews observed that the vehicle was traveling roughly 20 miles per hour in a 35 miles-per-hour (m.p.h.) zone. After following the vehicle a short distance, Lt. Andrews watched it stop at the intersection of McCrae and Highland Streets—where there is no stop sign, traffic light, or traffic control device—for "longer than usual." The Hyundai resumed motion, turned right on McCrae Street, still proceeding at 20 miles per hour in a 35 m.p.h. zone, and then stopped at a railroad crossing for 15 to 20 seconds, although there was no train coming and no signal to stop. The first road that intersects McCrae Street after crossing the tracks is Gordon Street, and the next is Brooks Alley. After the Hyundai crossed the tracks, Lt. Andrews activated the blue emergency lights on his police cruiser and signaled the vehicle to pull over; it did not do so for another two to three blocks. This failure to yield, which lasted for approximately two minutes, prompted Lt. Andrews to "bump" his siren a number of times. The vehicle turned left onto Pitt Street, proceeded for approximately one hundred yards, and stopped in the middle of the road. Lt. Andrews arrested the driver, John Eddie Mangum (defendant), for impaired driving. Defendant was found guilty in district court, and appealed to superior court.

Prior to trial in superior court, defendant moved to suppress the evidence obtained as a result of the traffic stop. On 20 August 2015, after a hearing on defendant's suppression motion, the trial court orally granted the motion in open court, and the State gave notice of appeal. On the next day, however, the trial court reversed its ruling and denied defendant's motion to suppress. The trial court entered a written order denying the suppression motion on 18 September 2015.

The trial court's pertinent findings in its order denying the suppression motion were that: (1) Lt. Andrews received a concerned citizen report that a drunk driver operating a black, four-door Hyundai was headed north on Highland Boulevard; (2) while Lt. Andrews followed him, defendant drove well below the speed limit; (3) defendant stopped for an unusual period of time before making a right turn, despite the absence of a stop sign or light; (4) defendant stopped for approximately fifteen or twenty seconds before crossing the railroad tracks, despite the fact that no train was approaching; (5) defendant did not immediately stop when Lt. Andrews activated his blue lights, but instead continued driving for approximately two minutes and traveled another two or three blocks; and (6) defendant stopped in the middle of Pitt Street, a narrow

road with no bank or curb. Based on these findings, the trial court concluded that "based upon the totality of circumstances, there was a reasonable and articulable suspicion to stop . . . [d]efendant's vehicle."

Defendant pleaded guilty and preserved his right to appeal the suppression ruling. The trial court sentenced defendant to six months' imprisonment, suspended the sentence, and placed defendant on supervised probation for 24 months. Defendant appeals.

II. Standard of Review

Our review of a suppression order is limited to determining "whether competent evidence supports the trial court's findings of fact and whether the findings [in turn] support the [trial court's] conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). Because the trial court is "entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred[,]" *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 620 (1982), "[w]e accord great deference to [the] trial court's findings of fact," and any findings left unchallenged "on appeal are binding and deemed to be supported by competent evidence." *State v. Knudsen*, 229 N.C. App. 271, 275, 747 S.E.2d 641, 645 (2013) (citation omitted). "This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000).

However, "[a] trial court's conclusions of law on a motion to suppress are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. . . . The conclusions of law 'must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *Knudsen*, 229 N.C. App. at 281, 747 S.E.2d at 649 (citations omitted).

III. Motion to Suppress

A. Factual Findings

Defendant first argues that one of the trial court's findings of fact is unsupported by the evidence and therefore erroneous. Specifically, defendant challenges Finding of Fact No. 25, which states in relevant part: "The Hyundai did not stop immediately in response to [Lt. Andrews'

activation of the] blue lights, and instead continued two additional blocks east past Gordon Street and Brooks Alley."

Lt. Andrews made four statements at the suppression hearing as to when he activated his blue emergency lights. On direct examination, Lt. Andrews stated that he activated his lights immediately after he crossed the railroad tracks, adding that "[w]e went two blocks . . . [and] passed Gordon Street and Brooks Alley." On cross-examination, Lt. Andrews confirmed this statement, but shortly thereafter, he consulted his notes and indicated that his lights were activated at Brooks Alley. Toward the end of cross-examination, defense counsel asked, "And you also testified that you had your lights on at – maybe – you said Brook [sic] Alley – when you turned your blue lights on; is that correct?" to which Lt. Andrews replied, "Yes, ma'am." According to defendant, the "only reasonable inference to be drawn from this [statement] is that . . . [Lt.] Andrews was revising his earlier testimony to conform with his notes, which indicated that he activated his blue lights at Brooks Alley."

Our review of the written suppression order, however, reveals that the trial court explicitly addressed this discrepancy in Findings of Fact Nos. 22 and 23:

> 22. . . . Once the Hyundai crossed the railroad tracks, [Lt.] Andrews made the decision to activate emergency equipment and stop the Hyundai.
>
> 23. On cross-examination by counsel for [d]efendant [Lt.] Andrews acknowledged that he wrote in his notes from the DWI stop that he activated his blue lights at Brook [sic] Alley.

As a result, Finding of Fact No. 25 represents the trial court's reconciliation of Lt. Andrews' conflicting statements regarding the point at which he activated his blue lights. This finding is supported by Lt. Andrews' statement on direct examination and his confirmation of that statement on cross-examination. That Lt. Andrews went on to acknowledge that his notes differed from his recollection is of no moment. Our Supreme Court has specifically noted that when "supported by competent evidence, the trial court's findings of fact are conclusive on appeal, even if conflicting evidence was also introduced." *State v. Wilkerson*, 363 N.C. 382, 434, 683 S.E.2d 174, 205 (2009) (citation omitted). "Furthermore, a trial court's resolution of a conflict in the evidence will not be disturbed on appeal[.]" *State v. Steen*, 352 N.C. 227, 237, 536 S.E.2d 1, 7 (2000) (citation omitted). Properly harmonized, Findings of Fact Nos. 22, 23, and 25 suggest that the trial court credited Lt. Andrews' initial statements after

it considered the differing statements he gave during the latter portions of his cross-examination. Acknowledging the trial court's resolution of conflicting testimony, we conclude that Finding of Fact No. 25 is supported by competent evidence and thus is binding on appeal.

Defendant also argues that, based on the trial court's "comments" in Findings of Fact Nos. 30 and 31, defendant's "stop in the middle of Pitt St[reet] was insignificant in its determination that the stop was supported by reasonable suspicion[.]" Findings of Fact Nos. 30 and 31 read as follows:

> 30. When it came to a stop, the Hyundai stopped in the middle of Pitt Street rather than along the uncurbed roadside. There is no ditch or bank along the roadsides on that section of Pitt Street. The Court noted [at the suppression hearing], however, that Pitt Street is a narrow road.
>
> 31. [Lt.] Andrews testified that the Hyundai's position in the middle of the street had the potential to disrupt traffic flow along Pitt Street, but did not actually disrupt flow because no cars were traveling down that road at the time.

Because it is not our prerogative to usurp the province of the trial court, we refuse to declare that Findings of Fact Nos. 30 and 31 include only extraneous information. Qualifications contained in those findings may be considered on appeal. Moreover, the trial court had to consider all the circumstances of the traffic stop, and despite defendant's assertions to the contrary—i.e., that the court included extra, insignificant information in its order—we must assume the court found the facts that were necessary to support its ruling. Accordingly, we reject defendant's contention that his stop in the middle of Pitt Street was wholly "insignificant" to the trial court's denial of the suppression motion.

B. Reasonable Suspicion and Investigatory (*Terry*) Stop

1. *General Principles*

In his principal argument on appeal, defendant contends that the trial court erred in denying his motion to suppress the stop. More specifically, defendant contends that because Lt. Andrews lacked reasonable suspicion to stop defendant, the stop violated the Fourth Amendment and Article I, Section 20 of the North Carolina Constitution. We disagree.

The Fourth Amendment to the United States Constitution protects, *inter alia*, the "right of the people . . . against unreasonable searches and seizures." U.S. Const. amend. IV. When government officials, including

law enforcement agents, engage in the exercise of discretion and search or seize citizens, the Fourth Amendment imposes a standard of "reasonableness," *see Terry v. Ohio*, 392 U.S. 1, 20-21, 20 L. Ed. 2d 889, 905 (1968), upon their actions in order " 'to safeguard the privacy and security of individuals against arbitrary invasions[.]' " *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, 56 L. Ed. 2d 305, 311 (1978) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528, 18 L. Ed. 2d 930, 935 (1967)). The actions of law enforcement agents must comport with the Fourth Amendment, the requirements of which are "enforceable against the States through the Due Process Clause" of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655, L. Ed. 2d 1081, 1090 (1961).

> The language of Article I, Section 20 " 'differs markedly from the language of the Fourth Amendment to the Constitution of the United States.' " Nevertheless, Article I, Section 20 provides protection "similar" to the protection provided by the Fourth Amendment, . . . and it is well-settled that both Article I, Section 20 and the Fourth Amendment prohibit the government from conducting "unreasonable" searches. Whether a search is unreasonable, and therefore prohibited by Article I, Section 20, and the proper tests to be used in resolving that issue " 'are questions which can only be answered with finality by [the North Carolina Supreme Court].' " The North Carolina Supreme Court has stated that we may not construe provisions of the North Carolina Constitution as according lesser rights than are guaranteed by the federal Constitution. . . . Accordingly, we first determine whether the [stop] violates the Fourth Amendment; if so, the [stop] also violates Article I, Section 20. If we determine that the [stop] does not violate the Fourth Amendment, we may then proceed to determine whether Article I, Section 20 provides " 'basic rights *in addition* to those guaranteed by the [Fourth Amendment].' "

Jones v. Graham Cty. Bd. of Educ., 197 N.C. App. 279, 288-90, 677 S.E.2d 171, 177-78 (2009) (emphasis added; citations omitted).

> North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court. Even so, despite the fact that they are not binding on North Carolina's courts, the holdings and underlying rationale of decisions

> rendered by lower federal courts may be considered persuasive authority in interpreting a federal statute.

In re Fifth Third Bank, 216 N.C. App. 482, 488-89, 716 S.E.2d 850, 855 (2011) (citations and quotation marks omitted), *cert. denied*, 366 N.C. 231, 731 S.E.2d 687 (2012).

> In analyzing federal constitutional questions, we look to decisions of the United States Supreme Court[,] . . . [and] decisions of the North Carolina Supreme Court construing federal constitutional . . . provisions, and we are bound by those interpretations. We are also bound by prior decisions of this Court construing those provisions, which are not inconsistent with the holdings of the United States Supreme Court and the North Carolina Supreme Court.

Johnston v. State, 224 N.C. App. 282, 288, 735 S.E.2d 859, 865 (2012) (citing *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749 (2006), and *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989)), *aff'd*, 367 N.C. 164, 749 S.E.2d 278 (2013).

In *Terry*, the United States Supreme Court held that police officers may initiate a brief, investigatory stop of an individual when "specific and articulable facts . . . , taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21, 20 L. Ed. 2d at 906. A *Terry* stop is justified when the detaining officer has reasonable suspicion, that is, "a particularized and objective basis[,] for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18, 66 L. Ed. 2d 621, 629 (1981).

2. *The Point From Which Reasonable Suspicion Must Be Measured*

Before determining whether defendant's motion to suppress was properly denied, we must address a key issue pertaining to the scope of the trial court's "reasonable suspicion" analysis. At the suppression hearing, the State argued that a determination of when the *Terry* stop occurred—i.e., the point at which Lt. Andrews was required to have a reasonable suspicion of criminal activity—was dispositive in this case. To that end, after acknowledging that if defendant had been "stopped at the railroad tracks, [it] probably [would have been] a bad stop[,]" the State cited *California v. Hodari D.*, 499 U.S. 621, 113 L. Ed. 2d 690 (1991), and contended that under the totality of the circumstances both *before and after* Lt. Andrews signaled his intention to pull defendant over, the eventual stop was supported by a reasonable suspicion of criminal activity. The essence of this argument is that the activation of an

officer's emergency lights does not constitute an official stop (and therefore a seizure) in and of itself, but is merely an order to stop, with no concomitant seizure of the person. Therefore, the stop/seizure did not occur when Lt. Andrews activated his blue lights and bumped his siren; instead, it occurred when defendant yielded to this show of authority. According to the State, the window of inquiry into the existence of reasonable suspicion had to include defendant's failure to comply with the order to stop for approximately two minutes and his decision to park in the middle of Pitt Street.

In rendering its oral ruling at the suppression hearing, the trial court excluded these two circumstances from its analysis:

> All right, we have a tip with no indicia of reliability and no corroboration. The conduct stopping at a – slow driving and stopping at a[n] intersection to turn right and stopping at a railroad crossing that falls within the broad range of what could be described as normal driving behavior. I'm going to grant the motion. It's close.

However, the trial court appears to have considered these circumstances in the reversal of its initial, oral ruling, as the written order explicitly notes that the court reviewed *Hodari D.* before reaching its final decision on defendant's suppression motion.

As discussed above, we reject defendant's challenges to the trial court's factual findings regarding his failure to immediately comply with the order to stop and his eventual stop in the middle of Pitt Street. Yet defendant further argues that these circumstances, which emerged after Lt. Andrews activated his blue lights, should not have factored into the trial court's ruling as a matter of law. In other words, defendant maintains that the trial court's inquiry into the existence of reasonable suspicion should have been confined to events that occurred *before* Lt. Andrews ordered defendant to stop. According to this view, the stop occurred—and defendant was seized—when Lt. Andrews activated his blue lights, and events that occurred after that point were improperly considered.

In contrast, the State asserts that the circumstances Lt. Andrews observed after activating his lights and bumping his siren were properly considered, and supported the trial court's ultimate conclusion that the stop passed constitutional muster.

Accordingly, this matter presents the questions of (1) when the stop officially occurred, and (2) at what point during the process of the stop Lt. Andrews was required to have reasonable suspicion.

The Fourth Amendment's protections are applicable only to "searches and seizures" within the meaning of the federal constitution. *Terry*, 392 U.S. at 16, 20 L. Ed. 2d at 903. The United States Supreme Court announced in *Terry* that "[o]nly when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [it be] conclude[d] that a 'seizure' has occurred." 392 U.S. at 19 n. 16, 20 L. Ed. 2d at 905 n. 16. In *United States v. Mendenhall*, the Court established the principle that a person is seized "*only if*, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980) (opinion of Stewart, J.) (emphasis added). The *Mendenhall* decision instituted an objective test as to when a seizure occurs.

The United States Supreme Court, however, clarified this holding in *Hodari D.* when it concluded that the "only if" language used in *Mendenhall* "states a *necessary*, but not a *sufficient*, condition for seizure—or, more precisely, for seizure effected through a 'show of authority.' " *Hodari D.*, 499 U.S. at 628, 113 L. Ed. 2d at 698. The *Hodari D.* Court rejected the notion that a defendant is seized upon a police officer's mere exhibition of authority, and held that a Fourth Amendment seizure requires either the application of physical force or submission to an officer's show of authority. *Id.* at 626, 113 L. Ed. 2d at 697. Consequently, *Hodari D.* introduced the possibility of a subjective element into Fourth Amendment seizure analysis: an individual's decision either to disregard the show of authority or to yield to it may determine the existence of a seizure.

In *Hodari D.*, two police officers were patrolling a high-crime area in an unmarked vehicle when they observed a group of youths, including the defendant, huddled around a car. *Id.* at 622, 113 L. Ed. 2d at 695. When the officers approached the car, the youths dispersed. *Id.* at 623, 113 L. Ed. 2d at 695. One of the officers exited the patrol car, pursued the defendant through an alley, and eventually overtook him. *Id.* During the pursuit but before the officer tackled and handcuffed him, the defendant "tossed away what appeared to be a small rock[,]" which was later determined to be crack cocaine. *Id.*

The defendant moved to suppress evidence of the cocaine in a California juvenile court, but the motion was denied. *Id.* The California Court of Appeals reversed, holding that the defendant "had been 'seized' when he saw [the officer] running towards him, that this seizure was unreasonable under the Fourth Amendment, and that the evidence of cocaine had to be suppressed as the fruit of that illegal seizure." *Id.*

In reversing the California Court of Appeals' decision, the United States Supreme Court both "accept[ed] as true for purposes of [its] decision[ ] that [the police] pursuit qualified as a show of authority calling upon [the defendant] to halt[,]" *id.* at 625-26, 113 L. Ed. 2d at 697 (internal quotation marks omitted), and "rel[ied] entirely upon the State's concession" that the police "did not have the reasonable suspicion required to justify stopping [the defendant]" at the moment they gave chase. *Id.* at 623-24 n.1, 113 L. Ed. 2d at 695-96 n.1 (internal quotation marks omitted). As a result, the Court held that even if the officers did not have reasonable suspicion to effectuate an investigatory stop when the pursuit began, the cocaine evidence should not have been suppressed because the defendant failed to comply with the officers' original show of authority and thus was not seized when he tossed the drugs aside.

Since *Hodari D.*, courts across this nation have considered whether events that occur between an officer's initial "show of authority" and an individual's actual seizure may be considered when determining if the police had reasonable suspicion to justify a *Terry* stop. Several states have rejected *Hodari D.* on state constitutional grounds and afforded their citizens heightened privacy protections. *See*, *e.g.*, *State v. Garcia*, 147 N.M. 134, 217 P.3d 1032 (2009); *State v. Randolph*, 74 S.W.3d 330 (Tenn. 2002); *Baker v. Commonwealth*, 5 S.W.3d 142 (Ky. 1999); *State v. Young*, 135 Wash.2d 498, 957 P.2d 681 (1998) (en banc); *Commonwealth v. Stoute*, 422 Mass. 782, 665 N.E.2d 93 (1996); *Commonwealth v. Matos*, 543 Pa. 449, 672 A.2d 769 (1996); *State v. Quino*, 74 Haw. 161, 840 P.2d 358 (1992); *State v. Oquendo*, 223 Conn. 635, 613 A.2d 1300 (1992). In so doing, most of these states have maintained *Mendenhall*'s "free-to-leave" test as the proper measure of a seizure under their state constitutions.

Other state courts have adopted *Hodari D.*'s seizure analysis and considered circumstances that arose after a suspect's failure to comply with an officer's order to stop. *E.g.*, *Williams v. State*, 212 Md. App. 396, 69 A.3d 74 (2013); *In re Kelsey C.R.*, 243 Wis. 2d 422, 626 N.W.2d 777 (2001); *People v. Archuleta*, 980 P.2d 509 (Colo. 1999) (en banc); *State v. Weaver*, 259 Kan. 844, 915 P.2d 746 (1996); *Perez v. State*, 620 So.2d 1256 (Fla. 1993). Under these decisions, the reasonable suspicion inquiry does not begin when police issue an order to stop; rather, it begins when the suspect actually yields to that show of authority.

In the federal context, some circuit courts of appeal have emphasized that a stop should be justified at its inception. *See Feathers v. Aey*, 319 F.3d 843, 848-49 (6th Cir. 2003) ("The question is whether, at the moment that they initiated the stop, the totality of the circumstances

provided the officers with the reasonable suspicion required in order to detain a citizen under *Terry*."); *United States v. Finke*, 85 F.3d 1275, 1279 (7th Cir. 1996) ("Under *Terry* the stop must be justified at its inception. . . ."). However, the weight of authority in the federal appellate courts is that, under *Hodari D.*, a suspect postpones the point of seizure (and the beginning of the official stop) by failing to comply with an officers' initial show of authority. *See, e.g.*, *United States v. Simmons*, 560 F.3d 98, 105-07 (2d Cir. 2009); *United States v. Waterman*, 569 F.3d 144, 145-46 & n. 3 (3d Cir. 2009); *United States v. Muhammad*, 463 F.3d 115, 123 (2d Cir. 2006); *United States v. Randolph*, 131 F. App'x 459, 462 (6th Cir. 2005); *United States v. Swindle*, 407 F.3d 562, 567-69 (2d Cir. 2005); *United States v. Smith*, 396 F.3d 579, 586 n. 5 (4th Cir. 2005); *United States v. Valentine*, 232 F.3d 350, 358-59 (3d Cir. 2000); *United States v. Johnson*, 212 F.3d 1313, 1316-17 (D.C. Cir. 2000); *Watkins v. City of Southfield*, 221 F.3d 883, 889 n. 3 (6th Cir. 2000); *United States v. Santamaria–Hernandez*, 968 F.2d 980, 981-83 (9th Cir. 1992); *see also United States v. Walraven*, 892 F.2d 972, 975-76 (10th Cir. 1989) (pre-*Hodari D.* case holding that reasonable suspicion existed for investigatory stop in part because vehicle failed to stop promptly in response to police lights). The principle underscored by these decisions is that the reasonable suspicion inquiry includes events that occur between the initiation and the completion of a stop.

Recently, the Fourth Circuit reiterated this principle in the context of traffic stops, and held that "it is entirely proper for [a police officer] to justify his ultimate seizure of [a suspect] with reference to facts that occurred after activation of the siren but before [the suspect's] eventual submission to police authority, such as [an] initial failure to stop[.]" *United States v. Holley*, 602 F. App'x 104, 107 (4th Cir. 2015). In *Holley*, a police officer activated his blue lights to pull over the vehicle in which the defendant was a passenger, but the vehicle failed to stop and continued to drive "erratically." *Id.* at 105. The district court granted the defendant's motion to suppress firearms recovered from the eventual stop, and held: "[T]he fact that this car took off and didn't stop is not a part of the [reasonable suspicion] equation." *Id.* at 106. On appeal, the Fourth Circuit reversed and concluded that "[b]y failing to take account of these pre-seizure observations as part of its reasonable suspicion analysis, the district court *improperly truncated its review*." *Id.* at 107 (emphasis added).

North Carolina decisions comport with the principles and the analysis recognized in *Holley*. Although our Supreme Court has never squarely addressed the point from which reasonable suspicion to conduct a

Terry stop must be measured, it has cited *Hodari D.* in passing.[1] *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 586 (1994). By contrast, when confronted with situations where a suspect refused or failed to comply with an officer's show of authority, this Court has consistently applied *Hodari D.*'s standard for determining when a seizure occurs under the Fourth Amendment. *E.g.*, *State v. Eaton*, 210 N.C. App. 142, 146-48, 707 S.E.2d 642, 645-46 (2011); *State v. Leach*, 166 N.C. App. 711, 716-17, 603 S.E.2d 831, 835 (2004); *State v. West*, 119 N.C. App. 562, 566, 459 S.E.2d 55, 57-58 (1995). In addition, our courts have included events that occurred after an officer's order to stop in Fourth Amendment reasonable suspicion and probable cause analyses in both pre- and post-*Hodari D.* cases. *See State v. White*, 311 N.C. 238, 244, 316 S.E.2d 42, 46 (1984) (reasonable suspicion for *Terry* stop existed where officer observed defendant's drunken appearance and where defendant failed to pull over in response to blue lights and only stopped in response to siren); *State v. Atwater*, __ N.C. App. __, 723 S.E.2d 582, 2012 WL 133416, at *2 (2012) (unpublished) (citing *Hodari D.* and holding that: "[D]efendant did not stop upon Officer Modlin's activation of his patrol car's blue lights. Defendant fled from Officer Modlin at a high rate of speed, drove erratically, and ran two stop signs. Regardless of whether Officer Modlin had a reasonable suspicion that defendant was involved in criminal activity prior to turning on his blue lights, defendant's subsequent actions gave Officer Modlin reasonable suspicion to stop defendant for traffic violations."); *State v. Milien*, 144 N.C. App. 335, 342, 548 S.E.2d 768, 773 (2001) (considering defendant's failure to immediately stop in response to officers' activation of blue lights in probable cause analysis); *State v. Jordan*, 120 N.C. App. 364, 367-68, 462 S.E.2d 234, 237 (1995) (finding reasonable

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1. We note that this Court and our Supreme Court have consistently applied *Mendenhall*'s objective test to determine whether a defendant was seized under the federal constitution in the absence of physical force. *See*, *e.g.*, *State v. Campbell*, 359 N.C. 644, 662-63, 617 S.E.2d 1, 13 (2005); *State v. Gaines*, 345 N.C. 647, 663, 483 S.E.2d 396, 406 (1997); *State v. Isenhour*, 194 N.C. App. 539, 543, 670 S.E.2d 264, 267-68 (2008). However, as explained below, this Court has applied *Hodari D.* and held that a suspect who fails to submit to law enforcement authority is not seized within the meaning of the Fourth Amendment. Furthermore, the *Mendenhall* Court required more than a determination that a reasonable person would not have felt free to the leave when it stated: "We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." 446 U.S. at 553, 64 L. Ed. 2d at 508. Finally, our Supreme Court has never rejected *Hodari D.* in favor of heightened seizure protections under our State Constitution. We are not aware of any North Carolina decisions holding, for example, that a suspect who disregards a police officer's show of authority is seized because a reasonable person would have submitted to the officer's command.

suspicion for stop existed, in part, based on defendant's failure to immediately pull over in response to officer's blue lights). Most importantly, in *West*, this Court held that an officer's questioning and attempted frisk of the defendant did not violate the Fourth Amendment and "decline[d] [the defendant's request] to reject the United States Supreme Court's *Hodari D.* standard" and afford greater protection against unreasonable searches and seizures under the North Carolina State Constitution. 119 N.C. App. at 565-66, 459 S.E.2d at 57-58. Therefore, until our Supreme Court rules otherwise, West precludes any determination that Article I, Section 20 of our State Constitution provides a heightened, more protective, standard than the one compelled by *Hodari D.*

Against this backdrop, we conclude that defendant was not seized within the meaning of the Fourth Amendment until he stopped his vehicle on Pitt Street. When Lt. Andrews activated his blue lights, he asserted his authority and ordered defendant to pull over. Yet because defendant chose to continue driving, there was no submission to the officer's authority and therefore no seizure at that time. Rather, the *Terry* stop occurred approximately two minutes later, when defendant did in fact pull over. Accordingly, the trial court's reasonable suspicion inquiry properly took account of circumstances that arose after Lt. Andrews' activation of his blue lights but before defendant's actual submission to police authority.

3. *Reasonable Suspicion Analysis*

We now consider whether Lt. Andrews had reasonable suspicion to stop defendant's vehicle. The reasonable, articulable suspicion standard articulated in *Terry* and its progeny has been applied to brief investigatory traffic stops. *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008). As this Court has recognized,

> "a traffic stop based on an officer's *mere* suspicion that a traffic violation is being committed, but which can only be verified by stopping the vehicle, such as drunk driving or driving with a revoked license, is . . . justified if the totality of circumstances affords an officer reasonable grounds to believe that criminal activity may be afoot."

State v. Wilson, 155 N.C. App. 89, 94-95, 574 S.E.2d 93, 98 (2002) (quoting *State v. Young*, 148 N.C. App. 462, 471, 559 S.E.2d 814, 821 (2002) (Greene, J., concurring) (citations omitted)), *appeal dismissed and disc. review denied*, 356 N.C. 693, 579 S.E.2d 98 (2003), *overruled on other grounds by Styles*, 362 N.C. at 414-15, 665 S.E.2d at 440. Although it is "not possible" to precisely articulate what constitutes "reasonable

suspicion," *Ornelas v. United States*, 517 U.S. 690, 695, 134 L. Ed. 2d 911, 918 (1996), the following principles should be considered in any judicial evaluation of an investigatory traffic stop pursuant to *Terry*.

To begin, while the constitutional basis for a warrantless investigatory stop must rest on something "more than an 'inchoate and unparticularized suspicion or hunch' of criminal activity," *Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576 (2000) (quoting *Terry*, 392 U.S. at 27, 20 L. Ed. 2d. at 909 (internal quotation marks omitted)), only a "minimum level of objective justification" is required. *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (citation omitted). *Terry*'s reasonable suspicion standard simply requires that "[t]he stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (citing *Terry*, 392 U.S. at 21-22, 20 L. Ed. 2d at 906). As a result, reasonable suspicion may be demonstrated through an evidentiary showing that is "considerably less than [a] preponderance of the evidence." *Wardlow*, 528 U.S. at 123, 120, 145 L. Ed. 2d at 576.

In addition, an analysis of reasonable suspicion requires a complete review of the facts and circumstances supporting an investigatory stop. *State v. Johnson*, __ N.C. App. __, __, 783 S.E.2d 753, 762 (2016). "Thus, context matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances." *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008). When assessing the legality of a *Terry* stop, the "totality of the circumstances" must be evaluated to ensure that the "whole picture . . . [is] taken into account." *Cortez*, 449 U.S. at 417, 66 L. Ed. 2d at 629. "It is the entire mosaic that counts, not single tiles." *United States v. Whitehead*, 849 F.2d 849, 858 (4th Cir. 1988), *abrogated on other grounds by Gozlon-Peretz v. United States*, 498 U.S. 395, 112 L. Ed. 2d 919 (1991). Courts are therefore not permitted to consider each fact in isolation. *United States v. Arvizu*, 534 U.S. 266, 274, 151 L. Ed. 2d 740, 750 (2002) (rejecting the approach taken by the Ninth Circuit in attempting to delimit the extent to which certain factors may be considered as a type of "divide-and-conquer analysis"). Instead, courts must look at "the cumulative information available" to an officer who conducts a *Terry* stop, *id.* at 273, 151 L. Ed. 2d at 750, and refuse to find the stop unjustified based on a mere "piecemeal refutation of each individual" fact and inference. *Whitehead*, 849 F.2d at 858. This means "that multiple factors 'quite consistent with innocent travel' can, when viewed together, 'amount to reasonable suspicion.' " *State v. Barnard*, 362 N.C 244, 250,

658 S.E.2d 643, 647 (2008) (Brady, J., dissenting) (quoting *Sokolow*, 490 U.S. at 9, 104 L. Ed. 2d at 11). Accordingly, "the key determination is not the innocence of an individual's conduct, 'but the *degree of suspicion* that attaches to particular types of noncriminal acts.' " *Id.* (quoting *Sokolow*, 490 U.S. at 10, 104 L. Ed. 2d at 12).

Finally, the legal evaluation of a police officer's reasonable suspicion determination must be grounded in a pragmatic approach. Reasonable suspicion is a "nontechnical conception[] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Ornelas*, 517 U.S. at 695, 134 L. Ed. 2d at 918 (citations omitted). Our nation's highest court has acknowledged that the "concept of reasonable suspicion is somewhat abstract" and has "deliberately avoided reducing it to a neat set of legal rules[.]" *Arvizu*, 534 U.S. at 274, 151 L. Ed. 2d at 750 (citations and internal quotations marks omitted). As such, "common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685, 84 L. Ed. 2d 605, 615 (1985). To that end, courts should "credit[ ] the practical experience of officers who observe on a daily basis what transpires on the street[,]" *United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993), so as to avoid "indulg[ing] in unrealistic second-guessing" of law enforcement judgment calls. *Sharpe*, 470 U.S. at 686, 84 L. Ed. 2d at 616; *Cortez*, 449 U.S. at 418, 66 L. Ed. 2d at 629 ("The process [by which reasonable suspicion is determined] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.")

Defendant maintains that the anonymous tip was insufficient to create reasonable suspicion to stop him. He further argues that Lt. Andrews' observations prior to and after activating his lights were similarly insufficient.

As to the concerned citizen report, we agree that an anonymous tip, absent "sufficient indicia of reliability[,]" is not on its own sufficient to create reasonable suspicion for a stop. *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630 (citing *Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000)). Nevertheless, "a tip that is somewhat lacking in reliability may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration." *Id.*

Here, it is insufficient that the tip accurately described defendant's vehicle and the direction in which it was heading. *Hughes*, 353 N.C. at

209, 539 S.E.2d at 632 (recognizing that "reasonable suspicion does not arise merely from the fact that the individual met the description given to the officers"); *see also J.L.*, 529 U.S. at 272, 146 L. Ed. 2d at 261 (noting that an accurate tip may help police identify a person, but "does not show that the tipster has knowledge of concealed criminal activity"). A Fourth Amendment violation would likely have occurred if Lt. Andrews had stopped defendant's vehicle based solely on the tip.

However, the tip was not the sole basis for the stop. The subsequent observations of Lt. Andrews "buttressed" the tip through "sufficient police corroboration[,]" *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630, and those observations ultimately formed the basis for Lt. Andrews' suspicion of criminal activity. Lt. Andrews testified that defendant consistently drove roughly 15 miles below the 35 m.p.h. speed limit. This Court has recognized that driving substantially lower than the speed limit is a factor that may contribute to a police officer's reasonable suspicion in stopping a vehicle. *See State v. Bonds*, 139 N.C. App. 627, 629, 533 S.E.2d 855, 857 (2000); *see also State v. Aubin*, 100 N.C. App. 628, 632, 397 S.E.2d 653, 655 (1990) (noting that, based on prior precedent, "observations of a car going 20 miles an hour below the posted speed and weaving within its lane are sufficient to raise a reasonable suspicion that the driver is operating the vehicle while impaired") (citation omitted). In *Bonds*, we noted that the National Highway Traffic Safety Administration had stated that "driving ten miles per hour or more under the speed limit, plus staring straight ahead with fixed eyes, indicates a fifty percent chance of being legally intoxicated." 139 N.C. App. at 629, 533 S.E.2d at 857. Furthermore, our Supreme Court has held that one dominant factor can create reasonable suspicion. *Barnard*, 362 N.C. at 248, 658 S.E.2d at 645. The *Barnard* Court concluded that the defendant's thirty-second delay at a green traffic light gave rise to a reasonable, articulable suspicion that he may have been driving while impaired. *Id.*

Here, Lt. Andrews located defendant's vehicle after receiving the concerned citizen report, and observed it traveling 20 miles per hour in a 35 m.p.h. zone. The vehicle stopped at the intersection of McCrae and Highland Streets—where there was no stop sign or signal to stop—for "longer than usual," turned right on McCrae Street, and continued traveling well below the speed limit. The vehicle stopped again at a railroad crossing. Although there was no train coming and no signal to stop, the vehicle remained motionless at the crossing for 15-20 seconds. After the Hyundai crossed the train tracks, Lt. Andrews activated his blue emergency lights and signaled the vehicle to pull over. However, defendant continued driving north on McCrae Street. Lt. Andrews bumped his

siren, but still, the vehicle did not respond. Critically, defendant failed to yield for approximately two minutes, adding to the suspicion of criminal activity. Defendant eventually turned left onto Pitt Street, traveled one hundred yards, and stopped in the middle of the road. Although Pitt Street is a narrow road with no bank or curb, Lt. Andrews observed that defendant passed several safe places to pull over after the blue lights were activated.

There are plenty of innocent explanations for each of these circumstances, but individual facts "susceptible of innocent explanation" may combine "to form a particularized and objective basis" for reasonable suspicion. *Arvizu*, 534 U.S. at 277, 151 L. Ed. 2d at 752. That is what happened here. From these facts, we conclude that Lt. Andrews was not acting on a mere hunch by the time defendant finally stopped his vehicle. Instead, Lt. Andrews made a judgment call based on his observation of several facts that, when taken together, reasonably indicated the possibility of criminal activity, namely that defendant was driving while impaired. Although defendant claims that all of his actions were consistent with normal driving behavior, "[i]t must be rare indeed that an officer observes behavior consistent [o]nly with guilt and incapable of innocent interpretation." *United States v. Price*, 599 F.2d 494, 502 (2d Cir. 1979) (citations omitted). We are also particularly mindful that "*post hoc* judicial review of police action should not serve as a platform for 'unrealistic second-guessing' of law enforcement judgment calls." *Branch*, 537 F.3d at 337 (citation omitted). Accordingly, we hold that the trial court's findings, which are supported by competent evidence, support its conclusions of law. In sum, because the stop of defendant's vehicle was supported by Lt. Andrews' reasonable suspicion of criminal activity, it did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.

IV. Conclusion

For the foregoing reasons, we conclude that the trial court properly considered events that occurred after Lt. Andrews activated his blue lights but before defendant complied with the order to stop. Based on the totality of the circumstances, Lt. Andrews possessed a reasonable, articulable suspicion that defendant might be engaged in criminal activity. Accordingly, we affirm the trial court's denial of defendant's motion to suppress.

AFFIRMED.

Judges ELMORE and ENOCHS concur.

STATE OF NORTH CAROLINA
v.
ELIAZAR JUAN MENDOZA

No. COA16-224

Filed 6 December 2016

1. Evidence—expert witness—letters—bias or prejudice—child advocacy—sexual child abuse

The trial court did not abuse its discretion in a child sexual abuse case by failing to admit into evidence three letters the expert witness wrote that were published in the Winston-Salem Journal in 2003. Defendant failed to demonstrate a reasonable possibility of a different result at trial had the letters been admitted since defendant was still permitted to cross-examine the expert about her possible bias or prejudice in child advocacy matters.

2. Evidence—expert testimony—sexual child abuse—report and treatment records—late discovery—additional time to review

The trial court did not abuse its discretion in a child sexual abuse case by admitting certain expert testimony over defendant's objections. Defendant conceded, both the report and treatment records were made available to defendant in February 2015, and the trial court granted defendant approximately two additional months to review the evidence and prepare to cross-examine the witnesses at trial.

3. Appeal and Error—preservation of issues—failure to argue at trial—post-traumatic stress disorder

Although defendant argued that the trial court committed prejudicial error in a child sexual abuse case by allowing an expert witness to testify that she diagnosed the minor child with post-traumatic stress disorder and thus impermissibly vouched for the child, defendant failed to preserve this argument by failing to raise this issue at trial.

4. Evidence—expert witnesses—treatment records—sexual child abuse—minor child's sexual activity

The trial court did not abuse its discretion in a child sexual abuse case by not allowing defendant to cross-examine two expert witnesses about information in their treatment records regarding the minor child's sexual activity with partners other than defendant

father even though it did not fall within one of the categories in the Rape Shield Statute.

Appeal by Defendant from judgments dated 20 April 2015 by Judge Edwin G. Wilson, Jr., in Superior Court, Forsyth County. Heard in the Court of Appeals 3 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Beechler Tomberlin, PLLC, by Christopher A. Beechler; and Bennett & Guthrie, PLLC, by Jasmine M. Pitt, for Defendant.

McGEE, Chief Judge.

Eliazar Juan Mendoza ("Defendant") appeals his convictions for felony sexual child abuse, first-degree rape, first-degree sexual offense, and indecent liberties with a child. Defendant contends the trial court erred by (1) precluding Defendant from fully cross-examining certain expert witnesses, and (2) admitting certain expert testimony over Defendant's objections. We find no error.

I. Background

Defendant and Mirna Solace ("Ms. Solace") were married for about fifteen years and four children were born of the marriage. Their eldest daughter, G.J., who was born on 8 March 1996, had a close relationship with Defendant, her father, and enjoyed spending time with him. When G.J. was nine years old, Ms. Solace told G.J. that she and Defendant "were going to take a break and that [the children might] not be able to see [Defendant] because they were going to split." The family was living in a townhouse in the Sugar Creek apartment complex in Winston-Salem, where G.J. shared a room with her younger sister, Y.J. They shared a bunk bed, with G.J.'s bed on the bottom and Y.J.'s bed on the top.

G.J. testified that on the night Ms. Solace told her that she and Defendant had decided to separate, Defendant came into her bedroom around midnight. G.J. thought Defendant was coming to say goodnight, but Defendant got in bed next to her and unzipped her footie pajamas. Defendant took G.J.'s foot out of the pajamas and slipped his shorts off. Defendant said "hush, . . . it [is] going to hurt." Defendant got on top of G.J. and penetrated her vagina with his penis. Defendant held her wrists above her head and began moving back and forth. G.J. whimpered but stopped when Defendant again told her to hush. Y.J. was asleep in

the top bunk bed and did not wake up. Defendant stopped moving back and forth and G.J. felt something wet against her thigh. G.J. testified that Defendant "walked out [of the bedroom] as if nothing had happened." The next day, G.J. felt sore in her vaginal area and stayed in bed all day. She did not tell anyone what happened with Defendant the night before.

A few nights later, Defendant again came into G.J.'s bedroom around midnight and got in her bed. He unzipped her pajamas, "spread [her] legs open . . . [and] penetrated [her] vaginally." Y.J. was asleep in the top bunk bed. Defendant "started moving back and forth and held . . . [G.J.'s] arms up . . . above [her] head[.]" G.J. cried softly but did not scream out or yell. Defendant told G.J. not to tell anyone.

On a third occasion shortly thereafter, Defendant came into G.J.'s bedroom while she and Y.J. were asleep on the floor in opposite corners of the room. Defendant had a children's book in his hand and told G.J. he was going to read to her. After reading one page from the book, Defendant got underneath G.J.'s blanket, removed her shorts and underwear, spread her legs open, and penetrated her vaginally with his penis. Defendant was not wearing a condom and ejaculated on G.J.'s stomach. Y.J. did not wake up at any point. G.J. testified that, over the next two years, when Defendant was not traveling for work, he raped her approximately two times per week.

When G.J. was eleven years old, Ms. Solace accused Defendant of cheating on her and told him she "didn't want him in the house anymore[.]" Ms. Solace refused to let Defendant sleep in their bedroom that night, so Defendant made the children sleep downstairs with him on the living room floor. G.J. slept next to Defendant. After all the children were asleep, Defendant woke G.J. up by shaking her, pulled down her pants and underwear, and opened her legs. G.J. tried to push Defendant away, but Defendant told her not to move and she stopped resisting because she believed Defendant would hurt her. Defendant penetrated her vaginally with his penis and then ejaculated onto her thigh.

When G.J. was thirteen, Defendant moved to Kannapolis. G.J. testified Defendant raped her once when she and her siblings visited him in Kannapolis. G.J. stopped visiting Defendant when she was fourteen years old.

G.J. testified that, when she was in middle school, she began struggling academically and having problems at home. She also began secluding herself and arguing with her siblings. G.J. felt angry "[f]or allowing [herself] to carry such a burden, and for letting [the sexual abuse]

continue for so long." She began cutting herself and taking OxyContin pills. She experienced recurrent nightmares and multiple anxiety attacks.

When G.J. was sixteen years old, she attended a church service at which Victoria Burgos, the daughter of Pastor Mario Burgos ("Pastor Burgos"), shared an experience of past sexual abuse. One year later, in late July or early August 2013, G.J. told her mother Defendant had sexually abused her when she was nine years old. Ms. Solace called Pastor Burgos and told him about G.J.'s allegations against Defendant. Pastor Burgos and his family came over to Ms. Solace's apartment and Ms. Solace appeared to be "in shock." Pastor Burgos told her the abuse would have to be reported to the police, and he called the police about a week later.

Officer M.L. Mitchell ("Officer Mitchell") of the Winston-Salem Police Department ("WSPD") testified he received a call on 9 August 2013 "in reference to an [alleged] indecent liberties with a minor." Officer Mitchell responded to 4039 Bethania Station Road, where he spoke with Pastor Burgos and Ms. Solace. With Pastor Burgos translating from Spanish to English, Ms. Solace told Officer Mitchell that G.J. said she had been sexually abused by Defendant. G.J. was in a different room during this initial conversation. Officer Mitchell then interviewed G.J. privately. G.J. told Officer Mitchell she had been sexually assaulted by Defendant "approximately [ten] times total, [ten] different times between [nine] and [ten] years old to [fifteen] years old." G.J. said the assaults occurred at the Sugar Creek apartment complex and Defendant's house in Kannapolis. Officer Mitchell testified:

> [G.J.] said that her father would . . . come into her bedroom after she had already gone to bed. He would get on top of her, [and] undress her until she was fully naked. . . . [S]he said that [Defendant] would then insert his penis into her vagina, and would hold her down by her shoulders with . . . his hands. And [she] stated that he would stay in that position until he ejaculated. And then she stated that . . . he would touch her all over her body in various places. And then once he was done, he would get up and walk out of the room without saying anything to her.

G.J. said she had attempted to resist Defendant only once, when she was about twelve years old, but Defendant "just push[ed] down on her harder." Officer Mitchell referred the case to the WSPD Criminal Investigations Division.

WSPD Detective Robert Williams ("Det. Williams"), who had special training in interviewing children and investigating alleged child sexual abuse, interviewed G.J. alone on 14 August 2013. Det. Williams asked G.J. what prompted her to finally come forward with the sexual abuse allegations, and she said "she couldn't hold it in anymore, she just needed to tell someone, and the first person she told was her mother." Det. Williams testified G.J. gave him an account that was largely consistent with her testimony at trial. Det. Williams also interviewed Pastor Burgos and Ms. Solace. Det. Williams told Ms. Solace that G.J. should have a comprehensive medical examination.

Dr. Meggan Goodpasture ("Dr. Goodpasture"), a physician at Wake Forest Baptist Medical Center ("WFBMC") and Brenner's Children Hospital ("BCH"),[1] examined G.J. on 17 September 2013. Prior to the medical examination, G.J. spoke with Cynthia Stewart ("Ms. Stewart"), a social worker at WFBMC and BCH. Ms. Stewart's role was to "gather[] [information about G.J.'s] social history . . . [and] complet[e] a diagnostic interview" to help "inform [Dr. Goodpasture's] medical examination." Dr. Goodpasture testified that, during her medical examination, she noticed "very faint superficial scars on [G.J.'s] left forearm, which were well healed." Dr. Goodpasture also performed vaginal and anal exams on G.J. She testified that G.J.'s "anatomy appeared completely normal." Dr. Goodpasture found G.J. had "no vaginal bleeding, discharge or lesions[,] . . . [and] no abnormal [anal] dilat[ion] or fissures or scars." She testified that "there was at least a number of months since [G.J.'s] last contact with [Defendant]" and that "most of the time, after children disclose a history of sexual abuse, their [physical] exams are completely normal." Dr. Goodpasture also "conducted testing [on G.J.] for sexually transmitted infections, which [came back] 'negative.' " She recommended G.J. receive therapy.

Ms. Stewart testified as an expert in interviewing children in cases of suspected abuse or neglect. Ms. Stewart met with G.J. before G.J.'s medical examination "to make sure that [Dr. Goodpasture] knew exactly how to physically examine her[.]" Ms. Stewart's description of her interview with G.J. was largely consistent with G.J.'s testimony at trial, including Ms. Stewart's testimony that, during the interview,

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1. Dr. Goodpasture testified that her role at Brenner Children's Hospital was to "provide both inpatient and outpatient consultations upon requests [sic] for children, whether [it involves] some concern for . . . child physical abuse, child sexual abuse, [or] child neglect[.]"

> [G.J.] voiced several things that were consistent with her being in distress, and that she mentioned how she felt responsible. She talked about the negative consequences that she perceived that could be there. She talked about feeling so bad that she wanted to hurt herself. She talked about being very angry all the time and upset about things, [being] on edge.

In Ms. Stewart's opinion, the characteristics she observed in G.J. were consistent with past sexual abuse.

Blair Cobb ("Ms. Cobb"), a licensed clinical social worker and pediatric therapist at Family Preservation Services, testified as an expert in child counseling. Ms. Cobb first met with G.J. in early November 2013. Ms. Cobb testified that, at that meeting, G.J. exhibited the following:

> Primarily symptoms of anxiety, nightmares, difficulty concentrating, difficulty sleeping. [G.J.] also discussed re-experiencing symptoms of memories and of a traumatic event. She had symptoms of hypervigilance, [such as being] easily startled, always looking out for danger or things to occur and avoidance; not wanting to be around things that reminded her of what had occurred. She also expressed irritability and anger. . . . She reported to me that she was sexually abused by her father.

Ms. Cobb told G.J. they "could move forward with trauma-focused cognitive behavioral therapy, and . . . explained to her what that treatment outlined, and scheduled her next session."

Ms. Cobb testified that any time a client "[came] in . . . having [experienced] a traumatic event," she would discuss different symptoms associated with post-traumatic stress disorder ("PTSD"), consider whether the client "[met] the three different clusters of symptoms – meaning avoidance, . . . re-experiencing and hypervigilance, [and if so,] . . . move forward with the diagnosis." Ms. Cobb testified she used a "psychological [assessment] tool to help assist with asking a patient questions directly associated with [PTSD]. And . . . it's broken down into age ranges. So for [G.J.'s] age group, it directly asks questions related to those three clusters [of symptoms]." Ms. Cobb testified that, after conducting these assessments on G.J., she "diagnosed [G.J. with] PTSD." When asked by the State, Ms. Cobb agreed that, while PTSD requires a traumatic event, "that traumatic event could be anything traumatizing[.]"

Ms. Cobb and G.J. met for approximately eight counseling sessions. Each session focused on traumatic events in G.J.'s past. Ms. Cobb "only ask[ed] open-ended questions; no details in regards to [specific incidents] – it's all based on [the client's] memory and what they would like to discuss at that time." G.J. told Ms. Cobb she began drinking alcohol and engaging in recreational prescription drug use around the ninth grade, and that she had self-harmed by cutting herself. Ms. Cobb testified that "substance abuse is definitely associated with a child who has experienced a traumatic event[,]" and that "[c]utting is usually exhibited in children who do experience symptoms of depression, anxiety or trauma-related symptoms."

Defendant also presented witness testimony. Joyce Vargas ("Ms. Vargas"), Defendant's niece, testified she visited Defendant, Ms. Solace, and their children in Winston-Salem every summer from 2005 to 2009. Ms. Vargas said the bunk beds that G.J. and Y.J. slept in were noisy and hit the wall if anyone moved in them. Ms. Vargas testified that, during her visits, G.J. seemed happy. Ms. Vargas also never observed anything strange about Defendant's behavior.

Lizbeth Izquierdo ("Ms. Izquierdo"), who was Defendant's live-in girlfriend when he lived in Kannapolis, testified about Defendant's interactions with G.J. during the children's visits to their house in 2009 and 2010. Ms. Izquierdo testified G.J. appeared "happy" during those visits and Ms. Izquierdo never witnessed anything that would lead her to believe Defendant had raped G.J. Ms. Izquierdo did not recall Defendant spending time with G.J. outside Ms. Izquierdo's presence. Although Defendant would sometimes leave their bedroom at night to "make sure that [the children] were going to sleep[,]" Ms. Izquierdo never noticed him leaving for longer than a few minutes.

Defendant testified in his own defense. He denied ever having raped, inappropriately touched, or vaginally penetrated G.J.

Warrants for Defendant's arrest were issued on 30 May 2014 and 2 June 2014. A grand jury indicted Defendant on 27 October 2014 for multiple counts each of first-degree rape of a child, first-degree sexual offense, felonious child abuse by the commission of a sexual act, and taking indecent liberties with a child.

The State served notice of expert witnesses on 24 November 2014, indicating it would call Dr. Goodpasture, Ms. Stewart, and Ms. Cobb to testify. The State attached reports prepared by Dr. Goodpasture and Ms. Stewart regarding their evaluations of G.J. Defendant filed a "Motion for

Reports and Other Materials of State's Expert Witnesses" on 29 January 2015, seeking a court order

> requiring the State to produce to [Defendant] all expert reports, material and opinion basis discoverable pursuant to [N.C. Gen. Stat. §] 15A-903 and to specifically direct each such expert who is anticipated to testify to prepare a meaningful and detailed report concerning each expert's examination and opinion and the basis thereof.

The State produced additional discovery on 18 February 2015. Defendant filed a motion *in limine* to exclude Ms. Stewart and Ms. Cobb from testifying as expert witnesses "as a sanction for the [State's] violation of discovery rules[.]" At a hearing on the motion on 18 February 2015, Defendant sought "either to exclude the expert opinions of the two witnesses, [Ms. Cobb] and/or [Ms. Stewart], . . . or . . . a continuance . . . [to] prepare[] to defend those [opinions] . . . ." The trial court granted a continuance and the case was continued until 13 April 2015.

The jury found Defendant guilty on all counts on 20 April 2015.[2] The trial court sentenced Defendant as a Prior Record Level II to five consecutive sentences of 288 to 355 months' imprisonment. Defendant gave oral notice of appeal in open court.

II. Ms. Stewart's Letters to the Editor

A. *Standard of Review*

[1] Defendant first argues the trial court erred by not admitting into evidence three letters to the editor Ms. Stewart wrote and that were published in the *Winston-Salem Journal* in 2003. According to Defendant, "the letters represented [Ms.] Stewart's possible bias or prejudice in child advocacy matters[,]" and he should have been permitted to cross-examine Ms. Stewart about the content of the letters.

"In reviewing trial court decisions relating to the admissibility of expert testimony evidence, [our Supreme] Court has long applied the deferential standard of abuse of discretion. Trial courts enjoy wide latitude and discretion when making a determination about the admissibility of [expert] testimony." *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012) (citation and internal quotation marks omitted). The trial court's

2. In total, Defendant was convicted of five counts of first-degree rape, two counts of first-degree sexual offense, two counts of felonious child abuse by the commission of a sexual act, and four counts of taking indecent liberties with a child.

decision will not be disturbed on appeal unless "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. Ward*, 364 N.C. 133, 139, 694 S.E.2d 738, 742 (2010) (citation and internal quotation marks omitted).

Even when an abuse of discretion occurs, a defendant is not entitled to a new trial unless the error was prejudicial. *See State v. Cook*, 193 N.C. App. 179, 185, 666 S.E.2d 795, 799 (2008) (citation omitted). Prejudicial error exists "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2015). Defendant bears the burden of showing prejudice. *Id.*

B. *Analysis*

We note initially that Ms. Stewart's letters to the editor do not appear in the record on appeal. *See Fickley v. Greystone Enterprises, Inc.*, 140 N.C. App. 258, 259, 536 S.E.2d 331, 332 (2000) (observing that "[e]ffective appellate review . . . [is] made more difficult by the filing of an incomplete record on appeal."). The State failed to serve timely notice of approval or objections to Defendant's proposed record as required by North Carolina Rule of Appellate Procedure Rule 11(b). As a result, Defendant's proposed record became the settled record on appeal. *See* N.C.R. App. P. 11(b) (2016). It is unclear why Defendant did not include Ms. Stewart's letters in his proposed record.[3]

This Court's review is typically limited to the record on appeal, and "[m]atters discussed in the brief but outside the record will not be considered." *Hudson v. Game World, Inc.*, 126 N.C. App. 139, 142, 484 S.E.2d 435, 437-38 (1997). However, in the present case, we are able to conclude from the record before us that even if Ms. Stewart's letters were erroneously excluded, the error was harmless.

The trial court denied Defendant's motion to admit Ms. Stewart's letters based on its determination that "[the letters were] about a lot more than child abuse. . . . They're about newspapers and DSS and the like[.]" N.C. Gen. Stat. § 8C-1, Rule 403 states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2015). Defendant

3. Defendant filed a motion with this Court on 4 May 2016 seeking to amend the record on appeal by adding the letters. The motion was denied on 12 September 2016.

contends the probative value of Ms. Stewart's letters exceeded any of the concerns set forth in Rule 403, because they were "the only evidence offered to show prejudice on the part of [Ms.] Stewart[,]" and

> regard[ed] [Ms.] Stewart's thoughts and outrage about child abuse, including her advocacy for children who had been abused and killed by their parents. [The letters] also evidence[d] [Ms. Stewart's] belief that not enough is being done to protect children . . . [and] reflect[ed] [Ms.] Stewart's beliefs, and potential prejudice and bias, about advocating for children.

Thus, Defendant argues, "the trial court abused its discretion by precluding . . . Defendant from cross-examining [Ms.] Stewart on her possible bias based on the letters." Moreover, Defendant submits that "but-for the trial court's denial of cross-examination, [Defendant] would have had the opportunity to confront [Ms.] Stewart about her potential prejudice and bias against him, possibly leading to a different result at trial[.]" These arguments are without merit.

Contrary to Defendant's contention, the trial transcript plainly reflects that he was permitted to cross-examine Ms. Stewart about her "possible bias or prejudice in child advocacy matters." Specifically, defense counsel cross-examined Ms. Stewart as follows:

> [DEFENSE]: Now, would you describe yourself more as a child advocate than a forensic interviewer?
>
> [MS. STEWART]: Uhm –
>
> [STATE]: Objection to the characterization, Your Honor.
>
> [COURT]: Well, she can answer it however she feels would be appropriate.
>
> [MS. STEWART]: In my role with medical evaluation of children, I do – I have a passion for what I do. I have a passion for doing it appropriately. I have a passion for following the standards that are set forth. I also have a passion for the safety and protection of children who have been hurt and abused.
>
> [DEFENSE]: Do you recall writing some letters to the editor in 2003 expressing that passion quite strongly?
>
> [MS. STEWART]: Sure.

> . . .
>
> [DEFENSE]: Ms. Stewart, did you write a series of letters to the editor on the subject of child abuse?
>
> [MS. STEWART]: I remember, but I don't remember exactly what I wrote.
>
> [DEFENSE]: May I approach the witness?
>
> [COURT]: I'm not going to allow those letters in. I'm sustaining the objection. I don't want anymore [sic] talk about them.
>
> [DEFENSE]: Well, would it be fair to say, then, you are strongly passionate on this subject?
>
> [MS. STEWART]: I have been working in the field of child abuse and neglect for 30 years. It would be hard to be doing my job for that long and not have some passion about what I do.

In light of Ms. Stewart's own testimony, it is difficult to see how admitting the letters — that, we note, predated Ms. Stewart's interview with G.J. by a decade — would have provided any necessary additional insight into "[Ms.] Stewart's thoughts and outrage about child abuse, including her advocacy for children who had been abused . . . by their parents." Defendant has failed to demonstrate a reasonable possibility of a different result at trial had the letters been admitted. *See State v. Beach*, 333 N.C. 733, 742, 430 S.E.2d 248, 253 (1993) (holding erroneous exclusion of relevant testimony was not prejudicial where "defendant was able to elicit substantial evidence of a similar nature[.]").

III. Untimely Disclosure of Expert Testimony

A. *Standard of Review*

[2] Defendant next argues the trial court erred by permitting Ms. Stewart to testify about information in her report and Ms. Cobb to testify about information in her treatment records. Defendant contends the State violated N.C. Gen. Stat. § 15A-903(a)(2) by not sending Ms. Stewart's report and Ms. Cobb's records to defense counsel until February 2015. According to Defendant, he was prejudiced by the admitted testimony because he "did not have time to adequately prepare to effectively cross-examine [Ms.] Stewart and [Ms.] Cobb on the undisclosed opinions." We review the trial court's decisions for abuse of discretion. *See State v. Blankenship*, 178 N.C. App. 351, 356, 631 S.E.2d 208, 211-12 (2006)

(holding trial court abused its discretion in permitting expert to testify, where State violated statutory disclosure requirements by "fail[ing] to provide any notice whatsoever to [the] defendant that it would be calling any law enforcement officer or expert to testify concerning the process of manufacturing methamphetamine.").

B. *Analysis*

N.C. Gen. Stat. § 15A-903(a)(2) provides that, upon motion of a criminal defendant, the trial court must order

> [t]he prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The State shall give the notice and furnish the materials required by this subsection within a reasonable time prior to trial, as specified by the court.

N.C. Gen. Stat. § 15A-903(a)(2) (2015). Where discovery is "voluntarily made in response to a request or written agreement, the discovery is deemed to have been made under an order of the court[.]" N.C. Gen. Stat. § 15A-902(b) (2015). Once a party has provided discovery, whether voluntarily or mandatorily, "there is a continuing duty to provide discovery and disclosure." *State v. Ellis*, 205 N.C. App. 650, 655, 696 S.E.2d 536, 539 (2010) (citation and quotation marks omitted); N.C. Gen. Stat. § 15A-907 (2015). If a party fails to comply with these statutory mandates, a trial court may, *inter alia*, "[g]rant a continuance" or "[p]rohibit the party from introducing [the] evidence not disclosed[.]" See N.C. Gen. Stat. §§ 15A-910(a)(2)-(3) (2015); *State v. Hodge*, 118 N.C. App. 655, 657, 456 S.E.2d 855, 856 (1995) ("N.C. Gen. Stat. § 15A-910 . . . empowers the court to apply sanctions for noncompliance . . . . Although the court has the authority to impose such discovery violation sanctions, it is not required to do so."). "The purpose of discovery under our [criminal] statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *Blankenship*, 178 N.C. App. at 354, 631 S.E.2d at 210 (citation and quotation marks omitted).

The State served notice of expert witnesses to Defendant on 24 November 2014. The notice listed Dr. Goodpasture, Ms. Stewart, and Ms. Cobb, and indicated the State would make the reports of

each expert regarding G.J. available to Defendant "during the regular course of discovery." The State attached curricula vitae ("CV") for Dr. Goodpasture and Ms. Stewart, and stipulated that Ms. Cobb's CV would be "forthcoming."

The State provided initial discovery to Defendant on 2 December 2014. This initial disclosure included Dr. Goodpasture's full report about her medical examination of G.J.; a two-page report prepared by Ms. Stewart after her interview with G.J., stating her impressions and recommendations; and "about a [thirty] page report" by Ms. Cobb regarding "her visits with [G.J.], which . . . detail[ed] [Ms. Cobb's] comprehensive clinical assessment."

Defendant filed a "Motion for Reports and Other Materials of State's Expert Witnesses" on 29 January 2015, in which he requested

> an [o]rder requiring the State to produce to the defendant all expert reports, material and opinion basis discoverable pursuant to [N.C.G.S. §] 15A-903 and to specifically direct each such expert who is anticipated to testify to prepare a meaningful and detailed report concerning each expert's examination and opinion and the basis thereof.

At a hearing on 4 February 2015, the trial court concluded the State had provided sufficient discovery with respect to Dr. Goodpasture, but instructed the State to "ask [Ms. Stewart and Ms. Cobb] to couch their diagnosis in the form of opinion and . . . in the report that they produce [to the defense] . . . be specific as to what their opinion is." The State subsequently provided Defendant with some further discovery, including additional therapy notes received from Ms. Cobb after the original discovery and "a revised letter [from Ms. Cobb] outlining the basis of her opinion[.]" These were produced to Defendant on 14 February 2015 and 16 February 2015, respectively. The State also provided Defendant with a DVD recording of Ms. Stewart's interview with G.J. on 16 February 2015.

At a hearing on 18 February 2015, defense counsel told the trial court Defendant

> would need either to exclude the expert opinions of the two witnesses, [Ms. Cobb] and/or [Ms. Stewart], on the grounds that we have not had time to prepare for those opinions provided to us on essentially Monday morning or we need a continuance on those because we simply are not prepared to defend those at this point without further investigation and possible experts that may need to be retained by the defense.

Pursuant to Defendant's request, and as authorized by N.C.G.S. § 15A-910(a)(2), the trial court continued the matter until 13 April 2015.

Although Defendant characterizes Ms. Stewart's and Ms. Cobb's testimony as "unanticipated," he does not identify which specific portions of either witness's testimony he contends were "undisclosed." Defendant observes generally that "[w]hile [Ms.] Stewart's report was not admitted into evidence, she still referred to [it] throughout [her] testimony. Likewise, [Ms.] Cobb testified about information in her treatment records." However, as Defendant concedes, both Ms. Stewart's report and Ms. Cobb's treatment records were made available to Defendant in February 2015, and the trial court granted Defendant approximately two additional months to review the evidence and prepare to cross-examine the witnesses at trial.

Defendant's argument that he "did not have time to adequately prepare to effectively cross-examine [Ms.] Stewart and [Ms.] Cobb on the undisclosed opinions" fails in light of the fact that the trial court granted a continuance upon Defendant's late receipt of additional materials from the State. Under N.C.G.S. § 15A-910(a), granting a continuance is as much a "sanction" as "prohibiting [a] party from introducing undisclosed evidence," and whether and which to impose are at the trial court's discretion. *See State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988) ("The sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion."); *State v. McDougald*, 38 N.C. App. 244, 258, 248 S.E.2d 72, 83 (1978) ("When a party to a criminal proceeding fails to comply with discovery requirements, the trial court may impose sanctions upon that party. These sanctions include holding the party in contempt, ordering discovery, granting a continuance or recess, prohibiting the party from introducing the evidence or entering other appropriate orders. The particular sanction to be imposed rests within the sound discretion of the trial court." (citations omitted)). Indeed, at the hearing on 18 February 2015, Defendant explicitly requested "*either* to exclude the expert opinions . . . or . . . a continuance[.]"

The cases Defendant cites are unavailing. In *State v. Cook*, 362 N.C. 285, 661 S.E.2d 874 (2008), the State provided the defendant with an expert's report one day prior to the date trial was set to begin. The defendant immediately sought a continuance, but the trial court denied the motion and allowed the trial to proceed as scheduled. Our Supreme Court held that the trial court abused its discretion by denying the defendant's request for a continuance, because "the State's last-minute piecemeal disclosure of its expert's . . . written report was not 'within a

reasonable time prior to trial' as required by N.C.G.S. § 15A-903(a)(2)." *Id.*, 362 N.C. at 292, 661 S.E.2d at 878. The Court was "satisfied that a continuance would have alleviated any 'unfair surprise' to [the] defendant, and would have afforded the defense [an] opportunity to meet [the State's] evidence." *Id.*, 362 N.C. at 295, 661 S.E.2d at 880 (citations and internal quotation marks omitted). In *State v. Moncree*, 188 N.C. App. 221, 655 S.E.2d 464 (2008), this Court held the trial court improperly permitted an agent for the State Bureau of Investigation ("SBI") to testify as a lay witness. We concluded that because the agent's testimony was in fact expert opinion testimony, it should have been disclosed to the defendant prior to trial pursuant to N.C.G.S. § 15A-903(a)(2).[4] *See id.*, 188 N.C. App. at 226-27, 655 S.E.2d at 468.

In contrast to *Moncree*, Defendant was aware that Ms. Stewart and Ms. Cobb would offer expert testimony at trial. Further, unlike in *Cook*, the trial court granted Defendant a continuance upon his late receipt of additional discovery from the State. Defendant has failed to demonstrate the trial court abused its discretion by permitting Ms. Stewart and Ms. Cobb to testify about expert opinions that were disclosed to Defendant "within a reasonable time prior to trial."

IV. Cobb's PTSD Testimony

Preservation of Error

[3] Defendant next argues the trial court committed prejudicial error by allowing Ms. Cobb to testify that she "diagnosed [G.J. with] PTSD." According to Defendant, Ms. Cobb "impermissibly vouched for [G.J.,] the prosecuting witness" by "corroborat[ing] G.J.'s testimony that the alleged sexual assault by [Defendant] was the *source* of the resulting PTSD."

The State responds that despite "challeng[ing] Ms. Cobb's overall qualifications to render testimony that G.J. suffered from PTSD[,]" Defendant "failed to challenge and preserve for appellate review the admissibility of the overall diagnosis of PTSD." We agree Defendant failed to preserve this argument for appellate review.

During Ms. Cobb's testimony, defense counsel stated in *voir dire* that Defendant

4. Although the *Moncree* trial court erred in admitting the expert testimony, we held the error was not prejudicial because the defendant was aware that two other witnesses would offer substantially similar testimony and therefore "should have anticipated this evidence and should not have been unfairly surprised by [the SBI agent's] testimony[.]" *Id.*, 188 N.C. App. at 227, 655 S.E.2d at 468.

> would lodge an objection to [Ms. Cobb] as an expert witness giving that opinion [that G.J. suffered from PTSD or had symptoms of PTSD]. We have no objection to her being – testifying that she's a therapist and testifying what she did [with G.J.] in the therapy, but to render the opinion that [G.J.] suffers from or suffered from post[-]traumatic stress disorder, *we would contend requires a medical diagnosis to be a medical opinion.*

The State responded that North Carolina law

> does not require the testimony of a medical doctor, but it does require the testimony of someone who is familiar with the criteria of the diagnosis of post[-]traumatic stress disorder and has, in fact, made that diagnosis and can testify as to what the particular criteria is [sic] that was present in the particular child that resulted in that diagnosis.

According to the State, Ms. Cobb would testify that she

> has a set criteria [for diagnosing PTSD] that is well accepted in the field of therapeutic services, that she, in fact, did an assessment [of G.J.], and based on her assessment, it was her opinion that the child was suffering from several criteria that were consistent with [PTSD].

The State also noted that

> the law does limit the State in how far we can go with that . . . . We are not allowed to ask what the cause of the trauma is, only that sexual abuse could be one of many factors. And the State certainly would request a limited instruction from the Court that this [testimony] is only to be considered for corroboration purposes[.]

Defense counsel agreed that "where an expert testifies the victim is suffering from PTSD, . . . the testimony must be limited to the corroboration of the victim and could not be admitted . . . for the sole purpose of proving that a rape or a sexual abuse has, in fact, occurred." When the trial court overruled Defendant's objection to Ms. Cobb's PTSD testimony, defense counsel requested in the absence of the jury that the court give the limiting instruction "at the time of [Ms. Cobb's] testimony regarding the corroboration purposes only so the jury doesn't get confused."

When the jury returned to the courtroom, the trial court instructed it as follows:

> Okay. Now, the testimony that you all are going to hear from this witness is what's called opinion testimony, and it's going to be admitted solely for the purpose of corroborating other testimony. You're going to hear evidence about post[-]traumatic stress disorder.
>
> You're not to consider any evidence of [PTSD] as evidence of whether or not the offense charged in this case actually occurred; but, rather, you can receive and consider that evidence solely for two purposes: One purpose is to corroborate the testimony of witnesses that you have previously heard testify in this case. And the second reason is to explain, if you so find, conduct or behavior of the alleged victim.
>
> So this . . . witness qualifies as an expert. She is an expert. I'll give you more instructions about how you're – what you are to do with expert testimony before you begin your deliberations.

Defendant did not object to the instruction as given. When Ms. Cobb subsequently testified that, after performing a psychological assessment "directly associated with post[-]traumatic stress disorder," she "diagnosed [G.J. with] PTSD," Defendant objected "[on the] same grounds as previously stated in this area."

At trial, although Defendant objected contemporaneously to Ms. Cobb's statement that she "diagnosed [G.J. with] PTSD," he did not do so on the basis that the testimony impermissibly vouched for G.J.'s credibility or the veracity of the sexual abuse allegations. Defendant's "previously stated" ground for objecting to Ms. Cobb's PTSD testimony was that "a licensed clinical social worker is not sufficiently qualified to give a medical opinion or a medical diagnosis of post[-]traumatic stress disorder, which is a documented psychiatric disorder[.]" Thus, when defense counsel objected to Ms. Cobb's statement that she "diagnosed PTSD" on "the same grounds as previously stated in this area," counsel was ostensibly referring to its earlier contention that Ms. Cobb was "not sufficiently qualified to give a medical opinion or a medical diagnosis of [PTSD]."[5]

This conclusion is consistent with defense counsel's statements at a 4 February 2015 hearing on Defendant's request that the State specify

5. On appeal, Defendant does not challenge Ms. Cobb's qualifications to give a medical opinion or diagnosis regarding PTSD.

the bases for the opinions of its expert witnesses. There, counsel said of Ms. Cobb: "[T]he only thing I can reference [as] an opinion is . . . the statement . . . that [G.J.] suffers from PTSD. If that in fact is [Ms. Cobb's] opinion I need to know that that's her opinion and how she comes to that diagnosis *because she's not a medical doctor* and there is nothing in her report that indicates that."

Defendant also submitted motions *in limine* on 16 February 2015 to exclude certain expert testimony. With respect to Dr. Goodpasture and Ms. Stewart *only*, Defendant argued the trial court should prohibit any opinion "to the effect that a finding of no physical evidence of molestation is not inconsistent with molestation" because "admission of this evidence could only be used *to improperly bolster the testimony of the prosecuting witness*, which is the sole evidence in this case of the alleged abuse." Defendant also asked that the court prohibit Ms. Cobb "from referencing in any way that the prosecuting witness has been diagnosed with post [-]traumatic stress disorder[;]" however, Defendant's only arguments in support of this request were that

> [Ms.] Cobb, a licensed social worker, is not qualified to make and the [S]tate has not offered any evidence through any other expert as to how such diagnosis was made or if it was made. The admission of such evidence without . . . a properly qualified expert witness would violate Rule 403 in that it would be more prejudicial than probative in its value. Further, the admission of such evidence . . . would violate [N.C.G.S. §] 15A-903 as no such evidence from any medical expert was proffered through discovery . . . . Further, the admission of such testimony . . . would violate Rule 703 of the Rules of Evidence in that [*Ms.*] *Cobb is not qualified as an expert in the area of post[-]traumatic stress disorder diagnosis.*

Defendant did not argue, as he did with respect to Dr. Goodpasture and Ms. Stewart, that Ms. Cobb's PTSD opinion testimony might "be used to improperly bolster the testimony of the prosecuting witness."

The argument Defendant makes on appeal – that Ms. Cobb's testimony about her PTSD diagnosis impermissibly "corroborated G.J.'s testimony that the alleged sexual assault by [Defendant] was the *source* of the resulting PTSD" – was never raised before the trial court. North Carolina Rule of Appellate Procedure 10(a)(1) requires that a criminal defendant present specific and detailed objections to a trial court's evidentiary rulings in order to preserve an issue for appellate review. *See*

State v. Rayfield, 231 N.C. App. 632, 637, 752 S.E.2d 745, 751 (2014). For example, in *State v. Rainey*, 198 N.C. App. 427, 680 S.E.2d 760 (2009), the defendant argued on appeal that certain evidence was barred by the Confrontation Clause. This Court held the defendant failed to properly preserve the issue for appellate review because, while defendant had objected at trial on general constitutional and due process grounds, he "did not specifically object on Confrontation Clause grounds." *Id.* at 433, 680 S.E.2d at 766-67. The general constitutional objections were insufficient under N.C.R. App. P. 10(a)(1) to preserve the more specific Confrontation Clause argument for appellate review. Likewise, "[a] party must make a specific objection to *the content of the testimony* or the qualifications of a witness as an expert in a particular field; a general objection will not preserve the matter for appellate review." *State v. Faulkner*, 180 N.C. App. 499, 512, 638 S.E.2d 18, 28 (2006) (emphasis added). In this case, Defendant's objections based on Ms. Cobb's qualifications to give a medical opinion were insufficient to preserve an argument that Ms. Cobb's PTSD testimony impermissibly vouched for G.J.'s credibility.

Defendant cites *State v. Mendoza-Mejia*, ___ N.C. App. ___, 780 S.E.2d 891, 2015 WL 7729215 (2015), a recent unpublished decision of this Court, that held certain witness testimony impermissibly vouched for the credibility of the prosecuting witness. This Court concluded that

> in juvenile sexual abuse cases where the State relies on the victim's testimony without any physical evidence, witnesses are not permitted to testify that they believe the victim's testimony or otherwise suggest that the victim is telling the truth. This Court has held that this type of vouching testimony is prejudicial and therefore reversible error.

Id., ___ N.C. App. at ___, 780 S.E.2d at ___, 2015 WL 7729215 at *1. However, Defendant overlooks the fact that in *Mendoza-Mejia*, the defendant specifically "objected to [the two witnesses'] testimony *on the ground that* [it] . . . impermissibly vouched for [the victim's] credibility, but the trial court overruled the objection[s]." *Id.* (emphasis added). The same is not true in Defendant's case. Without specifically objecting to Ms. Cobb's PTSD testimony on the ground that it impermissibly vouched for G.J.'s credibility, Defendant failed to preserve this argument.

"Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012); *see also State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002) (observing that "plain error analysis applies only to jury instructions

and evidentiary matters[.]"). "To have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error." *Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333 (citing N.C.R. App. P. 10(a)(4)). Because Defendant "has not alleged plain error in his arguments to this Court, he has waived appellate review . . . on such grounds." *State v. Thibodeaux*, 352 N.C. 570, 582, 532 S.E.2d 797, 806 (2000) (citations omitted).

V. G.J.'s Sexual History

A. *Standard of Review*

[4] Defendant also contends the trial court erroneously precluded Defendant from cross-examining Ms. Stewart and Ms. Cobb about information in their treatment records regarding G.J.'s sexual activity with partners other than Defendant. Defendant argues this evidence was not barred by the "rape shield law" codified in N.C. Gen. Stat. § 8A-1, Rule 412, and that the trial court improperly concluded the evidence was more prejudicial than probative. "We review the trial court's rulings as to relevance with great deference. . . . [T]he same deferential standard of review [applies] to the trial court's determination of admissibility under Rule 412." *State v. Davis*, 237 N.C. App. 481, 488, 767 S.E.2d 565, 570 (2014) (quoting *State v. Khouri*, 214 N.C. App. 389, 406, 716 S.E.2d 1, 12-13 (2011)).

B. *Analysis*

At trial, Defendant sought to cross-examine the State's expert witnesses about G.J.'s consensual sexual activity with other individuals. During Ms. Cobb's testimony, defense counsel argued in *voir dire* that the information was relevant

> first of all, because [Ms. Cobb] incorporated [the information] in the material she used to render an expert opinion. Anything that an expert has relied upon under [evidentiary] Rule 702 on the basis thereof of [evidentiary] Rule 705, when requested by counsel must be produced and is subject to cross-examination. And in this case, [Ms. Cobb has] very clearly incorporated it in her opinion. She's referred multiple times to the assessment and the factors in it in supporting her opinion of PTSD and all of which she's rendered an opinion upon. This would formulate an underlying basis of the opinion by her own testimony, so anything in that is entitled to be cross-examined on without relevance to Rule 412 or otherwise. The relevance is

> she's used it in formulating her opinion. And as an expert, anything considered by the expert is fair game to be cross-examined upon, whether or not it is actually incorporated –
>
> COURT: So you think [Rule] 412 – if it's her opinion, 412 doesn't even matter?
>
> [DEFENSE COUNSEL]: Correct . . . . Once an expert incorporates material like that into their review, . . . if you tender that person as an expert, then we're entitled to full and wide cross-examination on everything that expert considered whether they chose to incorporate it in their opinion or not.

The State contended that evidence of G.J.'s consensual sexual activity fell squarely within Rule 412's "rule of exclusion." The trial court then permitted both Defendant and the State to question Ms. Cobb about the extent to which G.J.'s sexual activity "assisted [her] in formulating [the] opinion that [G.J.] suffered from post[-]traumatic stress disorder[.]" Defense counsel had the following exchange with Ms. Cobb:

> [DEFENSE COUNSEL]: You said you wouldn't have taken that into account in doing your diagnosis of PTSD, correct?
>
> [MS. COBB]: I wouldn't have.
>
> [DEFENSE COUNSEL]: So in that case, you took this information and discarded it before incorporating your opinion, correct?
>
> [MS. COBB]: The fact that [G.J.] had any acts currently of consensual sexual acts, anything, that runs the gamut, from kissing on down the line, did not formulate my opinion in the diagnosis.
>
> [DEFENSE COUNSEL]: Okay. But you asked about it?
>
> [MS. COBB]: I did.
>
> [DEFENSE COUNSEL]: And so you took that information into account whether you chose to incorporate it in your opinion or not, correct?
>
> [MS. COBB]: I took it into account, and based on – and in that – taking into account, as it was not relevant, it did not sway my opinion.

> [DEFENSE COUNSEL]: So you, as an expert, made a determination that you did not feel it was relevant to your opinion, correct?
>
> [MS. COBB]: It was not relevant to the diagnosis I made.
>
> [DEFENSE COUNSEL]: But you did, in fact, seek that information in your form and obtained it and then chose, in formulating your opinion, not to incorporate it?
>
> [MS. COBB]: It's not relevant in the diagnoses [sic] of PTSD.
>
> [DEFENSE COUNSEL]: And that is what your opinion is, that it's not relevant, correct?
>
> [MS. COBB]: It's not anywhere in the criteria, so it's my opinion and multiple people's opinion.

The trial court ruled it would "exclude any evidence whatsoever as to any sexual activity by the victim." When defense counsel reasserted its desire to cross-examine Ms. Cobb about G.J.'s sexual activity, the trial court responded: "Well, [Ms. Cobb] just got through saying that she took nothing into account involving [G.J.'s] sexual history. . . . So . . . I don't even feel the need to do a balancing test . . . . [T]here's no relevance to it whatsoever."

Rule 412 provides that ordinarily, "sexual behavior of [a] complainant is irrelevant to any issue in the prosecution" and is thus inadmissible as evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 412 (2015); *Davis*, 237 N.C. App. at 488, 767 S.E.2d at 569-70. The statute also sets forth four exceptions to the otherwise categorical exclusion, none of which Defendant argues applied in this case. *See* N.C. Gen. Stat. § 8C-1, Rule 412(b) (2015). Pursuant to Rule 412, before a complaining witness may be questioned about sexual activity other than the sexual act(s) at issue in the trial,

> the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. . . . [T]he court shall conduct an *in camera* hearing . . . to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. . . . If the court finds that the evidence is relevant, it shall enter an order stating that the evidence

> may be admitted and the nature of the questions which will be permitted.

N.C. Gen. Stat. § 8C-1, Rule 412(d) (2015).

Defendant cites *State v. Martin*, ___ N.C. App. ___, 774 S.E.2d 330 (2015), for the unremarkable proposition that Rule 412's exceptions are "not confined to those listed in the statute." In *Martin*, this Court reversed a trial court's determination that "[certain] evidence was *per se* irrelevant because the evidence did not fit under any of the four exceptions provided in our Rape Shield Statute[.]" *Id.* at ___, 774 S.E.2d at 332. We noted that "our Court has [previously] held that there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute." *Id.* at ___, 774 S.E.2d at 335-36 (citations omitted); *see also State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982) (holding that the four exceptions in the rape shield statute are not "the sole gauge for determining whether evidence is admissible in rape cases."). The *Martin* defendant sought to introduce evidence for the purpose of showing the victim had a motive to falsely accuse him of sexual assault. We held that the trial court

> should have looked beyond the four [exceptions in Rule 412] to determine whether the evidence was, in fact, relevant to show [the victim's] motive to falsely accuse [the defendant] and, if so, conducted a balancing test of the probative and prejudicial value of the evidence under Rule 403 or [whether it] was otherwise inadmissible on some other basis[.]

Id. at ___, 774 S.E.2d at 336; *see also State v. Mbaya*, ___ N.C. App. ___, ___ S.E.2d ___ (2016), WL 5030402 at *5-8 (discussing and distinguishing *Martin*).

In the present case, the trial court followed the precise approach prescribed in *Martin*. Although Defendant sought to introduce evidence about G.J.'s sexual history for a purpose that did not fit within any of Rule 412's four exceptions, the trial court nonetheless conducted a *voir dire* hearing on the matter, allowing arguments from both Defendant and the State regarding the purported relevancy of the evidence. After Ms. Cobb was questioned extensively regarding the extent to which G.J.'s sexual conduct with other individuals informed Ms. Cobb's PTSD diagnosis, the trial court concluded the evidence was not relevant. Having found the evidence irrelevant, the trial court was not required under *Martin* to proceed to a balancing test of the probative and prejudicial

value of the evidence. Pursuant to the "great deference" accorded to a trial court's determinations of relevancy under Rule 412, and in light of Ms. Cobb's repeated statements that G.J.'s sexual history had no bearing whatsoever on her PTSD diagnosis, we conclude the trial court did not err in excluding the evidence as irrelevant. Moreover, "we review errors committed by the trial court in excluding relevant evidence under Rule 412 for prejudice." *Davis*, 237 N.C. App. at 489, 767 S.E.2d at 570. Even if G.J.'s sexual conduct with other individuals was erroneously excluded, Defendant presents no plausible argument that, had the jury heard this evidence, there is a reasonable possibility it would have reached a different result.

VI. Conclusion

For the reasons stated above, we find no error in Defendant's trial.

NO ERROR.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
BARRY RANDALL REVELS, Defendant

No. COA16-318

Filed 6 December 2016

1. Contempt—civil and criminal—distinct conduct with partially overlapping facts

Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court erroneously found him in both civil and criminal contempt based on the same conduct. It was readily apparent from the trial court's order that defendant was in civil and criminal contempt for distinctly separate and discrete conduct based on a partially overlapping nucleus of facts.

2. Contempt—criminal—punitive punishment

Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court erred by finding him in criminal contempt

and imposing a civil punishment. The sentence imposed for the criminal contempt of court was clearly punitive in nature.

3. Contempt—criminal—jurisdiction—show cause order

Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that the trial court's show cause order failed to adequately allege that he was subject to being found in criminal contempt of court with sufficient specificity so as to confer jurisdiction upon the trial court. The trial court was fully authorized to find defendant in criminal contempt because it entered a show cause order requiring him to appear in court and explain why he had failed to comply with the temporary restraining order and preliminary injunction.

4. Contempt—omission of term "guilty"

Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that his conviction should be overturned because the trial court never expressly used the term "guilty" in finding him in contempt of court. Defendant could not show that but for the omission of such language the trial court would have reached a contrary result.

5. Contempt—effective assistance of counsel

Where the trial court found defendant in both civil and criminal contempt of court, the Court of Appeals rejected defendant's argument that he received ineffective assistance of counsel due to his counsel's failure to object to the criminal contempt proceedings. Defendant could not show that the trial court erred procedurally in finding him in civil and criminal contempt of court, so he could not demonstrate that his trial counsel's failure to object to the proceedings affected the outcome.

Judge ELMORE dissenting.

Appeal by defendant from order entered 23 September 2015 by Judge Lisa C. Bell in Cleveland County Superior Court. Heard in the Court of Appeals 7 September 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Keith Clayton, for the State.

Amanda S. Zimmer for defendant-appellant.

ENOCHS, Judge.

Barry Randall Revels ("Defendant") appeals from the trial court's order finding him in criminal contempt of court. On appeal, Defendant contends that the trial court erred by (1) finding him in both civil and criminal contempt based on the same conduct; (2) finding him in criminal contempt of court; (3) relying upon a fatally defective show cause order thereby depriving it of jurisdiction; and (4) failing to enter a finding of guilty with regard to its determination that Defendant was in criminal contempt of court. Defendant also asserts that he received ineffective assistance of counsel. After careful review, we affirm.

Factual Background

RST Global Communications, LLC ("RST") is a company located in Cleveland County, North Carolina which is in the business of installing and maintaining fiber optic networks and offering network communication services to third parties. Defendant is a 30% member and former head of day-to-day operations of RST. Defendant ran the company's daily operations from his home address located at 335 Magness Road in Shelby, North Carolina.

In early 2014, RST became aware that Defendant was improperly using company funds from RST's bank accounts for personal debts and expenditures. As a result, a meeting of RST's members was called by RST's Chief Executive Officer, Dan Limerick ("Limerick"). A series of unanimous resolutions were approved at the meeting including that (1) RST operations would be transferred to the company's headquarters at 1300 South Dekalb Street in Shelby, North Carolina; (2) Doug Brown ("Brown") would assume responsibility for RST's day-to-day operations; (3) Defendant would no longer be paid a salary; and (4) all company-issued credit and debit cards would be turned in and no longer used without the express authorization of RST's members.

Defendant refused to comply with these resolutions and retained RST records, data, and property at his personal residence. He also continued to communicate with other business entities on RST's behalf and refused to turn over his company issued credit and debit cards.

After several "actions without meetings" issued by Limerick and Brown demanding that Defendant (1) return items of RST's property including checkbooks, credit and debit cards, keys, lock combinations, account login and password information; (2) have all company mail being sent to his residence rerouted to the South Dekalb Street Office; and (3) remove himself from all company bank accounts, Defendant

still refused to comply. As a result, RST filed a verified complaint and motion for a temporary restraining order ("TRO") against Defendant in Cleveland County Superior Court on 30 April 2015.

A hearing on RST's motion for a TRO was held before the Honorable Forrest Donald Bridges on 4 May 2015, and on 5 May 2015, Judge Bridges granted RST's motion and entered a TRO against Defendant.

Judge Bridges continued the matter until 6 May 2015 in order to give Defendant the opportunity to obtain counsel. Defendant did not attend the 6 May 2015 hearing, and the court issued a second TRO on 8 May 2015 incorporating the terms of the 5 May 2015 TRO and adding several additional provisions thereto.

At a subsequent hearing on 18 May 2015, RST moved for a preliminary injunction and submitted the sworn affidavit of Brown delineating Defendant's failure to return RST's property or otherwise cooperate with Judge Bridges' TRO. The court entered an order for Defendant to show cause and a preliminary injunction that same day.

On 8 June 2015, a hearing on the show cause order was held before the Honorable Lisa C. Bell. At the outset of the proceedings, Judge Bell informed Defendant that the hearing would determine whether he would be found in criminal or civil contempt. The case was ultimately continued several times until 23 September 2015.

At the 23 September 2015 hearing, RST presented evidence that Defendant had not complied with the TRO or the preliminary injunction. As a result, Judge Bell found Defendant in both civil and criminal contempt of court and entered corresponding orders on that same day. On 23 October 2015, Judge Bell entered a detailed order of criminal and civil contempt laying out findings of fact supporting her conclusion that Defendant was in both civil and criminal contempt of court. Defendant gave oral notice of appeal of the 23 September 2015 criminal contempt order in open court.

Analysis

I. Finding Both Civil and Criminal Contempt Based Upon the Same Conduct

[1] Defendant first contends on appeal that the trial court found him to be in both civil and criminal contempt based upon the same conduct in violation of N.C. Gen. Stat. § 5A-12(d) (2015) and N.C. Gen. Stat. § 5A-21(c) (2015). We disagree.

> At the outset we note that contempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.
>
> A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. The importance in distinguishing between criminal and civil contempt lies in the difference in procedure, punishment, and right of review.

O'Briant v. O'Briant, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (internal citations omitted).

Defendant is correct as a general proposition that a person cannot be found in both civil and criminal contempt for the same conduct. *See* N.C. Gen. Stat. § 5A-12(d) ("A person held in criminal contempt under this Article shall not, for the same conduct, be found in civil contempt under Article 2 of this Chapter, Civil Contempt."); N.C. Gen. Stat. § 5A-21(c) ("A person who is found in civil contempt under this Article shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter."). However, where divergent and distinct conduct arising from the same underlying nucleus of facts would give rise to independent findings of both civil and criminal contempt, a trial court does not err by finding a person in criminal contempt for certain conduct while also finding him in civil contempt for other separate and discrete conduct. *See*, *e.g.*, *Adams Creek Assocs. v. Davis*, 186 N.C. App. 512, 527, 652 S.E.2d 677, 687 (2007) ("Defendants argue that they were found in civil and criminal contempt for the same behavior, in violation of N.C. Gen. Stat. § 5A-21(c) and 5A-23(g), which prohibit finding a defendant in both civil and criminal contempt for the same behavior. . . . [D]efendants were found in civil contempt for failing to comply with the court's 2004 order, and were found in criminal contempt for their testimony threatening to

disobey future orders of the court. Thus, defendants were found in civil and criminal contempt on the basis of different acts.”).

Indeed, in *Adams Creek Assocs.*, the defendants were found in criminal contempt for continuing to trespass upon the plaintiff’s property in defiance of the trial court’s order. They then testified at trial that they intended to continue to trespass on the property in the future because they erroneously believed that the property was theirs. *Id.* Despite the overlapping nucleus of facts — to wit, trespass on the plaintiff’s real property — the trial court also found them in civil contempt. *Id.* On appeal, the defendants argued “that they were found in civil and criminal contempt for the same behavior, in violation of N.C. Gen. Stat. § 5A-21(c) and 5A-23(g), which prohibit finding a defendant in both civil and criminal contempt for the same behavior.” *Id.* In rejecting this argument, this Court emphasized that “defendants were found in civil contempt for failing to comply with the court’s 2004 order, and were found in criminal contempt for their testimony threatening to disobey future orders of the court.” *Id.* Therefore, both the civil and criminal contempt orders were based upon the defendants’ trespass on the exact same piece of land, but were deemed distinguishable based on the diverging *conduct* and intent of the defendants — that is the disobedience of a past trial court order on the one hand accounting for one type of conduct, and the intention to continue to disobey the court’s orders in the future as a separate type of conduct. *Id.*

This is in line with the *O’Briant* line of cases which emphasize that “ ‘[a] major factor in determining whether contempt is criminal or civil is the *purpose* for which the power is exercised.’ ” *Watson v. Watson*, 187 N.C. App. 55, 61, 652 S.E.2d 310, 315 (2007) (quoting *Bishop v. Bishop*, 90 N.C. App. 499, 503, 369 S.E.2d 106, 108 (1988)).

> Criminal contempt is imposed in order to preserve the court’s authority and to punish disobedience of its orders. Criminal contempt is a crime, and constitutional safeguards are triggered accordingly. On the other hand, when the court seeks to compel obedience with court orders, and a party may avoid the contempt sentence or fine by performing the acts required in the court order, the contempt is best characterized as civil.

Id. (internal citations omitted).

In the present case, the trial court’s 23 October 2015 order of criminal and civil contempt was divided into two parts. In the first section, the trial court, applying the beyond a reasonable doubt standard, found that

Defendant failed to (1) cause RST's mail to be delivered to the Dekalb Street address in violation of the TRO; (2) deliver all of RST's equipment to the Dekalb Street address including but not limited to at least two phones as required by the TRO; (3) provide account login and password information in violation of the TRO; and (4) relinquish RST's credit and debit cards in violation of the TRO and preliminary injunction.

In the second section of the order, the trial court, applying the greater weight of the evidence standard, found Defendant in civil contempt for (1) instructing third-parties to break RST's fiber optic cables and not to repair them until he got a new contract; (2) using RST's equipment and business connections to continue to appropriate business opportunities for his newly formed business; and (3) retaining RST's equipment detailed in the TRO and preliminary injunction.

Here, it is readily apparent that, in accord with *Adams Creek Assocs.*, the trial court found Defendant in civil contempt based on his continued conduct in violation of the TRO and preliminarily injunction in attempting to frustrate RST's business interests while simultaneously attempting to further his own at their expense, and found him in criminal contempt based upon his *past conduct*, that is, his refusal to obey the trial court's TRO and preliminary injunction in failing to adhere to their terms including the return of various company assets of RST. As a result, the trial court did not find Defendant in civil and criminal contempt for the same conduct, but instead for distinctly separate and discrete conduct based on a partially overlapping nucleus of facts. Therefore, Defendant's argument on this issue is overruled.

II. Criminal Contempt

[2] In a related argument, Defendant asserts that the trial court erred in finding him in criminal contempt because the punishment imposed upon him was civil in nature as opposed to the type of punitive punishment reserved for those found to be in criminal contempt. We disagree.

As noted above, the trial court is fully authorized to impose both civil and criminal contempt in the same proceeding as long as they are not imposed for the same conduct. Therefore, the trial court was within its authority to impose upon Defendant both (1) criminal contempt to punish Defendant's past conduct in failing to adhere to the TRO and preliminary injunction; and (2) civil contempt designed to compel Defendant to comply with its directives.

In the present case, the trial court ordered, in pertinent part, as follows:

> Effective immediately, Defendant will serve a 7-day active sentence in the Cleveland County jail of a total sentence of 30 days in jail for his willful criminal contempt of this Court. The remaining 23 days will be suspended, and Defendant will be on unsupervised probation for a period of 12 months.

This sentence was clearly punitive in nature and was imposed as punishment for Defendant's criminal contempt of court.

The trial court then further separately ordered the following: "Defendant will be and is indefinitely incarcerated in the Cleveland County jail for his willful civil contempt of this Court, which will begin immediately upon the conclusion, release, or other cessation of his 7-day active sentence until he complies with the following purge conditions . . . ." The trial court then imposed conditions that Defendant return RST's assets, complete a change of address causing RST's business mail to be sent to the Dekalb Street address instead of to his house, and surrender his company debit and credit cards to RST.

The latter portion of the trial court's order clearly imposes conditions for Defendant's release from imprisonment *after the conclusion* of his criminal contempt sentence. The punishment is indefinite and remedial in nature and designed to ensure compliance with the court's orders as opposed to a punishment for past violations of the TRO and preliminary injunction. As a result, both the sentence imposed for criminal contempt and the sentence imposed for civil contempt are consecutive in nature and do not overlap in the manner Defendant suggests. Consequently, Defendant's argument on this issue is without merit.

III. Jurisdiction

[3] Defendant next argues that the trial court's show cause order failed to adequately allege that he was subject to being found in criminal contempt of court with sufficient specificity so as to confer jurisdiction upon the trial court. We disagree.

N.C. Gen. Stat. § 5A-13(b) (2015) provides that "[a]ny criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15." N.C. Gen. Stat. § 5A-15(a) (2015) in turn provides, in pertinent part, that "[w]hen a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time

specified in the order and show cause why he should not be held in contempt of court." *See State v. Coleman*, 188 N.C. App. 144, 149, 655 S.E.2d 450, 453 (2008) ("For indirect criminal contempt proceedings in which a trial court is not allowed to proceed summarily, a show cause order is analogous to a criminal indictment and is the means by which the defendant is afforded the constitutional safeguard of notice." (internal footnote omitted)). That is precisely what occurred in the present case.

Moreover, our caselaw has consistently held that a show cause order is sufficient to confer jurisdiction on a trial court for finding a defendant in indirect criminal contempt where it incorporates by reference a prior court order that a defendant has failed to comply with.

> When issuing a criminal contempt citation, the presiding judge need only enter an order directing the person to appear before a judge and show cause why he should not be held in contempt of court. Unlike a citation for *civil* contempt, which requires the judge's order be accompanied by a sworn affidavit and a finding of probable cause, there is no requirement that the judge make a finding of improper conduct upon the issuance of a criminal contempt citation.
>
> In this case, [the trial court judge's] order directed [d]efendant to appear and show cause why he should not be punished for contempt. This language has been construed to have reference to criminal contempt. Indeed, [d]efendant refers to the order as one for criminal contempt in his own motion to dismiss. Furthermore, the order seeks to punish [d]efendant for interfering with the administration of justice, a function of criminal contempt, rather than compel obedience to an order entered to benefit a private party, a function of civil contempt. Accordingly, [the judge] was not required to make a specific finding of improper conduct, and [the court] properly denied [d]efendant's motion to dismiss.

State v. Pierce, 134 N.C. App. 148, 151, 516 S.E.2d 916, 919 (1999) (internal citations, quotation marks, and ellipses omitted); *see also Bennett v. Bennett*, 71 N.C. App. 424, 322 S.E.2d 439 (1984) (outstanding show cause order upon which no action had been taken satisfied statutory requirement of N.C. Gen. Stat. § 5A-15 that a contempt hearing be held on a show cause order).

Consequently, because the trial court entered a show cause order requiring Defendant to appear in court and explain why he had failed to comply with the TRO and preliminary injunction, it was fully authorized to find him in criminal contempt of court. Defendant's argument that the trial court never gained jurisdiction over the criminal contempt proceedings should, as a result, be overruled.[1]

IV. Guilty Mandate

[4] Defendant next argues that because the trial court never expressly used the term "guilty" in finding him in contempt of court, his conviction must be overturned. We disagree.

It is apparent in the present case that the trial court found Defendant guilty of both civil and criminal contempt. Its order clearly stated that "Defendant is in civil and criminal contempt of this Court[.]" The trial court based this conclusion upon application of the beyond a reasonable doubt standard to the evidence before it, which is supported by the record.

Our Supreme Court has held that "insubstantial technical errors which could not have affected the result will not be held prejudicial. The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred." *State v. Alexander*, 279 N.C. 527, 538, 184 S.E.2d 274, 282 (1971) (internal citation omitted); *see State v. Keyes*, 56 N.C. App. 75, 79, 286 S.E.2d 861, 863-64 (1982) ("Mere technical error is not sufficient to require the granting of a new trial. The error must be so prejudicial as to affect the result.").

Defendant's attempt to rely on this Court's decision in *State v. Phillips*, 230 N.C. App. 382, 750 S.E.2d 43 (2013), in arguing that the trial court's failure to state Defendant was "guilty" is misplaced. In that case, this Court found that the trial court's order was fatally defective because the trial court had failed to indicate that it had applied the beyond a reasonable doubt standard, thereby precluding this Court on appeal from being able to discern that it had actually done so in accordance with the law. *Id.* at 385, 750 S.E.2d at 45. Such is not the case here where the trial court — as set forth in the plain language of its order — correctly

1. Defendant also makes a brief argument that we should impute the requirements for a larceny indictment onto a show cause order alleging criminal contempt. Defendant has cited to no case law in support of this proposition and our research has revealed none. Consequently, this argument is without merit.

applied the beyond a reasonable doubt standard to the evidence before it and unambiguously determined that Defendant was, in fact, in criminal contempt of court. Defendant was then sentenced accordingly.

The fact that the trial court did not use the talismanic term "guilty" here does not affect the outcome of Defendant being found in criminal contempt of court. Defendant cannot show that "but for" the omission of such language, the trial court would have reached a contrary result. Consequently, Defendant cannot establish that he was prejudiced and his argument on this issue is overruled.

V. Ineffective Assistance of Counsel

[5] Defendant's final argument on appeal is that he received ineffective assistance of counsel due to his trial counsel's failure to object to the criminal contempt proceedings. Defendant's argument is without merit.

> In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense.
>
> > Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Edgar, ___ N.C. App. ___, ___, 777 S.E.2d 766, 770-71 (2015) (internal citations and quotation marks omitted) (quoting *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006)).

Because, for the reasons stated above, Defendant cannot show that the trial court erred procedurally in finding him in civil and criminal contempt of court, it logically follows that he cannot demonstrate that his trial counsel's failure to object to the proceedings affected the outcome. Therefore, he cannot successfully establish an ineffective assistance of counsel claim.

Conclusion

For the reasons stated above, we affirm the trial court's criminal contempt order.

AFFIRMED.

Judge ZACHARY concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

I respectfully disagree with the majority's conclusion that the trial court found defendant in both civil and criminal contempt for "distinctly separate and discrete conduct." Defendant's same conduct—failing to return company property in willful violation of its orders—underlies both contempt adjudications, in direct violation of our general statutes. Accordingly, I respectfully dissent.

Because " '[d]efendant alleges a violation of a statutory mandate, and '[a]lleged statutory errors are questions of law[,]' " *State v. Reeves*, 218 N.C. App. 570, 576, 721 S.E.2d 317, 322 (2012) (quoting *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011)), we employ *de novo* review of defendant's challenge. *Id.*

Chapter 5A of our general statutes grants a court the power to punish a party for certain conduct by finding him or her in contempt of court, which comes in two forms: criminal contempt, governed by Article 1, *see* N.C. Gen. Stat. §§ 5A-11 to -17 (2105), and civil contempt, governed by Article 2, *see* N.C. Gen. Stat. §§ 5A-21 to -25 (2105). Under Article 1, N.C. Gen. Stat. § 5A-11(a)(1)–(10) enumerates conduct constituting criminal contempt, including "[w]illful disobedience of . . . a court's . . . order." *Id.* § 5A-11(a)(3). Under Article 2, N.C. Gen. Stat. § 5A-21(a) describes conduct constituting civil contempt and provides, in pertinent part:

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

Generally, a trial court imposes criminal contempt to " 'punish[ ] for acts already committed that have impeded the administration of justice,' " and civil contempt " 'to coerce disobedient defendants into complying with orders of court.' " *Ruth v. Ruth*, 158 N.C. App. 123, 126, 579 S.E.2d 909, 912 (2003) (quoting *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984)). However, by statute, a court cannot punish a party twice by imposing both criminal and civil contempt for the same conduct. *Compare* N.C. Gen. Stat. § 5A-12(d) ("A person held in criminal contempt under this Article *shall not*, *for the same conduct*, be found in civil contempt under Article 2 of this Chapter, Civil Contempt." (emphasis added)), *with* N.C. Gen. Stat. § 5A-21(c) ("A person who is found in civil contempt under this Article *shall not*, *for the same conduct*, be found in criminal contempt under Article 1 of this Chapter." (emphasis added)). Yet the trial court here did just this when it found defendant in civil and criminal contempt based in large part upon the same conduct—his failing to return company property in willful violation of its TRO and preliminary injunction orders.

The relevant provisions of both orders are identical except for paragraph subheadings. The relevant paragraphs of the TRO provide:

> h. Defendant shall . . . take the following actions . . . as stated below:
>
> . . . .
>
> v. That all company-issued credit cards will be turned in and will not be used until and unless authorized by the Managers.
>
> i. Defendant shall . . . tak[e] the following actions within 24 hours of the entry of this order:
>
> i. . . .[R]eturn to Company Headquarters . . . any and all [company] property, including . . . the items listed below:
>
> 1. All office and other equipment purchased by or for the use of the Companies, including computers, tablets, phones, drones, audiovisual equipment, etc.;
>
> 2. All hardcopy and electronic Company files;
>
> 3. Keys and lock combinations to access Company property and equipment, including the Shelby Headend, Kings Mountain Headend, Simulsat, all

> runs completed or in progress (such as Ballantyne, Wake Forest, etc.), and other assets;
>
> 4. All Company vehicles along with keys or fobs;
>
> 5. All checkbooks, credit cards, and debit cards; and
>
> 6. All account, login and password access information.
>
> . . . .
>
> iii. . . . [H]ave all mail currently being delivered to [defendant's] residential address or UPS or USPS boxes now be delivered to Company Headquarters[.]

After the contempt proceeding, the trial court entered an order finding defendant in both civil and criminal contempt simultaneously for his willful noncompliance with its orders. In the criminal contempt section of its order, the trial court made the following findings regarding defendant's conduct:

> a. Defendant failed to cause the Plaintiffs' mail to be delivered to Plaintiffs' headquarters . . . as required by paragraph (i)(iii) of the TRO and [an identical paragraph] of the Preliminary Injunction;
>
> b. *Defendant failed to deliver . . . equipment to Plaintiffs' headquarters* . . . including but not limited to at least two phone devices . . . as required by paragraph (i)(i)(1) of the TRO and [an identical paragraph] of the Preliminary Injunction;
>
> c. *Defendant failed to provide all account, login and password access information* . . . as required by paragraph (i)(i)(6) of the TRO and [an identical paragraph] of the Preliminary Injunction; and,
>
> d. *Defendant failed to relinquish the Plaintiffs' credit card and debit cards* as required by paragraphs (i)(i)(5) and (h)(v) of the TRO and [identical paragraphs] of the Preliminary Injunction.

(Emphasis added.) Based upon these findings, the trial court held defendant in criminal contempt for willful noncompliance with the TRO and preliminary injunction:

> At all times relevant to this proceeding Defendant had the ability to comply with these provisions of the TRO and Preliminary Injunction and has willfully failed to do so in criminal contempt of this Court as set forth in N.C.G.S. § 5A-11(a).

In the civil contempt section of its order, the trial court made the following findings regarding defendant's conduct:

> a. Defendant's instruction to third parties to break Plaintiffs' fiber optic cables and re-splicing them upon renewal of a contract as illustrated in Plaintiffs' Exhibit 12;
>
> b. Defendant's actions in establishing through the North Carolina Secretary of State an LLC known as RST Wireless without the Plaintiffs' knowledge and the engaging in both the purchase of equipment as well as exploration of utilizing Plaintiffs' existing networks in Wake Forest, North Carolina in order to provide wireless communication services; and,
>
> c. *Defendant's failure to return certain of Plaintiffs' equipment (as listed in Plaintiffs' Exhibit 12) as required by paragraphs (i)(i) of the TRO and (j)(i) of the Preliminary Injunction.*

(Emphasis added.) Based upon these findings, the trial court held defendant in civil contempt for willful noncompliance with the TRO and preliminary injunction:

> At all times relevant to this proceeding Defendant had the ability to comply with these provisions of the TRO and Preliminary Injunction and has willfully failed to do so in civil contempt of this Court as set forth in N.C.G.S. § 5A-21 . . . .

As shown, the trial court's order establishes that it found defendant in civil and criminal contempt for willful noncompliance with its orders based upon, in large part, defendant's same exact conduct—failing to return company property. Yet the trial court punished defendant twice by imposing both civil and criminal contempt sanctions. Although willful noncompliance with a court order may constitute *either* criminal contempt under section 5A-11(a)(3), or civil contempt under section 5A-21(a), a contemnor shall not be punished under *both* statutes based upon the same conduct. *See* N.C. Gen. Stat. §§ 5A-12(d), -21(c). Accordingly, I agree with defendant that, in violation of sections 5A-12(d)

and 5A-21(c), the trial court improperly found him in both criminal and civil contempt, and I would vacate the entire order.

The majority, however, relies on our decision in *Adams Creek Associates v. Davis*, 186 N.C. App. 512, 652 S.E.2d 677 (2007), to hold that the trial court here properly punished defendant twice by imposing both forms of contempt for "distinctly separate and discrete conduct." I disagree with the majority's expansive reading of our holding in *Adams Creek Assocs.* and its application of the reasoning in that case to support its holding in this case. The majority attaches significance to the fact in that case that the contempt orders were "based upon the defendants' trespass on the exact same piece of land," rather than the more relevant fact that the orders were based upon separate, contemptible acts.

In *Adams Creek Assocs.*, we affirmed a trial court's simultaneous civil and criminal contempt adjudications against two trespassers over the exact same piece of land only because the defendants committed independently contemptible acts: (1) willfully violating the court's orders by continuing to live and otherwise trespass on the property; and (2) displaying disparaging behavior during the contempt proceeding by testifying that they intended to continue trespassing regardless of court orders directing them otherwise. *Adams Creek Assocs.*, 186 N.C. App. at 527, 652 S.E.2d at 687. In that case, the defendants were "charged with contempt of court for their continued trespass on [particular] property following the entry of several court orders directing them not to trespass thereon," *id.*, and, after the contempt proceeding, the trial court entered two orders finding them in both civil and criminal contempt. *Id.* at 520, 652 S.E.2d at 683.

On appeal, we rejected the defendants' argument that the trial court erred by finding them in civil and criminal contempt for the same behavior because, in fact, the sanctions were based upon separate, contemptible conduct. *Id.* at 526–27, 652 S.E.2d at 686–87. We observed that, during the contempt proceeding, the defendants testified they "had in fact been living on the subject property or otherwise trespassing on it" and "would not follow future court orders directing them to vacate the property." *Id.* at 527, 652 S.E.2d at 687. Thus, we explained, the "defendants were found in civil contempt for *failing to comply with the court's [previous] order*, and were found in criminal contempt for their *testimony threatening to disobey future orders* of the court." *Id.* (emphasis added). Because the defendants "were found in civil and criminal contempt on the basis of different acts," we rejected the defendant's argument and affirmed the trial court's contempt adjudications. *Id.*

To be sure, although the *Adams Creek Assocs.* decision does not specify which criminal contempt ground enumerated in N.C. Gen. Stat. § 5A-11(a) applied to the defendants, we can glean insight from the *Adams Creek Assocs.* Court's discussion addressing the trial court's "misnomer" in finding the defendants in indirect, rather than direct, criminal contempt:

> In the instant case, defendants testified in the trial court's presence, constituting direct criminal contempt. However, the trial court mistakenly held them in indirect criminal contempt:
>
> > The testimony of the Defendants stating that they are not going to obey the orders of the court is disrespectful and disparages the respect due to the court and its orders.

Id. at 528, 652 S.E.2d at 687; *see also* N.C. Gen. Stat. § 5A-11(a)(2) ("Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority."). Based on this discussion, it is apparent that the defendants in *Adams Creek Assocs.* were being held in criminal contempt not for willful noncompliance with a court order, as here, but for their disparaging testimony. Thus, the contempt adjudications were based upon two independently contemptible acts.

Yet the majority relies on *Adams Creek Assocs.* to support its conclusion that defendant here was found in criminal and civil contempt for "distinctly separate and discrete conduct based on a partially overlapping nucleus of facts." In reaching this conclusion, the majority points out that "both the civil and criminal contempt orders were based upon the defendants' trespass on the exact same piece of land" and reasons that the defendants' conduct differed in that one act was "the[ir] disobedience of a past . . . order" and another act was "th[eir] intention to continue to disobey the court's orders." Thus, in applying *Adams Creek Assocs.*, the majority concludes:

> Here, it is readily apparent that, in accord with *Adams Creek Assocs.*, the trial court found Defendant in civil *contempt based on his continued conduct in violation of the TRO and preliminary injunction* in attempting to frustrate RST's business interests while simultaneously attempting to further his own at RST's expense, and found him in criminal contempt *based upon his past conduct, that is, his refusal to obey the trial court's TRO and*

> *preliminary injunction* in failing to adhere to their terms including the return of various company assets of RST.

(Emphasis added.) I disagree with this expansive reading of *Adams Creek Assocs. Adams Creek Assocs.* held that a contemnor simultaneously may be found in civil and criminal contempt at the same proceeding, provided he or she is punished for different conduct. In my view, the emphasis should not be that both orders were "based upon the defendants' trespass on the exact same piece of land," but that both orders were based upon independently contemptible conduct—willful disobedience with a court order and disparaging testimony threatening to disobey future court orders.

Here, unlike the defendants in *Adams Creek Assocs.*, defendant neither testified that he intended to retain plaintiffs' property nor that he would disobey future orders of the court. Unlike in *Adams Creek Assocs.*, the record here does not reveal two forms of contemptible conduct. Rather, the trial court's order indicates that it imposed both forms of contempt against defendant for willful noncompliance with its orders, basing its decision, in large part, upon defendant's failure to return company property, *see* N.C. Gen. Stat. § 5A-11(a)(3) ("Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution."), which I believe runs afoul of our general statutes.

Furthermore, the majority's holding effectively nullifies the statutory mandates that a party "shall not, for the same conduct" be punished for both civil and criminal contempt, *see* N.C. Gen. Stat. §§ 5A-12(d), -21(c), as every party charged with willful noncompliance of a court order whose only conduct was leaving uncorrected a single directive in that order would nonetheless be subject to both criminal and civil contempt, on the basis that past and continued violations of that order constitute separate, contemptible conduct.

Because the trial court here punished defendant twice by imposing both civil and criminal contempt sanctions against him based, in large part, upon the same exact conduct—violating its orders by failing to return company property—I believe the trial court violated the statutory mandates prohibiting it from finding a party in both forms of contempt for the same conduct. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JOSHUA ADAM STROESSENREUTHER

No. COA16-151

Filed 6 December 2016

1. Satellite-Based Monitoring—facial challenge to statute rejected—Fourth Amendment

Defendant's facial challenge to the satellite-based monitoring statute was rejected. Although the statute does not expressly authorize trial courts to consider the reasonableness of the monitoring under the Fourth Amendment, trial courts are free to address this issue and hold a hearing if necessary when defendants assert it.

2. Satellite-Based Monitoring—as-applied challenge to statute—Fourth Amendment—reasonableness inquiry

The satellite-based monitoring program was unconstitutional as applied to defendant. Under *Grady*, the trial court was required to consider the reasonableness of the satellite-based monitoring when defendant challenged the monitoring on Fourth Amendment grounds. The imposition of satellite-based monitoring was vacated and the case was remanded to the trial court to conduct the necessary reasonableness inquiry.

Appeal by defendant from order entered 29 October 2015 by Judge John E. Nobles, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 10 August 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant.

DIETZ, Judge.

Defendant Joshua Stroessenreuther appeals from the trial court's order imposing satellite-based monitoring. Relying on the U.S. Supreme Court's recent decision in *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), which held that satellite-based monitoring implicates the Fourth Amendment, Stroessenreuther argues that our State's satellite-based

monitoring laws are facially unconstitutional or, alternatively, unconstitutional as applied to him.

We reject Stroessenreuther's facial challenge. That challenge is premised on the notion that, because the satellite-based monitoring statute does not expressly authorize trial courts to consider the reasonableness of the monitoring under the Fourth Amendment, the law is facially unconstitutional. But the statute neither permits nor prohibits trial courts from addressing this constitutional argument—it is simply silent. As a result, trial courts are free to address this Fourth Amendment issue, and hold a hearing if necessary, when defendants assert it. Indeed, this Court has issued several recent decisions discussing the procedures trial courts should use when a Fourth Amendment argument is raised under *Grady*. These decisions confirm that trial courts can (and must) consider a Fourth Amendment challenge to satellite-based monitoring when a defendant raises it. Accordingly, Stroessenreuther's facial challenge is meritless.

The State concedes that Stroessenreuther's as-applied challenge is meritorious, and we agree. Under *Grady*, the trial court was required to consider the reasonableness of the satellite-based monitoring when Stroessenreuther challenged that monitoring on Fourth Amendment grounds. The trial court did not conduct that inquiry in this case, and we must therefore vacate the imposition of satellite-based monitoring. We remand this case for the trial court to conduct the necessary reasonableness inquiry described in our decisions in *State v. Blue*, __ N.C. App. __, __, 783 S.E.2d 524, 527 (2016) and *State v. Morris*, __ N.C. App. __, __, 783 S.E.2d 528, 530 (2016).

Facts and Procedural History

On 29 October 2015, Defendant Joshua Stroessenreuther entered an *Alford* plea to one count of indecent liberties with a child and one count of sex offense with a child as an adult offender. Stroessenreuther stipulated to a prior conviction for sex offense with a child as an adult offender. The trial court sentenced him to 300 to 420 months of imprisonment and ordered lifetime sex offender registration.

At the sentencing hearing, the State also requested lifetime satellite-based monitoring because Stroessenreuther had been convicted of a reportable offense under N.C. Gen. Stat. § 14–208.6 and qualified as a recidivist based on his prior conviction.

Stroessenreuther argued that "[t]he satellite-based monitoring statute violates the Federal and State Constitutions based both on their face

and as applied to this Defendant" because "[t]he imposition of satellite-based monitoring violates the defendant's right to be free from unreasonable searches and seizures." He relied on the U.S. Supreme Court's recent ruling in *Grady*. In *Grady*, the Supreme Court held that North Carolina's satellite-based monitoring program implicates the Fourth Amendment. 135 S. Ct. at 1371.

The State responded that there was no need to address the reasonableness of the monitoring under the Fourth Amendment because imposition of lifetime monitoring was required by the applicable statute. The trial court responded "I understand" and entered an order imposing lifetime satellite-based monitoring without addressing Stroessenreuther's Fourth Amendment argument. Stroessenreuther timely appealed.

Analysis

I. Facial Challenge

[1] Stroessenreuther first argues that our State's satellite-based monitoring statute is facially unconstitutional because it requires the trial court to impose satellite-based monitoring without permitting the trial court to consider whether that monitoring is reasonable under the Fourth Amendment. This, Stroessenreuther argues, violates the Supreme Court's holding in *Grady*, which held that satellite-based monitoring implicates the Fourth Amendment. As explained below, we reject this facial challenge because trial courts are capable of addressing any Fourth Amendment concerns raised by defendants before imposing satellite-based monitoring.[1]

"An individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid." *State v. Whiteley*, 172 N.C. App. 772, 778, 616 S.E.2d 576, 580 (2005). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

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1. Section 1–267.1(a1) of our General Statutes provides that "any facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County." But subsection (d) of the statute provides that this rule "applies only to civil proceedings" and "[n]othing in this section shall be deemed to apply to criminal proceedings." N.C. Gen. Stat. § 1–267.1(d). Although imposition of satellite-based monitoring is civil, not criminal, in nature, this satellite-based monitoring issue arose during a criminal sentencing proceeding. We interpret Section 1–267.1 to permit a criminal defendant to assert this type of constitutional challenge before a single trial judge during sentencing without having to transfer the issue to a three-judge panel.

Stroessenreuther contends that, in our State's satellite-based monitoring laws, "there is no opportunity provided for the state to present evidence to meet its burden of proving that the imposition of [satellite-based monitoring] is reasonable under the Fourth Amendment" and "no provision allowing the trial court to consider the reasonableness of [satellite-based monitoring] under the Fourth Amendment."

We agree with Stroessenreuther that the satellite-based monitoring statute does not expressly set out a procedure for hearing a Fourth Amendment argument challenging the reasonableness of the monitoring. *See* N.C. Gen. Stat. § 14–208.40A. But the statute also does not *prohibit* a trial court from hearing and considering that Fourth Amendment argument. This is a critical distinction. If the statute precluded trial courts from considering the reasonableness of the monitoring, the statute would be unconstitutional on its face. *Grady*, 135 S. Ct. at 1371. But merely lacking an express procedure for evaluating the reasonableness of the monitoring does not render the statute facially unconstitutional. There are countless examples of courts considering constitutional arguments despite no formal process for doing so. *See, e.g.*, *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015); *State v. Davis*, 96 N.C. App. 545, 386 S.E.2d 743 (1989).

Indeed, this Court has vacated and remanded several satellite-based monitoring cases to permit trial courts to engage in the proper analysis required by *Grady*. *See Blue*, __ N.C. App. at __, 783 S.E.2d at 527; *Morris*, __ N.C. App. at __, 783 S.E.2d at 530; *State v. Collins*, __ N.C. App. __, __, 783 S.E.2d 9, 16 (2016). These cases illustrate that trial courts can, and must, engage in that reasonableness inquiry when the defendant asserts a Fourth Amendment challenge, regardless of whether the statute sets out an express procedure for doing so. As a result, Stroessenreuther's facial challenge to our State's satellite-based monitoring statute is meritless.

II. As-Applied Challenge

[2] Stroessenreuther next argues that the satellite-based monitoring program is unconstitutional as applied to him because the trial court imposed that monitoring without first considering whether it was reasonable under the Fourth Amendment. The State concedes that, in light of *Grady*, the trial court erred by failing to engage in a reasonableness inquiry once Stroessenreuther asserted his Fourth Amendment claim. We agree. As in *Blue* and *Morris*, we vacate the order imposing satellite-based monitoring and remand for a new hearing in which the trial court can engage in the analysis outlined by this Court in those cases. *See*

Morris, __ N.C. App. at __, 783 S.E.2d at 530; *Blue*, __ N.C. App. at __, 783 S.E.2d at 527.

Conclusion

We vacate the trial court's order imposing satellite-based monitoring and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges ELMORE and DAVIS concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER GLENN TURNER

No. COA16-656

Filed 6 December 2016

Statutes of Limitation and Repose—driving while impaired—prosecution within two years

The trial court did not err by dismissing the charge of driving while impaired. The express language of N.C.G.S. § 15-1 required the State to prosecute defendant's misdemeanor charge within two years. Because the State failed to take any action in that time, prosecution was barred by the statute of limitations.

Appeal by the State from order entered 15 January 2016 by Judge Michael D. Duncan in Caldwell County Superior Court. Heard in the Court of Appeals 18 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for defendant-appellee.

CALABRIA, Judge.

The express language of N.C. Gen. Stat. § 15-1 required the State to prosecute defendant's misdemeanor charge within two years. Because the State failed to take any action in that time, prosecution was barred

by the statute of limitations, and the trial court did not err in dismissing the charge.

I. Factual and Procedural Background

On 7 August 2012, Christopher Glenn Turner ("defendant") received a citation for driving while impaired. Defendant was arrested and brought before a magistrate, who issued a magistrate's order. Defendant was never charged via indictment, presentment, or warrant.

On 26 November 2014, defendant moved to dismiss the charge, pursuant to N.C. Gen. Stat. §§ 15-1, 15A-953, and 15A-954, alleging the expiration of the statute of limitations. On 3 December 2014, defendant moved that he be charged in a new pleading, pursuant to N.C. Gen. Stat. § 15A-922(c). Judge Amy. S. Walker ("Judge Walker"), a District Court Judge in Caldwell County, held a hearing in response to defendant's motions. On 22 April 2015, Judge Walker entered a preliminary indication, holding that the statute of limitations barred prosecution of defendant. The State appealed to superior court.

On 1 October 2015, the superior court affirmed Judge Walker's preliminary indication, citing the explicit language of N.C. Gen. Stat. § 15-1, and our Supreme Court's decision in *State v. Underwood*, 244 N.C. 68, 92 S.E.2d 461 (1956). Thereafter, Judge Walker issued a final order of dismissal. The State appealed this dismissal, and on 15 January 2016, the Superior Court of Caldwell County entered an order affirming the dismissal.

The State appeals.

II. Standard of Review

> " 'Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court. In conducting this review, we are guided by the following principles of statutory construction.' " *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (quoting *In Re Proposed Assessments v. Jefferson-Pilot*, 161 N.C. App. 558, 559-60, 589 S.E.2d 179, 180-81 (2003)). "Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning, and the courts are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* (internal quotation marks and citations omitted).

State v. Williams, 218 N.C. App. 450, 451, 725 S.E.2d 7, 8-9 (2012).

"When reviewing the trial court's grant of a criminal defendant's motion to dismiss . . . [w]e review the trial court's conclusions of law *de novo*." *State v. Price*, 233 N.C. App. 386, 389, 757 S.E.2d 309, 312 (citations omitted), *writ denied*, *review denied*, *appeal dismissed*, 367 N.C. 508, 759 S.E.2d 90 (2014).

III. Statute of Limitations

In its sole argument on appeal, the State contends that the trial court erred in dismissing defendant's driving while impaired charge because the citation tolled the statute of limitations. We disagree.

The General Statutes provide a statute of limitations with respect to misdemeanors such as the one at issue:

> The crimes of deceit and malicious mischief, and the crime of petit larceny where the value of the property does not exceed five dollars ($5.00), and all misdemeanors except malicious misdemeanors, *shall be presented or found by the grand jury within two years* after the commission of the same, and not afterwards: Provided, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offense, within one year after the first shall have been abandoned by the State.

N.C. Gen. Stat. § 15-1 (2015) (emphasis added). By its explicit language, this statute establishes a two-year statute of limitations on the misdemeanors listed.

On appeal, however, the State contends that, pursuant to N.C. Gen. Stat. §§ 15A-921 and 15A-922, a citation constitutes a criminal pleading. Specifically, a "citation, . . . or magistrate's order serves as the pleading of the State for a misdemeanor prosecuted in the district court[.]" N.C. Gen. Stat. § 15A-922(a) (2015). The State contends that this tolled the statute of limitations.

The State cites several cases in support of its position. Primarily, the State relies upon our Supreme Court's decision in *State v. Underwood*, 244 N.C. 68, 92 S.E.2d 461 (1956). The State contends that *Underwood* stands for the principle that, upon the issuance of a criminal pleading, the statute of limitations is tolled. However, we hold that the State's reliance is misplaced.

Underwood is a successor case to *State v. Hedden*, 187 N.C. 803, 123 S.E. 65 (1924). In *Hedden*, the defendant was arrested and charged

with abandonment on 11 September 1921; a magistrate's warrant issued 25 October 1922, and an indictment issued on 1 November 1923, more than two years after the defendant's arrest. The defendant was subsequently tried, and his motion to dismiss was denied. On appeal, our Supreme Court held:

> There is no saving clause in this statute[1] as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and in our opinion on the facts of this record the law must be construed and applied as written. There must be a presentment or indictment within two years from the time of the offense committed and not afterwards.

Id. at 805, 123 S.E. at 65. The Supreme Court held that the trial court erred in denying the defendant's motion to dismiss, and reversed.

More than thirty years later, *Underwood* revisited *Hedden*. In *Underwood*, the defendant was tried upon a warrant, which was issued on 29 June 1953. He appealed the matter to superior court, and raised the issue of the statute of limitations, moving to dismiss. This motion was denied, and the defendant appealed. *Underwood*, 244 N.C. at 69, 92 S.E.2d at 461-62. Our Supreme Court distinguished *Underwood* from *Hedden*, noting that *Hedden* "involved an entirely different factual situation from that involved in the present appeal." *Id.* at 70, 92 S.E.2d at 463. The Court then went on to hold that, "[i]n criminal cases where an indictment or presentment is required, the date on which the indictment or presentment has been brought or found by the grand jury marks the beginning of the criminal proceeding and arrests the statute of limitations." *Id.* As a result, the Court found no error with the trial court's denial of the defendant's motion to dismiss.

In the roughly sixty years since *Underwood* was decided, that case has only been held to apply to indictments, presentments, and warrants; never once has it been applied to citations or other forms of criminal pleading. *See State v. Hundley*, 272 N.C. 491, 493, 158 S.E.2d 582, 583-84 (1968) (a warrant tolls the statute of limitations); *State v. Gamez*, 228 N.C. App. 329, 332, 745 S.E.2d 876, 878 (2013) (an indictment or presentment tolls the statute of limitations); *State v. Taylor*, 212 N.C. App. 238, 249-50, 713 S.E.2d 82, 90 (2011) (an indictment, presentment, or warrant

1. The statute in question was C.S. § 4512, a predecessor to N.C. Gen. Stat. § 15-1, which had substantially similar language.

tolls the statute of limitations); *State v. Whittle*, 118 N.C. App. 130, 134, 454 S.E.2d 688, 690 (1995) (an indictment or presentment tolls the statute of limitations).

The State's arguments to the contrary notwithstanding, the language of N.C. Gen. Stat. § 15-1 is explicit: misdemeanors, such as the matter in the instant case, "shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards[.]" N.C. Gen. Stat. § 15-1. "Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning, and the courts are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Williams*, 218 N.C. App. at 451, 725 S.E.2d at 8-9 (citations and quotations omitted). Further, *Hedden* explicitly held that "[t]here is no saving clause in this statute as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and in our opinion on the facts of this record the law must be construed and applied as written." *Hedden*, 187 N.C. at 805, 123 S.E. at 65. And despite the holding in *Underwood*, we note that that case was specifically limited to "those misdemeanor cases in which the defendant may be tried in the Superior Court on a warrant issued by an inferior court and without an indictment." *Underwood*, 244 N.C. at 69, 92 S.E.2d at 462.

We hold that *Underwood*, in which our Supreme Court considered whether a superior court could try a defendant based on a warrant issued by an inferior court, is distinguishable from the instant case. We further hold that the explicit language of N.C. Gen. Stat. § 15-1, as interpreted in *Hedden*, is binding upon this Court. The issuance of a citation did not toll the statute of limitations pursuant to N.C. Gen. Stat. § 15-1; the State had two years to either commence the prosecution of its case, or to issue a warrant, indictment, or presentment which would toll the statute of limitations. Because the State failed to do so, the statute of limitations expired, and the State was barred from prosecuting this action. The trial court did not err in dismissing the charge.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

STATE OF NORTH CAROLINA
v.
JOSHUA RYAN WILSON

No. COA16-243

Filed 6 December 2016

Search and Seizure—uniformed officer by marked car—gesture to stop—no seizure

Where a uniformed police officer standing outside of his marked patrol car waved both of his arms above his head to gesture defendant to stop his vehicle, and the officer smelled alcohol coming from inside the vehicle when defendant rolled down his window, the trial court did not err by concluding that defendant was not seized and denying his motion to suppress. Considering the totality of the circumstances, the officer's hand motions were not so authoritative that a reasonable person would not have felt free to leave.

Judge DILLON dissenting.

Appeal by Defendant from judgment dated 24 September 2015 by Judge Michael O'Foghludha in Alamance County Superior Court. Heard in the Court of Appeals 23 August 2016.

Attorney General Roy Cooper, by Associate Attorney General Marie H. Evitt, for the State.

Leslie Rawls for Defendant.

STEPHENS, Judge.

Defendant Joshua Ryan Wilson appeals from the judgment entered on his guilty plea for impaired driving. Wilson argues that the trial court erred by failing to suppress evidence obtained during his seizure by a police officer. Because we conclude Wilson was not seized under the Fourth Amendment, we find no error in the court's refusal to suppress the evidence obtained from the police officer's encounter with Wilson.

Factual and Procedural Background

The evidence considered by the trial court pursuant to Wilson's motion to suppress tended to show the following:

On 25 September 2013, Officer Blake Johnson of the Burlington Police Department went to a residence at 402 Brooklyn Street to find a man who had outstanding warrants for his arrest. Officer Johnson was acting on an anonymous tip to the Burlington Police Department that the wanted individual would be at the residence. Officer Johnson parked his car on Brooklyn Street across from the residence and got out of the vehicle. He walked toward the residence.

Officer Johnson observed a pickup truck leaving the residence at 402 Brooklyn Street. Officer Johnson was in the road, but was not blocking it. The truck, driven by Wilson, moved toward Officer Johnson from a cross street adjacent to the residence. Officer Johnson waved his hands back and forth just above shoulder level to tell Wilson to stop the vehicle. The officer's intention was to question Wilson to see if he knew anything about the man with the outstanding warrants. Officer Johnson had no suspicion that Wilson was the man he was looking for nor did he observe any illegal behavior by Wilson. Officer Johnson was in uniform, but no weapon was drawn, neither police car was blocking the road, and the blue lights and sirens were not activated.

Wilson stopped the truck with the driver's side window next to Officer Johnson. Wilson was alone in the vehicle. Officer Johnson "smelled the odor of alcohol coming from inside the vehicle" almost immediately. He asked Wilson about his alcohol consumption. Wilson admitted that he had been drinking, but said that he could not remember how many drinks he had consumed.

Officer Johnson arrested Wilson for driving while subject to an impairing substance. Wilson pled guilty in Alamance County District Court on 4 August 2015, but appealed to the Superior Court. In Superior Court, Wilson moved to suppress the evidence resulting from his encounter with Officer Johnson. A hearing was held on 15 September 2015 before Judge Michael O'Foghludha, who denied Wilson's motion to suppress. Wilson subsequently pled guilty on 24 September 2015, reserving the right to appeal the order denying suppression of the evidence. Wilson gave notice of appeal the same day in open court.

Discussion

On appeal, Wilson argues that the trial court erred in denying his motion to suppress the evidence obtained from his encounter with Officer Johnson, because Officer Johnson unconstitutionally seized Wilson without reasonable suspicion or probable cause. Because the trial court's findings of fact are supported by competent evidence, and the findings support its conclusions of law that Wilson was not seized

under the Fourth Amendment, we find no error in the trial court's refusal to suppress the evidence obtained by Officer Johnson.

1. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Unchallenged findings of fact are presumed to be supported by competent evidence. *See State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206 (2006) (citations omitted). "[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations omitted). Findings of fact which are mislabeled as conclusions of law may be re-classified by the appellate court and subjected to the appropriate standard of review. *State v. Hopper*, 205 N.C. App. 175, 179, 695 S.E.2d 801, 805 (2010). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

2. No Fourth Amendment seizure

Wilson first argues that the trial court erred in finding as fact that a reasonable person would not have felt compelled to stop to talk to Officer Johnson. Although labelled as a finding of fact by the trial court, "whether a reasonable person would feel free to decline the officer['s] request[]" requires a legal analysis, *Florida v. Bostick*, 501 U.S. 429, 436, 115 L. Ed. 2d 389, 400 (1991), and the exercise of judgment. Thus, we treat the trial court's finding that a reasonable person would not have felt compelled to stop as a conclusion of law. Wilson does not challenge any other findings of fact. Therefore, the remaining findings of the trial court are presumed to be supported by competent evidence.

Wilson also argues that the trial court erred in concluding as a matter of law that he was not seized under the Fourth Amendment. Whether Wilson was seized turns on the same analysis as whether a reasonable person would have felt compelled to stop. *See id.*, 501 U.S. at 436, 115 L. Ed. 2d at 400. Therefore, we address these arguments together, and hold that each conclusion is supported by the trial court's findings of fact.

The Fourth Amendment to the United States Constitution guarantees to individuals the right to be free from unreasonable searches

and seizures. U.S. Const. amend. IV. "[T]he crucial test [to determine if a person is seized] is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Id.*, 501 U.S. at 437, 115 L. Ed. 2d at 400 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 100 L. Ed. 2d 565, 569 (1988)).

Wilson cites *Bostick* for the rule that a person is seized when his freedom of movement is terminated or restrained "by means of physical force or show of authority." 501 U.S. at 434, 115 L. Ed. 2d at 398 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n. 16 (1968)). However, Wilson omits the context in which the Court made this statement. The Court cited *Terry* while making the point that a "seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Id.* Rather, as the Court stated in *Terry*, a seizure occurs "[*o*]*nly* when the officer, by means of physical force or show of authority, has in some way *restrained the liberty of a citizen*." *Id.* (quoting *Terry*, 392 U.S. at 19 n.16, 20 L. Ed. 2d at 905 n.16) (emphasis added).

In *Bostick*, two police officers with visible badges boarded a bus and questioned the defendant "without articulable suspicion." *Id.* at 431, 115 L. Ed. 2d at 396. One officer carried a gun in a zipper pouch, but never brandished the weapon. *Id.* at 432, 115 L. Ed. 2d at 397. The officers asked the defendant for consent to search his luggage, which was given. *Id.* at 432, 115 L. Ed. 2d at 396-97. The defendant argued that he was unconstitutionally seized by the officers on the bus because he did not feel free to leave the encounter. *Id.* at 435, 115 L. Ed. 2d at 399. The Court reasoned that the restriction of the defendant's movements happened not because of the police, but because he chose to get on a bus. *Id.* at 436, 115 L. Ed. 2d at 399. This restriction, therefore, and the defendant's feeling that he could not leave the bus, did not necessarily render the encounter non-consensual. *Id.* The Court ultimately remanded the case to the Florida Supreme Court to analyze the voluntariness of the encounter based on the totality of the circumstances. *Id.* at 439-40, 115 L. Ed. 2d at 402.

Wilson also cites *United States v. Mendenhall* for the reasonable person test adopted by the Supreme Court in which a person is seized "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980). However, immediately after that holding, the Supreme Court explained:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 554-55, 64 L. Ed. 2d at 509 (internal citations omitted).

Finally, Wilson cites *Chesternut* for the proposition that Officer Johnson's hand motions were tantamount to a command to stop, and were thus a display of authority resulting in Wilson's seizure. Wilson mischaracterizes the holding of the Supreme Court. In *Chesternut*, the Supreme Court held that the defendant was not seized when police officers in a marked car followed him as he ran away from the car. 486 U.S. at 574-75, 100 L. Ed. 2d at 572-73. Rather than list behaviors that would constitute a seizure, in analyzing whether a reasonable person would have interpreted the police conduct as an attempt to restrict his movement, the Court stated, "The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement." *Id.* at 575, 100 L. Ed. 2d at 573. The Court did not indicate that any one of these behaviors would constitute an authoritative display resulting in a Fourth Amendment seizure. To the contrary, the Court applied the test enumerated in *Mendenhall*, which requires evaluation of all the facts and circumstances surrounding the encounter. *Id.* at 573, 100 L. Ed. 2d at 571-72. In doing so, it concluded that the "presence of a police car driving parallel to a running pedestrian," while intimidating, was not sufficient on its own to constitute a seizure. *Id.* at 575, 100 L. Ed. 2d at 573.

Unlike the officers in *Bostick*, Officer Johnson did not approach Wilson in a confined space nor did Wilson see his weapon. Wilson's movement was not restricted the way a passenger on a bus would be restricted with a police officer standing above him. To the contrary, the fact that Wilson was in a truck while Officer Johnson was on foot and not blocking the road indicates that Wilson's movement was not restricted. Wilson's encounter was thus more voluntary than that of the defendant in *Bostick*, whose encounter on the bus was held to be consensual.

Bostick v. State, 593 So. 2d 494, 495 (Fla. 1992) (per curiam), *on remand from* 501 U.S. 429, 115 L. Ed. 2d 389.

Further, none of the examples illustrated by the Court in *Mendenhall* of circumstances indicating a seizure are present in this case. The trial court found that Officer Johnson was alone on the scene, he did not draw his weapon, and his lights and sirens were off. The officer also did not touch Wilson or use any language or tone which would indicate that compliance with his request would be compelled.

The facts of this case are more similar to those in *Chesternut*, where there was no evidence that the officers used lights and sirens, displayed a weapon, or blocked the defendant's movement with the patrol car. While Wilson argues that Officer Johnson's arm motions were tantamount to a command to stop, the motions occurred without any other display of police authority, such as lights, sirens, or a weapon, and while Wilson had the ability to continue driving on the road in front of him. Despite Wilson's argument that Officer Johnson at least partially blocked the road, the trial court made no finding that the road was blocked. To the contrary, the court found that "[t]here was no roadblock in place, and Officer Johnson's patrol car was not blocking traffic." Further, the presence of a single police officer waving his hands in the road is a less authoritative display than a patrol car driving parallel to a pedestrian, which was held insufficient to constitute a seizure.

Wilson argues that his case is distinguishable from North Carolina precedent based on the fact that Officer Johnson signaled to Wilson to stop rather than approaching the moving vehicle. Citing two cases, *State v. Farmer*, 333 N.C. 172, 424 S.E.2d 120 (1993), and *State v. Veal*, 234 N.C. App. 570, 760 S.E.2d 43 (2014), Wilson argues that Officer's Johnson's motions were a "directive" and a "summons" rather than a request.

In *Farmer*, two police officers in a car passed the defendant, who was walking on the side of the road. 333 N.C. at 180, 424 S.E.2d at 125. Because he matched the description of the person they were on their way to question, the officers backed up their car and parked about twenty feet in front of the defendant. *Id.* at 180, 424 S.E.2d at 125. The officers exited their vehicle and approached the defendant to question him. *Id.* After some questioning, the officers decided to call the local sheriff's department, and asked the defendant if he would wait in the police car. *Id.* at 182, 424 S.E.2d at 126. One officer opened the door for the defendant, who entered the vehicle without being touched. *Id.* The door to the vehicle was left open. *Id.* at 182-83, 424 S.E.2d at 126. While the defendant was in the vehicle, the officer asked him for biographical

information and subsequently why he had lied about his name. *Id.* at 183, 424 S.E.2d at 127. The defendant argued that he was unconstitutionally seized during the conversations on the street and in the car. *Id.* at 179, 424 S.E.2d at 124. While the North Carolina Supreme Court noted that one of the factors in its voluntariness analysis was that the officers approached the defendant rather than summoning him, the Court analyzed the totality of the circumstances, as dictated by the test set out in *Mendenhall*. *Id.* at 187-88, 424 S.E.2d at 129. The other factors the Court noted were that the encounter was on a public street, the officers did not wear uniforms or display weapons, and they requested but did not demand information. *Id.* at 188, 424 S.E.2d at 129. Based on all of these factors, the Court held that the defendant was not seized either during the initial questioning on the street or during questioning in the police vehicle, because he had no objective reason to believe he was not free to leave. *Id.* at 188, 424 S.E.2d at 129-30. Nothing in the Court's analysis indicates that a request for the defendant to stop and speak with the officers would be a determinative factor indicating a seizure. Further, Officer Johnson's hand motions were a less authoritative display than questioning a defendant inside of a police vehicle.

In *Veal*, an officer parked his car in a gas station parking lot and approached the defendant's stopped vehicle on foot. 234 N.C. App. at 571-72, 760 S.E.2d at 44. The officer asked to speak with the defendant. *Id.* at 571, 760 S.E.2d at 44. During the conversation, the officer smelled alcohol and noticed signs of intoxication. *Id.* The officer proceeded to have the defendant perform sobriety tests, and then placed him under arrest for driving while impaired. *Id.* The defendant argued that he was unconstitutionally seized when the officer questioned him at his vehicle. *Id.* at 573, 760 S.E.2d at 46. Applying the totality of the circumstances test as set forth in *Chesternut* and applied in *Bostick*, this Court held that the defendant was not seized. *Id.* at 575-76, 760 S.E.2d at 47. In reaching this conclusion, the Court noted that the officer did not park behind the defendant's car, activate his blue lights, or speak in a threatening tone. *Id.* at 575, 760 S.E.2d at 47. The Court did not consider the factor of approaching the vehicle as opposed to any other method of initiating conversation. However, all of the factors that the court did take into account in holding that the defendant was not seized are present in this case.

Finally, Wilson argues that he was compelled to stop by North Carolina traffic law, which obligated him to "comply with any lawful order or direction of any law-enforcement officer or traffic-control officer . . . which order or direction related to the control of traffic." N.C.

Gen. Stat. § 20-114.1(a) (2015). We disagree. Officer Johnson's hand motion was not related to the control of traffic nor were there any circumstances which would indicate to a reasonable person that Officer Johnson was acting as a traffic control officer. The trial court found that there was no roadblock and no blue lights were activated. Further, there was no evidence of any cones, construction, a visible accident, or any other indication that Officer's Johnson's motions were "related to the control of traffic." Thus, this is not a factor which would indicate to a reasonable person that he was not free to leave the encounter.

Considering the totality of the circumstances, Officer Johnson's hand motions were not so authoritative or coercive that a reasonable person would not have felt free to leave. This holding is in line with established North Carolina precedent in cases in which no lights or sirens were used, no weapon was brandished, no language or behavior was used indicating compliance was mandatory, and the defendant's movement was not blocked. *See Veal*, 234 N.C. App. at 575, 760 S.E.2d at 47; *State v. Williams*, 201 N.C. App. 566, 571-72, 686 S.E.2d 905, 909 (holding that the defendant was not seized when an officer parked his vehicle across the street without blocking the defendant's egress, did not brandish a weapon, did not activate the blue lights or sirens, questioned the defendant, and asked for consent to search the vehicle without using any language or behavior that would indicate the defendant was not free to leave), *disc. review denied*, 363 N.C. 859, 695 S.E.2d 450 (2009); *State v. Isenhour*, 194 N.C. App. 539, 544, 670 S.E.2d 264, 268 (2008) (holding that the defendant was not seized when two uniformed officers parked their marked car eight feet from the defendant's vehicle, approached the vehicle and questioned the defendant, but did not block the defendant from leaving, use threatening language, brandish a weapon, or turn on the lights or sirens). The trial court's findings therefore support its conclusions of law that Wilson was not seized under the Fourth Amendment and that a reasonable person would have believed he was free to leave when Officer Johnson waved his arms to signal Wilson to stop. The order of the trial court is

AFFIRMED.

Judge BRYANT concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I believe that Defendant's encounter with the police officer was a Fourth Amendment seizure. However, I believe that the matter should be remanded for more findings on the issue of whether the seizure was constitutionally reasonable. Therefore, my vote is to vacate the order denying Plaintiff's motion to suppress and to remand the matter to the trial court for additional findings regarding the reasonableness of the seizure, in order to balance the public interest served by the stop with Defendant's right to be free from arbitrary interference by law enforcement officers. *Brown v. Texas*, 443 U.S. 47, 50 (1979).

A. The encounter was a seizure.

The trial court found as follows: A uniformed police officer arrived in a neighborhood in his marked patrol car to serve arrest warrants on the occupant of a particular house. While the officer was standing outside his car near the house, he saw Defendant approaching in a vehicle, whereupon he waved both of his arms above his head, gesturing Defendant to stop his vehicle. The officer's reason for stopping Defendant was to gather "intel" about the house and the person named in the arrest warrants from someone he thought might live nearby. However, once Defendant stopped his vehicle, the officer detected an odor of alcohol on Defendant's breath.

I believe that this encounter was a Fourth Amendment seizure. A seizure occurs where police conduct would " 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Florida v. Bostick*, 501 U.S. 429, 436 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)). And here, I believe that any reasonable motorist in Defendant's position – seeing a uniformed officer standing next to a marked patrol car waving his arms, gesturing to the motorist to stop – would feel compelled to stop, as Defendant did here. The *subjective* intent of the officer is irrelevant in this analysis. *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 581 (1982) (holding that the determination is based on "an objective test").[1]

Further, the seizure had not ended by the time the officer had detected the odor of alcohol. That is, nothing had occurred that would have lead a reasonable motorist in Defendant's position to believe that

1. Indeed, our law *requires* a motorist to comply with any lawful direction from an officer related to traffic control. N.C. Gen. Stat. § 20-114.1(a). In the present case, there is no finding to indicate that a reasonable motorist in Defendant's position would know that the officer's hand gestures were merely intended as a *request*, rather than a command, to stop or whether the officer was gesturing for the purpose of controlling traffic.

he was no longer compelled to remain.[2] Rather, as soon as Defendant stopped and before any meaningful communication had occurred, the officer smelled alcohol coming from inside Defendant's truck, leading to the charge for which Defendant was convicted. If, for example, *prior* to detecting the odor of alcohol, the officer had told Defendant that he had merely stopped Defendant to ask some questions about the neighborhood, then perhaps the seizure became a consensual encounter. Thus any subsequent detection of alcohol by the officer likely would have been admissible. But the findings do not suggest that the seizure had transformed into a consensual encounter at the time the officer detected the odor of alcohol. Therefore, I conclude, at that time, Defendant was still subject to a Fourth Amendment seizure.

B. Whether the seizure was reasonable requires more findings.

The fact that the officer had no reasonable suspicion that Defendant was involved in criminal activity does not necessarily mean that the seizure was unconstitutional. The United States Supreme Court has held that, in some circumstances, an officer may conduct an "information stop" of a random passing motorist as part of an investigation of the area. *See Illinois v. Lidster*, 540 U.S. 419, 426-27 (2004) (holding that a checkpoint set up to ask passing motorists about a killing which occurred on the same street was reasonable). The Court recognized in *Lidster* that a "[highway] stop [which] lack[s] individualized suspicion cannot by itself determine the constitutional outcome. . . . [S]pecial law enforcement concerns will sometimes justify highway stops without individualized suspicion." *Id.* at 424. The Court instructed that the reasonableness of such stops must be judged "on the basis of individual circumstances," and that in judging the circumstances, courts must "look to 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.' " *Id.* at 426-27 (quoting *Brown*, 443 U.S. at 50); *see also State v. Woldt*, 293 Neb. 265, 271, 876 N.W.2d 891, 896 (2016) (citing state and federal cases from around the country which have applied *Lidster* to non-checkpoint stop cases).

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2. A seizure ends when a detainee would no longer feel obligated to remain. By way of example, our Court and the Fourth Circuit Court of Appeals have held that "[g]enerally, an initial traffic stop concludes and the encounter becomes consensual [] after an officer returns the detainee's driver's license and registration." *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009). *See also United States v. Whitney*, 391 F. App'x. 277, 280-81 (4th Cir. 2010) (unpublished).

Here, the trial court made a number of findings concerning the officer's reasons for stopping Defendant. However, I believe that the matter needs to be remanded to allow the trial court to make additional findings concerning the reasonableness of the stop, giving consideration to the guidance provided in *Lidster*. Certainly, the safety of our law enforcement officers is a matter of grave public concern. So too is the proper and timely execution of arrest warrants. And the officer's stop of Defendant in this case might advance these public interests. The trial court needs to make additional findings to balance these public interests against Defendant's constitutionally protected interests. For example, it might be appropriate for the trial court to consider whether the officer was serving arrest warrants on someone who had committed a violent crime or on someone who merely failed to appear in court for a traffic ticket. Further, it might be appropriate for the trial court to consider the importance of the information the officer was seeking to obtain and the circumstances which led the officer to believe that Defendant might have such information.

Accordingly, my vote is to vacate the trial court's order and remand the matter for more findings concerning the reasonableness of the seizure.

TETRA TECH TESORO, INC., Plaintiff
v.
JAAAT TECHNICAL SERVICES, LLC, RICKEY B. BARNHILL, and CLYDE E. CUMMINGS, II, Defendants

No. COA15-1369

Filed 6 December 2016

1. Appeal and Error—motion to modify preliminary injunction—brought under Rules 59 and 60—did not toll time to appeal

Where a subcontractor filed complaints against a contractor for various claims concerning payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss and granting the subcontractor's motion for a preliminary injunction, the Court of Appeals lacked jurisdiction to review the contractor's appeal from the preliminary injunction order. The contractor failed to appeal the order within 30 days, and its motion to modify the preliminary injunction order—purportedly

brought under Rules 59 and 60 of the N.C. Rules of Civil Procedure—did not toll the time to appeal.

2. Pretrial Proceedings—preliminary injunction—modification

Where a subcontractor filed complaints against a contractor for various claims concerning payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss and granting the subcontractor's motion for a preliminary injunction requiring the contractor to hold in escrow and not disburse or distribute any monies received from the federal government on the projects to any person or entity other than plaintiff subcontractor, the trial court did not abuse its discretion by denying the contractor's motion to alter or amend the preliminary injunction to allow the contractor to pay certain third parties. The trial court carefully considered the contractor's arguments and modified the injunction to permit the U.S. to pay the project surety, who could use the funds to pay subcontractors and suppliers on the project.

3. Contempt—proceedings during pending appeal—no jurisdiction

Where a subcontractor filed complaints against a contractor for various claims concerning payment for work on projects at Fort Bragg, and the trial court entered an order denying the contractor's motion to dismiss and granting the subcontractor's motion for a preliminary injunction, the Court of Appeals vacated the trial court's contempt order imposing sanctions on the contractor for violating the preliminary injunction order. The trial court lacked jurisdiction to conduct a contempt proceeding and impose sanctions because the contractor's appeal divested the trial court of jurisdiction to do so while the appeal was pending.

Judge BRYANT concurring in the result only.

Appeal by defendants from orders entered 6 May 2015, 16 July 2015 and 10 September 2015 by Judge Mary Ann L. Tally in Cumberland County Superior Court. Heard in the Court of Appeals 26 April 2016.

Vandeventer Black LLP, by David P. Ferrell and Kevin A. Rust, for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard LLP, by Walter L. Tippett, Jr. and Charles E. Coble, and DurretteCrump PLC, by Wyatt B. Durrette, Jr. and J. Buckley Warden IV, for defendants-appellants.

DIETZ, Judge.

This case came to the Court of Appeals posing as a complicated construction law dispute raising novel issues concerning who owns portions of the Fort Bragg military installation and whether the parties are covered by North Carolina law or instead by the federal laws that apply at Fort Bragg. The parties' appellate briefs deal exclusively with the merits of these contract, venue, and choice-of-law issues.

Unfortunately, this Court cannot reach these issues because the appeal also is plagued by jurisdictional problems stemming from the way in which it was appealed. Specifically, Appellant JAAAT Technical Services challenges a series of decisions by the trial court reaching all the way back to a preliminary injunction order, but the only orders from which JAAAT timely appealed are a motion seeking to modify certain language in the preliminary injunction, and a contempt order and corresponding sanctions order.

As explained below, even if styled as a "Rule 59" motion, a pretrial motion to modify a preliminary injunction does not toll the time in which to appeal the underlying preliminary injunction order. This Court has held that Rule 59 of the Rules of Civil Procedure, which governs motions to alter or amend a judgment, only applies to post-trial motions, and that holding is confirmed by the plain text of Rule 59. Moreover, separate provisions in Rule 54(b) and Rule 62(c) permit parties to move to modify a preliminary injunction at any time, even while the case is on appeal. Thus, the underlying purpose of Rule 59 and its corresponding tolling provision in the appellate rules is unnecessary in this context—a fact the drafters of the rules understood. In short, our review in this appeal is limited to the denial of the motion to modify the preliminary injunction because the appeal from the underlying preliminary injunction order is untimely.

We affirm the denial of that motion to modify, which is subject to a broad abuse-of-discretion standard of review. But we reverse the trial court's contempt and sanctions orders that came after JAAAT appealed the denial of its motion to modify. Once JAAAT appealed, the trial court was divested of jurisdiction over the order from which it appealed and all matters "embraced therein." N.C. Gen. Stat. § 1–294. Under long-standing precedent from our Supreme Court, the appeal prevented the trial court from conducting a contempt proceeding or imposing sanctions for violation of the injunction. *See Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 726–27 (1962). Accordingly, we vacate the trial court's contempt orders and corresponding sanctions.

Facts and Procedural History

Defendant JAAAT Technical Services, LLC was the general contractor on three construction projects located at Fort Bragg. JAAAT is a Virginia limited liability company. Defendants Rickey B. Barnhill and Clyde Cummings are employees of JAAAT.[1]

JAAAT subcontracted its Fort Bragg projects to Plaintiff Tetra Tech Tesoro, Inc. Tesoro is a Virginia corporation. All of the contracts between JAAAT and Tesoro contain a forum selection clause requiring any disputes over the contracts to be litigated in Virginia.

On 21 November 2014, Tesoro filed three complaints against JAAAT in Cumberland County Superior Court. The complaints contained various claims concerning payment for work on the Fort Bragg projects. Tesoro alleged that JAAAT failed to pay it in full for the subcontract work performed, and that JAAAT had misappropriated project funds.

JAAAT and Tesoro also contracted for similar work at U.S. military installations in other states, and similar disputes arose with respect to those projects. After Tesoro sued JAAAT in Cumberland County, JAAAT sued Tesoro in federal district court in Virginia in an action that also included the parties' claims concerning the other military bases outside North Carolina. During this appeal, the federal court in Virginia held that it has jurisdiction over that larger, more complete action and declined Tesoro's request to dismiss that action. *JAAAT Tech. Servs., LLC v. Tetra Tech Tesoro, Inc.*, No. 3:15cv235, 2016 WL 1271039 (E.D. Va. Mar. 29, 2016).

On 15 December 2014, in the Cumberland County action, Tesoro moved for a temporary restraining order and preliminary injunction that would require JAAAT to segregate funds related to the construction projects and not to pay those funds out without court approval. On 5 January 2015, JAAAT moved to dismiss Tesoro's claims based on the forum selection clause in the contracts at issue. The trial court granted the TRO and held a series of hearings.

The proper venue for this dispute was the key legal issue in these hearings. Under a relatively recent North Carolina statute, North Carolina courts cannot enforce a forum selection clause like the one in the parties' contracts. N.C. Gen. Stat. § 22B–2. But in a federal enclave, such as Fort Bragg, courts apply a special form of federal law that incorporates only the North Carolina law in existence when the federal enclave is

1. For ease of reference, this opinion refers to all Defendants collectively as JAAAT.

created. Thus, the central issue in determining the proper venue for this dispute was whether the projects at Fort Bragg actually were on property that was part of a federal enclave and thus governed by federal law that does not include this recently enacted North Carolina statute.

On 6 May 2015, the trial court entered an order denying JAAAT's motion to dismiss and granting Tesoro's motion for a preliminary injunction. The preliminary injunction required JAAAT "to hold in escrow and . . . not disburse or distribute any funds or monies . . . received . . . from the federal government on the Projects to any person(s) or entity(s) other than Plaintiff." It also required JAAAT to provide accountings to Tesoro of "monies received from the federal government on the Projects and the disbursement or other disposition of those monies."

On 21 May 2015, JAAAT moved to modify the preliminary injunction, purportedly under Rules 59 and 60 of the North Carolina Rules of Civil Procedure, on the ground that the preliminary injunction prevented JAAAT from paying its subcontractors and other innocent third parties who performed work on the project and were owed payment for their work.

On 27 May 2015, Tesoro moved for contempt, alleging that JAAAT had disbursed funds and failed to provide accountings in violation of the preliminary injunction order. In response to that motion, JAAAT continued to insist that the case was governed by federal law and that venue was proper only in Virginia.

On 7 July 2015, the trial court held a hearing on JAAAT's motion to modify the preliminary injunction order. On 16 July 2015, the court rejected JAAAT's motion to modify the preliminary injunction in the specific manner JAAAT requested, but entered an order modifying the injunction to allow the federal government to make payments to the project surety, who in turn could pay subcontractors. That same day, the trial court entered an order instructing JAAAT to "appear and show cause . . . why they should not be held in contempt of court."

On 20 July 2015, JAAAT filed a notice of appeal from the 16 July 2015 order denying JAAAT's motion to modify the preliminary injunction. JAAAT's notice of appeal also indicated that JAAAT appealed from the trial court's original 6 May 2015 preliminary injunction order on the ground that the time to appeal that order was "tolled" by its motion to modify, which purportedly was filed under Rules 59 and 60.

On 27 July 2015, Tesoro moved to dismiss JAAAT's counterclaims with prejudice as a sanction under North Carolina Rule of Civil Procedure 41(b) for non-compliance with the preliminary injunction. The court

held a joint contempt hearing and hearing on Tesoro's motion to dismiss JAAAT's counterclaims on 17 August 2015 and, on 10 September 2015, issued orders holding JAAAT in contempt for violating the preliminary injunction and dismissing JAAAT's counterclaims with prejudice as a sanction. JAAAT timely appealed those orders on 18 September 2015.

Analysis

I. Appeal from the Preliminary Injunction Order

[1] We begin our analysis by examining JAAAT's appeal from the underlying preliminary injunction order. The trial court entered that order on 6 May 2015 and JAAAT appealed it on 20 July 2015, well past the thirty-day jurisdictional deadline to appeal.

JAAAT argues that when it timely filed its Rule 59 motion to alter or amend the preliminary injunction on 21 May 2015, that motion tolled the time to file a notice of appeal. And, indeed, Rule 3(c)(3) of the Rules of Appellate Procedure states that "if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion." N.C. R. App. P. 3(c)(3).

But Rule 59, by its plain terms, does not apply to an interlocutory, pretrial order like the preliminary injunction order in this case. Rule 59(a) states:

> (a) Grounds.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
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> (1) Any irregularity by which any party was prevented from having a fair trial;
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> (2) Misconduct of the jury or prevailing party;
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> (3) Accident or surprise which ordinary prudence could not have guarded against;
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> (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
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> (5) Manifest disregard by the jury of the instructions of the court;
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> (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
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> (8) Error in law occurring at the trial and objected to by the party making the motion, or
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> (9) Any other reason heretofore recognized as grounds for new trial.
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> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

N.C. R. Civ. P. 59(a).

All of the enumerated grounds in Rule 59(a), and the concluding text addressing "an action tried without a jury," indicate that this rule applies only after a trial on the merits or, at a minimum, a judgment ending a case on the merits. This is no surprise, as the express purpose of Rule 59(a) is to seek "a new trial." A preliminary injunction hearing, by definition, is not a trial. It is a hearing intended to secure preliminary relief to avoid irreparable harm that might occur while the case is decided on the merits. *See A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983).

Relying on the plain text of Rule 59, several decisions of this Court have held that Rule 59 only applies to "post-trial motions" and cannot be used to alter an interlocutory order made before a trial on the merits. *See Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283, 294, 716 S.E.2d 67, 76 (2011); *TD Bank N.A. v. Eagles Crest at Sharp Top, LLC*, No. COA15-807, 2016 WL 4367257, at *1 (N.C. Ct. App. Aug. 16, 2016) (unpublished) (holding that "Rule 59 is not a valid means to challenge pretrial orders").

This brings us to Rule 59(e). Rule 59(e) is titled "Motion to alter or amend a judgment" and states that "[a] motion to alter or amend the judgment *under section (a) of this rule* shall be served not later than 10 days after entry of the judgment." N.C. R. Civ. P. 59(e) (emphasis added). The text of this rule indicates that it applies, like Rule 59(a), only to final judgments, not to pretrial rulings.

Our interpretation of Rule 59(e) is bolstered by federal court decisions that address the similarly worded provision in Rule 59(e) of the Federal Rules of Civil Procedure. This Court has long held that federal

decisions interpreting the federal rules are persuasive authority when interpreting similar state rules. *See, e.g.*, *Crowley v. Crowley*, 203 N.C. App. 299, 305, 691 S.E.2d 727, 732 (2010). Federal courts have held that Rule 59(e) is "applicable only to a final judgment." *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469 (4th Cir. 1991). This is significant because Rule 59(e) of the Federal Rules of Civil Procedure arguably is broader than our State's counterpart: it permits a motion to "alter or amend a judgment" generally, unlike the State rule, which limits its application to a "motion to alter or amend the judgment under section (a) of this rule." *Compare* Fed. R. Civ. P. 59(e), *with* N.C. R. Civ. P. 59(e). If anything, this reinforces our conclusion that the State rule cannot reasonably be interpreted to cover interlocutory, pretrial orders.

This conclusion is further confirmed by the text of Rule 54(b). Rule 54 draws a distinction between final judgments and interlocutory rulings: "A judgment is either interlocutory or the final determination of the rights of the parties." N.C. R. Civ. P. 54(a). Rule 54(b) then describes the types of rulings that can be considered "final judgments" and states that "in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." N.C. R. Civ. P. 54(b). As the federal courts have observed, this language in Rule 54(b) is the source of authority for what litigants typically refer to as "motions to reconsider." *See, e.g.*, *Akeva, L.L.C. v. Adidas Am., Inc.*, 385 F. Supp. 2d 559, 565 (M.D.N.C. 2005). Thus, if we were to apply the narrow Rule 59(e) standard for altering a judgment to pretrial, interlocutory orders, it would clash with the language of Rule 54(b), which grants broader discretion to trial courts to amend their interlocutory orders before entry of a final judgment.

Moreover, the key reason a party might desire to apply Rule 59(e) to a pretrial ruling—the tolling of the time to appeal until the motion is ruled upon—is inapplicable here. Ordinarily, once a party appeals from a judgment, it divests the trial court of jurisdiction over all matters embraced by the order appealed. *See* N.C. Gen. Stat. § 1–294. Thus, without the tolling provision in Rule 59, litigants would be forced either to immediately appeal a final judgment and forgo post-trial motions (over which the trial court would lack jurisdiction following the appeal) or to risk the time to appeal the original judgment expiring while awaiting a ruling on the post-trial motion. But this dilemma does not exist in appeals from preliminary injunction orders because Rule 62(c) of the Rules of Civil Procedure permits the trial court to modify a preliminary injunction even while an appeal is pending.

Likewise, a preliminary injunction order is immediately appealable only if the order affects a substantial right. *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 361 (2004). Thus, it makes sense that litigants would be expected to immediately appeal the underlying injunction order and then file a motion to modify under Rule 62(c) if necessary because, for the preliminary injunction order to be appealable at all, it must be so damaging to the aggrieved party that it satisfies the substantial right test.

Finally, there are strong policy reasons for interpreting Rule 59 according to its plain text. The Rules of Civil Procedure are enacted by our General Assembly, often following careful review by experts in the Bar. It undermines the purpose of the rules if the appellate courts expand their meaning beyond the written text, forcing litigants to research case law or consult treatises to fully understand the procedures that apply in civil actions.

In sum, we reaffirm our holdings in *Bodie Island* and *TD Bank* that Rule 59, by its plain terms, does not apply to interlocutory, pretrial orders. Accordingly, we lack jurisdiction to review JAAAT's appeal from the preliminary injunction order because JAAAT did not appeal that order within thirty days and its motion to modify the preliminary injunction order, purportedly brought under Rules 59 and 60 of the Rules of Civil Procedure, did not toll the time to appeal.

II. Appeal from the Denial of Motion to Modify the Injunction

[2] JAAAT next challenges the trial court's denial of its motion to alter or amend the preliminary injunction to permit JAAAT to pay certain third-party contractors.

Importantly, that preliminary injunction did not merely maintain the status quo during the litigation; instead, it forced JAAAT to place funds it received from an ongoing construction project in a separate account and severely restricted JAAAT's ability to use those funds to continue its operations. Indeed, even after the trial court modified the injunction by permitting the United States to pay the project surety, who in turn could pay certain vital third parties, the injunction prohibited JAAAT from using any funds it received to pay for its own operations. This Court has held that a preliminary injunction affects a substantial right where the injunction would prevent the defendant from continuing to conduct its business during the pendency of the action. *See Harris v. Pinewood Dev. Corp.*, 176 N.C. App. 704, 705, 627 S.E.2d 639, 641 (2006); *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 635, 568 S.E.2d 267, 271 (2002). Under *Harris* and *Precision Walls*, the preliminary injunction in this

case satisfies the substantial rights test. We thus have appellate jurisdiction to review this interlocutory order.

This Court reviews the denial of a motion to modify an injunction for abuse of discretion. *Wachovia Bank, Nat. Ass'n v. Harbinger Capital Partners Master Fund I, Ltd.*, 201 N.C. App. 507, 516, 687 S.E.2d 487, 493 (2009). A trial court abuses its discretion when its decision is so arbitrary that it cannot be the result of a reasoned decision. *Manning v. Anagnost*, 225 N.C. App. 576, 579, 739 S.E.2d 859, 861 (2013).

In the trial court, JAAAT argued that the interests of justice and equity required modification of the preliminary injunction so that JAAAT could pay its subcontractors, thereby avoiding "breach of ongoing contracts with innocent, third-party subcontractors" and possible violations of federal law requiring prompt payment to subcontractors on federal government projects. JAAAT asked the trial court to modify the language of the injunction to provide that it only applies to funds "received by JAAAT as payment by the federal government for work performed by Tesoro" and that it does not "apply to funds received by JAAAT after the last pay application that included Tesoro's work."

The trial court's order reflects its careful consideration of this argument. The trial court modified the injunction to permit the United States to pay the project surety, who in turn could use those funds to pay subcontractors and suppliers on the project. Limiting our review solely to the motion to modify the injunction, and not to the underlying merits of the injunction itself, we find no abuse of discretion in the trial court's denial of JAAAT's requested modifications to the preliminary injunction.

III. Appeal from Contempt Orders

[3] Finally, JAAAT challenges the trial court's orders holding it in contempt and imposing sanctions for violating the preliminary injunction order.

These orders, like all the other orders in this appeal, are interlocutory. But this Court generally has concluded that a contempt order and corresponding sanctions for violating a court order or injunction affect a substantial right and are immediately appealable. *Wilson v. Wilson*, 124 N.C. App. 371, 375, 477 S.E.2d 254, 256 (1996). Under *Wilson*, the challenged orders in this case are immediately appealable.

JAAAT argues that the contempt sanctions were improper on the merits, but we need not address these arguments because the trial court lacked jurisdiction to conduct a contempt proceeding and impose sanctions. In *Joyner*, our Supreme Court held that, because an appeal divests

the trial court of jurisdiction over the subject matter of the order from which the appeal is taken, a trial court lacks the power to hold a party in contempt for violating an order that is the subject of a pending appeal. 256 N.C. at 591, 124 S.E.2d at 727. The Supreme Court cautioned that "taking an appeal does not authorize a violation of the order. One who willfully violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when the case is remanded to the superior court." *Id.*

After *Joyner*, the General Assembly enacted the Rules of Civil Procedure, which authorize a trial court to "suspend, modify, restore, or grant an injunction during the pendency of the appeal" from a preliminary injunction. N.C. R. Civ. P. 62(c). But the Rules of Civil Procedure do not authorize the trial court to conduct contempt proceedings while an appeal is pending, and thus we conclude that Joyner is still binding on this Court.[2]

Accordingly, we vacate the trial court's contempt order and corresponding sanctions order for lack of jurisdiction.[3]

IV. Proceedings on remand

We leave it to the trial court, on remand, to determine how to proceed with this contentious litigation. The United States District Court for the Eastern District of Virginia has held (correctly, in our view) that if the disputed construction project took place on a federal enclave, then federal law applies. *JAAAT Tech. Servs., LLC*, 2016 WL 1271039, at *4. Federal enclave law incorporates state law in effect at the time the land becomes part of the federal enclave but not "future statutes of the state"

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2. The General Assembly recently amended N.C. Gen. Stat. § 1–294 and the statute now permits the Supreme Court, through the Rules of Appellate Procedure, to create exceptions to the general rule that an appeal divests the trial court of jurisdiction to proceed with trial matters embraced by the order appealed. *See* N.C. Sess. Law 2015–25, § 2. The Supreme Court has not yet amended the Rules of Appellate Procedure in response to this statutory change.

3. This Court recently held that there is an exception to the *Joyner* rule: "a trial court properly retains jurisdiction over a case if it acts reasonably in determining that an interlocutory order is not immediately appealable." *SED Holdings, LLC v. 3 Star Prop., LLC*, __ N.C. App. __, __, __ S.E.2d __, __ (2016). The analysis in *SED Holdings* turned on the fact that the injunction at issue merely maintained the status quo. That is not the case here. This injunction was a mandatory one; it forced a business to segregate its funds, imposed controls on the business's operations, and forced the business to conduct an accounting and provide the results of that accounting to the opposing party. Thus, when JAAAT appealed the denial of its motion to modify that injunction, the trial court was divested of jurisdiction to enforce it.

enacted afterward. *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940). This almost surely means that, if the construction project at Fort Bragg is on a federal enclave, the relatively recent North Carolina statute prohibiting enforcement of the parties' forum selection clause would not apply.

This case involves sophisticated parties who contracted for work on projects at U.S. military installations across the country and agreed in those contracts to litigate their disputes in Virginia. The federal district court in Virginia is hearing a more comprehensive action that includes not only the claims asserted in this action (or which could be asserted in this action) but also all claims from these other jurisdictions. Moreover, on the record before us, it appears the only evidence presented to the trial court (thus far) on the question of whether this project took place on a federal enclave is the affidavit of a surveyor who did not even visit the site.

We are mindful that the trial court has broad discretion to control the course of proceedings below.[4] But we wonder whether, in the interests of justice, the parties ought to be permitted to conduct discovery and present evidence to the court through which the central question in this case—who owns the land on which the projects took place—can be answered. For example, it seems likely that the United States government would know whether buildings purportedly constructed at "Fort Bragg" were constructed on land that is owned by the United States or that is owned by someone else.

Before the parties in this action pursue multiple, costly parallel suits in parallel jurisdictions, at considerable waste of judicial resources, it might be sensible for the trial court to permit the parties to conduct discovery and then present the court with evidence from which it can determine whose law applies at the site of these projects and thus whether the forum selection clause is enforceable or not.

Conclusion

We dismiss the appeal from the trial court's 6 May 2015 order for lack of appellate jurisdiction. We affirm the trial court's 16 July 2015

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4. The trial court's preliminary injunction order also stated that JAAAT "waived" and was "equitably estopped" from asserting its venue arguments. There is little, if any, support for these conclusions. In any event, after the trial court entered its preliminary injunction order, the federal district court in Virginia disagreed with the trial court's analysis of "judicial" versus "legislative" jurisdiction on a federal enclave (again, correctly, in our view) and held that a more complete action could proceed in that court. This changed circumstance authorizes the trial court to reconsider its earlier waiver and estoppel rulings.

order denying JAAAT's motion to alter or amend the preliminary injunction. We vacate the trial court's 10 September 2015 orders holding JAAAT in contempt and imposing corresponding sanctions.

DISMISSED IN PART; AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judge STROUD concurs.

Judge BRYANT concurs in result only.

RUI DONG ZHU, PLAINTIFF
v.
LINGLING DENG, CHANG ZHU & PING LI, DEFENDANTS

No. COA16-53

Filed 6 December 2016

1. Contracts—immigration—Form I-864 Affidavit of Support—enforceable contract

Where defendant-wife, a Chinese citizen, married plaintiff-husband, a U.S. citizen, and came to the U.S. on a K-1 visa, for which plaintiff-husband and his parents (defendant-parents) were the sponsors pursuant to a Form I-864 Affidavit of Support, the trial court did not err by concluding that defendant-wife was entitled to ongoing support based on the Form I-864A. The form was an enforceable contract against defendant-parents, and defendant-wife had no affirmative duty to mitigate her damages under the contract. Further, defendant-wife's assets did not reduce the amount of support she was entitled to receive.

2. Appeal and Error—failure to support argument—abandoned

Where defendant-parents argued that the trial court erred by awarding defendant-daughter a constructive trust in the proceeds from the sale of a tailor shop in the amount of 50 percent of the initial purchase money contributed by plaintiff-husband and defendant-wife, the Court of Appeals deemed their argument abandoned because defendant-parents failed to support their argument with any legal authority.

3. Appeal and Error—failure to support argument—dismissed

Where defendant-parents argued that the trial court erred by dismissing their counterclaim against defendant-wife for living expenses, the Court of Appeals dismissed their argument because defendant-parents failed to support their argument with any legal authority.

4. Divorce—marital property—wedding gifts

Where the trial court determined that $150,000 of money given as wedding gifts was marital property, the Court of Appeals held that the determination was supported by competent evidence and affirmed the trial court on the issue.

5. Contracts—immigration—Form I-864 Affidavit of Support—no duty to mitigate damages

Where defendant-wife, a Chinese citizen, married plaintiff-husband, a U.S. citizen, and came to the U.S. on a K-1 visa, for which plaintiff-husband and his parents (defendant-parents) were the sponsors pursuant to a Form I-864 Affidavit of Support, the trial court erred by concluding as a matter of law that defendant-wife had a continuing duty to mitigate her damages under the Form I-864A contract.

Appeal by defendants Chang Zhu and Ping Li and cross-appeal by defendant Lingling Deng from order and judgment entered 10 April 2015 by Judge Anna E. Worley in Wake County District Court. Heard in the Court of Appeals 23 August 2016.

Yuanyue Mu PLLC, by Yuanyue Mu, for defendant-appellants Chang Zhu and Ping Li.

Nicholls & Crampton, P.A., by Nicholas J. Dombalis, II, for defendant cross-appellant Lingling Deng.

BRYANT, Judge.

Where defendant-parents indicated they understood the contract they were signing and were not misled, defendant-parents are bound by the terms of the Form I-864 Affidavit of Support in which they agreed to provide support for defendant-wife. Further, where defendant-parents have not offered proof of either procedural or substantive unconscionability, we affirm the order of the trial court. Where the trial court's determination that the disputed $150,000.00 is marital property is supported

by competent evidence, we affirm. Lastly, where the trial court erred in concluding as a matter of law that defendant-wife has a continuing duty to mitigate her damages under the Form I-864 affidavit, we reverse.

Defendant Lingling Deng ("Lingling"), a Chinese citizen, married plaintiff Rui Dong Zhu ("plaintiff-husband"), a U.S. citizen, on 17 January 2012 in Wake County, North Carolina. Lingling is twenty-eight years old and lived in China prior to coming to the United States to live in January 2012. Lingling and plaintiff-husband dated for several years before Lingling moved to the U.S. Chang Zhu and Ping Li (collectively "defendant-parents," individually, "defendant-father" and "defendant-mother", respectively) are the parents of plaintiff-husband.

In December 2011 and January 2012, plaintiff-husband and Lingling had two wedding parties in their respective hometowns in China. Many guests gave cash gifts, and in February 2012, $150,000.00 was transferred in three separate transactions from Lingling's father, mother, and younger brother in China into a joint account in the United States in the name of Lingling and plaintiff-husband.

Lingling came to the United States on a K-1 visa. Defendant-parents and plaintiff-husband were the sponsors for Lingling when she immigrated to the United States. In order for Lingling to be admitted to the U.S. and become a permanent resident, plaintiff-husband and defendant-parents executed a Form I-864 Affidavit of Support ("Form I-864A").[1]

On 17 May 2012, $110,239.89 of the $150,000.00 in the joint account was transferred to defendant-parents to pay off the mortgage on their Raleigh home, where defendant-parents, plaintiff-husband, and Lingling all lived. Also from the $150,000.00, $25,000.00 was used to contribute to the purchase of a tailor shop located in Raleigh. The tailor shop, known as Lulu's Tailor Shop, was purchased in September 2012.

Less than a year and a half after being married, on 31 July 2013, defendant-mother forced Lingling to leave the Raleigh home. The two had argued when Lingling asked that the $150,000.00 be repaid. Thereafter, Lingling moved in with a friend and has not lived with plaintiff-husband or his parents since that time.

In September 2013, Lingling spoke with defendant-father, who indicated that they would sell the Raleigh home and the tailor shop and repay

1. The I-864, Affidavit of Support Form is referred to throughout federal and state case law interchangeably as "Form I-864," "Form I-864A," "I-864," and "I-864A." All designations refer to the same form.

her. He also told her they would pay for her living expenses. Defendant-parents paid Lingling two months' worth of support, $1,000.00 in August and $1,200.00 in September 2013. They paid no support after those dates. When the tailor shop sold for $40,000.00 in September 2013, Lingling received no portion of the proceeds from the sale.

On 13 September 2013, Lingling filed a complaint in Wake County Superior Court for money owed and a temporary restraining order ("TRO") against defendant-parents. Plaintiff-husband moved to intervene and stay the matter filed by Lingling in Superior Court, and both motions were granted. Meanwhile, plaintiff-husband also filed a complaint in Wake County District Court on 7 October 2013 for equitable distribution of the marital property which he claimed belonged to him and Lingling, *i.e.*, the $150,000.00 which Lingling claimed was owed to her by defendant-parents. On 31 December 2013, Lingling answered and counterclaimed for support and cross-claimed against defendant-parents for support and money owed. Defendant-parents cross-claimed for declaratory judgment.

The parties' claims came on for hearing before the Honorable Anna E. Worley during the 28 October 2014 civil session of Wake County District Court. Judge Worley entered an order and judgment on the parties' competing claims dated 10 April 2015, ordering, in relevant part, that Lingling was entitled to: (1) a constructive trust in the Raleigh home in the amount of $55,120.00; (2) a constructive trust in the proceeds from the sale of the tailor shop in the amount of $12,500.00; (3) a judgment against defendant-parents, jointly and severally, in the amount of $67,620.00; (4) a judgment against plaintiff-husband and defendant-parents, jointly and severally, in the amount of $18,341.00 for support owed from August 2013 through November 2014; and (5) monthly support payments in the amount of $1,215.00 from plaintiff-husband and defendant-parents. Defendant-parents filed notice of appeal and Lingling filed and served a cross-appeal on 21 May 2016. Plaintiff-husband did not appeal.

I. Defendant-Parents' Appeal

On appeal, defendant-parents argue the trial court erred by (1) finding that the I-864A forms were an enforceable contract against defendant-parents; (2) finding Lingling was entitled to fifty percent of the proceeds from the sale of the tailor shop; and (3) dismissing defendant-parents' counterclaim against Lingling for the living expenses defendant-parents spent on her.

1. Form I-864A

[1] Defendant-parents first argue that the trial court erred in concluding that Lingling was entitled to ongoing support based on the Form I-864A defendant-parents executed and submitted to the United States Citizenship and Immigration Services ("USCIS"), as the contract is unconscionable and therefore unenforceable. In the alternative, even if the Form I-864A is enforceable, defendant-parents contend that Lingling is barred from claiming the full amount of support under the contract because she has unreasonably failed to mitigate her damages. Lastly, defendant-parents argue that even if the trial court correctly found Lingling was entitled to some support under the contract, the trial court erred by not setting off the award from support previously provided to Lingling. We disagree.

An immigrant who is likely to become a public charge is not eligible for admission into the United States unless her application for admission is accompanied by a Form I-864 Affidavit of Support. 8 U.S.C. § 1182(a)(4) (2015). Those persons petitioning for an immigrant to be admitted to the U.S. must sign a Form I-864A and, as signing sponsors, are obligated to provide the immigrant with whatever support is necessary to maintain the sponsored immigrant at an annual income that is at least 125% of the federal poverty level pursuant to the annual guideline. *Younis v. Farooqi*, 597 F. Supp. 2d 552, 554 (D. Md. 2009). A Form I-864A "is considered a legally enforceable contract between the sponsor and the sponsored immigrant." *Id.* (citation omitted). "The signing sponsor submits himself to the personal jurisdiction of any federal or state court in which a civil lawsuit to enforce the affidavit has been brought." *Id.* (citing 8 U.S.C. § 1183a(a)(1)(C) (2015)). "The sponsor's obligation under the affidavit does not terminate in the event of divorce." *Id.* (citation omitted).

Here, defendant-parents executed a Form I-864A which specifically states that, as signors, they "[p]romise to provide any and all financial support necessary to assist the sponsor [plaintiff-husband] in maintaining the sponsored immigrant(s) at or above [125 percent of the Federal Poverty Guidelines] during the period in which the affidavit of support is enforceable[,]" and "agree to be jointly and severally liable for payment of any and all obligations owed by the sponsor [plaintiff-husband] under the affidavit of support to the sponsored immigrant." Further, defendant-mother testified that she understood when she signed the contract that if Lingling could not support herself financially, defendant-mother would be obligated to help plaintiff-husband pay for Lingling's needs. Indeed, an accountant and an attorney both assisted with the preparation of

the immigration documents, and the attorney spoke Mandarin Chinese. Even so, our North Carolina jurisprudence makes very clear that "one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was willfully misled or misinformed . . . he is held to have signed with full knowledge and assent as to what is therein contained." *Martin v. Vance*, 133 N.C. App. 116, 121–22, 514 S.E.2d 306, 310 (1999) (quoting *Gas House, Inc. v. S. Bell Telephone Co.*, 289 N.C. 175, 180, 221 S.E.2d 449, 503 (1976)). As defendant-parents make no argument that their son, plaintiff-husband, misled them in any way, defendant-parents are bound by the terms of the Form I-864A which they signed and in which they agreed to provide support for Lingling.

Further, claims that I-864A forms are unconscionable have been explicitly rejected. *See, e.g.*, *Al-Mansour v. Shraim*, Civil No. CCB-10-1729, 2011 WL 345876, at *3 (D. Md. Feb. 2, 2011) (unpublished) ("While the Form I-864 may be a contract of adhesion under Maryland law, it is not unconscionable."); *Cheshire v. Cheshire*, No. 3:05-cv-00453-TJC-MCR, 2006 WL 1208010, at *4 (M.D. Fla. May 4, 2006) (unpublished) ("[T]he Court fails to find evidence that the affidavit of support Form I-864 was an unconscionable or illusory contract . . . ."). Under North Carolina law, a contract will be found to be unconscionable "only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense," and where the terms are "so one-sided that the contracting party is denied any opportunity for a meaningful choice[.]" *Brenner v. Little Red School House Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981) (citation omitted). The party claiming unconscionability has the burden to prove both procedural and substantive unconscionability. *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 102, 655 S.E.2d 362, 370 (2008) (citations omitted). Defendant-parents have not offered proof of either procedural or substantive unconscionability, and accordingly, their argument is overruled.

Defendant-parents also argue that Lingling should be barred from claiming the full amount of support as she has failed to mitigate her damages under the Form I-864A contract. As Lingling has no affirmative duty to mitigate her damages under such a contract, *see, e.g.*, *Wenfang Liu v. Mund*, 686 F.3d 418, 422 (7th Cir. 2012) ("[W]e can't see much benefit to imposing a duty to mitigate on a sponsored immigrant."); *see also infra* § II.2 (addressing specifically a sponsored immigrant's duty to mitigate damages pursuant to Form I-864A), this argument is overruled.

Defendant-parents also argue that because the trial court awarded Lingling a judgment against defendant-parents in the amount of $67,620.00, this "large amount of cash" would render her no longer a

"public charge" under the terms of the Form I-864A. Thus, defendant-parents contend that the amount of support they may be required to pay Lingling should be set off by the judgment Lingling obtained against them. Defendant-parents cite to no authority to support their argument that a sponsored immigrant is not entitled to support under a Form I-864A because of any "assets" he or she has; rather, relevant case law suggests the contrary to be true. *See Al-Mansour*, 2011 WL 345876, at *4–5 (rejecting the sponsor's claim that he was not obligated to provide support under a Form I-864A contract where he had given his wife an apartment during their marriage).

Assets do not amount to income, and a judgment, even a monetary one, is not necessarily an asset for purposes of income. *See id.* (rejecting sponsor's argument that immigrant-spouse's income exceeded 125% of the poverty line where sponsor failed to demonstrate that proceeds from the sale of an apartment were transferred to the immigrant-spouse "or that she derived any other income from the property"). Notably, plaintiff-husband listed $150,000.00 under a heading titled "**Assets of the principal sponsored immigrant**" on his Form I-864A. This fact had no bearing or impact on the government's requirement that contracts of support were necessary for Lingling to become a permanent resident, and nor should a judgment against defendant-parents in the amount of $67,620. This argument is overruled.

2. Proceeds from Sale of Tailor Shop

[2] Defendant-parents contend the trial court erred in awarding Lingling a constructive trust in the proceeds from the sale of the tailor shop in the amount of $12,500, fifty percent of the initial purchase money contributed by plaintiff-husband and Lingling ($25,000.00). Defendant-parents argue that Lingling, as a 25%-owner of Lulu's Tailor Shop, is only entitled to twenty-five percent of the net proceeds ($40,000.00) from the sale of the tailor shop after winding up and accounting of the business, net proceeds being the sale price subtracted by the transaction cost and debts and liabilities to be paid by the company. We disagree.

In their appellant brief, defendant-parents fail to support this argument with any citation to legal authority. They state, "[u]pon the dissolution of the company, an owner of the company shall only get his or her share of the NET proceeds. The net proceeds shall be the sale price subtracted by the transaction cost and debts and liabilities to be paid by the company." Defendant-parents cite to no statute or case law to support these statements and, in turn, their argument. "A party's assignment of error is deemed abandoned in the absence of citation to supporting

authority." *Consol. Elec. Distribs., Inc. v. Dorsey*, 170 N.C. App. 684, 686–87, 613 S.E.2d 518, 520 (2005) (citing *State v. Walters*, 357 N.C. 68, 85, 588 S.E.2d 344, 355 (2003)); *see id.* at 686, 613 S.E.2d at 520 (quoting N.C. R. App. P. 28(b)(6)) (deeming appeal abandoned where defendant only quoted one statute and made reference to another). Accordingly, as defendant-parents have failed to support their argument with stated or cited authority, we deem their argument abandoned.

3. Dismissal of Defendant-Parents' Counterclaim

[3] Defendant-parents argue that the trial court erred in dismissing their counterclaim against Lingling for living expenses. We disagree.

Defendant-parents' argument is limited to contending that their provision of lodging and living expenses for Lingling and plaintiff-husband was conditioned on Lingling and plaintiff-husband paying off defendant-parents' mortgage on the Raleigh home in which all parties lived. However, defendant-parents have again failed to provide any citation to authority which would support their proposition that the trial court erred in dismissing their counterclaim where the trial court found and concluded that defendant-parents "have failed to prove by the greater weight of the evidence that they have a claim against [Lingling] for the monies they allegedly spent on [Lingling]." "Under our appellate rules, it is the duty of appellate counsel to provide sufficient legal authority to this Court, and failure to do so will result in dismissal." *Moss Creek Homeowners Ass'n, Inc. v. Bissette*, 202 N.C. App. 222, 233, 689 S.E.2d 180, 187 (2010) (citing N.C. R. App. P. 28(b)(6)). Accordingly, this Court will not endeavor to construct an argument for defendant-parents (represented by appellate counsel), and we dismiss this argument on appeal.

II. Lingling's Cross-Appeal

[4] On cross-appeal, Lingling argues the trial court erred in its (1) Finding of Fact No. 14 that Lingling failed to rebut the presumption that the $150,000.00 was marital property, and Findings of Fact Nos. 23 and 24, and Conclusions of Law Nos. 3, 7, and 8; and (2) finding and conclusion that Lingling has a duty to mitigate her damages.

1. Finding of Fact No. 14

Lingling argues the trial court erred in making its Finding of Fact No. 14 that she failed to rebut the presumption that the $150,000.00 that was transferred into the joint account of plaintiff-husband and Lingling was marital property. As a result, Lingling also argues that Findings of Fact Nos. 23 and 24, and Conclusions of Law Nos. 3, 7, and 8, which

depend on the trial court's Finding of Fact No. 14, are also erroneous. We disagree.

"A trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal 'if there is competent evidence to support the determination.' " *Brackney v. Brackney*, 199 N.C. App. 375, 381, 682 S.E.2d 401, 405 (2009) (quoting *Holterman v. Holterman*, 127 N.C. App. 109, 113, 488 S.E.2d 265, 268 (1997)). "Ultimate, the court's equitable distribution award is reviewed for abuse of discretion and will be reversed 'only upon a showing that it [is] so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (alteration in original) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Lingling's main dispute in challenging Findings of Fact Nos. 14, 23, and 24 and Conclusions of Law Nos. 3, 7, and 8, *see infra*, is with the trial court's classification of the $150,000.00 transferred into the joint account by Lingling's father and other relatives as marital property:

> 14. The $150,000 that was transferred into the joint account of [Lingling] and Plaintiff by [Lingling's] father and other relatives belonged to both [Lingling] and Plaintiff. [Lingling] has failed to rebut the presumption that this money was marital as it was acquired during the marriage. Irrespective of the source of the money—i.e., whether it was money that [Lingling's] father gave her to use as she saw fit or whether it was cash given to [Lingling] and Plaintiff by the guests at the parties in China that was collected by [Lingling's] father, or a combination of the two, [Lingling] and Plaintiff treated the money as marital money intended for the use of both of them.
>
> . . .
>
> 23. The money used to pay off the mortgage on [the] Raleigh home belonged to both Plaintiff and [Lingling]. The $25,000 used to contribute to the purchase of the tailor shop belonged to both Plaintiff and [Lingling]. Thus any obligation owing to [Lingling] and Plaintiff on the part of [defendant-parents] in connection with these transactions is a marital asset. Any such marital asset should be divided equally between Plaintiff and [Lingling]. However Plaintiff has continued to live with his parents and thus has and continues to receive financial benefit from his

share of the money which was used to pay off his parents' mortgage. Plaintiff never expected his parents to repay him for the money used to pay off the mortgage on [the] Raleigh home. [Defendant-parents] never expected to repay Plaintiff for the money used to pay off the mortgage. Plaintiff is therefore not entitled to a constructive trust in [the] Raleigh home nor a judgment against his parents. Plaintiff has received some of the proceeds from the money paid for the tailor shop. He also got the benefit of income from the business during the period of time it was operated by him and [defendant-mother]. Plaintiff is therefore not entitled to a constructive trust against the proceeds of the tailor shop.

24. [Lingling] is entitled to a constructive trust in the Raleigh Home and the equity in [the] Raleigh Home equivalent to 50% of the monies that were used to pay off the mortgage on [the] Raleigh home. [Lingling] is thus entitled to a constructive trust in [the] Raleigh Home and in her favor in the amount of $55,120. In addition, [Lingling] is entitled to a constructive trust in the proceeds from the sale of the tailor shop in the amount of $12,500 representing 50% of those funds coming from [Lingling] and Plaintiff and used to purchase Lulu's Tailor Shop.

. . .

CONCLUSIONS OF LAW

. . .

3. During the course of their marriage [Lingling] and Plaintiff acquired $150,000. [Lingling] and Plaintiff used $110,239.89 of this money to pay the mortgage of Defendants Zhu and Li on the home which they own as tenants by the entireties. They also contributed $25,000 to the purchase of a tailor shop.

. . .

7. [Lingling] is entitled to a constructive trust in the Raleigh Home equivalent to 50% of the monies that were used to pay off the mortgage on [the] Raleigh home. The constructive trust in the Raleigh Home would thus be for $55,120. In addition, [Lingling] is entitled to a constructive

> trust in the proceeds from the sale of the tailor shop in the amount of $12,500 representing 50% of those funds coming from [Lingling] and Plaintiff used to purchase Lulu's Tailor Shop.
>
> 8. [Lingling] is also entitled to a judgment against [defendant-parents], jointly and severally, in the amount of $67,620.

"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). In contrast, "[s]eparate property" includes

> all real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. . . . Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance.

Id. § 50-20(b)(2); *see also Wade v. Wade*, 72 N.C. App. 372, 381, 325 S.E.2d 260, 269 (1985) (rejecting the theory of transmutation, which holds that "affirmative acts of augmenting separate property by commingling it with marital resources is viewed as indicative of intent to transmute . . . the separate property to marital property" (citations omitted)) ("[W]e discern from the statute a clear legislative intent that separate property brought into the marriage or acquired by a spouse during the marriage be returned to that spouse, if possible, upon dissolution of the marriage."). "In equitable distribution proceedings, the party claiming a certain classification has the burden of showing, by a preponderance of the evidence, that the property is within the claimed classification." *Brackney*, 199 N.C. App. at 383, 682 S.E.2d at 406 (citing *Joyce v. Joyce*, 180 N.C. App. 647, 650, 637 S.E.2d 908, 911 (2006)).

"[W]hen property is acquired during marriage by one spouse from his or her parent(s), a rebuttable presumption arises that the transfer is a gift to that spouse." *Caudill v. Caudill*, 131 N.C. App. 854, 857, 509 S.E.2d 246, 249 (1998) (citing *Burnett v. Burnett*, 122 N.C. App. 712, 714, 471 S.E.2d 649, 651 (1996)). "In such a case, the presumption must be rebutted by the spouse resisting the separate property classification

by showing a lack of donative intent." *Id.* (citation omitted). However, "[t]he trial judge [in an equitable distribution action] is the sole arbiter of credibility and may reject the testimony of any witness in whole or in part." *Joyce*, 180 N.C. App. at 650, 637 S.E.2d at 911 (alterations in original) (quoting *Fox v. Fox*, 114 N.C. App. 125, 134, 441 S.E.2d 613, 619 (1994)).

Additionally, "[t]he deposit of funds into a joint account, standing alone, is not sufficient evidence to show a gift or an intent to convert the funds from separate property to marital property." *Manes v. Harrison-Manes*, 79 N.C. App. 170, 172, 338 S.E.2d 815, 817 (1986) (citation omitted) (holding bank account and annuity purchased by husband with separate assets remained separate property of husband, even where husband added wife's name to bank account and annuity); *see also Fountain v. Fountain*, 148 N.C. App. 329, 333, 559 S.E.2d 25, 29 (2002) ("Commingling of separate property with marital property, occurring during the marriage and before the date of separation, does not necessarily transmute separate property into marital property." (citations omitted)). *But see Langston v. Richardson*, 206 N.C. App. 216, 222–23, 696 S.E.2d 867, 872 (2010) (finding that bank accounts were marital property where wife's name was added to the accounts during her marriage to husband and prior to their separation).

In the instant case, the property in dispute is $150,000, which was transferred from Lingling's father "and other relatives" into a joint account in the name of both Lingling and plaintiff-husband. Lingling concedes that "[t]he evidence as to the original source of the $150,000 is quite controverted." Indeed, the trial court did not make an explicit finding as to the ultimate source of the $150,000. It is clear from the record, however, that the $150,000 was transferred into the joint account in three separate transactions of $50,000 each, by three separate individuals, all relatives of Lingling: on 10 February 2012, $50,000.00 was wired from "Zhang Limei," Lingling's mother; on 13 February 2012, $100,000.00 was wired in $50,000 increments from "Jinhong Deng," Lingling's father, and "Binbin Deng," Lingling's younger brother, respectively.

At the hearing, plaintiff-husband testified the $150,000 was "our wedding gift[,]" that the money "came from wedding gifts given -- cash wedding gifts given at the celebration of [their] marriage in [Lingling's] hometown[.]" Plaintiff-husband testified, in relevant part, as follows:

> Q. After the ceremony in January 2012, did Lingling and you have a discussion about how much cash was given as gifts?

A. About $150,000.

Q. Okay. And did you and Lingling have a discussion about what should happen to this money?

A. At that time we didn't.

. . .

Q. On the second page of the document, do you see where $150,000 was deposited into the [joint] account?

A. Yes, I saw it.

Q. Okay. And what was your understanding as to where this 150,000 came from?

A. It should be the wedding money we got from the ceremony.

Q. Okay. During the time that you and Lingling were together and living with your parents, did she ever describe this money as a loan to you?

A. Yeah. It's almost like until we started like separated and she started saying that.[2]

. . .

Q. Was there any time during the period of time that you and Lingling were living together in your parents' household that she described this 150,000 as a loan?

A. No, never.

Q. Okay. When did you first hear from Lingling that this $150,000 was a loan from her family?

A. After I overheard -- after I overheard her telling her friend that she married me was just for immigration, after that.

. . .

2. All the parties to this action spoke Chinese as a first language and very little or no English, and the trial court appointed an interpreter who translated in real time. In many instances throughout the transcript, witnesses' statements seem to have been very roughly translated.

> Q. When approximately did you overhear her make this statement?
>
> A. About June 2013.
>
> Q. Okay. And prior to June of 2013, had Lingling ever characterized this $150,000 as a loan from her family?
>
> A. No.

Lingling testified, on the other hand, that she could "guarantee you in [her] life this is not wedding gift money[,]" and that the $150,000.00 was intended to be her money as "the control of the [$150,000.00] was given to me by my parents." She also testified that not only was it "[un]reasonable to believe that $150,000 in cash would have been given as gifts at the second wedding celebration," but also that it was "impossible." Further, she testified the $150,000.00 was wired into a joint account "[b]ecause I just came to United States and I did not have my separate account."

However, it remains that the trial judge in an equitable distribution action is the sole arbiter of credibility and may reject the testimony of any witness, *see Joyce*, 180 N.C. App. at 650, 637 S.E.2d at 911 (citation omitted), and this Court reviews a trial court's classification of property for abuse of discretion, *Brackney*, 199 N.C. App. at 381, 682 S.E.2d at 405 (citations omitted). Thus, as the trial court's determination that the $150,000 is marital property is supported by competent evidence, that determination will not be disturbed on appeal, and we affirm the trial court on this issue. Lingling's argument is overruled.

2. Duty to Mitigate Damages

[5] Lingling also contends the trial court erred in finding and concluding that she has a continuing duty to mitigate her damages under the contract of support, as laid out in Finding of Fact No. 37 and Conclusions of Law Nos. 16 and 17. We agree.

"Conclusions of law drawn by the trial court form its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citation omitted).

Here, as an initial matter, the trial court's findings which Lingling challenges within Finding of Fact No. 37—that Lingling "has mitigated her damages under the [Form I-864A] contract of support and has a continuing duty to mitigate her damages"—are essentially conclusions of law, and they will be treated as conclusions of law which are reviewable

de novo on appeal. *See Smith v. Beaufort Cnty. Hosp. Ass'n, Inc.*, 141 N.C. App. 203, 214, 540 S.E.2d 775, 782 (2000) (citation omitted).

The Form I-864A is required for a person who wants to sponsor an alien for admission to the United States. 8 C.F.R. § 213a.2(a), (b) (2016); *see also* 8 U.S.C. § 1182(a)(4)(C)(ii). The Form I-864A's contents are specified in 8 U.S.C. § 1183a, and as such, this is essentially an issue of statutory interpretation. *See Wenfang Liu*, 686 F.3d at 421 ("But the question is whether reading a duty of mitigation into the immigration statute and the regulations and the affidavit-contract would serve or disserve statutory and regulatory objectives." (citation omitted)).

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990)). "This intent 'must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.' " *Burgess*, 326 N.C. at 209, 388 S.E.2d at 137 (quoting *Milk Comm'n v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)).

Finding of Fact No. 37 and Conclusions of Law Nos. 16 and 17 are as follows:

> 37. [Lingling] speaks no English. She has very little in the way of work skills to obtain employment in the United States. [Lingling] has mitigated her damages under the contract of support and has a continuing duty to mitigate her damages. She has attempted to obtain a job but has been unsuccessful given her speech limitations and her lack of work skills. [Lingling] has had no income since she and Plaintiff separated other than the $2200 paid by [defendant-parents] in August and September, 2013 (see below). [Lingling] is entitled to judgment against Plaintiff, [and defendant-parents], jointly and severally, for $4976 ($7176 for supported owed from August 2013 through January 201[4] less $2200 for the two months of support that was paid) and for $13,365 for support owed from February 2014 through November, 2014.
>
> . . .

> 16. [Lingling] has had no income since she and Plaintiff separated. [Lingling] has attempted to obtain employment but due to the language barrier and her lack of skills she has been unable to find employment.
>
> 17. [Lingling] has mitigated her damages under the contract of support and she has a continuing obligation to mitigate her damages.

Pursuant to North Carolina common law, "[t]he duty placed on an injured party to mitigate damages is well established." *Thermal Design, Inc. v. M & M Builders, Inc.*, 207 N.C. App. 79, 89, 698 S.E.2d 516, 523 (2010). "The general rule is that where there has been a breach of contract, the injured party must do 'what fair and reasonable prudence requires to save himself and reduce the damage[.]' " *Turner Halsey Co., Inc. v. Lawrence Knitting Mills, Inc.*, 38 N.C. App. 569, 572, 248 S.E.2d 342, 344 (1978) (quoting *Little v. Rose*, 285 N.C. 724, 728, 708 S.E.2d 666, 669 (1974)); *see also Blakely v. Town of Taylortown*, 233 N.C. App. 441, 450, 756 S.E.2d 878, 884–85 (2014) ("Under the law in North Carolina, an injured plaintiff must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If plaintiff fails to mitigate his damages, for any part of the loss incident to such failure, no recovery can be had." (quoting *Lloyd v. Norfolk S. Railway Co.*, 231 N.C. App. 368, 371, 752 S.E.2d 704, 706 (2013))).

In looking first to the text of the statute in question, 8 U.S.C. § 1183a, the Form I-864A requires the sponsor to agree to provide the sponsored immigrant with "any support necessary to maintain him or her at an income that is at least 125 percent of the Federal Poverty Guidelines . . . ." *See* 8 U.S.C. § 1183a(a)(1)(A) (2015). The form also notes that a sponsor's obligations end only in the event the sponsored immigrant:

- Becomes a U.S. citizen;
- Has worked, or can be credited with, 40 quarters of coverage under the Social Security Act;
- No longer has lawful permanent resident status, and has departed the United States;
- Becomes subject to removal, but applies for and obtains in removal proceedings a new grant of adjustment of status, based on a new affidavit of support, if one is required; or
- Dies.

> Note that divorce **does not** terminate your obligations under this Form I-864.

Id. § 1183a(a)(2). Notably, the above list does not include a sponsored immigrant's duty to mitigate damages under such a contract. *See Wenfang Liu*, 686 F.3d at 420 (noting the Form I-864 "specifies several excusing conditions," but "does not mention . . . failing to mitigate his or her damages").

In an opinion written by Judge Posner, the Seventh Circuit held that a Form I-864A beneficiary has no duty to mitigate damages by seeking employment because, *inter alia*, the federal regulations and the form itself were all silent as to whether the beneficiary had a duty to seek employment:

> Recall that the obligation is to support the sponsored alien at 125 percent of the poverty income level; the [I-864] affidavit must include this requirement. 8 U.S.C. § 1183(a)(1)(A). The affidavit also, however, specifies several excusing conditions, such as the sponsor's death or the alien's being employed for 40 quarters (also specified as an excusing condition in the statute, 8 U.S.C. § 1183(a)(3)(A)). But the list of excusing conditions does not mention the alien's failing to seek work or otherwise failing to mitigate his or her damages.

Id. (holding no federal common law duty to mitigate and that underlying policy behind Form I-864A was only to prevent the noncitizen from becoming a public charge); *see also Ainsworth v. Ainsworth*, No. Civ.A. 02-1137-A., 2004 WL 5219037, at *2–3 (M.D. La. May 27, 2004) (unpublished) (finding obligation of support fully enforceable against defendant in accordance with Form I-864A), *rev'g in part* No. Civ.A. 02-1137-A-M2, 2004 WL 5219036, at *2 (M.D. La. Apr. 29, 2004) (unpublished) ("[I]f the sponsored immigrant is earning, or is capable of earning, [125% of the poverty guidelines] or more, there obviously is no need for continued support."). *But see Naik v. Naik*, 944 A.2d 713, 717 (N.J. Super Ct. A.D. 2007) ("[T]he sponsored immigrant is expected to engage in gainful employment, commensurate with his or her education, skills, training and ability to work in accordance with the common law duty to mitigate damages.").

With regard to legislative intent, the Seventh Circuit wrote as follows:

> So far as we can tell, neither the Congress that enacted sections 1182 and 1183a of the Immigration and

> Nationality Act nor the immigration authorities that promulgated implementing regulations and have drafted successive versions of Form I-864 ever thought about mitigation of damages. . . .
>
> . . .
>
> The Justice Department argues as we noted that to impose a duty to mitigate would encourage immigrants to become self-sufficient. But self-sufficiency, though mentioned briefly in the House Conference Report on the 1996 statute as a goal, see H.R. Rep. No. 104–828, p. 241 (1996), is not the goal stated in the statute; the stated statutory goal, remember, is to prevent the admission to the United States of any alien who "is likely at any time to become a public charge." The direct path to that goal would involve imposing on the sponsor a duty of support with no excusing conditions. Some such conditions are specified; but why should the judiciary add to them—specifically why should it make failure to mitigate a further excusing condition? The only beneficiary of the duty would be the sponsor—and it is not for his benefit that the duty of support was imposed; it was imposed for the benefit of federal and state taxpayers and of the donors to organizations that provide charity for the poor.

Wenfang Liu, 686 F.3d at 421 (internal citations omitted).

An opinion out of federal court in Maryland, on the other hand, concluded that "[a]ssuming the plaintiff ha[d] an obligation to mitigate her damages by seeking employment, she need not apply for every available job in order to mitigate her losses; she need only make reasonable efforts." *Younis*, 597 F. Supp. 2d at 556 (citation omitted). Further, "[i]t is the [sponsor's] burden to prove that the [sponsored immigrant] did not make reasonable efforts[.]" *Id.* (citation omitted). The court in *Younis* noted that regardless of whether the sponsored immigrant obtains employment, or even where the sponsored immigrant is *unwilling* to obtain employment, a sponsor continues to remain liable under the Form I-864A, as this is not a terminating condition. *Id.* at 557 n.5 (citing 8 U.S.C. § 1183a).

The *Younis* court appears to equivocate where it "assumes" a sponsored immigrant has a duty to mitigate under a Form I-864A, while at the same time acknowledging in a footnote that a sponsor is likely

liable regardless of whether a sponsored immigrant even tries to obtain employment. *See id.* at 556, 557 n.5. Such hedging seems to indicate the *Younis* court's reticence to read an explicit duty to mitigate into the statute at issue. *See Wenfang Liu*, 686 F.3d at 423 ("And if the government is serious about wanting to impose a duty of mitigation, why hasn't it revised Form I-864 to include such a duty? It revised the affidavit . . . to make explicit that 'divorce **does not** terminate your obligations under this Form I-864' (boldface in original), which before had merely been implicit.").

> The support obligation that the law imposes on the sponsor is limited. The poverty-line income is meager, even when enhanced by 25 percent, and a sponsored immigrant has therefore a strong incentive to seek employment, quite apart from having any legal duty to do so in order to secure the meager guaranty.

Id. at 422. In the instant case, the trial court found that, for the relevant time period, "[t]he federal poverty guidelines in effect beginning January 24, 2013 established $11,490 (x125% = $1,196/mo) as the annual poverty threshold. Beginning January 22, 2014, the threshold [was] $11,670 (x125% = $1,215/mo)." This is indeed a "meager guaranty." *See id.*

Based on the plain language of the Form I-864A, the contents of which are specified in 8 U.S.C. § 1183a, and the legislative history surrounding it, we agree with the Seventh Circuit's reasoning that reading a duty of mitigation into the immigration statute and the Form I-864A would disserve the stated statutory goal: "to prevent the admission to the United States of any alien who 'is likely at any time to become a public charge.' " *Id.* Accordingly, the trial court erred in concluding as a matter of law that Lingling has a continuing duty to mitigate her damages under the Form I-864A contract. The trial court's order is reversed so far as the court's imposition of a duty of mitigation.

AFFIRMED IN PART; REVERSED IN PART.

Judges STEPHENS and DILLON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 6 December 2016)

CAROLINA VISION INVS. I, LLC v. VACCARO No. 16-147	Iredell (13CVS1431)	Affirmed
DOSS v. ADAMS No. 16-446	Nash (15CVS1753)	Affirmed
GOODWIN v. CITY OF CHARLOTTE No. 16-551	N.C. Industrial Commission (808512)	Affirmed
HASHEMI v. HASHEMI-NEJAD No. 16-358	Wake (10CVD18622)	Dismissed
IN RE A.S. No. 16-472	Wake (14JA177)	Affirmed
IN RE B.M.A. No. 16-419	Transylvania (14JT22)	Affirmed
IN RE B.S. No. 16-438	Robeson (12JT375) (12JT376)	Affirmed
IN RE D.L.P. No. 16-468	Rutherford (13JA93-94)	Affirmed
IN RE H.B. No. 16-482	Alleghany (13JA16-17)	Affirmed
IN RE H.H. No. 16-550	Duplin (13JT80)	Affirmed
IN RE J.T.O. No. 16-383	Greene (14JT1-2)	Vacated and Remanded
IN RE K.D.I. No. 16-467	Sampson (14JA7)	Vacated and Remanded
IN RE L.M.C. No. 16-661	Yadkin (14JT37-38)	Affirmed
IN RE T.A.T. No. 16-688	Davidson (15JT28) (15JT29)	Affirmed

KOEHN v. HOLLEY No. 16-586	Wake (16CVD309)	Affirmed
LENNON v. N.C. JUDICIAL DEP'T No. 16-476	N.C. Industrial Commission (14-706512)	Affirmed
LENOIR CTY. v. DAVIS No. 16-298	Lenoir (14CVD452)	Dismissed
McADAMS v. N.C. DEP'T OF COMMERCE No. 16-196	Wake (15CVS4792)	Affirmed
McKNIGHT v. LOWE'S HOME CTRS., LLC No. 16-391	N.C. Industrial Commission (X27737)	Vacated and Remanded
McLEAN v. BAKER SAND & GRAVEL No. 15-1377	N.C. Industrial Commission (X74819)	Remanded
McVICKER v. BOGUE SOUND YACHT CLUB, INC. No. 16-456	Carteret (14CVS421)	Dismissed
RANDALL v. CLOUD & WILLIAMS, PLLC No. 16-477	Mecklenburg (15CVS16879)	Affirmed
SPRUILL v. WESTFIELD INS. CO. No. 15-1329	Currituck (14CVS396)	Affirmed
STATE v. ALLEN No. 16-539	Lincoln (13CRS53150)	No Error
STATE v. BANKS No. 16-308	Transylvania (15CRS50377-78)	No Error
STATE v. BANKS No. 16-402	Transylvania (15CRS51516)	No Error
STATE v. BATTLE No. 16-355	Duplin (14CRS50827)	VACATE AND REMAND IN PART; NO ERROR IN PART.
STATE v. BEARY No. 16-433	Wake (14CRS201449)	No Error
STATE v. CHILES No. 16-612	Martin (12CRS50657)	Affirmed

STATE v. CROSBY No. 16-172	Forsyth (14CRS110) (14CRS54254)	No error
STATE v. CURTIS No. 16-458	Caldwell (12CRS1563)	Affirmed
STATE v. GARRISON No. 16-565	Forsyth (14CRS58437)	No Error
STATE v. JOHNSON No. 16-509	Wake (11CRS220929)	NO ERROR IN PART, VACATED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING. IAC CLAIM DENIED.
STATE v. JOHNSON No. 16-193	Mecklenburg (14CRS224978) (14CRS38519)	No Error
STATE v. LAXTON No. 16-386	Davie (13CRS51539-40) (13CRS51542-44)	No Error
STATE v. LOGAN No. 16-418	Dare (13CRS949) (15CRS278)	No error in part; Dismissed in part.
STATE v. MANNING No. 16-442	Wake (15CR220382-84)	No prejudicial error
STATE v. MEEKER No. 16-552	Pamlico (13CRS50199)	Reversed
STATE v. MITHAMO No. 16-519	Wake (12CRS216306)	No Error
STATE v. MOORE No. 16-422	Cabarrus (14CRS50611)	Remanded
STATE v. NEAL No. 16-510	Mecklenburg (14CRS207102-03) (14CRS207496)	Affirmed
STATE v. PARKER No. 16-524	Pitt (13CRS57177)	No Error
STATE v. ROBINSON No. 16-567	Columbus (14CRS52858-59)	No Error

STATE v. ROUSSEAU No. 16-380	Forsyth (14CRS1642) (14CRS51004) (14CRS51233)	No Error
STATE v. SELLERS No. 15-1309	Wake (12CRS224404) (13CRS368)	No Error
STATE v. SIMMONS No. 16-255	Duplin (11CRS51393)	No Error
STATE v. SPIVEY No. 16-455	Hertford (14CRS51495-96) (15CRS101) (15CRS14)	Remanded for Resentencing
STATE v. STROESSENREUTHER No. 16-511	New Hanover (14CRS52404) (15CRS8129)	Affirmed in Part, Remanded for Correction of Clerical Error in Part, Vacated and Remanded in Part
STATE v. STUBBS No. 16-411	Pender (14CRS50033-34) (14CRS52008) (15CRS884-886)	No prejudicial error
STATE v. THOMPSON No. 16-607	Durham (13CRS5783)	Affirmed; Remanded for the correction of clerical errors.
STATE v. TOLLIVER No. 16-500	Haywood (14CRS50262-63)	No Error
STATE v. WALKER No. 16-423	Forsyth (13CRS55263-64)	Affirmed
STATE v. WATKINS No. 16-434	Cabarrus (13CRS54969-70)	Affirmed
STATE v. WHATLEY No. 16-284	Mecklenburg (14CRS233477-78)	New trial in part; no error in part; no prejudicial error in part
STATE v. WHITEHEAD No. 16-294	Nash (13CRS54109)	No Error in Part, No Plain Error in Part, Vacated in Part and Remanded

STATE v. WILLIAMS No. 16-432	New Hanover (14CRS57145)	No Error
STATE v. YORK No. 16-170	Guilford (14CRS94941-42)	No Error
TOWNSEND v. N.C. DEP'T OF TRANSP. No. 16-478	N.C. Industrial Commission (TA-22209) (TA-22210)	Affirmed
TURNIP INVS., LLC v. DEUTSCHE BANK TR. CO. AMS. No. 16-246	Jackson (15CVS227)	Dismissed
UTLEY v. SMITH No. 16-463	Wake (14CVS13728)	Affirmed
WILLIAMS v. PERRY No. 16-372	Rowan (15CVS777)	Affirmed

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