251 N.C. App.—No. 1 **Pages 1-371**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 8, 2019

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

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

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

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

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS[4]
J. DOUGLAS McCULLOUGH[5]
WENDY M. ENOCHS[6]

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

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis[7]

Assistant Director
David Alan Lagos

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

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

[7]Retired 31 August 2018.

COURT OF APPEALS

CASES REPORTED

FILED 20 DECEMBER 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

abetting a breach of fiduciary duty with respect to defendant Reynolds. Plaintiff lacked standing to bring the underlying breach of fiduciary duty claim against defendant board of directors. **Corwin v. British Am. Tobacco PLC, 45.**

CONSTITUTIONAL LAW

Constitutional Law—double jeopardy—appellate stay dissolved—re-trial— A violation of defendant's double jeopardy rights at the trial court level was furthered at the appellate level where defendant was twice subjected to double jeopardy arising from a non-fatal defect in an indictment. The prosecution under the first indictment was erroneously dismissed after a jury was empaneled, the Court of Appeals granted and then dissolved a temporary stay, and defendant was convicted in a new trial under a new indictment. **State v. Schalow, 334.**

Constitutional Law—double jeopardy—non-fatal flaw in indictment—mistrial and re-prosecution—Defendant's double jeopardy rights were violated where the trial court erred by denying defendant's motion to dismiss after a mistrial was erroneously declared in the initial prosecution after a jury was empaneled due to a defect in the indictment and defendant was subsequently tried and convicted under a new indictment. Attempted first-degree murder and the lesser-included offense of attempted voluntary manslaughter (for which defendant could have been tried under the first indictment) are considered one offense under double jeopardy. **State v. Schalow, 334.**

Constitutional Law—effective assistance of counsel—trial tactics— Respondent mother received effective assistance of counsel in a termination of parental rights case. While counsel's choice of tactics was "troublesome," respondent-mother failed to show prejudice or that counsel's conduct undermined the fundamental fairness of the proceeding. **In re M.Z.M., 120.**

Constitutional Law—right to speedy trial—length and reason for delay—The trial court did not err by denying defendant's speedy trial motion to dismiss charges of assault with a deadly weapon inflicting serious injury with a sentencing enhancement for possessing or wearing a bulletproof vest. The primary cause of the delay was a backlog at the State Bureau of Investigation's Crime Lab, but the 18 months used by the Crime Lab to process forensic testing of evidence was a neutral reason for the delay. Unlike the docket, which is controlled by the prosecutor, a backlog of evidence to be tested is within control of a separate agency. **State v. Johnson, 260.**

Constitutional Law—speedy trial—last-minute assertion of right—The trial court did not err by denying defendant's speedy trial motion to dismiss charges of assault with a deadly weapon inflicting serious injury with a sentencing enhancement for possessing or wearing a bulletproof vest. The eleventh-hour nature of defendant's motion carried minimal weight in determining whether defendant was denied his right to speedy trial. **State v. Johnson, 260.**

Constitutional Law—speedy trial—no prejudice from delay—The trial court did not err by denying defendant's speedy trial motion to dismiss charges of assault with a deadly weapon inflicting serious injury with a sentencing enhancement for possessing or wearing a bulletproof vest. Defendant was not prejudiced by the delay between his arrest and trial, although he raised the questions of witnesses' memories and the ability to confer with counsel since he was incarcerated. **State v. Johnson, 260.**

CORPORATIONS

Corporations—minority shareholder exercising actual control—controlling shareholder—fiduciary duty—The trial court erred by dismissing plaintiff's claim against defendant British American pursuant to Rule 12(b)(6). The amended complaint alleged facts sufficient, if proven true, to allow for the reasonable inference that defendant exercised actual control over the transaction and breached its fiduciary duty to the other shareholders. A minority shareholder exercising actual control over a corporation may be deemed a "controlling shareholder" with a concomitant fiduciary duty to the other shareholders. **Corwin v. British Am. Tobacco PLC, 45.**

CRIMINAL LAW

Criminal Law—appointed counsel—waived, then requested—The trial court's denial of defendant's request for appointed counsel and its ruling that defendant had waived the right to appointed counsel were not supported by competent evidence. Defendant had waived appointment of counsel before one judge and obtained continuances while he sought to hire counsel, but he was unsuccessful and his request for appointed counsel before another judge was refused. The second judge relied on the prosecutor's erroneous statement that defendant had been told at the last continuance that he would be forced to proceed pro se if he could not hire the private attorney. The first judge did not warn defendant that he would be forced to proceed pro se if he could not hire private counsel and did not make any inquiry to ascertain that defendant understood the consequences of representing himself. **State v. Curlee, 249.**

Criminal Law—defense of accident—wrongdoing by defendant—The trial court did not err in a prosecution for attempted first-degree murder and assault with a deadly weapon arising from a fight by not instructing the jury on the defense of accident. Even if the unrequested instruction had been given, it was not probable that the jury would have reached a different verdict. **State v. Robinson, 326.**

Criminal Law—prosecutor's argument—defendant's failure to produce exculpatory evidence—The trial court did not err by overruling defendant's objection to the prosecutor's closing argument concerning defendant not testifying in a prosecution for possession of a firearm by a felon. While a prosecutor may not comment on a defendant's failure to take the stand, the defendant's failure to produce exculpatory evidence or to contradict the evidence presented by the State may be brought to the jury's attention by the State. Moreover, in this case, any error was harmless beyond a reasonable doubt. **State v. Martinez, 284.**

Criminal Law—prosecutor's argument—scenario of the crime—The trial court did not abuse its discretion in a prosecution for possession of a firearm by a felon by allowing the prosecutor to make statements in his closing argument that allegedly asserted facts not in evidence. Prosecutors may create a scenario of the crime as long as the record contains sufficient evidence from which the scenario is reasonably inferable. **State v. Martinez, 284.**

Criminal Law—prosecutor's closing argument—demonstration—no gross impropriety—Defendant did not show gross impropriety and the trial court did not commit reversible error by not intervening *ex mero motu* in a prosecution for possession of a firearm by a felon where the prosecutor pointed a rifle at himself during a demonstration. Defendant failed to show gross impropriety. **State v. Martinez, 284.**

Workers' Compensation—Form 22 not filed—not necessary—The Industrial Commission did not err in a workers' compensation case by not making a finding regarding defendant's failure to submit a Form 22 (used in calculating wages). The Commission's findings were sufficient to address all matters in controversy; the Commission denied plaintiff's request for indemnity compensation, and a Form 22 was not necessary. **Patillo v. Goodyear Tire & Rubber Co., 228.**

Workers' Compensation—futility of employment search—advisory opinion not given—In a worker's compensation case remanded on other grounds, the Court of Appeals declined plaintiff's request to instruct the Commission to consider whether it would be futile for him to seek other employment in light of the decision in his Social Security Disability claim. It is not the proper function of courts to give advisory opinions. **Patillo v. Goodyear Tire & Rubber Co., 228.**

Workers' Compensation—jurisdiction—last act—phone conversation with worker physically present in North Carolina—The Industrial Commission had jurisdiction over plaintiff's workers' compensation claim. The last act making the employment arrangement between plaintiff and The Warehousing Company, LLC (TWC) "a binding obligation" was plaintiff's agreement during his telephone conversation to work on the Florida project for TWC. Because plaintiff was physically present in North Carolina during this conversation, the contract of employment was made in North Carolina. **Beal v. Coastal Carriers, Inc., 1.**

Workers' Compensation—Parsons presumption—not rebutted—The Industrial Commission did not err in a workers' compensation case by concluding that defendants failed to rebut the *Parsons* presumption (that further medical treatment is directly related to a compensable injury that has been shown initially). Defendants failed to present evidence showing that the medical treatment was not directly related to the compensable injury; the medical testimony did not show that plaintiff's low back pain was separate and distinct from his work injury. **Patillo v. Goodyear Tire & Rubber Co., 228.**

Workers' Compensation—Parsons presumption—properly applied—In a workers' compensation case, the presumption in *Parsons v. Pantry*, 126 N.C. App. 540, was properly applied to plaintiff's continuing back pain. The presumption applied only to the "very injury" determined to be compensable; plaintiff's continuing back pain was a future symptom allegedly related to the original compensable injury. **Patillo v. Goodyear Tire & Rubber Co., 228.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JEFFREY EUGENE BEAL, EMPLOYEE, AND LAWRENCE CRAIGE, GUARDIAN OF THE ESTATE OF JEFFREY EUGENE BEAL, PLAINTIFFS

v.

COASTAL CARRIERS, INC., (ALLEGED) EMPLOYER, AND ZURICH AMERICAN INSURANCE COMPANY, (ALLEGED CARRIER); DEFENDANTS; AND THE WAREHOUSING COMPANY, LLC, (ALLEGED) EMPLOYER AND KEY RISK INSURANCE COMPANY, (ALLEGED) CARRIER, DEFENDANTS

No. COA16-420

Filed 20 December 2016

1. Workers' Compensation—jurisdiction—last act—phone conversation with worker physically present in North Carolina

The Industrial Commission had jurisdiction over plaintiff's workers' compensation claim. The last act making the employment arrangement between plaintiff and The Warehousing Company, LLC (TWC) "a binding obligation" was plaintiff's agreement during his telephone conversation to work on the Florida project for TWC. Because plaintiff was physically present in North Carolina during this conversation, the contract of employment was made in North Carolina.

2. Workers' Compensation—base on operation—principal employment

The Industrial Commission erred in a workers' compensation case by determining that Key Risk's policy provided coverage for plaintiff's workplace accident. Throughout plaintiff's employment with The Warehousing Company, LLC, his "base of operation" was Florida. Accordingly, he was neither "principally employed" in

South Carolina nor was South Carolina the state where his employment was located.

Appeal by defendant-appellant Key Risk Insurance Company from opinion and award entered 15 December 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 October 2016.

Stiles, Byrum & Horne, L.L.P., by Henry C. Byrum, Jr., and B. Jeanette Byrum, for defendants-appellees Coastal Carriers, Inc. and Zurich American Insurance Company.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Erica B. Lewis, Shelley W. Coleman, and M. Duane Jones, for defendant-appellant Key Risk Insurance Company.

DAVIS, Judge.

This workers' compensation insurance coverage dispute arises from a workplace accident that occurred in Florida and injured an employee who lived in North Carolina and had been lent to an employer based in South Carolina. Key Risk Insurance Company ("Key Risk") appeals from an opinion and award of the North Carolina Industrial Commission ordering Key Risk to (1) pay temporary total disability compensation to Jeffrey Eugene Beal ("Plaintiff") pursuant to the North Carolina Workers' Compensation Act; and (2) pay all indemnity benefits owed on Plaintiff's claim. After careful review, we reverse and remand.

Factual Background

The facts giving rise to this case involve two furniture moving and installation companies — Coastal Carriers, Inc. ("Coastal") and The Warehousing Company, LLC ("TWC"). On 20 July 2010, TWC — a company based in South Carolina — entered into an agreement with Winter Park Construction Company ("Winter Park") to provide furniture, fixtures, and electronics installation services at Plantation Beach Club Condominiums in Stuart, Florida (the "Florida Project"). Because TWC did not have enough manpower to perform the job, TWC's owner, Sidney Baird, contacted Gordon Ray — Baird's longtime friend who was the president of Coastal — to see about the possibility of TWC hiring four of Coastal's employees to temporarily work for TWC on the Florida Project.

In 2010, Plaintiff was working for Coastal, which was based in North Carolina. At a safety meeting of Coastal employees, Ray shared with them the information regarding the Florida Project. Upon learning of

the employment opportunity from Ray, Plaintiff and three other Coastal employees — Michael Porter, Anthony Brown, and Randy Wallace — contacted Baird to inform him of their interest in working on the Florida Project. Baird offered each of the four employees the job — which they each accepted — and told all of them that upon completion of the job, they would be paid by TWC.

Plaintiff worked on the Florida Project under the on-site supervision of his fellow Coastal employee, Porter, and a TWC employee named David Fleener. Baird kept in contact with Porter and Fleener on a daily basis from his home in South Carolina.

On 26 September 2010, while working at the Florida job site, Plaintiff was injured when he fell while lifting furniture to the second floor of the building where the TWC crew was working. As a result of the fall, he sustained multiple injuries.

On 22 October 2010, Plaintiff filed a Form 18 "Notice of Accident" with the Industrial Commission, seeking compensation for his injuries from Coastal's workers' compensation insurance carrier, Zurich American Insurance Company ("Zurich"), due to his need for medical care for which TWC's insurance carrier, Key Risk, had refused to pay. Zurich paid Plaintiff's medical compensation of $350,799.25 and disability compensation of $44,068.85.

On 16 September 2011, Coastal filed a motion to add TWC as a defendant to Plaintiff's workers' compensation action. The motion was granted on 27 October 2011. On 2 January 2013, Coastal filed a Form 33 "Request That Claim be Assigned for Hearing" requesting that "[TWC] and its workers' compensation carrier [Key Risk] pay benefits pursuant to the North Carolina Workers' Compensation Act." On 25 February 2013, Key Risk filed a Form 33R "Response to Request That Claim Be Assigned for Hearing" contending that Key Risk was not a party and "would be prejudiced if added into this claim as a party" more than two years after it was removed from a hearing docket.

On 9 July 2013, a hearing was held before Deputy Commissioner Melanie Wade Goodwin. Deputy Commissioner Goodwin issued an opinion and award providing that Coastal, Zurich, and TWC were jointly liable for indemnity and medical benefits paid by Zurich and ordering that Key Risk be dismissed with prejudice as a party-defendant in the matter. Coastal and Zurich filed a notice of appeal from the deputy commissioner's dismissal of Key Risk on 18 June 2014.

On 15 December 2015, the Full Commission issued an opinion and award containing the following pertinent findings of fact:

> 1. On September 26, 2010, Jeffrey Eugene Beal (hereinafter, "Jeffrey Beal" or "Mr. Beal" or "Plaintiff") was injured when he fell approximately 10-20 feet from a piece of equipment called a lull which was being used to lift furniture to the second floor of the building where The Warehousing Company, LLC (hereinafter, "TWC") crew was working. As a result of his fall, Mr. Beal sustained multiple injuries, including fractures of the left sphenoid wing, left lateral orbital wall, left maxillary sinus, and left zygomatic arch; a comminuted right distal radius and ulna fracture; a left elbow comminuted intra-articular olecranon fracture; multiple left rib fractures; a ruptured spleen and a mild subarachnoid hemorrhage.
>
> 2. On October 22, 2010, Jeffrey Beal filed a Form 18 Notice of Accident with the North Carolina Industrial Commission seeking compensation for his injuries. The named Defendant was Coastal Carriers, Inc. (hereinafter, "Coastal"). Plaintiff's claim was accepted and paid by Coastal and Zurich American Insurance Company (hereinafter "Zurich") due to the emergent need for medical care which Key Risk Insurance Company (hereinafter, "Key Risk"), the workers' compensation carrier for TWC, would not address.
>
> . . . .
>
> 5. On September 16, 2011, Defendant Coastal filed a Motion to Add Party-Defendant, seeking to add TWC, as a party Defendant. This Motion was granted by the Executive Secretary on October 27, 2011.
>
> 6. On September 26, 2010, Gordon Wayne Ray, Jr. (hereinafter Mr. Ray) was the President of Coastal, which was located in Wilmington, North Carolina. Coastal was a mover of household goods regulated by state and federal tariffs.
>
> 7. On September 26, 2010, Sidney "Skip" Baird (hereinafter, "Mr. Baird") was the owner of TWC located at 122 Watergate Drive, Myrtle Beach, South Carolina. TWC's business included the warehousing of and the installation of furniture, fixtures, and electronics at resort properties,

installing furniture, fixtures, and electronics which was commercial work which was not regulated by state and federal tariffs.

. . . .

11. On July 20, 2010, TWC (through Mr. Baird) entered into a "Subcontract Agreement" with Winter Park Construction Company (hereinafter; "Winter Park") to provide furniture, fixture and electronics installation services at Plantation Beach Club Condominiums in Stuart, Florida. This contract was negotiated entirely by Mr. Baird on behalf of TWC and did not involve Mr. Ray or Coastal in any way.

12. Under the terms of the contract, TWC had eight days to complete the installation of furniture, fixtures and electronics in thirty-two units. At the time in question, TWC had multiple projects underway in various parts of the United States and did not have the manpower to complete all of these jobs. Mr. Baird's situation was further complicated by the fact that he was awaiting the birth of his daughter, which required him to remain in Myrtle Beach, South Carolina. Mr. Baird contacted Mr. Ray indicating he was "in a jam" and that he wanted to hire four of Mr. Ray's employees to work for TWC on a Florida job where all of the furniture, fixture and electronics installation had to be completed in eight days.

13. Sometime prior to September 19, 2010, Mr. Ray announced at a safety meeting of Coastal employees that Mr. Baird wanted to hire workers for a Florida project and since the work for his company was in a slow period, he instructed any of his interested workers to contact Mr. Baird directly. Mr. Ray did not select or designate any of his workers for the Florida job. His workers were free to accept or reject the offer of employment.

. . . .

15. Following this meeting, which occurred in North Carolina, four Coastal employees -- Michael Porter, Anthony Brown, Randy Wallace and Jeffrey Beal -- arranged with Mr. Baird to go to Florida to work for TWC. Prior to these workers leaving North Carolina, Mr. Baird spoke by telephone with each of these four men -- Michael

Porter, Anthony Brown, Randy Wallace and Jeffrey Beal -- to give a "pep talk["] and discuss payment or wages at the completion of the job in Florida. Mr. Baird informed them they would be paid by TWC. Each one of these four men accepted Mr. Baird's offer of employment while still in North Carolina.

16. Plaintiff testified that he agreed to work the Florida job while he was in North Carolina.

17. The four individuals who agreed to work on the Florida project did not have reliable transportation. When informed of their transportation problems, Mr. Ray loaned the men a Coastal sales van to drive and gave them a gas card to purchase fuel. He expected to be reimbursed by TWC for these expenses.

. . . .

19. When the four individuals hired by TWC -- Michael Porter, Anthony Brown, Randy Wallace and Jeffrey Beal -- arrived in Florida, they went to a motel room that was paid for by Mr. Baird. Mr. Porter supervised the work for the first couple of days until David Fleener, an employee of TWC arrived on the site. Mr. Fleener then instructed the workers on what to do. Mr. Baird communicated with TWC workers multiple times on a daily basis while they were in Florida and personally supervised them through Michael Porter and David Fleener. This included setting working hours and monitoring progress on the job. Mr. Ray never supervised the work of the TWC crew.

20. Prior to September 26, 2010, Mr. Ray had a conference in West Palm Beach and he decided to stop by the Florida jobsite for a visit on his way to the conference. During the period of about thirty minutes when he was at the site, he cautioned the TWC workers to "be careful" but did not offer supervision or instruct them on their work. While Mr. Ray was present, he was approached by Mr. Porter about loaning Mr. Brown, Mr. Wallace, Mr. Beal and him money for food. Mr. Baird had promised to send the TWC crew money, but had failed to do so. Mr. Ray loaned each man $100.00 out of his personal funds.

21. When TWC's project in Florida was completed, Mr. Baird paid Michael Porter, Anthony Brown, Randy Wallace and Jeffrey Beal for the work they did for TWC in Florida. These workers (other than Plaintiff) collected their money in Myrtle Beach, South Carolina. The offices for TWC remained in Myrtle Beach, South Carolina the entire time the company was in existence.

22. Plaintiff was performing the work of TWC when his accident occurred.

23. Anthony Brown gave a statement under oath on February 17, 2012, which was included in the record, stating he was one of four individuals who traveled from North Carolina to Florida to work for TWC and was working on the project for a man named "Skip." Mr. Porter was the contact person with Mr. Baird, and the two were constantly talking. Mr. Brown considered himself to be an employee of TWC. When the job was completed, the TWC employees drove to Mr. Baird's apartment in Myrtle Beach, South Carolina where they collected their checks for the project.

24. Plaintiff testified by deposition on October 9, 2012 in a civil action he filed in Florida as a result of the September 26, 2010 accident. Plaintiff testified that he received $100.00 from Mr. Ray so he would have food when Mr. Ray visited the Florida jobsite with his wife and took a "tour through the motel." Plaintiff testified that he took orders from Michael Porter on the job and that Mr. Porter kept his hours. He was paid by Skip Baird for the work he performed in Florida. Mr. Ray never directed his work on the project.

. . . .

26. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Jeffrey Beal was not an independent contractor for TWC. He was expressly hired pursuant to an oral contract to leave North Carolina and go to work in Florida for a job that was to be completed in eight days. He did not possess any special skills in performing the type of work done by TWC. He did not have control over any aspects of the work that he

performed for TWC. Mr. Beal obtained his work directions from persons designated by Mr. Baird to be onsite supervisors. He had no power to hire or fire anyone. The work he did was part of the trade or business of TWC. He was paid wages and trip expenses by TWC.

27. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Jeffrey Beal was an employee of TWC at the time of his injury. Mr. Baird, owner of TWC, expressly made a contract of hire with Plaintiff. The work Mr. Beal did for TWC was entirely the work of Mr. Baird and TWC and benefitted TWC and not Coastal. Mr. Baird and TWC had the right, and did in fact, control the details of the work done by Mr. Beal during the period he worked for TWC, including the date of his injury by accident. During the period Mr. Beal was hired to work for TWC, he did not do any work for Coastal and the work that he did for TWC was not part of the trade or business of Coastal. Mr. Beal and Mr. Baird on behalf of TWC agreed upon the employment terms. Coastal was not involved in the employment contract agreement, Mr. Ray did not assign employees to TWC; he only announced the availability of a temporary job with TWC and left the decision of whether to seek the job entirely up to any of his interested employees.

. . . .

32. The Full Commission finds that both Coastal and TWC are liable for all of the compensable consequences of Plaintiff's September 26, 2010 injury by accident in proportion to the wage liability of each employer.

33. At the time of Plaintiff's injury on September 26, 2010, TWC was insured by Key Risk. There is a dispute, however, over whether the policy of insurance between Key Risk and TWC covered Plaintiff's claim herein.

34. Mr. Baird arranged workers' compensation insurance for the Florida project on behalf of TWC through Associated Insurors (hereinafter "Associated") in Myrtle Beach, South Carolina. In doing so, he explained to the agent the nature of his business and that TWC worked outside South Carolina. At the time of Plaintiff's injury, TWC had more projects outside South Carolina than within

the State. It was Mr. Baird's understanding that TWC had workers' compensation coverage for each jobsite, including the jobsite in Florida where Plaintiff was injured.

35. As part of its Subcontract Agreement with Winter Park for the project in Stuart, Florida, TWC had to provide proof of workers' compensation insurance. Mr. Baird arranged for his insurance agent (Associated) to contact Winter Park to verify the required coverage. After that contact occurred, Associated sent Winter Park a certificate of insurance verifying workers' compensation insurance for TWC. The "Certificate Holder" was listed as Winter Park Construction, 221 Circle Drive, Maitland, Florida. After that contact occurred, Winter Park sent TWC the Subcontract Agreement to execute, and TWC went to work.

. . . .

61. Key Risk contends that the language of TWC's insurance policy provides for workers' compensation insurance coverage in South Carolina only, with additional coverage only if Plaintiff was hired in South Carolina or principally employed in South Carolina.

62. Based upon a preponderance of the evidence of record, the Full Commission finds that Plaintiff's employment was located in South Carolina because it is the only state in which he had any "base of operation." The only place of business ever maintained by TWC was located in Myrtle Beach, South Carolina. Plaintiff was hired from TWC's office in Myrtle Beach, South Carolina. Mr. Baird provided work assignments to the employees, including Plaintiff, working on the Winter Park project from his place of business in South Carolina and Plaintiff was paid out of South Carolina for the work he performed in Florida. The other three lent employees from Coastal -- Michael Porter, Anthony Brown and Randy Wallace -- traveled to Myrtle Beach, South Carolina to receive payment from TWC for the work they performed (along with Plaintiff) in Stuart, Florida upon completion of the job.

63. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's claim for compensation is covered under the Key Risk policy issued to TWC.

> 64. Coastal and TWC are jointly liable for medical payments made consequent of Plaintiff's September 26, 2010 injury. Since Coastal had no "wage liability" to Plaintiff for the Florida project, TWC owes all of Plaintiff's indemnity compensation. As a result of Plaintiff's injuries, Zurich has paid as carrier for Coastal, medical compensation in the amount of $350,799.25 and indemnity compensation in the amount of $44,068.85. TWC's carrier, Key Risk, has paid nothing. TWC and Key Risk are obligated to reimburse Zurich for TWC's and Key Risk's (50%) share of the joint amount of the medical compensation due as a result of Plaintiff's claim. TWC and Key Risk are obligated to reimburse Zurich for all the indemnity compensation due Plaintiff that Zurich has paid. Since the matter in controversy before the Full Commission is between the Defendants, the amount of Plaintiff's average weekly wage is not being determined.

Based on these findings of fact, the Commission made the following pertinent conclusions of law:

> 1. On September 26, 2010, Plaintiff, Jeffrey Beal, sustained a compensable injury by accident due to a fall which arose out of and in the course of his employment with TWC and involved the interruption of his work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. N.C. Gen. Stat. §§ 97-2(5); 97-2(6).
>
> 2. At the time of Plaintiff's injury on September 26, 2010, four employees, Michael Porter, Anthony Brown, Randy Wallace and Plaintiff, were employees of TWC who had been lent by Coastal to TWC. N.C. Gen. Stat. § 97-2; S.C. Code Ann. § 42-1-360(2).
>
> 3. The Full Commission concludes that the North Carolina Industrial Commission has jurisdiction over Plaintiff's claim. . . .
>
> . . . .
>
> 6. The Full Commission concludes that Plaintiff was an employee of TWC, not an independent contractor, at the time of his injury on September 26, 2010. . . .

. . . .

9. The Full Commission concludes, based upon a preponderance of the evidence of record, that the employment relationship Plaintiff had with TWC met all three of the conditions to establish a "special employer" relationship . . . . The preponderance of the evidence of record establishes that Plaintiff made a contract of hire with TWC; the work Plaintiff was doing for TWC on the Florida project was work involving furniture, fixture and electronics installations that TWC subcontracted with Winter Park to perform and was different from the type of work Plaintiff did for Coastal, a household moving company; Coastal had no part in negotiating the subcontract agreement that TWC made with Winter Park and there was no agreement between TWC and Coastal for Coastal to share the profits from the project; the work being done by Plaintiff was essentially that of TWC, the special employer; and TWC, the special employer, had the right to control, and did control, the details of the work that Plaintiff did on the Florida project. *Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 607, 525 S.E.2d 471, 473 (2000).

10. The Full Commission concludes that Coastal remained Plaintiff's general employer while he was working for TWC since the preponderance of the evidence and the reasonable inferences therefrom, indicate that Coastal was the general employer of Plaintiff while he was working for TWC, as Plaintiff and the three other workers Coastal lent to TWC had an expectation of returning to work with Coastal when the job with TWC was completed. Therefore, the legal presumption that the general employment with Coastal continued is not rebutted by a "clear demonstration." *Collins v. James Paul Edwards, Inc.*, 21 N.C. App. 455, 204 S.E.2d 873 (1974); *Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 607, 525 S.E.2d 471, 473 (2000).

11. Based upon a preponderance of the evidence of record, the Full Commission concludes that Plaintiff was lent by Coastal to TWC and that at the time of his injury on September 26, 2010, he was jointly employed by both TWC and Coastal and both employers are jointly liable for Plaintiff's injuries. N.C. Gen. Stat. § 97-51; *Collins*

v. James Paul Edwards, Inc., 21 N.C. App. 455, 204 S.E.2d 873 (1974); *Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 607, 525 S.E.2d 471, 473 (2000).

. . . .

14. The Commission has the inherent power in this case to order TWC and Key Risk to reimburse Coastal and Zurich for benefits paid or to be paid on Plaintiff[']s claim. . . .

. . . .

17. Key Risk further contends that Key Risk's obligation under a policy must be defined by the terms of the policy itself and that in construing policy language, basic contract rules apply. If the terms of a contract are unambiguous, the contract must be enforced. *South Carolina Ins. Co. v. White*, 301 S.C. 133, 390 S.E.2d 471 (1990). Key Risk argues that coverage cannot be extended to Plaintiff under the "Other State Insurance" portion of the policy because Plaintiff's claim does not meet the following conditions of the policy: "The employee claiming benefits was either hired under a contract of employment made in a state listed in Item 3.A. of the Information Page or was, at the time of the injury, principally employed in a state listed in Item 3.A. of the Information Page. . . ."

18. It is undisputed that the substantive law of South Carolina applies to this case. . . .

. . . .

21. Coastal relies on the provisions of S.C. Code Ann. § 42-[1]5-10, which state: "Any employee covered by the provisions of this Title is authorized to file his claim under the laws of the state where he is hired, the state where he is injured, or the state where his employment is located. ["] S.C. Code Ann. § 42-15-10 does not specifically use the term "principally employed," and instead refers to where an employee's employment is "located." S.C. Code Ann. § 42-15-10.

22. Key Risk contends, however, that Plaintiff must first show that his claim comes under the jurisdiction of the South Carolina Workers' Compensation Act before South Carolina statutory law can be applied to Plaintiff's claim.

23. The Full Commission concludes that South Carolina could have exercised jurisdiction over Plaintiff's claim had he chosen to file his claim in South Carolina because South Carolina is the state where Plaintiff's employment was located. To determine where a worker's employment is located, South Carolina follows the "base of operation rule." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 429-30, 645 S.E.2d 424, 427 (2007) (quoting *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 346, 428 S.E.2d 889, 892 (1993)). Under this rule, "the worker's employment is located at the employer's place of business to which he reports, from which he receives his work assignments, and from which he starts his road trips, regardless of where the work is performed." *Id.* at 373 S.C. [sic] at 429, 373 S.E.2d at 432. Where the work is performed is irrelevant on the issue of where an employee's employment is located. *Id.* In the present case, the only place of business ever maintained by TWC was located in Myrtle Beach, South Carolina. Plaintiff was hired from TWC's office in Myrtle Beach, South Carolina. Mr. Baird (TWC) provided detailed and specific work assignments to the employees, including Plaintiff, working on the Winter Park project from his place of business in South Carolina and Plaintiff was paid out of South Carolina for the work he performed in Florida. The other three lent employees from Coastal -- Michael Porter, Anthony Brown and Randy Wallace -- traveled to Myrtle Beach, South Carolina to receive payment from TWC for the work they performed in Stuart, Florida upon completion of the job. S.C. Code Ann. § 42-15-10; *Hill v. Eagle Motor Lines*, 373 S.C. 422, 429-30, 645 S.E.2d 424, 427 (2007). The Court of Appeals of South Carolina in *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (1997), held that the legislature did not intend to exclude all transient employment that did not fit neatly within the base of operations test set out in *Holman*. *Id.* The concept of "base of operation" rule presupposes that all employees have a fixed base of operation [to] which jurisdiction over a workers' compensation claim will attach. *Id.* The Court of Appeals in *Voss* ultimately held that South Carolina was the state where the employee's employment was located, given the amount of control exerted over the employee by his employer, who operated out of South Carolina, even though the employee received his daily assignments from

wherever his employer was located that day and he started his road trips from wherever the group was located, but never from South Carolina. *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (1997). The Supreme Court of South Carolina agreeing with the Court of Appeals' analysis in *Voss*, held in *Oxendine v. Davis*, 373 S.C. 438, 646 S.E.2d 143 (2007), that the base of operations rule is to "determine the location of nomadic employment based on the employer's place of business," and used other factors outside of those defined in *Holman*, such as the employee reporting to the employer's business in South Carolina to be paid, to determine the employee's location of employment. *Id.* The Supreme Court in *Oxendine* ultimately held that an employer's base of operations was in South Carolina when the employer clearly operated his business in South Carolina. *Id.* at 445, [646] S.E.2d at 150. Thus, even if the facts of the present case do [not] have all of the factors under the base of operations test set out in *Holman*, following the analysis of *Oxendine* and *Voss*, Plaintiff's employment would still be located in South Carolina, given the amount of the control exerted over Plaintiff by Mr. Baird (TWC), who clearly operated his business out of South Carolina. *Oxendine v. Davis*, 373 S.C. 438, 646 S.E.2d 143 (2007); *Voss v. Ramco, Inc.*, 325 S.C. 560, 482 S.E.2d 582 (1997).

24. Applying the applicable provisions of the South Carolina law to the current claim, the Full Commission finds that the Key Risk policy provided coverage for Plaintiff's claim filed in North Carolina. Pursuant to S.C. Code Ann. § 42-5-60, "Every policy for the insurance of the compensation provided in this Title or against liability therefore shall be deemed to be made subject to provisions of this Title . . . ." Therefore, the statutory provisions of the South Carolina Workers' Compensation Code are a required part of the Key Risk policy for workers' compensation insurance issued to TWC. Also, S.C. Code Ann. § 42-5-70 provides that jurisdiction of the insured for the purpose of this Title shall be jurisdiction of the insurer and S.C. Code Ann. § 42-5-60 requires that the Key Risk policy conform to South Carolina law. These statutory requirements are reflected in the language of the Key Risk workers' compensation insurance policy issued to TWC.

> The policy states, "Jurisdiction over you is jurisdiction over us for purposes of workers' compensation law. We are bound by decisions against you under the law, subject to the provisions of this policy that are not in conflict with the law." The policy also provided that, "Terms of this insurance that conflict with the workers' compensation law are changed by this statement to conform to that law." S.C. Code Ann. § 42-5-70. Key Risk, in issuing its workers' compensation policies, has submitted to the jurisdiction of South Carolina and its statutory provisions governing workers' compensation claims. Based upon the "base of operation" analysis above, the employment for the other three lent employees from Coastal was also located in South Carolina. Therefore, TWC had four or more employees in South Carolina for the purposes of jurisdiction under South Carolina Workers' Compensation Act. S.C. Code Ann. § 42-1-360(2).
>
> 25. The Full Commission concludes that the preponderance of the evidence of record establishes that South Carolina has jurisdiction over TWC, the insured, and that the workers' compensation insurance policy issued by Key Risk to TWC covered Plaintiff's injury, requiring Key Risk to reimburse Coastal and Zurich pursuant to N.C. Gen. Stat. § 97-86.1(d). . . .

Key Risk filed written notice of appeal from the Commission's 15 December 2015 Opinion and Award.[1]

Analysis

Appellate review of an opinion and award of the Industrial 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." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed *de novo*." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680

1. The appellees in this appeal are Coastal and Zurich. At times in this opinion, we refer to them jointly as "Coastal."

(2013) (internal citations omitted), *aff'd per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015).

[1] Before addressing Key Risk's arguments, we must first determine whether the Commission had jurisdiction over Plaintiff's workers' compensation claim. North Carolina's Workers' Compensation Act provides, in pertinent part, as follows:

> Where an accident happens while the employee is employed elsewhere than in this State and the accident is one which would entitle him or his dependents or next of kin to compensation if it had happened in this State, then the employee or his dependents or next of kin shall be entitled to compensation (*i*) *if the contract of employment was made in this State*, (ii) if the employer's principal place of business is in this State, or (iii) if the employee's principal place of employment is within this State; provided, however, that if an employee or his dependents or next of kin shall receive compensation or damages under the laws of any other state nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than is provided for in this Article.

N.C. Gen. Stat. § 97-36 (2015) (emphasis added).

In order to determine where a contract of employment was made, we apply the "last act" test. *Murray v. Ahlstrom Indus. Holdings, Inc.*, 131 N.C. App. 294, 296, 506 S.E.2d 724, 726 (1998). "For a contract to be made in North Carolina, the final act necessary to make it a binding obligation must be done here." *Id.* (citation, quotation marks, and brackets omitted).

Here, the Commission found that the last act making the employment arrangement between Plaintiff and TWC "a binding obligation" was Plaintiff's agreement during his telephone conversation with Baird to work on the Florida Project for TWC. Because Plaintiff was physically present in North Carolina during this conversation, the contract of employment was made in North Carolina.

"To be entitled to maintain a proceeding for workers' compensation, the claimant must be, in fact and in law, an employee of the party from whom compensation is claimed." *Youngblood v. N. State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988) (citations omitted). If no employer-employee relationship exists, the Commission lacks jurisdiction to hear the claim. *See Lucas v. Li'l Gen. Stores*, 289 N.C.

212, 218, 221 S.E.2d 257, 261 (1976) (citations omitted). "The issue of whether the employer-employee relationship exists is a jurisdictional one." *Youngblood*, 321 N.C. at 383, 364 S.E.2d at 437.

Here, the parties do not contest the Commission's finding that an employer-employee relationship existed between Plaintiff and TWC at the time of the 26 September 2010 accident. The record establishes that — as the Commission found — TWC was a "special employer," Plaintiff was a "borrowed employee," and Coastal remained Plaintiff's "general employer."

"The North Carolina Supreme Court has determined that the Industrial Commission has jurisdiction to . . . hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier." *Smith v. First Choice Servs.*, 158 N.C. App. 244, 248, 580 S.E.2d 743, 747 (2003) (citation and quotation marks omitted); *see also Harrison v. Tobacco Transp., Inc.*, 139 N.C. App. 561, 564-65, 533 S.E.2d 871, 873-74 (2000) (determining that Industrial Commission had jurisdiction to determine whether Kentucky's workers' compensation statutes expanded insurance policy's coverage so as to provide benefits to employee of Kentucky employer).

[2] Having determined that the Commission had jurisdiction to hear this matter, we next turn to Key Risk's argument that its policy does not provide coverage for Plaintiff's injuries. Specifically, Key Risk argues that (1) Plaintiff was not "principally employed" in South Carolina, and therefore, no coverage for his injuries exists under the terms of the policy it issued to TWC; and (2) South Carolina's Workers' Compensation Act does not require that such coverage be provided under Key Risk's policy.

The Information Page of Key Risk's policy states, in pertinent part, as follows:

> 3.A. Workers' Compensation Insurance: Part One of the policy applies to the Workers' Compensation Law of the states listed here:
>
> SC
>
> . . . .
>
> C. Other States Insurance: Part Three of the policy applies to the states, if any, listed here:
>
> [none listed]

The policy also contained a Residual Market Limited Other States Insurance Endorsement (the "Endorsement"), the relevant language of which provides as follows:

> "Part Three-Other States Insurance" of the policy is replaced by the following:
>
> PART THREE OTHER STATE INSURANCE
>
> A. How This Insurance Applies:
>
> 1. We will pay promptly when due the benefits required of you by the workers' compensation law of any state not listed in Item 3.A. of the Information Page if all of the following conditions are met:
>
> a. The employee claiming benefits was either hired under a contract of employment made in a state listed in Item 3.A. of the Information Page *or was*, *at the time of injury*, *principally employed in a state listed in Item 3.A. of the Information Page*[.]
>
> . . . .
>
> IMPORTANT NOTICE!
>
> If you hire any employees outside those states listed in Item 3.A. on the Information Page or begin operations in any such state, you should do whatever may be required under that state's law, as this endorsement does not satisfy the requirements of that state's workers' compensation law.

(Emphasis added.)

Thus, when the Endorsement is read in conjunction with Item 3.A. of the Information Page, the policy provides that Key Risk will pay benefits required by the workers' compensation law of a state other than South Carolina *only if* the employee claiming benefits was either (1) hired under a contract of employment made in South Carolina; or (2) principally employed in South Carolina at the time of injury. Neither party contends that Plaintiff was hired under a contract of employment made in South Carolina. However, the parties disagree as to whether Plaintiff was "principally employed" in South Carolina at the time of his injury.

Key Risk contends that Plaintiff was principally employed in Florida — rather than South Carolina — because his work on the project took

place exclusively in Florida. Coastal, conversely, contends that South Carolina was the state in which Plaintiff was principally employed because TWC was based in South Carolina and exercised control from South Carolina over the Florida Project.

"With insurance contracts the principle of *lex loci contractus* mandates that the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract." *Harrison*, 139 N.C. App. at 565, 533 S.E.2d at 874 (citation and quotation marks omitted). Here, Baird, a resident of South Carolina, sought workers' compensation coverage for TWC, a South Carolina business, through an agent in South Carolina. He received coverage through a policy issued by Key Risk, and the policy was delivered to him at his South Carolina address. Thus, the last act to make a binding insurance contract between Key Risk and TWC occurred in South Carolina. As such, the Commission correctly determined that South Carolina's substantive law governs the interpretation of Key Risk's policy.

Under South Carolina law,

> [i]nsurance policies are subject to the general rules of contract construction. This Court must give policy language its plain, ordinary, and popular meaning. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used.

B.L.G. Enters. v. First Fin. Ins. Co., 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) (internal citations omitted).

In the present case, the Commission held — and the parties agree — that the term "principally employed" in the Endorsement cannot be read in isolation but instead must be construed in conjunction with South Carolina's Workers' Compensation Act. *See* S.C. Code Ann. § 42-5-60 (2015) ("Every policy for the insurance of the compensation provided in this title or against liability therefor shall be deemed to be made subject to provisions of this title. No corporation, association, or organization shall enter into any such policy of insurance unless its form shall have been approved by the Director of the Department of Insurance.").

Coastal argues that § 42-15-10 of South Carolina's Workers' Compensation Act "extended jurisdiction over South Carolina employers beyond state lines by specifically authorizing employees to assert claims against employers domiciled in South Carolina in any state where the employee was hired, injured or his employment was located." Even

assuming *arguendo* that this is correct, however, we conclude that the Commission erred in determining that Key Risk's policy provided coverage for Plaintiff's accident.

S.C. Code Ann. § 42-15-10 states as follows:

> Any employee covered by the provisions of this title is authorized to file his claim under the laws of the state where he is hired, the state where he is injured, or the state *where his employment is located*. If an employee shall receive compensation or damages under the laws of any other state, nothing contained in this section shall be construed to permit a total compensation for the same injury greater than that provided in this title.

S.C. Code Ann. § 42-15-10 (2015) (emphasis added).

Based on this statute, Coastal contends that the phrase "principally employed" as used in Key Risk's policy must be interpreted as having the same meaning as the phrase "where . . . employment is located" as contained in the statute. For this reason, Coastal asserts that it is appropriate to examine South Carolina caselaw interpreting this language in § 42-15-10.

In determining where a worker's employment is located for purposes of § 42-15-10, South Carolina courts apply the "base of operation" rule, a doctrine originating from the decision by the South Carolina Court of Appeals in *Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 428 S.E.2d 889 (Ct. App. 1993). Under this rule, "the worker's employment is located at the employer's place of business to which he reports, from which he receives his work assignments and from which he starts his road trips, regardless of where the work is performed." *Id.* at 346, 428 S.E.2d at 892. South Carolina's appellate courts have made clear that "the location of employment can only be in one state." *Voss v. Ramco, Inc.*, 325 S.C. 560, 572, 482 S.E.2d 582, 588 (Ct. App. 1997).

In the present case, the Commission made the following finding of fact, which Key Risk challenges in this appeal:

> 62. Based upon a preponderance of the evidence of record, the Full Commission finds that Plaintiff's employment was located in South Carolina because it is the only state in which he had any "base of operation." The only place of business ever maintained by TWC was located in Myrtle Beach, South Carolina. Plaintiff was hired from TWC's office in Myrtle Beach, South Carolina. Mr. Baird provided

> work assignments to the employees, including Plaintiff, working on the Winter Park project from his place of business in South Carolina and Plaintiff was paid out of South Carolina for the work he performed in Florida. The other three lent employees from Coastal -- Michael Porter, Anthony Brown and Randy Wallace -- traveled to Myrtle Beach, South Carolina to receive payment from TWC for the work they performed (along with Plaintiff) in Stuart, Florida upon completion of the job.

The Commission then purported to apply the principles set forth in *Holman* and *Voss* as well as in two other South Carolina cases — Oxendine v. Davis, 373 S.C. 438, 646 S.E.2d 143 (2007), and *Hill v. Eagle Motor Lines*, 373 S.C. 422, 645 S.E.2d 424 (2007). Because of the significant amount of attention that the Commission and the parties give these four cases, we address each of them in turn.

In *Holman*, the employee, a truck driver, lived in South Carolina, but he would report to Georgia for his assignments. *Holman*, 311 S.C. at 343, 428 S.E.2d at 891. While driving his truck in Georgia, the employee was killed in an accident on the highway. The employee's mother filed for benefits under South Carolina's Workers' Compensation Act. Her claim was denied, and she appealed the decision to the South Carolina Court of Appeals. *Id.* at 344, 428 S.E.2d at 891.

The court held that in order to determine whether the truck driver's employment was located in South Carolina for purposes of § 42-15-10, an application of the "base of operation" test was required. *Id.* at 346, 428 S.E.2d at 892. In applying this test, the court relied on the fact that although the employee lived in South Carolina, he had reported to Georgia for duty, picked up and returned his company truck in Georgia, received his work assignments from Georgia, and made calls to his employer in Georgia. Therefore, the court concluded that his "base of operation" was in Georgia, meaning that his "employment was located" in Georgia for purposes of § 42-15-10 such that his workers' compensation claim had been correctly denied. *Id.* at 346-47, 428 S.E.2d at 893.

In *Voss*, the South Carolina Court of Appeals revisited this issue. In that case, a company called Ramco, Inc. that manufactured small industrial equipment was located in South Carolina. Voss, 325 S.C. at 563, 482 S.E.2d at 583. Another company, NATCO, which sold Ramco's equipment, was also located in South Carolina. *Id.* NATCO's owner hired the plaintiff — who lived in Texas — to sell Ramco's equipment across the country. The plaintiff would travel from city to city selling Ramco

equipment by the truckload. *Id.* at 563, 482 S.E.2d at 583-84. The agreement between Ramco and NATCO provided that Ramco would deliver its equipment to the city in which the group of salesmen — including the plaintiff — were selling the equipment, and NATCO's owner would then supervise the sales team in each city to which the team traveled. *Id.*

The plaintiff was injured selling Ramco equipment while in the state of Washington. *Id.* at 570, 482 S.E.2d at 587. During the time in which he worked for Ramco, he never sold equipment in South Carolina and made only one trip to South Carolina to pick up equipment. *Id.* at 565, 482 S.E.2d at 584. He filed a workers' compensation claim in South Carolina, but Ramco denied the claim, asserting that the South Carolina Workers' Compensation Commission lacked subject matter jurisdiction over the plaintiff's claim. *Id.* at 563, 482 S.E.2d at 583. The commission ruled in favor of the plaintiff, and its decision was ultimately affirmed by the circuit court. Ramco appealed to the South Carolina Court of Appeals. *Id.*

The court invoked the "base of operation" test set out in *Holman* to determine whether South Carolina had jurisdiction over the plaintiff's claim, noting that "all types of transient employment . . . do not fit neatly within the employment ritual of the employee truck driver in [*Holman*]." *Id.* at 571, 482 S.E.2d at 588. The court observed that a traveling salesman would not have the same work routine as a truck driver, stating the following:

> [I]t was not this Court's intention [in *Holman*] to hold that a class of transient employees could never have a "base of operation" and therefore be limited under section 42-15-10 to the benefits available in two states (the state where the employee [was] hired and the state where the employee was injured), while other transient employees could choose the most advantageous of three states.

Id.

The court reiterated its previous statement in *Holman* that "the location of employment can only be in one state" and that, logically, "the location of employment must be in *some* state." *Id.* at 572, 482 S.E.2d at 588. The court proceeded to hold that although the plaintiff lived in Texas and was injured in Washington, his employment was located in South Carolina. *Id.* The court ruled that regardless of the fact that the plaintiff received work assignments from a supervisor who was often physically present in multiple states, the plaintiff's employer was Ramco, and Ramco was permanently located in South Carolina. *Id.*

The court reasoned that

> although Voss started his road trips from wherever the group was located, but never from South Carolina, he nevertheless is principally employed in South Carolina because it is the only state in which he has any "base of operation." . . . [A]s a practical matter, South Carolina is the state where Voss was employed, given the amount of control exerted over Voss by [his employers], both of whom operated out of South Carolina.

Id.

In 2007, the Supreme Court of South Carolina issued two decisions applying the "base of operation" test. In *Oxendine*, the plaintiff was a construction worker living in North Carolina who did seasonal work for a construction company that was based in South Carolina. *Oxendine*, 373 S.C. at 440, 646 S.E.2d at 144. His employer hired him to work at a jobsite in North Carolina on a project that lasted for six weeks. The plaintiff had previously performed work for the employer in South Carolina and had regularly traveled to South Carolina to receive his payment. *Id.*

During the six-week period prior to his injury, the plaintiff worked solely at the jobsite in North Carolina. *Id.* At one point, the plaintiff visited his employer's home in South Carolina for social purposes and fixed the employer's water pump — a task for which he was not paid. *Id.* He also traveled to the employer's home in South Carolina to receive payment at least once during the time he worked on the North Carolina project. *Id.*

The plaintiff was injured in an accident while working on the North Carolina jobsite. *Id.* He filed a workers' compensation claim in North Carolina, which was denied. *Id.* He then filed a claim under South Carolina's Workers' Compensation Act, and the South Carolina Workers' Compensation Commission determined that it had jurisdiction over the plaintiff's claim. *Id.* at 440-41, 646 S.E.2d at 144. The employer ultimately appealed to the Supreme Court of South Carolina. *Id.*

The court held that South Carolina was the plaintiff's "base of operation." *Id.* at 445, 646 S.E.2d at 146. In making this determination, the court relied on multiple factors, noting that while none was "individually determinative, they all lend support to the conclusion[.]" *Id.* at 444, 646 S.E.2d at 146.

> (1) Respondent regularly worked for Employer in South Carolina during warm months for a number of years; (2) Respondent went to Employer's home/office in South Carolina on occasions to be paid, including at least once during the last interval of his work; (3) Respondent often met co-workers at the place of employment to go to jobs; and (4) Respondent performed work at Employer's home immediately before his injury.

Id.

The court then stated the following:

> In reaching this conclusion, we look not only at Respondent's six-week employment term, but also at his broad employment history with Employer. Respondent's regular and recurring employment with Employer for several years prior to his injury was nearly entirely based in South Carolina. The fact that Respondent was working in North Carolina on this particular occasion does not transport the Employer's base of operations from South Carolina to North Carolina.

Id.

The court further noted that "[t]his conclusion is underscored by the amount of control exerted over Respondent by Employer who was located in South Carolina." *Id.* In explaining its ruling, the court clarified the principles it drew from *Holman* and *Voss*:

> Appellants also argue that if the base of operations rule applies, the relevant base of operation was North Carolina because it is the employee's base, and not the employer's base, that should be considered. Appellants' reasoning directly contradicts both *Voss* and *Holman*[,] cases which apply the base of operations rule to determine the location of nomadic employment based on the employer's place of business, "regardless of where work is performed."

Id. at 445, 646 S.E.2d at 146.

Hill concerned a plaintiff truck driver who lived in South Carolina and was injured while driving through Virginia. *Hill*, 373 S.C. at 427, 645 S.E.2d at 426. The plaintiff's employer was based in Alabama. After his accident, the plaintiff successfully filed a claim under South Carolina's Workers' Compensation Act. His employer appealed the decision in

favor of the plaintiff to the Supreme Court of South Carolina. *Id.* at 427-28, 645 S.E.2d at 426.

Because the plaintiff had been hired in South Carolina, the court held that South Carolina had jurisdiction over the plaintiff's claim. *Id.* at 430, 645 S.E.2d at 428. However, the court also ruled that in addition to being the state where the plaintiff was hired, South Carolina was likewise the state where plaintiff's employment was "located" for purposes of § 42-15-10. The court determined that the plaintiff's "base of operation" was in South Carolina because the plaintiff began his road trips from South Carolina, kept his truck at his South Carolina home on the weekends, and received his paycheck at his home in South Carolina. *Id.* at 432-33, 645 S.E.2d at 429. The court further noted that although the plaintiff called the Alabama office at the end of each delivery to find out where to pick up his next load, he was not required to report to the Alabama office for duty or return to Alabama after completing his assignments. *Id.* at 432, 645 S.E.2d at 429. Nor was the plaintiff's truck licensed in Alabama. *Id.*

Holman, *Voss*, *Oxendine*, and *Hill* demonstrate the fact-specific nature of the "base of operation" test's application and the difficulty of determining where a worker's employment is "located" when his employment is nomadic in nature. In such cases, the employee works on multiple jobs for a particular employer in more than one state, making it difficult to pinpoint one specific state as the location of his employment.

In the present case, conversely, Plaintiff's employment was not nomadic. He worked *at one location* for his employer during the entire period of his employment. He had no prior history of working on jobs — in South Carolina, Florida, or anywhere else — for TWC, and the record is devoid of any indication that he was likely to work on future projects for TWC. He was not a traveling salesman or a truck driver whose job duties for his employer required him to travel to multiple states. Nor was he akin to the worker in *Oxendine* who performed multiple jobs for his employer in one state prior to being dispatched by the employer to perform a job in another state.

Instead, Plaintiff was a lent employee who was hired by TWC to perform one specific job in one specific place. TWC required that he perform all of his work in Florida, and he lived in Florida for the entire duration of the job, commuting from a motel in Florida to the Florida jobsite throughout the duration of his employment with TWC. Plaintiff reported to work each day in Florida and received assignments from on-site supervisors in Florida.

Standing in stark contrast to his numerous connections with Florida during his employment with TWC is the utter lack of contacts Plaintiff had with South Carolina. Plaintiff never reported to South Carolina for duty either before the project began or after it was completed. Indeed, the record is devoid of any indication that Plaintiff visited South Carolina for any purpose — except when he drove through that state as a matter of geographical necessity between North Carolina and Florida.

For these reasons, the present case requires nothing more than a commonsense application of the "base of operation" test to conclude that Plaintiff's employment with TWC was "located" in Florida. The courts in *Holman*, *Voss*, *Oxendine*, and *Hill* were required to balance competing factors in applying this test given that each of those cases involved employees who performed work for a single employer in multiple states. The facts of this case simply do not require us to do so here.

We are unpersuaded by Coastal's argument that Plaintiff's job assignments actually came from Baird in South Carolina. The record shows only two instances of direct contact between Baird and Plaintiff — the telephone call during which Baird offered him the job and a subsequent call in which he gave Plaintiff a "pep talk." Both of these telephone calls occurred while Plaintiff was still in North Carolina and before he had left the state to start work on the Florida Project.

Plaintiff had on-site supervisors at the Florida jobsite — initially Porter and later Fleener — who gave him his work assignments and instructions for the work to be performed. The record clearly indicates that these supervisors were both in Florida when they instructed Plaintiff as to his duties on the Florida Project. While Coastal argues that these on-site supervisors were relaying orders that had been given to them by Baird from South Carolina, we do not believe that any such indirect control over Plaintiff's work by Baird serves as a sufficient substitute for direct connections between Plaintiff and South Carolina given the circumstances of Plaintiff's employment with TWC.

Therefore, we conclude that throughout Plaintiff's employment with TWC, his "base of operation" was Florida. Accordingly, he was neither "principally employed" (for purposes of the Endorsement) in South Carolina nor was South Carolina the state "where his employment [was] located" (for purposes of § 42-15-10). Thus, the Commission erred in determining that Key Risk's policy provided coverage for Plaintiff's workplace accident.[2]

---

2. On appeal, Key Risk also raises as an alternative argument that the Commission erred in ordering Key Risk to pay *all* indemnity benefits owed on Plaintiff's claim as a

Conclusion

For the reasons stated above, we reverse the Commission's Opinion and Award to the extent it determined that Key Risk's policy provides any coverage for the 26 September 2010 accident and remand this matter for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges INMAN and ENOCHS concur.

BRADLEY WOODCRAFT, INC., Plaintiff
v.
CHRISTINE BODDEN a/k/a Christine Dryfus, Defendant

No. COA16-692

Filed 20 December 2016

1. Fraud—directed verdict—misapprehension of law

The trial court erred by entering a directed verdict against defendant on the fraud claim. The trial court operated under a misapprehension of the law as it applied to fraud claims, which are brought by a plaintiff where a valid contract exists between the litigants. A new trial was ordered on all issues.

2. Evidence—expert witness—qualifications—weight of testimony—cabinets

The trial court did not abuse its discretion in qualifying Haddock as an expert witness on cabinetry. Any lingering questions or controversy concerning the quality of the expert's conclusions went to the weight of the testimony rather than its admissibility.

Appeal by defendant from judgment entered 4 February 2016 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 28 November 2016.

---

result of his injury based on the theory that "the proportion of the responsibility of [Plaintiff's] wages [was] equal between Coastal and [TWC]." However, in light of our holding that Key Risk's policy does not provide any coverage regarding Plaintiff's accident, we need not address this issue.

John M. Kirby for defendant-appellant.

Morningstar Law Group, by Shannon R. Joseph, for plaintiff-appellee.

ENOCHS, Judge.

Christine Bodden a/k/a Christine Dryfus ("Defendant") appeals from the trial court's judgment against her, and the trial court's order awarding costs to Bradley Woodcraft, Inc. ("Plaintiff"). On appeal, she contends that the trial court erred in (1) entering a directed verdict against her as to her fraud claim; (2) entering a directed verdict against her as to her unfair and deceptive trade practices claim; (3) entering judgment where the verdicts were inconsistent; (4) admitting the testimony of a purported expert witness; (5) awarding costs to Plaintiff; and (6) denying her motion for costs. After careful review, we reverse the trial court's judgment and order and remand for a new trial on all issues.

Factual Background

In 2013, Defendant and her husband, Chris Dryfus ("Chris"), bought a house in Raleigh, North Carolina. The house was approximately 20 years old and Defendant and Chris decided to renovate certain parts of it.

Toward this end, in July 2013, Defendant contacted Plaintiff, a contracting company which is owned and operated by Joey Bradley ("Bradley"), and employed it to build custom archways and to do select trim work around the house. Bradley represented to Defendant that he was qualified to carry out these projects. Shortly after beginning his work at Defendant's and Chirs' home, Bradley submitted a proposal to Defendant for additional renovations in her kitchen that he claimed he could perform as well — including installing new cabinetry and an island cabinet. Defendant agreed to this proposal.

As work on the home renovations progressed, Defendant became dissatisfied with Plaintiff's work, believing that it did not conform to the specifications they had agreed to. As a result, Defendant communicated to Bradley on multiple occasions that the renovations were not being done correctly and were unacceptable. Specifically, Defendant informed Bradley, among other deficiencies in Plaintiff's work, that the island was not plumb, the ends of the cabinets were unfinished, the hutches for the archways were not flush with the wall, the quality of the cabinets

was poor, the refrigerator was not plumb, and the dishwasher opening was too large.

In late June 2014, Defendant and Bradley met to discuss the progress of the various renovation projects. During this meeting, Defendant made the final two agreed to payments for Plaintiff's work with her American Express card in the amounts of $19,000.00 and $7,000.00 respectively. Defendant believed that at the time she made these payments it was understood that Plaintiff would complete its work on her home to the agreed upon specifications and correct any errors in the work that had already been done. Bradley, conversely, had a different recollection of this meeting believing that he and Defendant had resolved that all of the renovations were complete and satisfactory and that no further work was necessary.

Thereafter, Bradley did not perform any further work on Defendant's house and did not return her phone calls or respond to other attempts by her to contact him. Defendant, believing that Plaintiff had breached their agreement by failing to finish the agreed to renovation projects, contacted American Express and disputed the $26,000.00 in payments she had made to Plaintiff. American Express ultimately reversed the charges based upon Defendant's representations.

On 14 November 2014, Plaintiff filed a complaint in Wake County Superior Court alleging causes of action for breach of implied and express contract against Defendant seeking to recover the $26,000.00 amount that Defendant had American Express reverse, plus interest, as well as court costs. On 20 January 2015, Defendant filed an answer, motion to dismiss Plaintiff's breach of implied contract claim, and counterclaims for (1) breach of contract; (2) fraudulent misrepresentation; (3) negligent misrepresentation; (4) wrongful interference with contractual rights; (5) wrongful interference with prospective contract; and (6) unfair and deceptive trade practices.

On 13 August 2015, Plaintiff filed a motion for summary judgment on all of Defendant's counterclaims except for her claim for breach of contract. A hearing on Plaintiff's motion for summary judgment and Defendant's motion to dismiss was held on 7 December 2015 before the Honorable G. Bryan Collins, Jr. in Wake County Superior Court. That same day, Judge Collins entered an order denying Defendant's motion to dismiss.

On 11 December 2015, Judge Collins entered an order granting Plaintiff's motion for summary judgment as to Defendant's wrongful

interference with contract rights counterclaim and wrongful interference with prospective contract counterclaim. Judge Collins denied Plaintiff's motion, however, as to Defendant's fraudulent misrepresentation, negligent misrepresentation, and unfair and deceptive trade practices counterclaims.

A trial was subsequently held before Judge Collins in Wake County Superior Court from 4 January 2016 through 8 January 2016. At trial, Plaintiff moved for a directed verdict on Defendant's fraud, negligent misrepresentation, and unfair and deceptive trade practices claims on the theory that because a valid contract was in effect between the parties, the economic loss rule limited Defendant's possible remedies to those arising under the law of contract. After hearing the arguments of the parties, the trial court ultimately granted Plaintiff's motion and directed verdict in its favor on these claims.

Defendant presented evidence at trial tending to establish that Bradley fraudulently represented to her that he was a licensed general contractor when he was not in order to induce Defendant to hire him to perform the renovations to her home. She also stated that Bradley billed her for items which were never delivered and promised that he would complete the work when he had no intention of doing so.

At the conclusion of trial, the jury found Defendant had breached her contract with Plaintiff and determined that she was liable to Plaintiff for $26,000.00. The jury also found Plaintiff had breached the contract as well, however, and awarded Defendant $19,400.00.

On 19 January 2016, Defendant filed a motion for reconsideration and for a new trial pursuant to Rules 54(b), 59, and 60 of the North Carolina Rules of Civil Procedure. Defendant additionally filed a motion for judgment notwithstanding the verdict pursuant to Rule 50. That same day, Plaintiff filed a motion for costs and attorneys' fees. Defendant, in turn, filed her own motion for costs on 1 February 2016.

The trial court entered judgment on 4 February 2016 offsetting the two verdicts resulting in a net judgment against Defendant in the amount of $6,600.00. The trial court also entered an order on 22 February 2016 (1) granting Plaintiff's motion for costs and awarding costs to Plaintiff in the amount of $4,599.87; (2) denying Plaintiff's motion for attorneys' fees; (3) denying Defendant's motion for reconsideration and for a new trial; (4) denying Defendant's motion for judgment notwithstanding the verdict; and (5) denying Defendant's motion for costs. Defendant filed notice of appeal of the trial court's judgment and 22 February 2016 order

on 7 March 2016. Plaintiff also filed notice of appeal of the trial court's judgment and 22 February 2016 order, but subsequently withdrew its appeal on 17 June 2016.

Analysis

I. Economic Loss Doctrine

[1] Defendant first argues on appeal that the trial court erred in entering a directed verdict against her as to her claim for fraud. Specifically, she contends that the trial court incorrectly applied the economic loss doctrine in directing its verdict on this issue. We agree.

> When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence. Any conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. If there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied.

Maxwell v. Michael P. Doyle, Inc., 164 N.C. App. 319, 322, 595 S.E.2d 759, 761 (2004) (internal citations omitted). "[T]his Court must determine whether plaintiff's evidence, when considered in the light most favorable to plaintiff, was legally sufficient to withstand defendants' motion for a directed verdict as to plaintiff's claims. The motion for directed verdict should be denied if there is more than a scintilla of evidence supporting each element of plaintiff's claim." *Merrick v. Peterson*, 143 N.C. App. 656, 661, 548 S.E.2d 171, 175 (2001). Also, "[b]ecause the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed *de novo*." *Maxwell*, 164 N.C. App. at 323, 595 S.E.2d at 761.

Furthermore, it is well settled that "[r]eversal is warranted where a trial court acts under a misapprehension of the law. Our Supreme Court has held that 'where it appears that the judge below has ruled upon [a] matter before him upon a misapprehension of the law, the cause will be remanded to the Superior Court for further hearing in the true legal light.' " *In re M.K. (I)*, __ N.C. App. __, __, 773 S.E.2d 535, 541 (2015) (quoting *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E.2d 137, 141 (1960)); *see also Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 204, 696 S.E.2d 559, 567 (2010) ("When the trial court exercises

its discretion under a misapprehension of the law, it is appropriate to remand for reconsideration in light of the correct law."). Consequently, in the present case, the dispositive question before us is whether the trial court correctly interpreted and applied the economic loss rule in granting Plaintiff's motion for a directed verdict on Defendant's counterclaim for fraud.

> Simply stated, the economic loss rule prohibits recovery for purely economic loss in tort, as such claims are instead governed by contract law. . . . Thus, the rule encourages contracting parties to allocate risks for economic loss themselves, because the promisee has the best opportunity to bargain for coverage of that risk or of faulty workmanship by the promisor. For that reason, a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.

Lord v. Customized Consulting Specialty, Inc., 182 N.C. App. 635, 639, 643 S.E.2d 28, 30-31 (2007) (citation and alteration omitted).

The economic loss rule was first recognized by our Supreme Court in *N.C. State Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E.2d 345 (1978). In that case, the plaintiff entered into a contract with a general contractor to construct two buildings. The general contractor was negligent in his construction of the buildings' roofs, however, and, as a result, they ultimately leaked causing significant damage to the structures. The plaintiff brought suit against the general contractor for breach of contract and for negligence. *Id.* at 81, 250 S.E.2d at 350.

Our Supreme Court held that the plaintiff was barred from bringing a negligence action against the general contractor pursuant to the economic loss rule given that the existence of the contract between the parties limited the plaintiff's remedies to those arising under the law of contract. *Id.* at 81-82, 250 S.E.2d at 350-51.

Significantly, however, *Ports Authority* and its progeny — despite the use of the broad term "tort" in *Ports Authority's* discussion of the economic loss rule — have been limited in their application to merely barring negligence claims. Indeed,

> [s]ince *Ports Authority* was decided, our appellate courts have applied the economic loss rule on a number of occasions to reject analogous *negligence* claims. *See Williams*, 213 N.C. App. at 6, 714 S.E.2d at 441-42 (economic loss rule precluded *negligence* claim by homeowners against builder where construction contract set forth available remedies and *Ports Authority* exceptions were inapplicable); *Land v. Tall House Bldg. Co.*, 165 N.C. App. 880, 882-83, 602 S.E.2d 1, 3 (2004) (economic loss rule barred *negligence* action by homeowners against contractor based on existence of construction contract between the parties); *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 42, 587 S.E.2d 470, 476 (2003) ("In accord with the Supreme Court's and our analysis in prior cases, we acknowledge no *negligence* claim where all rights and remedies have been set forth in the contractual relationship."), *disc. review denied*, 358 N.C. 235, 595 S.E.2d 152 (2004).

Beaufort Builders, Inc. v. White Plains Church Ministries, Inc., __ N.C. App. __, __, 783 S.E.2d 35, 40-41 (2016) (emphasis added).

Significantly, the case relied upon by the trial court and Plaintiff, *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 42, 587 S.E.2d 470, 476 (2003), is such a case where the plaintiff brought a negligence action where a valid contract existed between it and a general contractor. Applying the economic loss rule, this Court, in accord with *Ports Authority*, determined that no cause of action in negligence could lie and the plaintiff's remedies instead were limited to those arising under the law of contract. *Id.* at 44, 587 S.E.2d at 477. Critically, however, *Kaleel Builders, Inc.* did not contemplate a claim for fraud.

This is significant in light of this court's holding in *Jones v. Harrelson & Smith Contr'rs, LLC*, 194 N.C. App. 203, 670 S.E.2d 242 (2008), *aff'd per curiam*, 363 N.C. 371, 677 S.E.2d 453 (2009). In *Jones*, among other claims, the plaintiff brought a fraud claim against the defendant home mover where a contract existed between the parties. *Id.* at 214-15, 670 S.E.2d at 250. After initially denying the defendant's motion for a directed verdict, the trial court subsequently granted the defendant's motion for judgment notwithstanding the verdict on the plaintiff's fraud claim. *Id.* at 214, 670 S.E.2d at 250.

This Court stated on appeal the following:

> According to [the defendant], [the plaintiff] was . . . limited to suing for breach of contract. [The defendant], however,

> cites no authority supporting its assumption that a plaintiff cannot sue for fraud if she has a breach of contract claim. The law is, in fact, to the contrary: a plaintiff may assert both claims, although she may be required to elect between her remedies prior to obtaining a verdict.

Id. at 215, 670 S.E.2d at 250.

In the present case, the trial court stated the following:

> THE COURT: All right. I understand your arguments, they're very well-made, they're - but *Kaleel* disagrees with you. The North Carolina Court of Appeals and the *Kaleel* decision is (inaudible) So, a tort action and all these other things that you've planned are tort action does not lie against the party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was intentional when the injury resulting from the breach is damage to the subject matter of the contract.

In light of this colloquy, we are convinced that the trial court operated under a misapprehension of the law as it applies to fraud claims which are brought by a plaintiff where a valid contract exists between the litigants. Such claims are, in fact, allowable as has been clearly established by *Jones*.

Moreover, as noted above, *Ports Authority* and analogous cases applying the economic loss rule are limited in scope to claims for negligence and have never applied the doctrine to claims for fraud brought contemporaneously with claims for breach of contract. Therefore, we hold that *Jones*, *Ports Authority*, and *Kaleel Builders, Inc.* are in accord and establish that while claims for negligence are barred by the economic loss rule where a valid contract exists between the litigants, claims for fraud are not so barred and, indeed, "[t]he law is, in fact, to the contrary: a plaintiff may assert both claims[.]" *Jones*, 194 N.C. App. at 215, 670 S.E.2d at 250.

Consequently, the trial court erred in entering a directed verdict against Defendant on her counterclaim for fraud. As a result, we must reverse the trial court's entry of directed verdict as to this cause of action.

Moreover, because Defendant's fraud counterclaim is factually interwoven with her remaining counterclaims and directly touches and concerns Plaintiff's overall liability, our reversal of the trial court's entry of directed verdict as to this counterclaim directly impacts the jury's

verdict in its entirety to the extent that we cannot narrowly remand for a new trial on Defendant's fraud counterclaim alone, but rather are compelled to remand for a new trial on all issues. It is well settled that "[i]n ordering a new trial, it is within the discretion of this Court whether to grant a new trial on all issues." *Cicogna v. Holder*, 345 N.C. 488, 490, 480 S.E.2d 636, 637 (1997); *see also Mesimer v. Stancil*, 45 N.C. App. 533, 535, 263 S.E.2d 32, 33 (1980) ("In our discretion, we order a new trial on all issues.").

We have consistently maintained that

> [a] partial new trial should be ordered when the error is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication. . . . Where it appears that the verdict was the result of a compromise, such error taints the entire verdict and requires a new trial as to all of the issues in the case. . . . a new trial as to damages alone should not be granted where there is ground for a strong suspicion that the jury awarded inadequate damages to the plaintiff as a result of a compromise involving the question of liability.

Hous., Inc. v. Weaver, 305 N.C. 428, 442-43, 290 S.E.2d 642, 650-51 (1982) (internal citations, quotation marks, and brackets omitted); *see Robertson v. Stanley*, 285 N.C. 561, 569, 206 S.E.2d 190, 196 (1974) ("In our opinion, the issues of negligence, contributory negligence, and damages are so inextricably interwoven that a new trial on all issues is necessary."); *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 292 N.C. 557, 566, 234 S.E.2d 605, 610 (1977) ("[W]e find that on the present record the question of damages on defendant's counterclaim is so intertwined with the issue of liability that to grant a new trial on the issue of damages only might well result in confusion and uncertainty and in injustice to one or both of the parties. For these reasons and to insure that all the facts bearing on the issue of damages are fully developed and the issue itself more clearly presented, we are constrained to award a new trial on the entire counterclaim."); *Handex of Carolinas, Inc. v. Cnty. of Haywood*, 168 N.C. App. 1, 20, 607 S.E.2d 25, 37 (2005) ("In light of the single-figure jury verdict, we cannot determine whether the jury awarded damages pursuant to any of the four claims properly submitted to the jury, and we are therefore constrained to grant a new trial to determine both the question of liability and damages as to these four claims.").

Because we cannot say that had Defendant's fraud counterclaim been submitted to the jury the result as to liability or the amount of

damages awarded would have been the same, we are compelled to order a new trial on all issues. In addition, in light of our disposition on this issue, we do not reach Defendant's remaining issues on appeal. *See Roberts v. Edwards*, 48 N.C. App. 714, 719, 269 S.E.2d 745, 748 (1980) ("In light of our disposition of this case, it is not necessary to consider the remaining assignments of error. Although the error in excluding the witnesses' testimony relates to the damages issue, in our discretion, we order a new trial on all the issues."); *see also Hobson Const. Co. v. Great Am. Ins. Co.*, 71 N.C. App. 586, 591, 322 S.E.2d 632, 635 (1984) ("Our resolution of the first assignment of error disposes of the appeal and makes it unnecessary to consider appellants' remaining assignments of error.").

II. Expert Opinion Testimony

[2] While, for the reasons stated above, we grant Defendant a new trial on all issues, thereby foreclosing the need to discuss the remaining issues brought on appeal, we nevertheless elect to address, in our discretion, the issue of whether Shane Haddock was properly qualified as an expert witness in cabinetry given the potential likelihood that this issue may again arise below.

Rule 702(a) of the North Carolina Rules of Evidence provides that

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> > (1) The testimony is based upon sufficient facts or data.
> >
> > (2) The testimony is the product of reliable principles and methods.
> >
> > (3) The witness has applied the principles and methods reliably to the facts of the case.

It is well settled that "[t]he trial court has broad discretion in the determination and admission of expert testimony. The decision to qualify a witness as an expert is ordinarily within the exclusive province of the trial judge or hearing officer." *Stark v. N.C. Dep't of Env't & Nat. Res., Div. of Land Res.*, 224 N.C. App. 491, 498-99, 736 S.E.2d 553, 559 (2012) (internal citations and quotation marks omitted). Moreover, " '[a] finding by the trial court that the witness is qualified will not be reversed unless

there was no competent evidence to support it or the court abused its discretion.' " *Id.* at 499, 736 S.E.2d at 559 (quoting *State v. Love*, 100 N.C. App. 226, 232, 395 S.E.2d 429, 433 (1990)).

Here, Plaintiff tendered Haddock as an expert witness in cabinetry who testified as follows:

> Q. Mr. Haddock, please introduce yourself to the jury.
>
> A. I'm Shane Haddock, uh, I've been doing cabinets for 17 years.
>
> Q. What do you currently do?
>
> A. I'm still doing cabinets, but, uh, at the time, whenever I was asked, I was with Knowles Cabinets, outside president of operation. First of last year, I left and went with, uh, Reward Builders and we started our own line of cabinets.
>
> Q. You said you've got 17 years of experience doing cabinets?
>
> A. Yes, sir.
>
> Q. Um, was – who was that for?
>
> A. That was for Knowles Cabinets.
>
> Q. Uh, and what type of cabinets did you, um, work with?
>
> A. We did custom cabinets, which were called European Cabinets. You have (inaudible) frame cabinets and you have European Cabinets and we opted to build the European Cabinets.
>
> Q. Do you have any special, uh, training outside of on the job training, um, for those – for working with cabinets?
>
> A. Outside training meaning what?
>
> Q. Uh, college courses, anything like that?
>
> A. Well, I mean, we went – I went to school to learn how to run all the equipment that we had, but as far as training, no. It's pretty much you – you learn as you go.

Haddock then went on to testify that he personally examined Plaintiff's cabinetry work at Defendant's home and evaluated whether the work had been performed adequately.

As our Supreme Court has recently maintained,

> [e]xpertise can come from practical experience as much as from academic training. Whatever the source of the witness's knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject? The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. . . . As is true with respect to other aspects of Rule 702(a), the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field.

State v. McGrady, 368 N.C. 880, 889-90, 787 S.E.2d 1, 9 (2016) (internal citations omitted).

In *Kenney v. Medlin Const. & Realty Co.*, 68 N.C. App. 339, 315 S.E.2d 311 (1984), this Court addressed the qualifications of a witness as an expert in residential construction. In determining that the witness was properly qualified as an expert we stated the following: "We find no abuse of discretion in the trial court determination that Jones, who had been involved in building more than 200 residences, including eight to twelve in plaintiff's subdivision, was an expert, better qualified than the jury to form an opinion as to the quality of workmanship and damage resulting from the construction of plaintiff's house. That Jones was not a licensed contractor does not render his opinion testimony inadmissible." *Id.* at 342-43, 315 S.E.2d at 314.

In light of the above cited authority, we are satisfied that there was competent evidence in the present case, based upon his testimony, that Haddock possessed the requisite level of experience and expertise to testify as an expert witness in cabinetry. While Haddock did testify that he was "not really going to say there are any standards" regarding the cabinet industry in Wake County, he went on to clarify that he was not aware of any licensure requirements to perform cabinetry work. Additionally, he provided a follow-up response to the question of whether there were industry standards for cabinetry in Wake County as to the "accepted practice of the way people would build custom cabinets," however, his answer was inaudible and was consequently not transcribed by the court reporter. In any event, these statements are more properly characterized as speaking not to Haddock's qualifications as an expert, but rather as to his credibility — which is appropriately attacked not through seeking exclusion by the trial court, but rather by

means of cross-examination by opposing counsel. *See State v. Turbyfill*, __ N.C. App. __, __, 776 S.E.2d 249, 258 (" '[O]nce the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility.' " (quoting *State v. Taylor*, 165 N.C. App. 750, 756, 600 S.E.2d 483, 488 (2004))), *disc. review denied*, 368 N.C. 603, 780 S.E.2d 560 (2015); *see also Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 244, 311 S.E.2d 559, 571 (1984) ("It is the function of cross-examination to expose any weaknesses in [expert witness] testimony[.]").

Consequently, we find that the trial court did not abuse its discretion in qualifying Haddock as an expert witness on cabinetry. *See Stark*, 224 N.C. App. at 499, 736 S.E.2d at 559 (" 'A finding by the trial court that the witness is qualified will not be reversed unless there was no competent evidence to support it or the court abused its discretion.' " (quoting *State v. Love*, 100 N.C. App. 226, 232, 395 S.E.2d 429, 433 (1990))).

Conclusion

For the reasons stated above, the judgment and 22 February 2016 order of the trial court are reversed, and we remand for a new trial on all issues.

NEW TRIAL.

Chief Judge McGEE and Judge BRYANT concur.

CORBETT v. LYNCH

[251 N.C. App. 40 (2016)]

MOLLY PAIGE CORBETT, PLAINTIFF
v.
TRACEY LYNCH, DEFENDANT

No. COA16-221

Filed 20 December 2016

Guardian and Ward—Chapter 35A guardianship proceeding—dismissal of child custody action—mootness

The trial court did not err by dismissing plaintiff stepmother's custody petition in this action due to the award of guardianship of the children to decedent father's sister. The appointment of a general guardian by the clerk of superior court in the Chapter 35A guardianship proceeding rendered stepmother's Chapter 50 custody action moot.

Appeal by Plaintiff from order entered 2 November 2015 by Judge April C. Wood in Davidson County District Court. Heard in the Court of Appeals 6 September 2016.

Black, Slaughter & Black, P.A., by Carole R. Albright and T. Keith Black, for the Plaintiff-Appellant.

Allman Spry Davis Leggett & Crumpler, P.A., by Kim R. Bonuomo and Bennett D. Rainey, for the Defendant-Appellee.

DILLON, Judge.

Plaintiff Molly Paige Corbett ("Stepmother") commenced this action in district court seeking custody of her stepchildren, "Max" and "Allison,"[1] who had been orphaned after the recent death of Stepmother's husband, their father, Jason Corbett.[2] On appeal, Plaintiff challenges the district court's order dismissing her *custody* petition in this action due to the award of *guardianship* of the children to Mr. Corbett's sister, Defendant Tracey Lynch ("Aunt"), in a separate superior court proceeding. We affirm.

---

1. Pseudonyms.

2. Stepmother was indicted for second-degree murder and voluntary manslaughter in connection with Mr. Corbett's death. At the time of this appeal, she is still awaiting trial.

I. Background

Max and Allison spent their early years living with their biological parents in Ireland, where they are citizens. In 2006, their biological mother passed away. In 2008, Stepmother traveled from the United States to Ireland to serve as the children's *au pair*. In 2011, Mr. Corbett and Stepmother moved to the United States with the children. Shortly thereafter, Mr. Corbett and Stepmother were married. However, despite Stepmother's desire to adopt Max and Allison, Mr. Corbett did not consent to a stepparent adoption. In 2015, Mr. Corbett died, leaving Max and Allison orphaned. In his will, Mr. Corbett named Aunt and Aunt's husband as testamentary guardians for both minor children.

On 4 August 2015, Stepmother filed a petition for guardianship and a petition for stepparent adoption in superior court.

The following day, on 5 August 2015, Stepmother filed *this action* in district court for custody of the children, pursuant to N.C. Gen. Stat. § 50-13.5. Stepmother obtained an *ex parte* order for temporary emergency custody pursuant to N.C. Gen. Stat. § 50-13.5(d)(3), based on her allegation that Aunt was coming to the United States to take the children back to Ireland with her.

On 7 August 2015, Aunt filed (1) applications for guardianship of the children in the proceeding before the clerk of superior court and (2) an answer, motions to dismiss, and a counterclaim for child custody in this district court action.

On 17 August 2015, the clerk of superior court awarded guardianship of Max and Allison to Aunt and her husband.[3] Following a hearing in this district court action, the district court dismissed Stepmother's custody complaint based on the clerk's prior award of guardianship. Stepmother timely appealed the district court's dismissal of her custody action.

II. Analysis

On appeal, Stepmother argues that the district court erred in granting Aunt's motion to dismiss her Chapter 50 custody action, contending that the district court did, in fact, have subject matter jurisdiction. The resolution of this matter requires this Court to consider the jurisdictional relationship between Chapter 35A guardianship proceedings before a clerk of superior court and a Chapter 50 custody action before a district

3. The guardianship orders entered by the clerk of court were subsequently affirmed by Superior Court Judge Theodore S. Royster on 10 February 2016.

court judge. We conclude that the appointment of a general guardian by the clerk of superior court in the Chapter 35A guardianship proceeding rendered Stepmother's Chapter 50 custody action moot. Therefore, we affirm the district court's order dismissing Stepmother's Chapter 50 custody petition.

Our guardianship statutes, codified in Chapter 35A, allow "any person or corporation, including any State or local human services agency[,]" to file an application with the clerk of superior court "for the appointment of a guardian of the person or general guardian *for any minor who [does not have a] natural guardian*."[4] N.C. Gen. Stat. § 35A-1221 (2015) (emphasis added).[5] In such proceeding, the clerk conducts a hearing to determine whether the appointment of a guardian is required, and, if so, considers the child's best interest in determining who the guardian(s) should be. N.C. Gen. Stat. § 35A-1223. An award of general guardianship entitles the guardian to *custody* of the child. N.C. Gen. Stat. § 35A-1241(a)(1).

Chapter 50, on the other hand, provides the *district court* with jurisdiction to enter orders providing for the *custody* of a minor child. N.C. Gen. Stat. § 50-13.5(c)(2) (2015). Any "parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child." N.C. Gen. Stat. § 50-13.1. Chapter 50 custody actions generally involve a dispute between two parents *or* between the parent(s) and a non-parent. In certain emergency situations, the district court is authorized to enter a temporary child custody order *ex parte*, for example, when "there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts." N.C. Gen. Stat. § 50-13.5(d)(3).

Our Supreme Court has stated that parents, as "natural guardians," have a "constitutionally-protected paramount right [] to custody, care, and control of their children." *Petersen v. Rogers*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994). And if a person is appointed as the "general

---

4. North Carolina has long recognized that a child's biological mother and father are the "natural guardians" of the child. *See Bright v. Wilson*, 1 N.C. 251, 252 (1800); *Buchanan v. Buchanan*, 207 N.C. App. 112, 119, 698 S.E.2d 485, 489 (2010). Adoptive parents, too, are "natural guardians" as they have the same rights to the adopted child as to any child born to them. N.C. Gen. Stat. § 48-1-106(c).

5. A general guardian is defined as a guardian of both the ward's person and the ward's estate. N.C. Gen. Stat. § 35A-1202(7).

guardian" or as "guardian of the person" of a minor child, that guardianship necessarily includes physical custody of the minor. *See* N.C. Gen. Stat. § 35A-1202(10) (" 'Guardian of the person' means a guardian appointed . . . for the purpose of performing duties relating to the . . . custody . . . of a ward."). This relationship between guardianship and custody was articulated by the Supreme Court of Rhode Island as follows:

> Permanent custody, so called, with its attendant responsibilities, is an incident of guardianship and parents are the natural guardians of their children. . . . Where, as here, a child has been orphaned, the appointment of a guardian supersedes that of a custodian since the latter is contained within the former.

Petition of Loudin, 101 R.I. 35, 38-39, 219 A.2d 915, 917-18 (1966) (internal citations omitted).

Our General Assembly has generally followed the logic articulated in *Loudin* in crafting our custody and guardianship laws. Indeed, our statutes provide for an override of a Chapter 50 custody determination by the appointment of a general guardian or guardian of the person: Chapter 35A allows for an eligible party to obtain guardianship of a minor child with no living parents even if the issue of the child's custody has *already been resolved* by the district court in a Chapter 50 custody proceeding. Chapter 35A provides that an applicant for guardianship is to include "a copy of any . . . custody order" for the clerk's consideration in making a decision regarding guardianship of the child. N.C. Gen. Stat. § 35A-1221(4).

Following appointment of a guardian, Chapter 35A provides that "[t]he clerk shall retain jurisdiction . . . in order to assure compliance with the clerk's orders and those of the superior court." N.C. Gen. Stat. § 35A-1203(b). In addition, the clerk retains jurisdiction to "determine disputes between guardians." N.C. Gen. Stat. § 35A-1203(c). Indeed, we have held that in the context of a dispute over the custody of an incompetent adult child, "the district court obtains jurisdiction . . . to determine custody only when the disabled adult child at issue has not been declared incompetent and had a guardian appointed." *McKoy v. McKoy*, 202 N.C. App. 509, 515, 689 S.E.2d 590, 594 (2010). In *McKoy*, we also held that "the clerk of superior court is the proper forum for determining custody disputes regarding a person previously adjudicated an incompetent adult and who has been provided a guardian under Chapter 35A." *Id.* at 513, 689 S.E.2d at 593.

Thus, in the present case, the clerk properly exercised jurisdiction under Chapter 35A to consider the application for guardianship of Max and Allison, as the children had no natural guardian. The clerk's jurisdiction was not divested by the *ex parte* temporary custody order already entered by the district court because Chapter 35A contemplates the clerk giving due consideration of custody awards entered by other courts. *See* N.C. Gen. Stat. § 35A-1221(4) (providing that an application for guardianship is to include a copy of any order awarding custody). Accordingly, the clerk had jurisdiction to appoint Aunt and her husband as general guardians for Max and Allison, an incident of which is physical custody of the children. Thus, any modification of the clerk's guardianship arrangement, including modification of custody, would "require[] filing a motion . . . with the clerk under Chapter 35A rather than filing an action for custody action in district court under Chapter 50." *McKoy*, 202 N.C. App. at 511, 689 S.E.2d at 592.

Further, we note that once the clerk of superior court entered the order awarding general guardianship of Max and Allison to Aunt and her husband, the Chapter 50 custody action became moot. A final determination by the district court in Stepmother's Chapter 50 custody action would have no practical effect on the controversy regarding custody of the minor children, as custody was decided as part of the guardianship proceeding. *Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy."). The "proper procedure for a court to take upon a determination that a case has become moot is dismissal of the action[.]" *Id.*

Accordingly, we conclude that the district court properly dismissed Stepmother's Chapter 50 custody action.

Our holding today, however, does not affect any jurisdiction the district court may have to issue *ex parte* orders under Chapter 50 for temporary custody arrangements where the conditions of N.C. Gen. Stat. § 50-13.5(d)(2)-(3) are met.[6]

AFFIRMED.

Judges BRYANT and STEPHENS concur.

---

6. We note that Chapter 35A does provide the clerk with authority to enter a temporary, *ex parte* custody order when "an emergency exists which threatens [either] the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate." N.C. Gen. Stat. § 35A-1207.

CORWIN v. BRITISH AM. TOBACCO PLC

[251 N.C. App. 45 (2016)]

DR. ROBERT CORWIN AS TRUSTEE FOR THE BEATRICE CORWIN LIVING IRREVOCABLE TRUST, ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED, PLAINTIFF
v.
BRITISH AMERICAN TOBACCO PLC; REYNOLDS AMERICAN, INC.; SUSAN M. CAMERON; JOHN P. DALY; NEIL R. WITHINGTON; LUC JOBIN; SIR NICHOLAS SCHEELE; MARTIN D. FEINSTEIN; RONALD S. ROLFE; RICHARD E. THORNBURGH; HOLLY K. KOEPPEL; NANA MENSAH; LIONEL L. NOWELL III; JOHN J. ZILLMER; AND THOMAS C. WAJNERT, DEFENDANTS

No. COA15-1334

Filed 20 December 2016

1. Corporations—minority shareholder exercising actual control—controlling shareholder—fiduciary duty

The trial court erred by dismissing plaintiff's claim against defendant British American pursuant to Rule 12(b)(6). The amended complaint alleged facts sufficient, if proven true, to allow for the reasonable inference that defendant exercised actual control over the transaction and breached its fiduciary duty to the other shareholders. A minority shareholder exercising actual control over a corporation may be deemed a "controlling shareholder" with a concomitant fiduciary duty to the other shareholders.

2. Jurisdiction—standing—shareholder—derivative action—special duty

Plaintiff had standing to bring a direct claim against defendant British American. Although the general rule in North Carolina is that a shareholder may not bring suit against third parties except in a derivative action on behalf of the corporation, there are two exceptions to this rule including: (1) defendant owed plaintiff a special duty or (2) plaintiff suffered an injury separate and distinct from other shareholders. The amended complaint included allegations sufficient to support the conclusion that defendant owed a fiduciary duty.

3. Jurisdiction—standing—breach of fiduciary duty—aiding and abetting

The trial court did not err by dismissing plaintiff's claim against defendant board of directors for breach of fiduciary duty. Plaintiff did not have standing because plaintiff failed to allege facts necessary to establish either exception to the general rule requiring actions against the directors to be brought derivatively.

4. Conspiracy—aiding and abetting—lack of standing—breach of fiduciary duty

The trial court did not err by dismissing plaintiff's claim of aiding and abetting a breach of fiduciary duty with respect to defendant Reynolds. Plaintiff lacked standing to bring the underlying breach of fiduciary duty claim against defendant board of directors.

Appeal by Plaintiff from Order and Opinion entered 6 August 2015 by Chief Special Superior Court Judge for Complex Business Cases James L. Gale in Guilford County Superior Court. Heard in the Court of Appeals 27 April 2016.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell, Jr.; and Block & Leviton LLP, by Jason M. Leviton, pro hac vice, for Plaintiff-Appellant.

Robinson & Lawing, LLP, by H. Brent Helms; and Cravath, Swaine & Moore LLP, by Gary A. Bornstein, pro hac vice, for Defendant-Appellee British American Tobacco p.l.c.

Womble Carlyle Sandridge & Rice, LLP, by Ronald R. Davis, W. Andrew Copenhaver, and James A. Dean; and Jones Day, by Robert C. Micheletto, pro hac vice, for Defendant-Appellees, Reynolds American, Inc., Susan M. Cameron, John P. Daly, Sir Nicholas Scheele, Martin D. Feinstein, Ronald S. Rolfe, and Neil R. Withington.

Moore & Van Allen PLLC, by James P. McLoughlin, Jr., Mark A. Nebrig, and Johnathan M. Watkins, for Defendant-Appellees, Luc Jobin, Holly K. Koeppel, Nana Mensah, Lionel L. Nowell, Richard E. Thornburgh, Thomas C. Wajnert, and John J. Zillmer.

INMAN, Judge.

In this case of first impression, reviewing the sufficiency of the pleadings to state a claim for relief, we hold that a minority shareholder which owns shares eight times greater than any other shareholder, is the sole source of equity financing for a transformative corporate transaction, has a contractual right to prohibit the issuance of shares and the sale of intellectual property necessary for the transaction, and which pledges support for the transaction contingent on terms more favorable to it than to other shareholders may owe a fiduciary duty to other

shareholders who claim they were harmed by the transaction. We also hold that claims for diminished share value and diluted voting power, as alleged in this case, cannot be the basis for a direct claim against a board of directors.

Dr. Robert Corwin ("Plaintiff"), acting as trustee for the Beatrice Corwin Living Irrevocable Trust, on behalf of a Class of Shareholders so similarly situated, appeals from an Order and Opinion in favor of Defendants—British American Tobacco PLC ("Defendant-Shareholder" or "BAT" or "British American") and Reynolds American, Inc. ("Defendant-Corporation" or "RAI" or "Reynolds") and Susan M. Cameron, John P. Daly, Neil R. Withington, Luc Jobin, Sir Nicholas Scheele, Martin D. Feinstein, Ronald S. Rolfe, Richard E. Thornburgh, Holly K. Koeppel, Nana Mensah, Lionel L. Nowell III, John J. Zillmer, and Thomas C. Wajnert (collectively "Defendant-Directors" or "Reynolds Board of Directors") dismissing Plaintiff's claims for breach of a fiduciary duty and aiding and abetting a breach of fiduciary duty.

This appeal presents three issues: (1) whether a minority shareholder may be a controlling shareholder, and thus, owe a fiduciary duty to other shareholders; (2) whether a shareholder is permitted to bring a direct suit against a board of directors for the loss of value and voting power of the shareholder's shares; and (3) whether a shareholder may bring a claim for aiding and abetting a breach of fiduciary duty against a corporation based on the actions of the corporation's board of directors. After careful review, we hold that a minority shareholder may in certain circumstances control a corporation, and thus, owe the other shareholders a fiduciary duty. We also hold that Plaintiff does not have standing to bring a direct suit against the corporation's board of directors for his shares' loss of value and voting power alone. Finally, we hold that without an underlying claim against the board of directors for a breach of fiduciary duty, Plaintiff cannot assert a claim of aiding and abetting for breach of a fiduciary duty against the corporation. Accordingly, we reverse and remand the trial court's order in part and affirm the trial court's order in part.

Factual and Procedural History

This dispute arises out of a merger (the "Transaction") between Reynolds and Lorillard, Inc. ("Lorillard"), funded in part by an equity financing share purchase by Defendant-Corporation's largest shareholder, British American. The following facts are alleged in Plaintiff's Amended Complaint and are accepted as true for purposes of our review.

In 2004, R.J. Reynolds Tobacco Company acquired British American's U.S. subsidiary, Brown & Williamson, and formed a successor entity, Reynolds American Inc., in which British American took a forty-two percent stake. In connection with this acquisition, British American and Reynolds adopted a Governance Agreement (the "Governance Agreement") on 30 July 2004. The Governance Agreement included a standstill provision ("the Standstill provision"), which prevented British American from increasing its percentage ownership in Reynolds for ten years, until 30 July 2014. The Governance Agreement also limited British American's ability to control Reynolds by: (1) permitting British American to designate no more than five of the thirteen board members of Reynolds, (2) requiring British American to vote its shares in favor of any board candidates selected by a Corporate Governance and Nominating Committee, comprised solely of non-British American designees, and (3) requiring non-British American designees to approve of any entrance into a contract between British American and Reynolds or any of their subsidiaries. The Governance Agreement also provided contractual rights to British American, including granting British American the right to prohibit the sale or transfer of certain intellectual property, veto amendments to the Articles of Incorporation and By-laws and adoptions of any takeover defenses, and approve the issuance of equity securities in an amount of five percent or more of the voting power of outstanding shares. The Governance Agreement terminates when British American's ownership share in Reynolds reaches one-hundred percent, drops below fifteen percent, or if a third party acquires a majority stake in Reynolds.

In or around September 2012, the Reynolds board of directors, together with Reynolds senior management, began contemplating a merger with Lorillard as a means of alternative strategic growth. Before approaching Lorillard, the president and chief executive officer and a director of Reynolds met with representatives of British American to discuss, among other things, the potential merger. On 15 November 2012, Reynolds formally expressed to Lorillard its interest in a merger, and negotiations ensued.

Throughout the negotiations process, British American insisted that it would support the Transaction only on terms that would allow it to maintain its forty-two percent ownership in Reynolds. British American also insisted—and Reynolds agreed—that neither British American nor Reynolds would seek to amend the Governance Agreement in connection with the Transaction. The Standstill provision in the Governance Agreement was scheduled to expire on 30 July 2014; without changing

that provision or extending the expiration date, Reynolds ultimately could not prevent British American from taking control of Reynolds through the purchase of the remaining fifty-eight percent of Reynolds's outstanding shares.

In February 2014, Lorillard expressed concerns over the proposed terms of the Transaction and sought an additional ownership percentage for the Lorillard shareholders following the merger. Reynolds directors not designated by British American (the "Other Directors") expressed that any additional equity provided to Lorillard should come from a reduction of British American's ownership as opposed to a reduction of the non-British American shareholders' ownership. However, the Other Directors acknowledged that British American's ownership share would not be decreased without British American's consent.

By March 2014, the Lorillard Board of Directors determined the proposed terms did not reflect a "merger-of-equals," decided not to proceed with the Transaction, and terminated the related discussions with Reynolds. Reynolds senior management then explored the possibility of acquiring Lorillard at a premium. With British American as the equity financing source, Reynolds and Lorillard reopened negotiations for the Transaction.

In July 2014, the Reynolds Board of Directors unanimously approved the Transaction. Lorillard's shares were to be purchased for a price per share of $50.50 in cash, plus 0.2909 shares of Reynolds stock. The cash portion of the Transaction was financed by the sale of Reynolds stock to British American at a price of $60.16 per share for a total of approximately $4.7 billion. This price was $3.02 less than the fair market value of the shares on the date of approval by the Reynolds Board of Directors. This sale assured that British American would maintain its forty-two percent ownership share in the remaining company following the Transaction.

When the Transaction closed in June 2015, Reynolds stock was publicly trading at $72 per share, or $11.84 greater per share than the price British American paid for its additional stock as part of the Transaction. The post-closing value constituted a profit of approximately $920 million for British American, a profit no other shareholder enjoyed.

Plaintiff filed suit in August 2014 in Guilford County Superior Court, just after the Reynolds Board of Directors approved the Transaction. The case was assigned to the North Carolina Business Court ("trial court") with Chief Special Superior Court Judge for Complex Business Cases James L. Gale presiding. Following Reynolds's filing of a Form S-4 (the "Proxy Statement") with the Securities and Exchange Commission

describing the Transaction, Plaintiff filed its First Amended Class Action Complaint ("Amended Complaint"), which is the operative pleading at issue on appeal.

The Amended Complaint alleged two theories seeking relief, "Fairness Claims" and "Disclosure Claims." The Fairness Claims alleged that British American and Defendant-Directors breached their fiduciary duties to the Public Shareholders, and the Disclosure Claims alleged that Defendant-Directors breached their duties of candor by failing to disclose certain material facts in the Proxy Statement. The Fairness Claims also included an aiding and abetting a breach of fiduciary duty claim against Reynolds for the actions of Defendant-Directors.

In December 2014, Defendants moved to dismiss the case pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The parties settled the Disclosure Claims in a Memorandum of Understanding filed in January 2015. However, the Fairness Claims remained pending.

Following a hearing, in an Order and Opinion entered 6 August 2015, the trial court dismissed Plaintiff's Fairness Claims. The trial court held that (1) the Amended Complaint did not sufficiently plead facts necessary to establish British American as a controlling shareholder, and consequently did not sufficiently plead that British American owed a fiduciary duty to the other shareholders; (2) regardless of whether Plaintiff had standing to bring a direct suit against Defendant-Directors, Plaintiff's Amended Complaint failed to overcome the Business Judgment Rule and therefore the claim against Defendant-Directors did not survive; and (3) because the underlying fiduciary duty claims had been dismissed, the aiding and abetting claim against Reynolds necessarily failed.

Plaintiff timely appealed.

Analysis

Plaintiff contends that the trial court erred in granting Defendants' motions to dismiss under Rules 12(b)(1) and 12(b)(6) for lack of standing and failure to state a claim upon which relief may be granted. After careful examination of the Amended Complaint and documents incorporated therein, we reverse the trial court's order dismissing Plaintiff's claim against British American and affirm the trial court's dismissal of Plaintiff's remaining claims.

A. Standard of Review

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which

> relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wells Fargo Bank, N.A. v. Corneal, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014) (quoting *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009)). We review the pleadings *de novo* to determine whether Plaintiff has stated a claim for which relief can be granted. *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007) (citation omitted).

Included in the pleadings reviewed for purposes of deciding a motion to dismiss are documents attached to and incorporated by reference in the plaintiff's complaint. N.C. Gen. Stat. § 1A-1, Rule 10(c) (2015) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). In this case, incorporated documents include the Governance Agreement and the Proxy Statement. Central to the parties' dispute is the interpretation of these documents.

B. Minority Shareholder Liability

1. Controlling Shareholder

[1] Plaintiff's claim raises an issue of first impression in North Carolina: whether and under what circumstances a minority shareholder can be classified as a "controlling shareholder" owing a fiduciary duty to other shareholders.[1] We hold that a minority shareholder exercising actual control over a corporation may be deemed a "controlling shareholder" with a concomitant fiduciary duty to the other shareholders.

In North Carolina, an individual shareholder generally does not owe a fiduciary duty to the corporation or to the other shareholders. *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993) (citation

1. Neither party challenges the application of North Carolina law.

omitted). "An exception to this rule is that a controlling shareholder owes a fiduciary duty to minority shareholders." *Kaplan v. O.K. Techs., LLC*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137 (2009) (citation omitted) (comparing members of a limited liability company to shareholders of a corporation); *Freese*, 110 N.C. App. at 37, 428 S.E.2d at 847 ("[I]t is well established that a controlling shareholder owes a fiduciary duty to minority shareholders.").

North Carolina courts have held that shareholders owning a controlling number of shares in a corporation owe a special duty to other shareholders in the same corporation. In *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 67 S.E.2d 350 (1951), the North Carolina Supreme Court upheld a minority shareholder's ability to sue majority shareholders for breach of a fiduciary duty arising from a disputed corporate transaction. The court explained:

> The holders of the majority of the stock of a corporation have the power, by the election of directors and by the vote of their stock, to do everything that the corporation can do. Their power to . . . direct the action of the corporation places them in its shoes and constitutes them the actual, if not the technical, trustees for the holders of the minority of the stock. . . . It is *the fact of control* of the common property held and exercised, and *not the particular means* by which or manner in which the control is exercised, that creates the fiduciary obligation on the part of the majority stockholders in a corporation for the minority holders.

Gaines, 234 N.C. at 344-45, 67 S.E.2d at 353-54 (first alteration in original) (quoting Am. Jur., Corporations, sections 422 and 423, pp 474-76) (emphasis added).

Gaines relied on a North Carolina Supreme Court decision holding: " 'the directors of these corporate bodies are to be considered and dealt with as trustees in respect to their corporate management, and [] this same principle has been applied to a majority, *or other controlling number*, of stockholders in reference to the rights of the minority . . . when they are as a body in the exercise of this control, in the management and direction of corporate affairs . . . .' " *Id.* at 345, 67 S.E.2d at 353 (emphasis added) (quoting *White v. Kincaid*, 149 N.C. 415, 63 S.E. 109, 111 (1908)). The Court in *White* reasoned that a fiduciary duty arises when a "controlling number of stockholders are exercising their authority in dictating the action of the directors, thereby causing a breach of

fiduciary duty." *White*, 149 N.C. at 420, 63 S.E.2d at 111 (internal quotation marks omitted).[2]

Our courts have not previously classified a numerical minority shareholder, acting alone in either a closely held or publicly traded company, as a "controlling shareholder" for the purpose of imposing a fiduciary duty. However, this Court has held that individual minority shareholders working in concert as a majority to exercise control over a corporation to the detriment of the other shareholders could be held liable as fiduciaries. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981). In *Loy*, this Court held the trial court erred in directing a verdict for the defendants—three shareholders with an aggregate seventy-five percent interest in a corporation—who were sued by the fourth shareholder after transferring corporate assets to another corporation owned solely by the defendants themselves. *Id.* at 435, 278 S.E.2d at 902-03. The court in *Loy* looked beyond the percentage of shares owned by each of the three defendants to consider the control each of them derived from their concerted action. *Id.*

No North Carolina appellate court decision or statute has determined if and when a single minority shareholder can become a "controlling shareholder" with an accompanying fiduciary duty. So we consider other authorities.

North Carolina courts often look to Delaware courts for guidance regarding unsettled business law issues. *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 334, 525 S.E.2d 441, 443 (2000) (following Delaware courts' proposition "that shareholders and limited partners hold similar positions within their respective entities[]"); *Ehrenhaus v. Baker*, 216 N.C. App. 59, 88, 717 S.E.2d 9, 28 (2011) (finding "the Delaware courts' articulation of the non-disclosure principle persuasive[,]" and adopting this articulated principle in North Carolina).

Delaware decisional law allows a minority shareholder who exercises actual control over a corporation or a corporation's affairs to be classified as a "controlling shareholder." However, this law includes the rebuttable presumption that a minority shareholder does not control

---

2. Before it was incorporated in Gaines, the holding in *White* was *dicta*, because the court in *White*, reviewing an order restraining the dissolution of the defendant corporation, concluded that the plaintiff had failed to produce evidence sufficient to support his claim. *White*, 149 N.C. at 422-23, 63 S.E. at 111.

a corporation or a challenged corporate transaction. "[A] shareholder who owns less than [fifty percent] of a corporation's outstanding stocks does not, *without more*, become a controlling shareholder of that corporation, with a concomitant fiduciary status." *Citron v. Fairchild Camera and Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989) (first alteration in original) (emphasis added) (internal quotation marks and citations omitted). It therefore becomes necessary for the plaintiff to "allege domination by a minority shareholder through actual control of corporate conduct." *Id.*; *see also Kahn v. Lynch Commc'n Systems, Inc.*, 638 A.2d 1110, 1115 (Del. 1994) (holding that a minority shareholder with an approximate forty-three percent interest in a company exercised control sufficient to impose a fiduciary duty).

When determining if a shareholder has exercised control over a corporation, our courts and Delaware courts have considered, among other things, the shareholder's percentage of voting shares, the relationship between the shareholder and the corporation, the shareholder's ability to appoint directors, and the shareholder's ability to affect the outcome of particular transactions. *See, e.g.*, *Kaplan*, 196 N.C. App. at 473, 675 S.E.2d at 137; *Kahn*, 638 A.2d at 1113-15; and *Williams v. Cox Commc'ns, Inc.*, 2006 Del. Ch. LEXIS 111 *1, *22 (Del. Ch. June 5, 2006). The plaintiff in *Kahn* appealed from a final judgment in which the Delaware Chancery Court concluded a minority shareholder owed a fiduciary duty to the plaintiff, but that the evidence did not demonstrate that the defendant breached this duty. *Kahn*, 638 A.2d at 1111-12. The Delaware Supreme Court, affirming the Chancery Court, held that a minority shareholder whose designated director told the other board members that "[y]ou must listen to us. We are 43 percent owner. You have to do what we tell you[,]" and persuaded the board members to abandon their opposing votes in a "watershed vote," was a controlling shareholder who owed a fiduciary duty to the other shareholders. *Id.* at 1114 (first alteration in original).

A review of secondary authorities supports treating a minority shareholder as a "controlling shareholder" under certain circumstances. Black's Law Dictionary defines a controlling shareholder as "[a] shareholder who can influence the corporation's activities because the shareholder either owns a majority of outstanding shares or *owns a smaller percentage but a significant number of the remaining shares are widely distributed among many others*." *Black's Law Dictionary* 1586 (10th ed. 2014) (emphasis added). The American Law Institute, in its *Principles of Corporate Governance*, applies the following definition:

> (a) A "controlling shareholder" means a person [§ 1.28] who, either alone or pursuant to an arrangement or understanding with one or more persons:
>
> (1) Owns and has the power to vote more than 50 percent of the outstanding voting equity securities [§ 1.40] of a corporation; or
>
> (2) *Otherwise exercises a controlling influence over the management or policies of the corporation or the transaction or conduct in question by virtue of the person's position as a shareholder.*
>
> (b) A person who, either alone or pursuant to an arrangement or understanding with one or more other persons, owns or has the power to vote more than 25 percent of the outstanding voting equity securities of a corporation is presumed to exercise a controlling influence over the management or policies of the corporation, unless some other person, either alone or pursuant to an arrangement or understanding with one or more other persons, owns or has the power to vote a greater percentage of the voting equity securities. A person who does not, either alone or pursuant to an arrangement with one or more other persons, own or have the power to vote more than 25 percent of the outstanding voting equity securities of a corporation is not presumed to be in control of the corporation by virtue solely of ownership of or power to vote voting equity securities.

American Law Institute, *Principles of Corporate Governance* § 1.10 (1994) (emphasis added). We note that the American Law Institute applies the presumption of control at a lower threshold, *i.e.*, when a shareholder owns twenty-five percent of the corporation. *Id.* This is in contrast to our precedents and the decisions by Delaware courts in which control is presumed only where the shareholder holds a numerical majority interest.

Defendants argue that *Gaines* and our other precedents support the bright line rule that a "controlling shareholder" must have a numerical majority of the outstanding shares. However, these decisions hold only that a majority shareholder is presumed to be a "controlling shareholder." *See Gaines*, 234 N.C. at 344-45, 67 S.E.2d at 353-54; *Kaplan*, 196 N.C. App. at 473-74, 675 S.E.2d at 137. We find persuasive

Delaware's rule that a minority shareholder exercising actual control over a corporation or a corporation's affairs may be classified as a "controlling shareholder."

At the pleading stage, we must accept as true all of Plaintiff's allegations without regard to whether Plaintiff can produce evidence to support those allegations. But we begin with the general presumption that a minority shareholder is not in control of a corporation's conduct. *Cirton*, 569 A.2d at 70; *see Kaplan*, 196 N.C. App. at 473-74, 675 S.E.2d at 137; *Freese*, 110 N.C. App. at 37-38, 428 S.E.2d at 847-48. This presumption may be rebutted if a plaintiff alleges facts from which it is reasonable to infer that a minority shareholder exercised actual control over the corporation's actions. *Kahn*, 638 A.2d at 1113-14; *see Gaines*, 234 N.C. at 344-45, 67 S.E.2d at 353-54; *White*, 149 N.C. at 420, 63 S.E.2d at 111.

When tested by a motion to dismiss pursuant to Rule 12(b)(6), a plaintiff's complaint for a claim based upon shareholder liability must allege specific facts demonstrating or allowing for the reasonable inference of actual control by that shareholder. "The bare conclusory allegation that a minority stockholder possessed control is insufficient. Rather, the Complaint must contain well-pled facts allowing for a reasonable inference that the minority stockholder 'exercised actual domination and control over . . . [the] directors.' " *In re Morton's Restaurant Grp., Inc.*, 74 A.3d 656, 664-65 (Del. Ch. 2013) (alterations in original) (citations omitted).

Plaintiff argues that the Amended Complaint is not subject to dismissal because it alleges a "nexus of facts" that allows for a reasonable inference of corporate control by British American. Plaintiff relies on *Williams v. Cox Commc'ns, Inc.*, 2006 Del. Ch. LEXIS 111 *1, *22 (Del. Ch. June 5, 2006), an unpublished decision by the Chancery Court of Delaware, to support the "nexus of facts" standard. The court in *Williams* noted that with respect to claims alleging wrongful control by corporate shareholders, the line between whether certain actions amount to influence or control "is highly contextualized and is difficult to resolve based solely on the complaints[,]" and that while "[n]o single allegation in [the] plaintiff's complaint is sufficient on its own . . . [t]he complaint succeeds because it pleads a nexus of facts all suggesting that the [defendants] were in a controlling position and that they exploited that control for their own benefit." *Id.* at *23-24. This Court and the North Carolina Supreme Court routinely dismiss the precedential value of unpublished decisions. But absent any North Carolina precedent on the issue, we find the analysis in *Williams* helpful. We likewise agree

that a complaint alleging minority shareholder liability should survive a 12(b)(6) motion to dismiss if it pleads a "nexus of facts" allowing for a reasonable inference that the minority shareholder exercised actual control over material corporate affairs.

2. Sufficiency of the Pleadings

After careful review of the Amended Complaint and all inferences that may be drawn from its allegations, we hold that Plaintiff has pleaded facts sufficient to allow for a reasonable inference that British American exercised actual control over the Transaction and thus owed a fiduciary duty to Plaintiff.

To plead most civil claims in North Carolina, a complaint must contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]" N.C. Gen. Stat. § 1A-1, Rule 8(a)(1) (2015). "Thus, a complaint is sufficient where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim." *Pastva v. Naegele Outdoor Advers., Inc.*, 121 N.C. App. 656, 659, 468 S.E.2d 491, 493 (1996) (internal quotation marks and citations omitted).

The purpose behind this pleading standard, generally referred to as notice pleading, "is to resolve controversies on the merits, after an opportunity for discovery, instead of resolving them based on the technicalities of pleadings." *Ellison v. Ramos*, 130 N.C. App. 389, 395, 502 S.E.2d 891, 895 (1998) (citation omitted). Therefore, "[p]leadings must be liberally construed to do substantial justice, and must be fatally defective before they may be rejected as insufficient." *Fournier v. Haywood Cnty. Hosp.*, 95 N.C. App. 652, 654, 383 S.E.2d 227, 228-29 (1989) (citing *Smith v. N.C. Farm Bureau Mut. Ins. Co.*, 84 N.C. App. 120, 123, 351 S.E.2d 774, 776 (1987)).

The North Carolina legislature has designated several matters in which heightened pleading requirements must be met. N.C. Gen. Stat. § 1A-1, Rule 9 (2015). These matters include, among others, claims asserting capacity, fraud, duress, mistake, and libel and slander. *Id.* For these delineated situations, the legislature sought to provide guidance in areas "which have traditionally caused trouble when no codified directive existed." N.C. Gen. Stat. § 1A-1, Rule 9 N.C. cmt. (2015). Absent a specific designation by statute or precedent, we see no reason to adopt a stricter pleading standard for suits against minority shareholders for a

breach of a fiduciary duty. North Carolina's pleading standard requires a plaintiff to plead facts sufficient to overcome the presumption that a minority shareholder is not in control of a corporation's conduct. A complaint against a minority shareholder must therefore allege facts from which a trier of fact could reasonably infer that the minority shareholder exercised actual control over the corporation.

To survive a 12(b)(6) motion to dismiss, a complaint for breach of fiduciary duty claim must allege, in addition to the existence of a fiduciary relationship, a breach of that duty. *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 70, 614 S.E.2d 328, 337 (2005) (internal quotation marks and citations omitted) ("To state a claim for breach of fiduciary duty, a plaintiff must allege that a fiduciary relationship existed and that the fiduciary failed to act in good faith and with due regard to [the] [plaintiff's] interests.") (second alteration in original).

a. Limitations Preventing British American from Controlling Reynolds

Defendants argue that Plaintiff's Amended Complaint disclosed facts that necessarily defeated his claim—the limitations on British American's control of Reynolds contained within the Governance Agreement. The Governance Agreement provides, *inter alia*:

- British American has the right to designate only five of the thirteen directors on the Reynolds Board of Directors, with the number of directors designated by British American decreasing incrementally if British American's ownership drops below certain thresholds. Additionally, three of the directors designated by British American must be independent as defined by the rules of the New York Stock Exchange.
- With respect to the eight directors which it cannot designate, British American must vote all of its shares in favor of any Board of Director candidates selected by a committee comprised solely of directors not designated by British American.
- A majority of the directors not designated by British American must approve Reynolds's entrance into any contract involving Reynolds and its subsidiaries and British American and its subsidiaries.
- The Standstill provision prevented British American from purchasing additional shares in Reynolds until 30 July 2014.

b. Circumstances Allowing British American to Control Reynolds

Plaintiff asserts that events and circumstances surrounding the Transaction, including those described in the Proxy Statement, allowed British American to exercise actual control over the Transaction notwithstanding the terms of the Governance Agreement. Plaintiff cites the following allegations to support this assertion: (1) British American's outsized shareholding constituted a *de facto* veto power over any matter put to a shareholder vote—British American owned a forty-two percent stake of the voting shares, while the next largest block was five percent; (2) the Governance Agreement's granting to British American "veto power," in the form of contractual rights to prohibit the issuance of shares and the divestment of intellectual property necessary for the Transaction; (3) deal terms allowing British American to profit at the expense of—and to the exclusion of—the non-British American shareholders; and (4) the failure by the Other Directors to counter British American's control over the Transaction.

Our review has identified the following specific facts alleged or contained in the Governance Agreement or Proxy Statement from which a reasonable trier of fact could infer that British American exercised actual control over Reynolds with respect to the Transaction:

- In late 2012, the Reynolds Board of Directors considered a merger with Lorillard. Representatives of British American "expressed their support, on behalf of BAT as an RAI shareholder, for approaching Lorillard with an indication of interest."
- With the support of British American, Reynolds approached Lorillard and discussions between the two corporations ensued.
- In January 2013, British American's representatives reiterated, in discussions with the Reynolds Board of Directors, British American's support for the Transaction conditioned upon deal terms including British American maintaining its forty-two percent ownership of the surviving company following the merger.

> BAT's representatives also stated that decisions as to whether and how to pursue a business combination between RAI and Lorillard were to be made by the RAI board of directors, but that BAT, in its capacity as a substantial financing source and holder of contractual approval rights, would cooperate with combining the

> companies only on transactional terms and with an execution strategy of which it approved.

- Negotiations between Reynolds, Lorillard, and British American continued throughout the following months. Included among the negotiated terms was, "at the insistence of BAT, that neither BAT nor RAI would seek any changes in the governance agreement in connection with the possible acquisition of Lorillard."

- On 18 January 2014, the Reynolds Board of Directors met with, among others, representatives of Lazard, Reynold's financial advisors. "A representative of Lazard . . . introduce[ed] an alternative approach [to the Transaction] in which cash available as consideration would be distributed on a pro rata basis to Lorillard shareholders and to RAI shareholders other than BAT." The Lazard representatives also reported on discussions between

  > [Reynolds] management and Lazard, on the one hand, and BAT and its financial advisors, on the other, during which the parties discussed potential solutions that would be in the best interests of RAI shareholders other than BAT and continue to meet the objectives of both Lorillard and BAT. These discussions included the possibility that BAT and/or RAI shareholders other than BAT could have decreased post-closing ownership interest in the combined company.

  Following this meeting, the Other Directors discussed with Reynolds's outside legal advisors their fiduciary duties.

- The Other Directors reached a consensus "that RAI shareholders other than BAT should receive at least 30% of the equity ownership of the combined company and receive a pro rata portion of the cash distribution." The Other Directors also discussed the need to engage independent legal counsel.

- During a meeting on 12 February 2014 between the Other Directors and legal and financial advisers for Reynolds as well as independent counsel for the Other Directors, "[t]here was extensive discussion regarding the consideration to be received by RAI shareholders other than BAT and BAT's willingness to move from its initial position regarding post-transaction equity ownership."

- On 18 February 2014, the Reynolds Board of Directors discussed a counter-proposal by Lorillard seeking a higher percentage of post-transaction ownership. "The Other Directors considered the impact of increased ownership for Lorillard shareholders on RAI

shareholders other than BAT[,]" and "expressed their preference that any additional equity to Lorillard shareholders come from decreased ownership by BAT."

- By 20 February 2014, British American indicated, consistent with its earlier position that it "was not prepared to extend the standstill covenant in the governance agreement in connection with the proposed business combination transaction . . . ."
- On 13 March 2014, the Lorillard Board of Directors, fearing the Transaction was not a "merger-of-equals," determined not to proceed and terminated discussions.
- Reynolds's senior management then considered acquiring Lorillard at a premium—*i.e.*, purchasing Lorillard—as opposed to the previous "merger-of-equals" approach. Reynolds's Board of Directors began discussions with Lazard and Lorillard concerning this newly structured approach to the Transaction. This Transaction was to be funded by equity financing from British American, by which British American would purchase Reynolds shares and maintain its forty-two percent interest in the remaining company following the acquisition.
- On 17 June 2014, Jones Day—legal counsel for Reynolds—received a draft subscription and support agreement from British American proposing the terms of equity financing for the new Transaction. In the subscription and support agreement, British American pledged to vote its shares in favor of the Transaction, regardless of whether the Reynolds Board of Directors recommended proceeding with the Transaction.
- On 2 July 2014, Moore & Van Allen—independent legal counsel for the Other Directors—reviewed the proposed subscription and support agreement. Moore & Van Allen "requested that BAT's draft provision for an unconditional commitment to vote the shares of RAI common stock it beneficially owned in favor of the transaction (regardless of any change in recommendation of the RAI board of directors) be deleted."
- On 5 July 2014, Representatives of Lorillard notified Jones Day

> that Lorillard was insistent, as a condition of proceeding, on having a commitment from BAT to vote the shares of RAI common stock it beneficially owned in favor of the transaction even if the RAI board of directors changed its recommendation of the transaction. [BAT's legal counsel]

> advised Jones Day that BAT would consider this demand but would not give such a commitment over the objections of the Other Directors. The Other Directors agreed to accept that commitment.

The Proxy Statement does not provide any explanation regarding how or why the Other Directors determined to depart from the advice of their independent legal counsel in this respect.

- On 9 July 2014, "several news media speculated that BAT was seeking to acquire the remaining outstanding shares of RAI common stock that it did not currently own."
- On 14 July 2014, the Reynolds Board of Directors unanimously approved the Transaction.

The information summarized above is but a drop in the bucket of the detailed financial and historical data included within the Proxy Statement and endemic to corporate mergers and acquisitions. A multitude of inferences can be drawn from this information. However, our task is to consider whether the facts alleged allow for any reasonable inference that can support Plaintiff's claim.

When reviewing a 12(b)(6) motion, "the complaint must be liberally construed and should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Zenobile v. McKecuen*, 144 N.C. App. 104, 110, 548 S.E.2d 756, 760 (2001). Plaintiff's Amended Complaint alleged facts that support the reasonable inference that British American exercised actual control over Reynolds's Board of Directors' approval of the Transaction, despite the restrictions of the Governance Agreement.

This is a close case, even under the liberal standard of notice pleading. We acknowledge that one reasonable inference to be drawn from the events and circumstances is that the Other Directors believed that the Transaction was valuable enough to all shareholders that it was worth proceeding even on terms that disproportionately enriched British American. Another reasonable inference could be that the Other Directors did not seek funding for the Transaction from any other source because they had investigated prospects and determined that funding on the same or better terms was not available elsewhere. It is also reasonable to infer that British American earned the increased value of the shares it purchased by incurring the financial risk inherent in the Transaction, a risk not incurred by other shareholders. However, these

possible inferences do not preclude other reasonable inferences that support Plaintiff's claim that British American was a controlling shareholder with an accompanying fiduciary duty.

Defendants note that the strategic advantages British American enjoyed, such as its role as equity financer of the Transaction, have been dismissed by our courts as insufficient to establish a fiduciary duty. *Kaplan*, 196 N.C. App. at 474-77, 675 S.E.2d at 137-39 (holding that the plaintiff did not allege sufficient control of a limited liability company by a forty-one percent owner who was the company's sole source of financing). Defendants also argue that British American's contractual rights to prohibit the issuance of shares and transfer of intellectual property necessary to complete the Transaction do not constitute control. *See Superior Vision Servs. v. ReliaStar Life Ins. Co.*, 2006 Del. Ch. LEXIS 160 *1, *19-20 (Del. Ch. Aug. 25, 2006) (holding the defendant's exercise of its contractual right to prevent the distribution of dividends did not render it a "controlling shareholder" with an accompanying fiduciary duty). But unlike the facts alleged in any of the cases relied upon by Defendants, Plaintiff's Amended Complaint alleged a combination of facts which in the aggregate support a reasonable inference of actual control.

Defendants urge us to follow the Delaware Chancery Court's decision in *Thermopylae Capital Partners, L.P. v. Simbol, Inc.*, 2016 Del. Ch. LEXIS 15 *1 (Del. Ch. Jan. 29, 2016), which distinguished potential control from actual control and held that potential control is insufficient to impose a fiduciary duty. In *Thermopylae*, the plaintiff's complaint failed to allege "the number of directors at the time of the transaction, their identity, facts showing control by [the defendant], and details regarding the terms of the transaction itself[.]" *Id.* at *44-45. In contrast, Plaintiff's Amended Complaint alleges detailed facts, which we hold allow for the reasonable inference that British American exercised actual control over the Transaction.

Defendants also contrast the circumstantial allegations in this case with more explicit facts shown in cases upholding controlling shareholder liability. For example, Plaintiff has not alleged that any director designated by British American told other directors, "[y]ou have to do what we tell you." *Cf. Kahn*, 638 A.2d at 1114. However, the lack of more explicit facts at the pleading stage, before a plaintiff can obtain discovery, is not fatal if less than explicit facts allow for a reasonable inference of the essential elements of the claim.

Here, Plaintiff's allegations allow for a reasonable inference that the Other Directors agreed to the terms of the Transaction dictated by

British American at the expense of other shareholders in order to avoid the risk of a corporate takeover by British American. The Amended Complaint alleged not only that British American conditioned its support for the Transaction on terms disfavoring the other shareholders, but that the Other Directors capitulated to British American's terms against the advice of their independent legal counsel. The aggregate of these allegations along with the size of British American's shareholding, British American's contractual rights under the Governance Agreement, the impending expiration of the Standstill provision, and the lack of explanation surrounding the Other Director's decision to abandon advice by their independent legal counsel allows for the reasonable inference of actual control.

We conclude these allegations comprise a sufficient nexus of facts from which it is reasonable to infer that British American exercised actual control over the Transaction and the actions taken by the Other Directors. Therefore, Plaintiff has sufficiently pleaded that British American is a controlling shareholder with a concomitant fiduciary duty owed to Plaintiff, as a non-British American minority shareholder.

Having established that the Amended Complaint alleged facts sufficient to support the reasonable inference that British American owed a fiduciary duty to Plaintiff, we next consider whether the Amended Complaint includes allegations sufficient to establish, for the purposes of withstanding a 12(b)(6) challenge, that British American breached this duty and did not act in good faith with regard to Plaintiff's interests. We hold it does.

The relevant facts alleged include: conflicts of interests between British American and the non-British American shareholders noted by Reynolds's Board of Directors, the Other Directors' failure to obtain outside financial advice to resolve the conflicts, British American's potential pressuring of the Other Directors to act contrary to the interests of the non-British American shareholders, and British American's purchase of Reynolds stock below the fair market value on the closing date of the Transaction. These facts allow for a reasonable inference that British American breached its fiduciary duty to the other shareholders by acting contrary to their interest for its own pecuniary gain.

We conclude that Plaintiff alleged a nexus of facts that permits the reasonable inference that British American controlled the conduct of Reynolds for its pecuniary benefit to the detriment of the other shareholders. We do not hold that Plaintiff has presented evidence sufficient to prove that British American was a controlling shareholder, to prove

that British American breached a fiduciary duty, or even sufficient to raise disputed issues of fact in this regard. We simply hold the Amended Complaint alleges facts sufficient, if proven true, to allow for the reasonable inference that British American exercised actual control over the Transaction and breached its fiduciary duty to the other shareholders. Whether Plaintiff is able to produce evidence necessary to support his claims is a question to be answered after discovery.

Accordingly, we reverse the trial court's dismissal of Plaintiff's claim against British American pursuant to Rule 12(b)(6).

3. Standing

[2] The general rule in North Carolina is that a shareholder may not bring suit against third parties except in a derivative action on behalf of the corporation. *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997). There are two exceptions to this rule: when a plaintiff can show either (1) the defendant owed the plaintiff a special duty, or (2) the plaintiff suffered an injury separate and distinct from other shareholders. *Barger*, 346 N.C. at 658-59, 488 S.E.2d at 219-20. A fiduciary duty may constitute a "special duty" when owed directly to a party. *See id.* at 658-59, 488 S.E.2d at 220.

Here, Plaintiff's standing to bring a direct claim against British American turns on whether Plaintiff's Amended Complaint has alleged a special duty and thus a claim for relief. Because the Amended Complaint included allegations sufficient to support the conclusion that British American owed a fiduciary duty, Plaintiff has standing to bring a direct claim against British American.

C. Claims against Boards of Directors

[3] Plaintiff next contends the trial court erred by dismissing his claim against Defendant-Directors for breach of fiduciary duty. The trial court did not determine whether Plaintiff had standing to sue Defendant-Directors, but instead dismissed Plaintiff's claims on the merits. We hold that Plaintiff does not have standing and therefore affirm the trial court's dismissal on this alternative ground.

"The well-established general rule is that shareholders cannot purse individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Barger*, 346 N.C. at 658, 488 S.E.2d at 219 (citations omitted). Such third parties include the directors of a corporation. *See Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013). "The General Assembly has expressly indicated its intent 'to avoid an interpretation

[of N.C. Gen. Stat. § 55-8-30] . . . that would give shareholders a direct right of action on claims that should be asserted derivatively' and to avoid giving creditors a generalized fiduciary claim." *Id.* (quoting N.C. Gen. Stat. § 55-8-30 N.C. cmt. (2011)). Two exceptions to this rule allow shareholders to bring direct actions against either a third party or the directors: (1) "if the shareholder can show that the wrongdoer owed him a special duty or [(2)] that the injury suffered by the shareholder is separate and distinct from the injury sustained by the other shareholders or the corporation itself." *Barger*, 346 N.C. at 658-59, 488 S.E.2d at 219 (citations omitted).

To establish the first exception, a plaintiff "must allege facts from which it may be inferred that defendants owed plaintiffs a special duty. The special duty may arise from contract or otherwise." *Id.* at 659, 488 S.E.2d at 220 (citation omitted). The North Carolina Supreme Court has recognized as illustrative of a special duty, "when a party violate[s] its fiduciary duty to the shareholder." *Id.* (citing *FTD Corp. v. Banker's Trust Co.*, 954 F. Supp. 106, 109 (S.D.N.Y. 1997)). However, North Carolina has established that a director's fiduciary duty is owed to the corporation itself and not to the shareholders individually. *Estate of Browne v. Thompson*, 219 N.C. App. 637, 640-41, 727 S.E.2d 573, 576 (2012). Because the legislature intended shareholders to bring derivative actions, as opposed to direct actions, and a directors' fiduciary duty is to the corporation generally and not the shareholder individually, a shareholder's action against a director should be brought derivatively unless he or she can allege facts that the director owed him or her a special duty beyond that of the general fiduciary duty to the corporation. *Barger*, 346 N.C. at 660, 488 S.E.2d at 220 ("Plaintiffs have alleged no facts from which it may be inferred that defendants owed plaintiffs in their capacities as shareholders a duty that was personal to them and distinct from the duty defendants owed the corporation.").

Under the second exception, a plaintiff must "present evidence that they suffered an injury peculiar or personal to themselves." *Green*, 367 N.C. at 144, 749 S.E.2d at 269 (citing *Barger*, 346 N.C. at 661, 488 S.E.2d at 221). "An injury is peculiar or personal to the shareholder if 'a legal basis exists to support plaintiffs' allegations of an individual loss, separate and distinct from any damage suffered by the corporation.' " *Barger*, 346 N.C. at 659, 488 S.E.2d at 220 (quoting *Howell v. Fisher*, 49 N.C. App. 488, 492, 272 S.E.2d 19, 23 (1980)). The general diminution of stock value is not considered an injury "peculiar or personal" as it is felt by the corporation itself. *Green*, 367 N.C. at 144, 749 S.E.2d at 269 ("The loss of an investment is identical to the injury suffered by the corporate entity as a whole.") (internal quotations and citations omitted).

Here, Plaintiff asserts standing to bring his claim against Defendant-Directors under the second exception. Plaintiff frames his injuries as the inadequate compensation for the stock sold to British American and the dilution of voting power that resulted from this sale of shares to British American. Plaintiff argues these injuries were suffered uniquely by Plaintiff and the other non-British American shareholders, and thus satisfies the "peculiar or personal" requirement. We disagree.

Plaintiff's claimed injury from the inadequate compensation is the exact loss contemplated by the legislature when it drafted the requirement that plaintiffs must assert derivative claims where the injury is felt by the corporation itself. This injury does not satisfy the "peculiar or personal" requirement, and therefore standing for Plaintiff's direct claim may not be based on this injury.

Plaintiff's alternative framing for the injury, *i.e.*, the dilution of voting power, requires further consideration, but ultimately is not sufficient to satisfy the "peculiar or personal" requirement. Recognizing such dilution as a basis for standing to sue directly could allow any minority shareholder who opposes an equity financing agreement to bring a direct suit against the corporation's directors. Such injury is at its core a diminution of value of the stock held. While it is less directly felt by the corporation itself, it is felt generally by the shareholders and is thus not peculiar or personal to any one shareholder. Therefore, we hold that a dilution of voting power, standing alone, is an insufficient injury to base standing for a shareholder's direct claim against a board of directors.

Because we hold that Plaintiff has failed to allege facts necessary to establish either exception to the general rule requiring actions against the directors to be brought derivatively, we affirm the trial court's dismissal of Plaintiff's claim.

D. Claims against Corporation

[4] Plaintiff's final issue on appeal challenges the trial court's dismissal of his claim against Reynolds for aiding and abetting a breach of fiduciary duty.

The validity of an aiding and abetting a breach of fiduciary duty claim brought against a corporation for the actions of its directors is unsettled in North Carolina. *Bottom v. Bailey*, 238 N.C. App. 202, 211-12, 767 S.E.2d 883, 889 (2014). However, we need not address this issue today, because Plaintiff lacks standing to bring the underlying breach of fiduciary duty claim as against Defendant-Directors. *See*, *e.g.*, *Id.* at 211, 767 S.E.2d at 889. Accordingly, we hold the trial court did not err in

dismissing Plaintiff's claim of aiding and abetting a breach of fiduciary duty with respect to Reynolds.

Conclusion

Plaintiff's Amended Complaint, taken as true, supports the conclusion that British American acted as a "controlling shareholder," and therefore owed Plaintiff, as a minority shareholder, a fiduciary duty. The Amended Complaint, however, failed to establish that Defendant-Directors owed Plaintiff a special duty or that Plaintiff's injury was separate and distinct, and therefore Plaintiff failed to establish standing to bring a direct claim against Defendant-Directors. Because the complaint failed to plead the underlying fiduciary duty against Defendant-Directors, Plaintiff's claim against Reynolds for aiding and abetting a breach of fiduciary duty must also fail. Accordingly, the trial court erred in dismissing Plaintiff's claim against British American but did not err in dismissing Plaintiff's claims against Defendant-Directors and Reynolds. Therefore, we reverse and remand the trial court's order dismissing Plaintiff's claim against British American and affirm the trial court's order dismissing Plaintiff's claims against the Director Defendants and Reynolds.

REVERSED AND REMANDED IN PART AND AFFIRMED IN PART.

Judges ELMORE and McCULLOUGH concur.

DELVON R. GOODWIN, BY AND THROUGH HIS GUARDIAN AD LITEM, MELISSA I. HALES, PLAINTIFF

v.

FOUR COUNTY ELECTRIC CARE TRUST, INC , A/K/A FOUR COUNTY ELECTRIC MEMBERSHIP CORPORATION, DEFENDANT

No. COA16-481

Filed 20 December 2016

1. Appeal and Error—appealability—denial of motion to amend—intent inferred from notice of appeal

The Court of Appeals had jurisdiction to review the trial court's denial of plaintiff's motion to amend along with the trial court's grant of the Non-Profit Trust's motion to dismiss. Plaintiff's intent could be inferred from the notice of appeal and there was no indication that the Non-Profit Trust had been misled by plaintiff's inadvertent omission of the motion to amend ruling from the notice of appeal.

2. Pleadings—motion to amend—wrong party—not a misnomer

The trial court did not err in a personal injury case by denying plaintiff's motion to amend and dismissing claims against the Non-Profit Trust. There was no genuine issue of fact as to the Non-Profit Trust's lack of responsibility for plaintiff's injuries. Plaintiff's error was not a misnomer, but instead, plaintiff sued the wrong party.

Judge HUNTER, JR., concurring in the result.

Appeal by Plaintiff from order entered 4 January 2016 by Judge Charles H. Henry in Sampson County Superior Court. Heard in the Court of Appeals 5 October 2016.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors, and Law Offices of Wade E. Byrd, P.A., by Wade E. Byrd, for Plaintiff-Appellant.

Young Moore and Henderson, P.A., by Dana H. Hoffman, for Defendant-Appellee.

DILLON, Judge.

Plaintiff appeals from the trial court's order denying his motion to amend the summons and complaint and granting Four County Electric

Care Trust, Inc.'s motion to dismiss the action. For the following reasons, we affirm.

I. Background

The issues on appeal in this matter concern the North Carolina Rules of Civil Procedure. The crux of this matter is whether Plaintiff sued the right entity for injuries sustained on 30 October 2012 after he came into contact with a power line regulator owned by "Four County Electric Membership Corporation," an electric membership cooperative (the "Membership Co-Op").

On 29 October 2015, almost three years after the accident, a guardian *ad litem* was appointed for Plaintiff, who commenced this action that same day.[1] In the body of the complaint, Plaintiff did *not* allege that the regulator was owned by the Membership Co-Op; rather, Plaintiff alleged that the regulator was owned by a different entity, "Four County Electric Care Trust, Inc." (the "Non-Profit Trust" or "Defendant"). In the caption of the summons and the complaint, Plaintiff designated the defendant as a single entity, using an assumed name which incorporated the names of *both* the Membership Co-Op and the Non-Profit Trust as follows: "Four County Electric Care Trust, Inc. a/k/a Four County Electric Membership Corporation."

Defendant, the Non-Profit Trust, moved to dismiss Plaintiff's action pursuant to Rule 12(b)(2), (4), (5), and (6) of the North Carolina Rules of Civil Procedure, contending that it did *not* own the regulator, but rather Membership Co-Op owned it. At the Rule 12 motions hearing, Plaintiff orally moved to amend the complaint and summons to alter the assumed name in the caption to "Four County Electric Membership Corporation," averring that the amendment constituted the correction of a misnomer, not the addition of a new party. The Membership Co-Op never made an appearance in this action.

By order entered 4 January 2016, the trial court granted the Non-Profit Trust's motion to dismiss and denied Plaintiff's motion to amend its complaint and summons. Plaintiff timely filed a notice of appeal.

II. Appellate Jurisdiction over Ruling Denying Oral Motion to Amend

Plaintiff contends on appeal that the trial court erred in its 4 January 2016 order by (1) granting the Non-Profit Trust's motion to dismiss and (2) denying Plaintiff's motion to amend the summons and complaint.

---

1. The complaint alleged that Plaintiff was incompetent at the time of the accident.

[1] Before addressing Plaintiff's arguments on appeal, we must first determine whether Plaintiff properly noticed an appeal from *both* portions of the trial court's order. Though Plaintiff states in his notice that he was appealing the 4 January 2016 order, he only references that portion granting Defendant's motion to dismiss. The notice fails to reference the portion denying Plaintiff's motion to amend. Specifically, Plaintiff's notice of appeal states as follows:

> [Plaintiff] hereby gives notice of appeal to the Court of Appeals of North Carolina from the Order signed on December 22, 2015 and file-stamped/entered on January 4, 2016 in the Superior Court of Sampson County, granting Defendant's Motion to Dismiss the above-captioned matter.

Accordingly, Defendant argues that we lack jurisdiction to consider any issue concerning the denial of Plaintiff's motion to amend. Guided by our decision in *Evans v. Evans*, 169 N.C. App. 358, 610 S.E.2d 264 (2005), we conclude that *both* portions of the 4 January 2016 order are properly before us.

Our Court has interpreted Rule 3 of our Rules of Appellate Procedure to require that "an appellant . . . appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider." *Foreman v. Sholl*, 113 N.C. App. 282, 291, 439 S.E.2d 169, 175 (1994) (internal quotation marks omitted). However, we have also held that "a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can *be fairly inferred from the notice* and the appellee is not mislead [sic] by the mistake." *Smith v. Indep. Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979) (emphasis added) (internal quotation marks omitted).

Our *Evans* decision is remarkably similar to the present case. In *Evans*, the appellant gave notice of appeal from "the Order entered on December 18, 2001 . . . denying Defendant's claim for child custody and child support." *Evans*, 169 N.C. App. at 363, 610 S.E.2d at 269 (internal quotation marks omitted). On appeal, the appellant also sought review of the portion of the same order denying her request for post-separation support. *Id.* The appellee argued that we lacked jurisdiction to consider the post-separation determination since the appellant's notice only referenced the child custody/support portion of the order. *Id.* We held that, based on these facts, "it is readily apparent that [the appellant] is appealing from the order dated 18 December 2001 which addresses

not only child custody and support but also post-separation support. . . . Therefore, this Court has jurisdiction to consider [the appellant's] appeal of these additional issues." *Id.*

Here, we can infer from Plaintiff's notice of appeal his intent to challenge the denial of his motion to amend the complaint and summons. His notice of appeal specifically references the 4 January 2016 order which addressed *both* the Non-Profit Trust's motion to dismiss *and* Plaintiff's motion to amend. *See id.* There is no indication that the Non-Profit Trust has been misled by Plaintiff's inadvertent omission of the motion to amend ruling from the notice of appeal. *See Smith*, 43 N.C. App. at 274, 258 S.E.2d at 867. Nor could there be as Plaintiff's sole, viable ground for appeal is that he should be allowed to amend the complaint and summons to include the defendant's proper name. Accordingly, we conclude that we have jurisdiction to review the trial court's denial of Plaintiff's motion to amend along with the trial court's grant of the Non-Profit Trust's motion to dismiss.

III. Analysis

A. Plaintiff's Motion to Amend

[2] We first address whether the trial court erred in denying Plaintiff's oral motion to amend the summons and complaint to change the designation of the defendant in the caption from "Four County Electric Care Trust, Inc. a/k/a Four County Electric Membership Corporation" to "Four County Electric Membership Corporation." Plaintiff argues that this erroneous designation is merely a misnomer of the Membership Co-Op.

The Non-Profit Trust essentially argues that the designation in the caption, at best, identifies *it* as the sole defendant and that the summons was directed at and served upon it alone, and not upon the Membership Co-Op. Therefore, the Non-Profit Trust contends that the trial court was correct in its ruling because the trial court could not obtain jurisdiction over an entity that was not named or served (the Membership Co-Op) merely by amending the moniker on the summons and complaint. Indeed, both the summons and complaint identify and were served upon a different entity (the Non-Profit Trust).

Our Supreme Court has stated that an amendment to the summons and complaint may be allowed to correct a misnomer or mistake in the name of the party, but that such motion to amend must be denied "where the amendment amounts to a substitution or entire change in parties." *Bailey v. McPherson*, 233 N.C. 231, 235, 63 S.E.2d 559, 562 (1951). *See also Harris v. Maready*, 311 N.C. 536, 546, 319 S.E.2d 912, 918 (1984) (restating same general principle).

Here, we hold that the amendment sought by Plaintiff amounted to a substitution of parties. The summons was directed to the Non-Profit Trust, not the Membership Co-Op; specifically, the summons contained additional language which erroneously provided that the Non-Profit Trust was *also known* as the "Four County Electric Membership Corporation." Further, the body of the complaint never alleges any facts concerning the Membership Co-Op, but rather alleges that the power line regulator was owned, operated, and maintained by the Non-Profit Trust. We conclude that there is no confusion that the summons and complaint were directed to the Non-Profit Trust. Therefore, the trial court did not err in denying Plaintiff's motion to amend.

Our resolution of this issue is controlled by *Crawford v. Aetna Cas. & Sur. Co.*, 44 N.C. App. 368, 261 S.E.2d 25 (1979). In *Crawford*, the plaintiff sued "Michigan Tool Company, a Division of Ex-Cell-O Corporation" under the erroneous belief that Michigan Tool Company was part of Ex-Cell-O Corporation instead of a separate legal entity. *Id.* at 368, 261 S.E.2d at 26. After the statute of limitations had expired, the plaintiff then learned that Michigan Tool Company was in fact a *subsidiary* of Ex-Cell-O Corporation and that Ex-Cell-O Corporation and Michigan Tool Company were in fact *two separate entities*. *Id.* at 369, 261 S.E.2d at 26. The plaintiff then sought to amend the summons and complaint to reflect that Ex-Cell-O Corporation was the proper defendant, contending that the designation in the original summons and complaint was a mere misnomer. *Id.* However, this Court, relying on precedent from our Supreme Court, held that the designation was not a misnomer and that the amendment should not be allowed even if the summons and complaint in fact reached the hands of someone at Ex-Cell-O Corporation:

> In the case before us, we are dealing with two separate legal entities, Michigan Tool Company and Ex-Cell-O Corporation. Complaint and summons directed to a defendant named as "MICHIGAN TOOL COMPANY, A Division of Ex-Cell-O Corporation" is not service on the entity Ex-Cell-O Corporation even if the complaint and summons reach the hands of someone obligated to receive service in behalf of Ex-Cell-O.

Id. at 370, 261 S.E.2d at 27 (alteration in original).

Much like the plaintiff in *Crawford*, Plaintiff believed that the Non-Profit Trust was also known by the name of "Four County Electric Membership Corporation," when in fact the Non-Profit Trust and the Membership Co-Op are two separate legal entities. Accordingly,

based on our holding in *Crawford*, we conclude that the amendment sought by Plaintiff would have had the effect of adding the Membership Co-Op as a new party.

We are also persuaded by our Supreme Court's decision in *McLean v. Matheny*. 240 N.C. 785, 84 S.E.2d 190 (1954). In that case, the plaintiff sued "W.B. Matheny, trading as Matheny Motor Company." *Id.* at 785, 84 S.E.2d at 190. The plaintiff later moved to amend his complaint to add "Matheny Motor Company, Inc.," realizing that the Company was a legal entity, separate and distinct from Mr. Matheny. *Id.* at 786, 84 S.E.2d at 191. The Supreme Court held that the plaintiff could not add the corporation by merely amending the moniker used in the summons and complaint since the proposed amendment would add a new party. *Id.* at 787, 84 S.E.2d at 191-92. In the same way, here, Plaintiff is not seeking to correct a moniker, but rather is seeking to add a different entity.

In conclusion, Plaintiff sought to bring in the Membership Co-Op as a defendant by amending the summons and complaint which were issued and served on the Non-Profit Trust. Plaintiff's motion to amend was filed on the basis that the Membership Co-Op was already a named party, and that any potential error in the designation of the defendant in the summons and complaint was merely a misnomer. Plaintiff characterized his motion as such – rather than as a motion to add a new party – presumably out of concern that the Membership Co-Op, as a new party, would have a statute of limitations defense if the Membership Co-Op challenged Plaintiff's allegations of incompetency. Were the motion to amend be on the basis of a misnomer, rather than the addition of a new party, such motion would relate back to 29 October 2015, the date of filing for the original complaint. We make no determination as to whether the statute of limitations has indeed run on Plaintiff's claims against the Membership Co-Op. We simply conclude that the Membership Co-Op has not been sued in this action, nor has Plaintiff made any attempt to add the Membership Co-Op through any motion *to add it as a party*.

B. Defendant's Motion to Dismiss

The trial court granted the Non-Profit Trust's motion to dismiss pursuant, in part, to Rule 12(b)(6) of our Rules of Civil Procedure. In granting the motion, the trial court not only considered the four corners of Plaintiff's complaint, but also two affidavits offered by the Non-Profit Trust which established that (1) the Membership Co-Op and the Non-Profit Trust are two separate, distinct legal entities and (2) the power line regulator is owned, operated, and maintained by the Membership Co-Op and *not* by the Non-Profit Trust.

Rule 12 provides that if matters outside the pleading are presented and considered by the court on a Rule 12(b)(6) motion, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b). In the hearing below, Plaintiff did not object to the introduction of the affidavits. We note that the complaint alleging that the Non-Profit Trust owns the regulator was not verified. Further, Plaintiff presented no evidence to contradict the affidavits, but rather sought to amend his summons and complaint to reflect that the Membership Co-Op was the correct entity. Moreover, on appeal, Plaintiff concedes that the power line regulator is owned, operated, and maintained by the Membership Co-Op and that the Non-Profit Trust was not the correct party. Therefore, the only evidence before the trial court concerning the ownership of the power line regulator was in the form of the affidavits offered by Defendant. Accordingly, the trial court did not err in dismissing the claims against the Non-Profit Trust as there was no genuine issue of fact as to the Non-Profit Trust's lack of responsibility for Plaintiff's injuries.

IV. Conclusion

Plaintiff's error was not a misnomer; rather, Plaintiff sued the wrong party. The trial court properly denied Plaintiff's motion to amend based on a misnomer. Further, the trial court did not err in granting Defendant's motion to dismiss.

AFFIRMED.

Judge ELMORE concurs. Judge HUNTER, JR., concurs in the result and writes separately.

HUNTER, JR., Robert N., Judge, concurring in the result.

When a litigant has been adjudged incompetent, he becomes a ward of the court. *Perry v. Jolly*, 259 N.C. 305, 314 130 S.E.2d 654, 661 (1963); *In re Estate of Armfield*, 113 N.C. App. 467, 439 S.E.2d 216 (1994). Here, it is alleged the plaintiff was mentally incompetent before the occurrence leading to his injury and was further catastrophically injured after the accident. On this basis, the Clerk appointed a guardian ad litem for him as "an Incompetent Person." This finding is uncontroverted.

Plaintiff's status as an incompetent commits his legal rights "to the care of the court" as well as their attorneys. *Elledge v. Welch*, 238 N.C. 61, 68, 76 S.E.2d 340, 345 (1953). The duty to protect those who have been adjudged incompetent extends beyond the trial courts to

the appellate courts. *See id.* (exercising supervisory power to assume jurisdiction without an appeal and review errors committed against an incompetent defendant).

Because judges have an obligation to incompetents to ensure their legal rights, so as to avoid additional needless litigation in the future, I write separately to question why this case is before us.

Plaintiff does not dispute he named the wrong defendant in his complaint. However, the parties and the trial court appear to have proceeded under the misimpression of law that the statute of limitations on Plaintiff's claim had expired, leaving Plaintiff unable to file a new complaint against the proper defendant. Because the majority declines to address the statute of limitations issue, not only does it leave Plaintiff's underlying negligence claim, like Schrödinger's cat, in a state where it may be alive or dead,[1] but it fails to disabuse all concerned of the notion that an amendment to Plaintiff's complaint would need to relate back to the date of filing under North Carolina Rule of Civil Procedure 15(c).

While the majority focuses on whether Plaintiff's error constituted a mere misnomer or a fatal defect, it elides the fact that this analysis is appropriate only when the statute of limitations has expired. *See Franklin v. Winn Dixie Raleigh*, 117 N.C. App. 28, 38, 450 S.E.2d 24, 31 (1994), *aff'd per curiam*, 342 N.C. 404, 464 S.E.2d 46 (1995). Thus, I would like to make it clear the cat is alive; the statute of limitations has not yet expired on Plaintiff's negligence claim. As a result, the trial court was free to exercise its discretion to grant Plaintiff's motion to amend. However, neither the trial court's judgment nor our affirmance should not bar future litigation on the merits of his claim.

Under the North Carolina Rules of Civil Procedure, a party may amend a pleading after the opposing party files a responsive pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2015). Motions to amend are addressed to the discretion of the trial court. *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). In exercising its discretion, the trial court "should be liberal in . . . allowance and application." *Roper v. Thomas*, 60 N.C. App. 64, 68, 298 S.E.2d 424, 427 (1982). Generally, "[a]mendments should be freely allowed unless some material prejudice to the other party is demonstrated[.]" *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986).

---

1. *See* Ervin Schrödinger, Die gegenwärtige Situation in der Quantenmechanik, Die Naturwissenschaften, Vol 23, Issue 48, pp. 807-812 (1935).

Amendment to substitute a party is within the scope of the rule, although doing so represents the creation of "a new and independent [cause] of action and cannot be permitted when the statute of limitations has run." *Callicut v. American Honda Motor Co.*, 37 N.C. App. 210, 212, 245 S.E.2d 558, 560 (1978) (quoting *Kerner v. Rockmill*, 111 F. Supp. 150, 151 (M.D. Pa. 1953)).

If the statute of limitations has expired in the interim between the filing and the amendment, a plaintiff may preserve his claim only if the amendment can be said to relate back to the date of the original claim, under Rule 15(c):

> A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2015); *Winn Dixie Raleigh*, 117 N.C. App. at 38, 450 S.E.2d 30. A complaint will relate back with respect to a new defendant "if that new defendant had notice of the claim so as not to be prejudiced by the untimely amendment." *Winn Dixie Raleigh*, 117 N.C. App. at 39, 450 S.E.2d at 31 (citation omitted). Where the plaintiff has merely made a "mistake in name; giving incorrect name to person in accusation, indictment, pleading, deed or other instrument," *Liss v. Seamark Foods*, 147 N.C. App. 281, 285, 555 S.E.2d 365, 368 (2001), we have found it is permissible to amend the complaint to correct such a misnomer. *Piland v. Hertford County Bd. of Comm'rs*, 141 N.C. App. 293, 299, 539 S.E.2d 669, 673 (2000). Otherwise, the statute of limitations will bar the new claim. *Winn Dixie Raleigh*, 117 N.C. App. at 39, 450 S.E.2d at 31. Thus, the question of whether the plaintiff's error constitutes a misnomer or a fatal error need be reached only if the statute of limitations has expired.

N.C. Gen. Stat. § 1-52(16) sets the statute of limitations at three years for personal injury cases. No period of repose applies to personal injury cases. *See* N.C. Gen. Stat. § 1-15(c) (2015) (setting periods of repose for certain malpractice cases).

State law tolls the statute of limitations for plaintiffs who were disabled when the cause of action accrued:

> A person entitled to commence an action who is under a disability at the time the cause of action accrued may

> bring his or her action within the time limited in this Subchapter, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the real property, when the person must commence his or her action, or make the entry, within three years next after the removal of the disability, and at no time thereafter.

N.C. Gen. Stat. § 1-17(a) (2015). *See also* N.C. Gen. Stat. § 1-20 (2015) ("No person may avail himself of a disability except as authorized in G.S. 1-19, unless it existed when his right of action accrued.")

A person is considered disabled if they meet one or more of the following conditions: (1) the person is within the age of 18 years; (2) the person is insane; or (3) the person is incompetent as defined in N.C. Gen. Stat. § 35A-1101(7) or (8). N.C. Gen. Stat. § 1-17(a) (2015). An "incompetent adult" is one who "lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen. Stat. § 35A-1101(7) (2015).

If the statute of limitations has been tolled due to the plaintiff's disability, it "begins to run upon the appointment of a guardian or upon the removal of his disability as provided by G.S. 1-17, whichever shall occur first." *First-Citizens Bank & Trust Co. v. Willis*, 257 N.C. 59, 62, 125 S.E.2d 359, 361 (1962). *See also Bryant v. Adams*, 116 N.C. App. 448, 459, 448 S.E.2d 832, 837 (1994).

Here, according to his complaint, Plaintiff "was a deaf, mentally incompetent individual without any other physical impairment" when his action against Four County Electric Membership Corporation accrued. The trial court must assume the facts in the pleading are true when ruling on a motion to dismiss under Rule 12(b)(6). *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979). Thus, "a statute of limitation or repose may be the basis of a 12(b)(6) dismissal [only] if on its face the complaint reveals the claim is barred." *Forsyth Memorial Hosp. v. Armstrong World Indus.*, 336 N.C. 438, 442, 444 S.E.2d 423, 426 (1994). As a result, when there is an evidentiary dispute, the statute of limitations defense is not properly within the trial court's scope of review on a 12(b)(6) motion to dismiss. *White*, 296 N.C. at 667, 252 S.E.2d at 702.

Thus, because the trial court was required to assume that the statute of limitations was tolled in this case, it need not have considered whether Plaintiff's amendment related back to the date of filing. The relevant inquiry was only whether Plaintiff's amendment was proper under Rule 15(a). Consequently, the trial court was free to exercise its discretion to grant or deny Plaintiff's motion to amend without deciding whether the amendment related back to the original complaint.

Nevertheless, the trial court's decision to deny the motion and dismiss the complaint against Four County Electric Care Trust with prejudice does not prevent Plaintiff from refiling his complaint against the proper defendant. Under North Carolina Rule of Civil Procedure 41(b), dismissal with prejudice operates as an adjudication on the merits unless otherwise specified by the trial court. N.C. Gen. Stat. § 1A-1, Rule 41(b) (2015). Moreover, "[d]ismissal with prejudice ends the lawsuit and precludes subsequent litigation on the same controversy between the parties under the doctrine of res judicata." 2 G. Gray Wilson, *North Carolina Civil Procedure* § 41-5 (3d ed. 2007). When a case is dismissed with prejudice under Rule 41(b), the trial court must make findings of fact and state conclusions of law so as to "make definite what was decided for the purpose of res judicata and estoppel." *Helms v. Rea*, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973). While the trial court's order does state findings of fact and conclusions of law, its language is incomplete as to future litigation against the true property owner.

The doctrine of res judicata provides "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." 2 G. Gray Wilson, *North Carolina Civil Procedure* § 88-1 (3d ed. 2007). In order to invoke res judicata as a defense, the proponent must show: "(1) a final judgment on the merits in an earlier suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privities in the two suits." *State ex rel. Utilities Com. v. Thornburg*, 325 N.C. 463, 468, 385 S.E.2d 451, 453-54 (1989) (citation omitted).

Thus, res judicata will only prevent "a second suit based on the same cause of action *between the same parties or those in privity with them*." *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986) (emphasis added). This Court has recently held in the context of res judicata, "privity involves a person so identified in interest with another that he represents the same legal right." *Williams v. Peabody*, 217 N.C. App. 1, 8, 719 S.E.2d 88, 94 (2011). More specifically, "privity denotes a mutual or successive relationship to the

same rights of property." *Id.* (quoting *Whitacre P'Ship v. BioSignia, Inc.*, 358 N.C. 1, 36, 591 S.E.2d 870, 893 (2004)).

In the instant case, although the trial court dismissed the suit with prejudice, they did so precisely because the wrong defendant had been sued, noting in its order "Four County Electric Care Trust, Inc. does not own any property or electric equipment and the regulator identified in Plaintiff's complaint was owned, operated and maintained by a different company." As a result, the trial court's order makes clear the Four County Electric Care Trust and the Four County Electric Membership Corporation are two separate entities who have no "mutual or successive relationship" with regard to the equipment at hand. Thus, the Corporation cannot invoke res judicata as a defense to a suit alleging the same cause of action in this case.

Similar to res judicata, collateral estoppel "is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E. 2d 799, 805 (1973). Thus, "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." *Whitacre P'Ship v. BioSignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004).

A party asserting collateral estoppel must show (1) the earlier suit resulted in a final judgment on the merits; (2) the "issue in question was identical to an issue *actually litigated* and necessary to the judgment;" and (3) both parties or their privities were parties in the earlier suit. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996) (emphasis added) (citation omitted).

Traditionally, as with res judicata, collateral estoppel applied only between the parties or those in privity with them. *McInnis*, 318 N.C. at 429, 349 S.E.2d at 557. However, for "defensive" uses of collateral estoppel, our courts have rejected the "mutuality" requirement that both parties must be bound by the prior judgment. *Id.* at 434-35, 349 S.E.2d at 560. Thus, collateral estoppel may apply even where only the plaintiff is bound by a prior judgment on the merits.

However, an issue is only "actually litigated, for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and [is] in fact determined." *City of Asheville v. State*, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008), *appeal dismissed*, *disc. review denied*, 363 N.C. 123, 672 S.E.2d 685

(2009). This determination requires "[a] very close examination of matters actually litigated . . . . If they are not identical, then the doctrine of collateral estoppel does not apply." *Id.*

In the instant case, although the dismissal of the suit against the Trust operates as a decision on the merits, the trial court's findings of fact and conclusions of law pertain only to the identity of the defendant. Thus, the court's order is clear these two parties are not "in privity." Had they been, a different result would have obtained. Further, the language of the order demonstrates the parties have not "actually litigated" the substance of Plaintiff's negligence claim. As a result, if Plaintiff were to bring suit against the Corporation, rather than the Trust, the Corporation could not use collateral estoppel to bar the suit, as the plaintiff's negligence claim has not yet been litigated.

KAREN HEAD, PLAINTIFF
v.
GOULD KILLIAN CPA GROUP, P.A., G. EDWARD TOWSON, II, CPA, DEFENDANTS

No. COA16-525

Filed 20 December 2016

1. Appeal and Error—interlocutory orders and appeals—substantial right—common factual nexus—potential for inconsistent verdicts

Plaintiff's appeal from an interlocutory order affected a substantial right and was immediately appealable. The present appeal presented overlapping factual issues concerning plaintiff's business relationship with defendants. There was a potential for inconsistent verdicts based upon a common factual nexus.

2. Statutes of Limitation and Repose—statute of repose—summary judgment—dates and facts disputed—professional negligence

The trial court's conclusions in a professional negligence case that the statute of repose applied as a matter of law to affirm summary judgment under these facts was error when the dates and facts constituting defendants' last acts or omissions were in dispute. Genuine issues of material fact existed as to whether defendants were responsible for delivering, mailing, or providing plaintiff with her tax returns, and whether and when they did so.

3. Accountants and Accounting—professional negligence—tax preparation and filing—summary judgment

Plaintiff sufficiently alleged and pled the elements of professional negligence to defeat defendants' motion for summary judgment. Viewing the evidence in the light most favorable to plaintiff, a reasonable fact finder could determine defendants negligently failed to file, deliver, or provide plaintiff with her completed tax returns for her to timely file, and their failure resulted in plaintiff's inability to claim a tax refund or credit.

4. Fraud—fraudulent concealment—sufficiency of evidence—punitive damages

The trial court did not err by granting summary judgment in defendants' favor on the claim of fraudulent concealment. Plaintiff failed to proffer evidence demonstrating that a pre-existing duty to disclose existed and also failed to advance all of the elements of a fraudulent concealment claim. The grant of summary judgment in defendants' favor on the punitive damages claim was also affirmed.

Judge ENOCHS concurring in part and dissenting in part.

Appeal by plaintiff from order entered 31 December 2015 by Judge William H. Coward in Buncombe County Superior Court. Heard in the Court of Appeals 17 October 2016.

Erwin, Bishop, Capitano & Moss, PA, by J. Daniel Bishop and Matthew M. Holtgrewe, for plaintiff-appellant.

Sharpless & Stavola, P.A., by Brenda S. McClearn, for defendants-appellees.

TYSON, Judge.

Karen Head ("Plaintiff") appeals from the trial court's order granting Gould Killian CPA Group, P.A.'s and G. Edward Towson, II, CPA's ("Towson") (collectively "Defendants") motion for partial summary judgment and amended motion for partial summary judgment We affirm in part, reverse in part, and remand for trial on Plaintiff's professional negligence claim.

I. Factual Background

Plaintiff hired Defendants to prepare her tax returns for the 2005 tax year and subsequently employed them to prepare her taxes for tax years

2006, 2007, 2008 and 2009 respectively. Upon Defendants' completion of the preparation of Plaintiff's 2005 returns, Plaintiff came to Defendants' office, met with Towson, reviewed and signed her returns, tendered a check in the amount of taxes she owed, and requested that Towson mail her taxes to the Internal Revenue Service ("IRS") and several state tax agencies for her. Towson agreed to do so as a courtesy to Plaintiff, and deposited her completed returns in the mail.

For each of the ensuing four tax years, 2006 through 2009, Defendants were engaged to prepare Plaintiff's tax returns. However, these returns were not timely filed, as neither Defendants nor Plaintiff submitted them to or filed them with the IRS as required by the applicable deadlines.

On 4 November 2013, Plaintiff filed a complaint and alleged causes of action against Defendants for professional negligence and fraudulent concealment. Plaintiff also asserted a claim for punitive damages in connection with her fraudulent concealment claim. Plaintiff's complaint asserted Defendants had willfully and wantonly deceived Plaintiff by concealing from her the fact that they had failed to ensure her tax returns for tax years 2006 through 2009 were timely filed. As a result, she incurred tax penalties and interest.

Defendants filed a motion to dismiss and motion for attorneys' fees pursuant to Rules 9(b) and 12(b)(6) of the North Carolina Rules of Civil Procedure. On 14 July 2014, the trial court entered an order denying this motion.

On 23 November 2015, Defendants filed a motion for partial summary judgment, and filed an amended motion for partial summary judgment on 9 December 2015. Defendants' amended motion sought summary judgment on Plaintiff's claims for professional negligence regarding her 2006 and 2007 tax returns, as well as her fraudulent concealment and punitive damages claims. Defendants did not move for summary judgment on Plaintiff's professional malpractice claims relating to her 2008 and 2009 tax returns.

In support of their motion for partial summary judgment, Defendants submitted the following for consideration by the trial court: (1) a brief in support of their motion; (2) Plaintiff's complaint; (3) a document entitled "2006 Individual Income Tax Cover Sheet" along with an accompanying document entitled "Filing Instructions Individual Income Tax Return Taxable Year Ended December 31, 2006" provided to Plaintiff explaining the steps she needed to take in order to submit her prepared tax returns to the IRS; (4) a document entitled "2007 Individual Income Tax Cover Sheet" along with an accompanying document entitled

"Filing Instructions Individual Income Tax Return Taxable Year Ended December 31, 2007" similar in all material respects to the 2006 cover sheet provided to Plaintiff for her 2007 prepared tax returns; (5) a deposition of Plaintiff; (6) IRS documents detailing Plaintiff's penalties and interest incurred in connection with her returns; (7) excerpts from a deposition of Defendants' expert, Michael Gillis, explaining Defendants' tax preparation procedures; and (8) a tolling agreement executed in 2013. Defendants additionally submitted various cases and statutes in support of their position.

Plaintiff, in response, submitted: (1) a brief in support of her position; (2) a series of emails between Towson, Plaintiff, and her assistant; (3) various correspondence and documents from the IRS; (4) Defendants' responses to interrogatories; (5) the deposition of Edward Towson affirmatively stating that Plaintiff's prepared tax returns and accompanying instructions had been provided to her along with instructions on how to file them and the importance of doing so in a timely fashion; and (6) the log of IRS Revenue Officer Rosa Shade indicating she had never had certain discussions with Towson concerning Plaintiff's taxes despite his assertion to the contrary. Plaintiff additionally submitted various cases and statutes in support of her position.

The "2006 Individual Income Tax Cover Sheet" and accompanying "Filing Instructions Individual Income Tax Return Taxable Year Ended December 31, 2006" document submitted to the trial court stated, in pertinent part, the following:

> Sign and date the return on Page 2. Initial and date the copy, and retain it for your records.
>
> Mail the Form 1040 return by October 15, 2007 to:
>
> Internal Revenue Service
> Atlanta, GA 39901-0002
>
> Your required federal estimated tax payments are shown below. . . . Make each check payable to the United States Treasury, write your social security number and "2007 Form 1040-ES" on the check.
>
> . . . .
>
> Mail the Form 1040-ES payment voucher and check by the due date indicated above to

Internal Revenue Service
P.O. Box 105225
Atlanta, GA 30348-5225

At the bottom of the cover sheet after "How Delivered:" the following was written: "By Hand to Karen." The corresponding 2007 cover sheet and instructions, in turn, also similarly state: "How Delivered: Mailed to K. Head . . . Picked up on 12/12/08."

On 31 December 2015, the trial court entered an order granting Defendants' motions. Plaintiff filed notice of appeal on 19 January 2016.

II. Issues

Plaintiff argues the trial court erred in granting Defendants' motion for summary judgment and amended motion for partial summary judgment. She asserts genuine issues of material fact exist concerning her professional negligence and fraudulent concealment claims regarding her tax returns. We agree with Plaintiff that a genuine issue of material fact exists as to her professional negligence claim, and disagree with Plaintiff that the trial court erred in granting Defendants' partial summary judgment motion concerning her fraudulent concealment and punitive damages claims.

III. Appellate Jurisdiction

[1] Initially, we address whether this Court possesses jurisdiction over the present appeal. It is undisputed the present appeal is interlocutory. *See Mecklenburg Cnty. v. Simply Fashion Stores, Ltd.*, 208 N.C. App. 664, 667, 704 S.E.2d 48, 51 (2010) (citations omitted) ("An order is interlocutory when it does not dispose of the entire case but instead, leaves outstanding issues for further action at the trial level."). Generally, there is no right of immediate appeal from an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

> An interlocutory order may be appealed, however, if the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment. It is the appealing party's burden to establish that a substantial right would be jeopardized unless an immediate appeal is allowed.

Radcliffe v. Avenel Homeowners Ass'n, Inc., __ N.C. App. __, __, 789 S.E.2d 893, 901 (2016) (internal citations, quotation marks, and footnote omitted).

It is well settled that a substantial right is affected " 'where a possibility of inconsistent verdicts exists if the case proceeds to trial.' " *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 627, 727 S.E.2d 311, 314 (2012) (quoting *Country Club of Johnston Cnty., Inc. v. U.S. Fidelity & Guar. Co.*, 135 N.C. App. 159, 167, 519 S.E.2d 540, 546 (1999), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000)).

> To demonstrate that a second trial will affect a substantial right, [the appellant] must show not only that one claim has been finally determined and others remain which have not yet been determined, but that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists.

Id. at 627-28, 727 S.E.2d at 314-15 (citation, internal quotation marks, and brackets omitted).

" '[S]o long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined.' " *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 168, 684 S.E.2d 41, 47 (2009) (quoting *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 26, 376 S.E.2d 488, 492, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989)). "Issues are the 'same' if the facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011) (citing *Davidson*, 93 N.C. App. at 25, 376 S.E.2d at 491).

The present appeal presents overlapping factual issues concerning Plaintiff's business relationship with Defendants, which speak directly not only to her claims ruled upon by the trial court, but also her remaining professional negligence claims concerning her 2008 and 2009 returns. With the potential for inconsistent verdicts based upon a common factual nexus, we hold Plaintiff's appeal of the trial court's order affects a substantial right and is properly before us.

IV. Standard of Review

Entry of summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue exists concerning any material fact and that any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c). "When considering a motion for summary

judgment, the [court] must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted).

> The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.
>
> We review an order allowing summary judgment de novo. If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.

Wilkins v. Safran, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007) (internal citations and quotations omitted).

"Summary judgment is a drastic measure and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case." *Harrison v. City of Sanford*, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676 (2006) (citation omitted).

V. Statute of Repose

[2] Plaintiff argues the trial court erred in granting summary judgment in favor of Defendants regarding professional negligence claims relating to her 2006 and 2007 tax returns. The trial court based its determination on finding Plaintiff's professional negligence claim is barred by N.C. Gen. Stat. § 1-15(c), the applicable statute of repose.

"[I]n no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]" N.C. Gen. Stat. § 1-15(c) (2015).

Furthermore,

> [u]nlike the statute of limitations, the statute of repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.
>
> In order to decide whether the statute of repose bars plaintiffs' claim we must determine when the last act of alleged negligence took place. To determine when the last act or omission occurred we look to factors such as the contractual relationship between the parties, when the contracted-for services were complete, and when the alleged mistakes could no longer be remedied.

Carle v. Wyrick, *Robbins*, *Yates & Ponton*, *LLP*, 225 N.C. App. 656, 661, 738 S.E.2d 766, 770-71 (2013) (internal citations, quotation marks, and footnote omitted).

In arguing Plaintiff's professional negligence claim is barred by the statute of repose, Defendants assert, as undisputed fact, the final act taken by Defendants in regards to Plaintiff's 2006 and 2007 tax returns occurred on 12 December 2008, when Defendants purportedly hand delivered Plaintiff her prepared 2007 returns. We disagree.

Defendants characterize the evidence, regarding if and when Plaintiff received her tax returns from Defendants, as unrebutted fact. However, when viewed in the light most favorable to Plaintiff, as the non-moving party, the 2006 and 2007 Income Tax Cover Sheets and internal tracking presented by Defendants as evidence that Defendants provided and delivered to Plaintiff her tax returns on the dates signified in those documents is challenged and rebutted by Plaintiff's deposition testimony.

Reading Plaintiff's testimony from her deposition in the light most favorable to her as the non-moving party, she was unsure about even being present in Defendants' office in 2007 and 2008, when the returns were purportedly hand delivered, but she emphatically denies receiving either prepared returns or written instructions. This evidence directly contradicts Defendants' testimonial and documentary evidence purporting Defendants hand delivered and Plaintiff received in Defendants' office her 2006 returns on 8 October 2007 and 2007 returns on 12 December 2008.

Viewing the Defendants' evidence as conclusive fact Defendant delivered and Plaintiff physically received her returns is error and does not view all the record evidence, and every reasonable inference therefrom, in the light most favorable to Plaintiff as the non-moving party. *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707.

Genuine issues of material fact exist of whether Defendants were responsible for filing, mailing, or providing Plaintiff with her completed returns, and whether, if and when, Defendants did, in fact, provide Plaintiff with her returns. Defendants contend that the *preparation* of the returns were the Defendants' last acts pertaining to Plaintiff's 2006 and 2007 returns to accrue the statute of repose. However, Defendants' assertions are rebutted by the testimony of an expert witness, Michael Gillis, on the standard of care, which shows the delivery of the completed returns to the client, not completion of preparation, marks the conclusion of a tax preparation engagement:

> Q. So by your testimony, then, for each year, the engagement of Gould Killian ended when they delivered a prepared return to Karen Head?
>
> A. Delivered, mailed, she picked up, whatever process it was in which she *received* her returns, then it's her responsibility to sign and file at that point. (emphasis supplied).

Generally, the start of the running of the statute of repose for professional negligence occurs when a prospective defendant has completed the transaction he was hired to complete, which concludes his professional obligation to his client. *See Carle*, 225 N.C. App. at 665, 738 S.E. 2d at 772-73 (holding that defendants' obligation to plaintiffs was complete and statute of repose began to run when defendants structured the completed transaction of stock into employee stock ownership plan); *Hargett v. Holland*, 337 N.C. 651, 654, 447 S.E.2d 784, 787 (1994) (holding that last act of defendants triggering the running of the statute of repose was the preparation, delivery and supervised execution of a will); *Babb v. Hoskins*, 223 N.C. App. 103, 108, 733 S.E.2d 881, 885 (2012) (holding that the last act of defendants triggering the running of the statute of repose was the preparation, delivery, and execution of trust documents).

In this case, Plaintiff alleges a disputed issue of fact exists of whether the tax returns were to be delivered to her or filed by Defendants. *See Wilkins*, 185 N.C. App. at 672, 649 S.E.2d at 661. The facts are in dispute whether Defendants were responsible for delivering or filing Plaintiff's

tax returns and whether they did, in fact, deliver or file Plaintiff's completed tax returns. The resolution of this disputed fact is the basis to determine when the last act by Defendants occurred to trigger and commence the running of the statute of repose.

If the parties' understanding was that Defendants were responsible for delivering, filing, or mailing Plaintiff's 2006 and 2007 returns, and Defendants failed to do so as alleged by Plaintiff, then the last act of Defendants for statute of repose purposes would be their failure to provide Plaintiff with her returns at the times immediately prior to the deadlines for which refunds could be claimed by Plaintiff on those returns. Those points in time would be when "the alleged mistakes could no longer be remedied." *Carle*, 225 N.C. App. at 661, 738 S.E. 2d at 771. The statute of repose would not have commenced to run until those points in time for each return had passed. *See id.*

Genuine issues of material fact exist of whether Defendants were responsible for delivering, mailing, or providing Plaintiff with her tax returns, and whether and when they did so. These are classic issues of fact reserved for the jury to resolve. The trial court's conclusions that the statute of repose applies as a matter of law to affirm summary judgment under these facts is error, when the dates and facts constituting Defendants' last acts or omissions are in dispute.

VI. Professional Negligence

[3] Due to the trial court's determination that Plaintiff's professional negligence claim is barred by the applicable statute of repose, it declined to address whether Plaintiff has sufficiently alleged and pled the elements of professional negligence to defeat Defendants' motion for summary judgment. Our *de novo* review shows Plaintiff has alleged and shown genuine issues of fact exist, which overcomes Defendants' motion for summary judgment on Plaintiff's professional negligence claim.

"In order to establish a claim of professional negligence, a plaintiff must show: '(1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs.' " *Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008) (emphasis omitted) (quoting *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 413, 590 S.E.2d 866, 872 (2004)).

"It is generally recognized that an accountant may be held liable for damages naturally and proximately resulting from his failure to use that degree of knowledge, skill and judgment usually possessed by members

of the profession in a particular locality." *Snipes v. Jackson*, 69 N.C. App. 64, 73, 316 S.E.2d 657, 662, *disc. rev. denied*, 312 N.C. 85, 321 S.E.2d 899 (1984) (citation omitted).

Viewed in the light most favorable to Plaintiff, as the non-moving party, the evidence tends to show genuine issues of material fact exist regarding Defendants' alleged professional negligence which precludes summary judgment. *Wilkins*, 185 N.C. App. at 672, 649 S.E.2d at 661. Defendant, Edward Towson, agrees in his testimony that he and his co-Defendant firm owe a duty of care to Plaintiff.

The fact is undisputed that Defendants did timely submit, mail, and file Plaintiff's 2005 tax returns at her request. Even though the record shows Plaintiff did not ask Defendants to mail her 2006 and 2007 tax returns, a genuine issue of fact is raised by Plaintiff's testimony about her understanding regarding whether Defendants would file or mail her tax returns for 2006 and 2007 based on their prior willingness to mail her returns in 2005.

Whether Defendants should have made it clearer, and did make it clear to Plaintiff that they allegedly did not intend to file or mail her tax returns in those years is a factual dispute. Having filed her returns the previous year, it would be reasonable for Plaintiff to presume and expect Defendants would do the same in succeeding years, particularly where federal and multiple state returns were required to be prepared, signed, and filed.

Taking Plaintiff's allegations and testimony as true, together with the undisputed fact that Plaintiff's 2005 tax returns were timely filed and her 2006 and 2007 returns were not filed when due, a genuine issue of material fact exists for the jury to determine whether Defendants breached their duty of care by not timely filing or by physically providing Plaintiff with her completed tax returns.

On the matter of injury incurred, the record shows Plaintiff's 2006 and 2007 returns were not filed within three years of their original due date, which cost her the ability to claim a refund or tax credit for overpayment. I.R.C. § 6511(b)(2)(A) (2010). Plaintiff's 2006 return reflected an overpayment of $60,019 to be applied to the 2007 return. Based upon I.R.C. § 6511(b)(2)(A), Plaintiff could have claimed the overpayment credit, if the 2006 return had been timely filed by October 15, 2007.

Viewing the evidence in the light most favorable to Plaintiff, a reasonable fact-finder could determine Defendants negligently failed to file, deliver, or provide Plaintiff with her completed tax returns for her to

timely file, and their failure resulted in Plaintiff's inability to claim a tax refund or credit.

VII. Fraudulent Concealment

[4] Plaintiff next contends the trial court erred by granting summary judgment in Defendants' favor as to her claim for fraudulent concealment. We disagree.

> Fraudulent concealment is generally asserted as a claim for damages. It is a form of fraudulent misrepresentation entitling the claimant to damages or rescission of [a] contract. To assert a claim for fraudulent concealment, there must be a showing that the opposing party knew a material fact, and failed to fully disclose that fact in violation of a pre-existing duty to disclose.

Friedland v. Gales, 131 N.C. App. 802, 807, 509 S.E.2d 793, 797 (1998) (internal citations and quotation marks omitted).

Plaintiff cites to portions of her deposition testimony, as well as a series of emails including emails between her, Towson, and her assistant, and the log of Rosa Shade, beginning on or around 28 March 2012. She asserts this evidence supports her position that a genuine issue of material fact exists concerning her fraudulent concealment claim. Significantly, however, these emails were exchanged *after* Plaintiff had already terminated her employment of Defendants on 27 September 2011.

> A cause of action for fraud is based on an affirmative misrepresentation of a material fact, or a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose. . . .
>
> A duty to disclose arises in three situations. The first instance is where a fiduciary relationship exists between the parties to the transaction. . . .
>
> . . . .
>
> The two remaining situations in which a duty to disclose exists arise outside a fiduciary relationship, when the parties are negotiating at arm's length. The first of these is when a party has taken affirmative steps to conceal material facts from the other. . . .
>
> A duty to disclose in arm's length negotiations also arises where one party has knowledge of a latent defect in the

> subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence.

Harton v. Harton, 81 N.C. App. 295, 297-98, 344 S.E.2d 117, 119 (1986) (internal citations omitted).

"We have found no case stating that the relationship between accountant and client is *per se* fiduciary in nature." *Harrold v. Dowd*, 149 N.C. App. 777, 784, 561 S.E.2d 914, 919 (2002); *see also CommScope Credit Union v. Butler & Burke, LLP*, __ N.C. __, __, 790 S.E.2d 657, 660-61 (2016) (holding that there is no *per se* fiduciary relationship between an independent auditor and its audit client). "For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton v. Camp*, 353 N.C. at 651, 548 S.E.2d at 707 (citations omitted).

Consequently, Defendants owed no *per se* fiduciary duty to Plaintiff at the time the emails were sent because Defendants had already been terminated by Plaintiff and replaced by another accountant. Furthermore, Defendants and Plaintiff were in no way "negotiating at arm's length" about "the subject matter of [a] negotiation" at the time the emails were sent. *Harton*, 81 N.C. App. at 298, 344 S.E.2d at 119.

No relationship, fiduciary or otherwise, existed between the parties at that point in time, as Plaintiff had already terminated her relationship with Defendants, hired a new CPA, and was not attempting to hire or pay Defendants for any new work engagement.

We hold that Plaintiff has failed to proffer evidence demonstrating that a pre-existing duty to disclose existed. She has failed to advance all of the elements of a fraudulent concealment claim and to rebut Defendants' evidence in support of their motions for summary judgment and partial summary judgment. Plaintiff's arguments on this issue are overruled.

Because the trial court properly granted summary judgment in Defendants' favor on Plaintiff's fraudulent concealment claim, we also affirm its grant of summary judgment in Defendants' favor on Plaintiff's claim for punitive damages. *See Watson v. Dixon*, 352 N.C. 343, 348, 532 S.E.2d 175, 178 (2000) (citations omitted) ("As a rule you cannot have a cause of action for punitive damages by itself. If the complainant fails to plead or prove his cause of action, then he is not allowed an award of punitive damages because he must establish his cause of action as a prerequisite for a punitive damage award.").

VIII. Conclusion

The trial court's order granting partial summary judgment to Defendants on Plaintiff's fraudulent concealment claim and punitive damages claim is affirmed. The trial court's order granting Defendant partial summary judgment on the Plaintiff's professional negligence claim is reversed. We remand for trial on Plaintiff's professional negligence claim. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

Chief Judge McGEE concurs.

Judge ENOCHS concurs in part and dissents in a separate opinion.

ENOCHS, Judge, concurring in part and dissenting in part.

Although I agree with my colleagues that the trial court properly granted Defendants' motion for partial summary judgment on Plaintiff's fraudulent concealment claim, I respectfully dissent from the majority's position that the trial court erroneously granted partial summary judgment on Plaintiff's professional negligence claims concerning her 2006 and 2007 tax returns. Because I believe that Plaintiff's professional negligence claims were properly barred by the applicable statute of repose, I would affirm the trial court's grant of partial summary judgement on these claims as well.

Plaintiff contends that the trial court erred in granting summary judgement in favor of Defendants as to her professional negligence claims relating to her 2006 and 2007 tax returns. "In order to establish a claim of professional negligence, a plaintiff must show: '(1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs.' " *Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008) (emphasis omitted) (quoting *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 413, 590 S.E.2d 866, 872 (2004)).

However, in the present case, the issue of whether Plaintiff successfully established the elements of a professional negligence claim need not be reached as her professional negligence claims relating to her 2006 and 2007 tax returns are barred by the applicable statute of repose. N.C. Gen. Stat. § 1-15(c) (2015) states, in pertinent part, that "in no event shall

an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]"

It is well established that

> statutes of repose are intended to mitigate the risk of inherently uncertain and potentially limitless legal exposure. Accordingly, such a statute's limitation period is initiated by the defendant's last act *or omission* that at some later point gives rise to the plaintiff's cause of action. *The time of the occurrence or discovery of the plaintiff's injury is not a factor in the operation of a statute of repose.*

Christie v. Hartley Constr., Inc., 367 N.C. 534, 539, 766 S.E.2d 283, 287 (2014) (internal citations and quotation marks omitted) (emphasis added).

Moreover,

> [u]nlike the statute of limitations, the statute of repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.
>
> In order to decide whether the statute of repose bars plaintiffs' claim we must determine when the last act of alleged negligence took place. To determine when the last act or omission occurred we look to factors such as the contractual relationship between the parties, when the contracted-for services were complete, and when the alleged mistakes could no longer be remedied.

Carle v. Wyrick, Robbins, Yates & Ponton, LLP, 225 N.C. App. 656, 661, 738 S.E.2d 766, 770-71 (2013) (internal citations, quotation marks, and footnote omitted).

Here, the unrebutted evidence reveals that the final act taken by Defendants in regard to Plaintiff's 2006 and 2007 tax returns occurred on 12 December 2008, when Defendants hand delivered Plaintiff her 2007 prepared returns. Plaintiff filed her complaint asserting professional negligence relating to the preparation of her 2006 and 2007 tax returns on 4 November 2013 — nearly 11 months after the limitations period imposed by N.C. Gen. Stat. § 1-15(c) had expired as to the 2007 returns, and well after the limitations period relating to her 2006 returns had run.

It is important to note that Defendants' preparation of Plaintiff's returns for each tax year were separate and distinct transactions for the purposes of the statute of repose. Indeed, this is evidenced by Michael Gillis' unrebutted deposition testimony:

> Q. So by your testimony, then, for each year, the engagement of Gould Killian ended when they delivered a prepared return to Karen Head?
>
> A. Delivered, mailed, she picked up, whatever process it was in which she received her returns, then it's her responsibility to sign and file at that point.

Moreover, the treatment of Plaintiff's professional negligence claims by the parties and the trial court below indicate that each prepared return was considered to be a separate and distinct transaction. This is made even more apparent by the fact that Plaintiff's professional negligence claims for tax years 2008 and 2009 — which were brought within the four-year window for statute of repose purposes — were allowed by the trial court to advance to trial. Consequently, preparation of each of the tax returns for tax years 2006, 2007, 2008, and 2009 constitute four separate completed transactions for which the four-year statute of repose began to run at the time they were delivered — or were erroneously not delivered due to an omission by Defendants — to Plaintiff.

Plaintiff nevertheless contends on appeal, however, that Defendants' final act was not the delivery of the 2006 and 2007 tax returns to her — or Defendants' omission in delivering them to her — but rather was the failure on the part of Defendants to later cure any failure to file the returns by subsequently alerting Plaintiff that she needed to file them before the assessment of interest and penalties by the IRS. Significantly though, "[t]he issue, however, is not whether defendants continued to represent plaintiffs after the transaction . . . . The issue is when the last act alleged to have caused plaintiffs harm occurred." *Carle*, 225 N.C. App. at 664, 738 S.E.2d at 772.

This Court addressed a similar situation in *Carle*, where we analyzed what constituted a completed transaction triggering the start of the running of the statute of repose. In that case, the plaintiffs brought a professional negligence action against the law firm and attorney who created an employee stock ownership trust for them in 2004. *Id.* at 656-57, 738 S.E.2d at 768. The transaction was supposed to be structured so that the plaintiffs would be able to monetize their corporate stock while avoiding the capital gains taxes normally associated with doing so. *Id.* at 657, 738 S.E.2d at 768. However, the defendants improperly structured the

trust and the plaintiffs were later assessed with tax deficiencies by the IRS on the basis that the plaintiffs did, in fact, owe capital gains taxes. *Id.* at 657-58, 738 S.E.2d at 768.

Significantly, as in the present case, the defendants in *Carle* continued to work with the plaintiffs towards resolving issues with the transaction *after* its completion:

> In August 2005, after the deal had closed, concerns were raised regarding the transaction . . . which defendants then investigated at plaintiffs' request. Defendants later helped prepare for plaintiffs' 2007 IRS inquiry relating to the tax implications of this transaction. Thus, it is clear that although they considered these matter[s] separate and billed plaintiffs for each matter[] separately, defendants continued to represent plaintiffs well after 10 June 2005 and to assist plaintiffs with matters arising from the transaction, even without any subsequent engagement letter.

Id. at 663-64, 738 S.E.2d at 772.

The plaintiffs filed suit for, among other claims, professional negligence on 25 January 2010. *Id.* at 658, 738 S.E.2d at 769. The defendants moved for summary judgment asserting the statute of repose. *Id.* The trial court granted the defendants' motion and the plaintiffs appealed arguing that the statute of repose did not apply as "their cause of action did not accrue until the IRS proceedings were completed on or about 26 May 2010." *Id.* at 659, 738 S.E.2d at 769.

On appeal, this Court affirmed the trial court's grant of summary judgment, holding that

> [c]onsidering the evidence in the light most favorable to plaintiffs, the last act giving rise to plaintiffs' claim took place on 10 June 2005 because at that point defendants' role in the transaction was complete and nothing could have been done to remedy the alleged omissions. Plaintiffs commenced this action on 25 January 2010, more than four years after the last act of defendants giving rise to plaintiff's cause of action. Even if plaintiffs are correct that their action did not accrue until the IRS issued its final assessment, the action would still be barred by the statute of repose. If the action is not brought within the specified period, the plaintiff literally has no cause of

> action. Therefore, defendants are entitled to judgment as a matter of law and we affirm the trial court's order granting defendants' motion for summary judgment.

Id. at 665, 738 S.E.2d at 772-73 (internal citations and quotation marks omitted); *see also Hargett v. Holland*, 337 N.C. 651, 656, 447 S.E.2d 784, 788 (1994) (holding plaintiffs' professional negligence claim barred by statute of repose where plaintiffs' claim brought more than four years after defendant drafted will and "plaintiffs' complaint allege[d] a contractual relationship between defendant and testator to draft a will and that defendant supervise[] execution of the will. After defendant completed these acts, he had performed his professional obligations; and his professional duty to testator was at an end"); *Babb v. Hoskins*, 223 N.C. App. 103, 108, 733 S.E.2d 881, 885 (2012) ("Because the 'nature of the services he agreed to perform' was solely limited to the drafting of three [trust] documents, we conclude that [the defendant-attorney's] professional duty to [the plaintiffs] ended upon completion of the Trust restatement on 9 October 2006, and, consistent with the above authority, [the defendant-attorney] owed no continuing fiduciary duty beyond that date[.] . . . Therefore, plaintiffs' claim for breach of fiduciary duty by [the defendant-attorney] for actions before 31 May 2007 was properly dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) because those actions are beyond the four year statute of repose provision contained in N.C.G.S. § 1-15(c)." (internal citation omitted)).

Therefore, whether Defendants delivered Plaintiff her 2006 and 2007 tax returns to file — as their evidence tends to show — or whether Defendants *never* delivered Plaintiff's 2006 and 2007 tax returns to her after their preparation through an omission on their part — as Plaintiff claims — the statute of repose would have begun to run in either scenario on 12 December 2008 as to her 2007 returns and well before that for her 2006 returns at the time these individual transactions were deemed completed. It is immaterial that Towson later purported to help Plaintiff to resolve issues surrounding her 2006 and 2007 tax returns in light of *Carle*, as those transactions, based on the unrebutted evidence, were already deemed to be completed.

Furthermore, even assuming *arguendo* as Plaintiff's evidence tends to show that Defendants had affirmatively agreed and represented to Plaintiff that they would *file* her 2006 and 2007 tax returns for her on her behalf and had failed to do so, this would, at the most, amount to an omission by Defendants occurring — at the latest — on 12 December 2008 given that a statute of repose's "limitation period is initiated by the defendant's last act *or omission* that at some later point gives rise

to the plaintiff's cause of action." *Christie*, 367 N.C. at 539, 766 S.E.2d at 287 (internal quotation marks omitted) (emphasis added). Therefore, Plaintiff's claims would be barred on statute of repose grounds on this basis as well even when taking her evidence as true.

In sum, either Defendants (1) properly delivered Plaintiff's 2006 and 2007 tax returns to her; or (2) omitted to do so despite their obligation to do so. Either way the "statute's limitation period is initiated by the defendant's last act *or omission* that *at some later point* gives rise to the plaintiff's cause of action. *The time of the occurrence or discovery of the plaintiff's injury is not a factor in the operation of a statute of repose*" *Id.* (internal citations and quotation marks omitted) (emphasis added), and "[u]nlike the statute of limitations, the statute of repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action *even before his cause of action may accrue*[.]" *Carle*, 225 N.C. App. at 661, 738 S.E.2d at 770 (citation and quotation marks omitted) (emphasis added).

As a result, for all of the above reasons, I would affirm the trial court's grant of partial summary judgment on Plaintiff's professional negligence claims concerning her 2006 and 2007 tax returns based upon the applicable statute of repose. I therefore respectfully dissent from the majority's opinion on this issue.

IN THE MATTER OF THE ESTATE OF JAMES JUNIOR PHILLIPS, DECEASED
MARY PHILLIPS, CAVEATOR & DIANE BOSWELL, PROPOUNDER

No. COA16-613

Filed 20 December 2016

1. Jurisdiction—standing—caveat to will

The trial court erred by ruling the caveator lacked standing to bring the caveat to the 2007 Will. That portion of the trial court's order was reversed.

2. Pleadings—affidavits—timeliness—North Carolina Dead Man's Statute

The trial court abused its discretion by granting the propounder's motion to strike the caveator's submitted affidavits made in opposition to the propounder's motion for summary judgment. The affidavits were served by hand delivery before the two-day limit proscribed by Rule 56(c). Further, North Carolina's Dead Man's Statute,

N.C.G.S. § 8C-1, Rule 601(c), was not at issue since none of the affiants were interested witnesses.

3. Wills—caveat proceeding—testamentary capacity—undue influence and duress—proper execution of will

The trial court erred by granting summary judgment in favor of the propounder. There were genuine issues of material fact regarding decedent's testamentary capacity, undue influence and duress, and proper execution of the will.

Appeal by caveator from order entered 2 February 2016 by Judge Eric C. Morgan in Alamance County Superior Court. Heard in the Court of Appeals 17 November 2016.

Ronald Barbee for caveator-appellant.

Holt, Longest, Wall, Blaetz & Moseley, PLLC, by W. Phillip Moseley, for propounder-appellee.

TYSON, Judge.

Mary Phillips ("caveator") appeals from an order granting summary judgment in favor of Diane Boswell ("propounder"). We reverse and remand for trial.

I. Factual Background

James Junior Phillips ("decedent") was born 20 September 1925 and died 2 May 2007. The decedent was the father of two children from two separate marriages, including the caveator. The decedent also fathered other children out of wedlock, including the propounder. His death certificate lists the cause of his death as general malnutrition and dementia. The death certificate lists the propounder as the informant.

Shortly after decedent's death, the propounder submitted a paper writing as the purported last will of the decedent signed on 3 April 2007 ("2007 Will"). The 2007 Will was signed less than a month prior to decedent's death and left all of his property to the propounder. The 2007 Will was admitted to probate and Letters Testamentary were issued to the propounder.

On 3 February 2010, the caveator filed a caveat to the 2007 Will. First, the caveator asserted at the time the decedent allegedly signed the 2007 Will, he suffered from dementia and lacked sufficient mental capacity to execute the will or any other legal document. Second, she asserted

the 2007 Will was procured by undue influence and duress over the decedent by the propounder and possibly others. Finally, she asserted, upon information and belief, that the 2007 Will was not properly executed as required by law for a valid attested will.

On 29 October 2012, the propounder filed a response to the caveat to the probate of the will. The response alleged an ongoing conflict between the caveator and the decedent. The decedent was alleged to have had little contact with the caveator for more than fifteen years prior to his death. The propounder referenced and attached another will, which the decedent had purportedly executed in 1993 ("1993 Will"). The 1993 Will left the majority of the decedent's property to the propounder and his nephew. The decedent also left a remaining vehicle to his girlfriend at the time, as well as a life estate in a house, with the remainder to the propounder and the decedent's nephew. The 1993 Will specifically made no bequest or devise to the caveator.

The propounder's response to the caveat also notes the decedent and attorney who executed the 2007 Will agreed to tear the 1993 Will in order to revoke it, pursuant to the execution of the 2007 Will. The caveator asserted neither the caveator nor her attorney had received a copy of the response, along with the certificate of service and exhibits. The trial court denied the caveator's motion to strike the response from being included in the record on appeal.

On 6 January 2016, the propounder filed a motion for summary judgment with six affidavits and two depositions in support of her motion. Two of the affidavits were from the two attorneys who had prepared the 1993 Will and 2007 Will. Each attorney separately stated the decedent was competent to execute each respective will. The affidavit regarding the 2007 Will asserts it was executed outside of the attorney's office.

Two of the propounder's other affidavits were submitted by a married couple, Herman and Shirley Long, who were long-time friends of the decedent. Their affidavits asserted Mrs. Long had suggested to the decedent that he prepare a will due to his declining health. Their affidavits asserted decedent responded that he already had a will, but was thinking of changing it to give the propounder all of his property. Mrs. Long's affidavit also stated she knew the caveator and noted the caveator had an estranged relationship with the decedent.

The propounder's final two affidavits were submitted by one of decedent's ex-wives and from a former girlfriend. Both women's affidavits stated they knew the propounder and caveator, and the propounder's and caveator's respective relationships with their father. Both women

noted the caveator had a contentious relationship with the decedent, but that the decedent loved the propounder, and she had looked after him during his illness. After visiting the decedent during the last year of his life, both women believed him to be in good mental health and aware of his property holdings. Overall, all six of the propounder's affidavits asserted the decedent was competent to make a will, had a good relationship with the propounder, and had a strained relationship with the caveator.

On 21 January 2016, the caveator responded with four affidavits made in opposition to the propounder's motion. These affidavits were sworn by blood relatives of the decedent, including his brother, two nieces, and grandniece. None of these affiants were interested parties in the estate.

These affidavits directly contradict the claims asserted in the propounder's affidavits, asserting decedent was in good mental health and that he wanted the propounder to inherit all his property. Three of the affiants stated they had visited the decedent almost daily from March 2007 until his death; the fourth affiant visited him frequently during that time frame. The affiants all assert decedent told them he did not trust the propounder, thought she was trying to poison him, and that she had stolen money from him. Three of the affiants assert that on one occasion the propounder refused to let the caveator see her father and had pushed her out of the house. These affiants also assert they had never seen Herman or Shirley Long at decedent's house.

The affiants allege the decedent stated, both before and after his admission to the hospital, that the propounder "was trying to get him to sign some papers that would give her all of his property" and he did not want to leave her any of his property. Specifically upon his return from the hospital, decedent told them he had refused to sign any papers and did not want the propounder to have any of his property. The affiants also assert they knew decedent's signature, and the signature on the 2007 Will was not that of the decedent.

The propounder moved to strike these affidavits on the grounds they (1) were not based upon personal knowledge, (2) contained hearsay, (3) were barred by Rule 601 of the North Carolina Rules of Civil Procedure, and (4) the statements regarding the decedent's signature raised issues not pled by the caveator. The trial court heard arguments on the propounder's motion to strike the affidavits and motion for summary judgment on 25 January 2016.

The trial court granted the propounder's motion to strike the caveator's affidavits and held the tendered affidavits were not timely served pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, they violated Rule 802 of the North Carolina Rules of Evidence, and the holding of *In re Will of Ball*, 225 N.C. 91, 33 S.E.2d 619 (1945). The trial court also granted the propounder's motion for summary judgment and concluded the caveator did not have standing to bring the action. The trial court further stated that even if the caveator did have standing, no genuine issue concerning any material fact existed and the propounder was entitled to summary judgment as a matter of law. The caveator appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1), which provides for an appeal of right from any final judgment of a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issues

The caveator contends the trial court erred by (1) granting the propounder's motion to strike her submitted affidavits made in opposition to the propounder's motion for summary judgment, and (2) granting the propounder's motion for summary judgment.

IV. Standard of Review

A caveat is an in rem proceeding and operates as "an attack upon the validity of the instrument purporting to be a will." *In re Will of Cox*, 254 N.C. 90, 91, 118 S.E.2d 17, 18 (1961) (citation omitted). This Court has noted:

> When a caveat is filed the superior court acquires jurisdiction of the whole matter in controversy, including both the question of probate and the issue of devisavit vel non. Devisavit vel non requires a finding of whether or not the decedent made a will and, if so, whether *any of the scripts* before the court is that will. Thus, in a case such as this one, where there are presented multiple scripts purporting to be the decedent's last will and testament, the issue of devisavit vel non should be resolved in a single caveat proceeding in which the jury may be required to answer numerous sub-issues[.]

In re Will of Dunn, 129 N.C. App. 321, 325-26, 500 S.E.2d 99, 102 (1998) (emphasis original) (citations and quotation marks omitted), *disc. review denied*, 348 N.C. 693, 511 S.E.3d 645 (1998).

Summary judgment may be entered in a caveat proceeding in factually appropriate cases. *See, e.g.*, *In re Will of Jones*, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576-77 (2008) (analyzing the case under traditional summary judgment standards to determine whether genuine issues of material fact existed). While we review an order striking an affidavit in support of or in opposition to summary judgment for abuse of discretion, *Blair Concrete Servs., Inc. v. Van-Allen Steel Co.*, 152 N.C. App. 215, 219, 566 S.E.2d 766, 768 (2002), we review the trial court's ultimate determination of the summary judgment motion *de novo*. *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). When considering a motion for summary judgment, the trial court views the evidence in a light most favorable to the nonmoving party and resolves all inferences against the moving party. *In re Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576. "Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied." *Id.* at 573-74, 669 S.E.2d at 576 (citation, brackets, and quotation marks omitted).

Because of the factual nature of issues presented during caveat proceedings, "[s]ummary judgment should be entered cautiously." *Seagraves v. Seagraves*, 206 N.C. App. 333, 338, 698 S.E.2d 155, 161 (2010); *see In re Will of Jones*, 362 N.C. at 582-83, 669 S.E.2d at 582 (reversing summary judgment on undue influence); *In re Will of Priddy*, 171 N.C. App. 395, 402, 614 S.E.2d 454, 460 (2005) (reversing summary judgment on testamentary capacity, undue influence, and proper execution of the will).

V. Standing

[1] The propounder asserts the caveator, although an heir-at-law, did not have standing to bring the caveat to the 2007 Will. The propounder argues the caveator would not take under the 1993 Will, which the propounder submitted to the trial court for consideration in her response to the caveat. We disagree.

"Standing to sue means simply that the party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001) (citations and quotation marks omitted). The parties in a caveat proceeding "are not parties in the usual sense

but are limited classes of persons specified by the statute who are given a right to participate in the determination of probate of testamentary script." *In re Ashley*, 23 N.C. App. 176, 181, 208 S.E.2d 398, 401, *cert. denied*, 286 N.C. 335, 210 S.E.2d 56 (1974).

N.C. Gen. Stat. § 31-32 allows any person "interested in the estate" to file such an action, which includes anyone "who has a direct pecuniary interest in the estate of the alleged testator which will be defeated or impaired if the instrument in question is held to be a valid will." *In re Ashley*, 23 N.C. App. at 180, 208 S.E.2d at 401 (citation and quotation marks omitted).

North Carolina courts have determined that heirs-at-law, next of kin, and persons claiming under a prior will are all considered as a person "interested in the estate" under the statute. *See e.g.*, *Sigmund Sternberger Foundation, Inc. v. Tannenbaum*, 273 N.C. 658, 674, 161 S.E.2d 116, 127 (1968) (persons claiming under a prior will); *Brissie v. Craig*, 232 N.C. 701, 705, 62 S.E.2d 330, 333 (1950) (heirs-at-law); *Randolph v. Hughes*, 89 N.C. 428, 431 (1883) (next of kin).

In *In re Will of Barnes*, 157 N.C. App. 144, 162, 579 S.E.2d 585, 597 (2003), *rev'd per curiam for reasons stated in the dissent*, 358 N.C. 143, 592 S.E.2d 688-89 (2004), beneficiaries under a prior will, who were not heirs-at-law, filed a caveat to the probated will. While the jury found the probated will had been procured by undue influence, it also found that the prior will had been revoked by the testator. *Id.* at 146, 579 S.E.2d at 587.

The majority's opinion held that, in managing the litigation of the caveat to the probated will, the trial judge should have first ordered the jury to determine whether the prior will had been revoked, prior to deciding the validity of the probated will. *Id.* at 158-59, 579 S.E.2d at 594-95. The majority reasoned that in order to determine whether the beneficiaries of the prior will had standing to caveat the probated will, it was first necessary to determine whether the prior will had been revoked. *Id.* If the prior will had been revoked, then the caveators did not have standing and the trial court lacked jurisdiction over the matter. *Id.*

The dissenting judge, and subsequently the Supreme Court, disagreed. *Id.* at 163, 579 S.E.2d at 597 (Hudson, J., concurring in part and dissenting in part). The dissenting judge argued the caveators, as beneficiaries under a previous will, had standing to bring the caveat against the probated will, and such caveat properly invoked the jurisdiction of the court. *Id.* Most significantly, the dissenting judge stated:

> because the will caveat is a proceeding *in rem*, I do not believe that the jury's ultimate determination that the [previous] will had been revoked should be held to erase the subject matter jurisdiction of the superior court over the entire proceeding *ab initio*. . . .
>
> . . . Whenever persons claiming under a prior will institute a caveat, they are potential, not certain, beneficiaries of the estate in question. Even if their claimed interest in the estate ultimately is not upheld, they nonetheless have standing to litigate the issues.

Id.

The dissent's analysis, adopted by our Supreme Court, in *In re Will of Barnes* is applicable here. While the propounder argues the caveator lacks standing, because the caveator does not take under the 1993 Will, our courts' precedents indicate otherwise. In this case, the caveator is a potential, but not certain, beneficiary of the estate in question as the decedent's heir-at-law. *See id.*; *Brissie v. Craig*, 232 N.C. at 705, 62 S.E.2d at 333. As such, she had standing to bring the initial caveat against the 2007 Will. Upon bringing the caveat, the court obtained jurisdiction over the whole controversy, which eventually included the 1993 Will submitted by the propounder. *See id.*

One of the purposes of a caveat proceeding is for the jury to determine if "any of the scripts" before the court are, in fact, the decedent's will. *In re Will of Dunn*, 129 N.C. App. at 325, 500 S.E.2d at 102 (emphasis and citation omitted). Whether the caveator's claimed interest is ultimately upheld, as an heir-at-law she had standing to challenge the 2007 Will. *See In re Will of Barnes*, 157 N.C. App. at 163, 579 S.E.2d at 597. (Hudson, J., concurring in part and dissenting in part). The propounder's subsequent submission of the 1993 Will does not change her status as such nor dissolve the court's jurisdiction. Even if the 2007 Will is held to be invalid and the 1993 Will upheld, because the caveator is an heir-at-law, this determination would not deprive the trial court of jurisdiction *ab initio*. *See id.* The trial court erred in ruling the caveator lacked standing to bring the caveat to the 2007 Will. That portion of the trial court's order is reversed.

VI. Motion to Strike

[2] The caveator argues the trial court erred in granting the propounder's motion to strike her submitted affidavits made in opposition to the propounder's motion for summary judgment. The trial court granted

the motion to strike the affidavits pursuant to: (1) Rule 56 of the North Carolina Rules of Civil Procedure; and, (2) Rule 802 of the North Carolina Rules of Evidence, along with *In re Will of Ball*, 225 N.C. 91, 33 S.E.2d 619. We address both of these grounds.

1. Timing of the Affidavits

The trial court first determined the affidavits were not timely served in accordance with Rule 56(c) of the North Carolina Rules of Civil Procedure. We disagree.

In response to a motion for summary judgment, the adverse party may submit opposing affidavits at least two days prior to the hearing. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). Here, the caveator's response to the propounder's motion for summary judgment and attached affidavits were served 21 January 2016. The summary judgment hearing was held on 25 January 2016, four days later. The affidavits were clearly served by hand delivery before the two day limit proscribed by Rule 56(c). The trial court abused its discretion by striking caveator's four affidavits on that ground. *See id.*

2. Substance of the Affidavits

The trial court found the caveator's four tendered affidavits "do not set forth such facts as would be admissible and contain hearsay and do not address the issues of Undue Influence, Duress or proper execution of the will." Based upon this finding of fact, the trial court concluded the propounder's objection to and motion to strike the caveator's affidavits in opposition to summary judgment should be allowed pursuant to Rule 802 of the North Carolina Rules of Evidence and the holding of *In re Will of Ball*. We disagree.

Affidavits submitted in opposition to a motion for summary judgment must be: (1) made on personal knowledge; (2) set forth such facts as would be admissible in evidence; and, (3) affirmatively show the affiant is competent to testify to the matters stated therein. N.C. Gen. Stat. §1A-1, Rule 56(e) (2015). The key issue in this case is whether the statements in any or all of the caveator's four affidavits "would be admissible in evidence." *Id.*

Our courts have long and consistently allowed a testator's declarations to be admitted into evidence for certain purposes during a caveat proceeding. *See In re Will of Brown*, 194 N.C. 583, 595-96, 140 S.E. 192, 199 (1927); *In re Will of Ball*, 225 N.C. at 94-95, 33 S.E.2d at 621-22. For example, the Supreme Court of North Carolina has stated:

> [i]t has been generally held that declarations, oral or written, by the deceased may be shown in evidence upon the trial of an issue involving his mental capacity, whether such declarations were made before, at or after the date on which it is contended that the deceased was of unsound mind.

In re Will of Brown, 194 N.C. at 595, 140 S.E. at 199 (citation omitted).

Our Supreme Court has also allowed a testator's declarations to be admitted for the purpose of showing undue influence:

> Evidence of declarations of the testator which disclose his state of mind at the time of the execution of the paper writing or the circumstances under which it was executed, tending to show he did or did not act freely and voluntarily, is competent as substantive proof of undue influence. *Other declarations*, *when relevant*, *may be admitted as corroborative or supporting evidence*, but alone they are not sufficient to establish the fact at issue.

In re Will of Ball, 225 N.C. at 94-95, 33 S.E.2d at 622 (internal citation omitted) (emphasis supplied).

Here, each of the affidavits in opposition to the propounder's motion for summary judgment include statements, which were allegedly made by the decedent to the affiants between March and April 2007. The affiants assert the decedent told them he did not trust the propounder, thought she was trying to poison him, and that the propounder had stolen money from him.

The affiants also assert decedent told them, both before and after his admission to the hospital, that the propounder was trying to get him to sign some papers that would give her all of his property and decedent did not want to leave the propounder any of his property.

The propounder asserts these statements were almost entirely confined to those made after the execution of the will, and as such the holding in *In re Will of Ball* prohibits them from being admitted into evidence. We disagree.

First, based upon the record, it appears these statements were made sometime between March 2007 and April 2007. The decedent's 2007 Will was allegedly signed on 3 April 2007, which means some of these statements were necessarily made prior to the purported execution of the 2007 Will. Second, even if some of the statements were made after

the execution of the will, nothing in *In re Will of Ball* requires their exclusion. *See In re Will of Ball*, 225 N.C. at 94-95, 33 S.E.2d at 622.

The Court in *In re Will of Ball* specifically allows other declarations, including those not made at the time of the execution of the will, or which demonstrate the circumstances under which it was executed, to be admitted into evidence, when relevant. *Id.*; *see* James B. McLaughlin, Jr. and Richard T. Bowser, *Wiggins Wills and Administration of Estates in North Carolina* § 6:3(b) (4th ed. 2005) ("North Carolina appears to . . . admit the testator's post-testamentary declarations as substantive proof of undue influence." (citing *Caudill v. Smith*, 117 N.C. App. 64, 450 S.E.2d 8 (1994); *In re Will of Hall*, 252 N.C. 70, 113 S.E.2d 1 (1960); *In re Will of Ball*, 225 N.C. 91, 33 S.E.2d 619).

While these statements may not establish all the facts at issue, that question was not before the court on the motion to strike the affidavits. Rather, the question was whether these statements were admissible into evidence. *See* N.C. Gen. Stat. § 1A-1, Rule 56(e). The decedent's declarations included in the affidavits are relevant to support the caveator's argument that the propounder exerted undue influence over the decedent, and, as such, are admissible into evidence, which defeats their exclusion.

Other information contained in the excluded affidavits outline the decedent's deteriorating health and memory based upon the times the affiants spent with him in the two months prior to his death. They also assert the propounder did not allow the caveator to see her father on one occasion. These affidavits meet the requirements of N.C. Gen. Stat. §1A-1, Rule 56(e) and do not violate Rule 802 or the case law outlined in *In re Will of Ball.* The trial court also erred by striking the affidavits on those grounds.

We note that North Carolina's Dead Man's Statute, N.C. Gen. Stat. § 8C-1, Rule 601(c), is not at issue here; as none of the affiants are interested witnesses. *See Taylor v. Abernethy*, 174 N.C. App. 93, 96, 620 S.E.2d 242, 246 (2005) (noting that to be disqualified as a interested witness under the statute, the witness must have "a direct legal or pecuniary interest in the outcome of the litigation . . . a pecuniary interest alone is insufficient to disqualify a witness under Rule 601." (internal quotation marks and citations omitted)), *cert. denied*, 360 N.C. 367, 630 S.E.2d 454 (2006).

VII. Summary Judgment

[3] After granting the motion to strike the caveator's affidavits in opposition to summary judgment, the trial court found there was no standing

for the caveator to bring the case and no genuine issue of material fact existed. The court granted the propounder summary judgment as a matter of law. We disagree.

In her caveat, the caveator asserted the decedent lacked capacity to execute the will, the will was procured by undue influence and duress, and that "upon information and belief" the will was not executed according to the legal requirements for a valid attested will. We address each contention.

1. Testamentary Capacity

The presumption is that "every individual has the requisite capacity to make a will, and those challenging the will bear the burden of proving, by the greater weight of the evidence, that such capacity was wanting." *In re Will of Sechrest*, 140 N.C. App. 464, 473, 537 S.E.2d 511, 517 (2000). "A testator has testamentary capacity if he comprehends the natural objects of his bounty; understands the kind, nature and extent of his property; knows the manner in which he desires his act to take effect; and realizes the effect his act will have upon his estate." *In re Will of Buck*, 130 N.C. App. 408, 412, 503 S.E.2d 126, 130 (1998), *aff'd*, 350 N.C. 621, 516 S.E.2d 858 (1999) (citing *In re Will of Shute*, 251 N.C. 697, 111 S.E.2d 851 (1960)).

To establish lack of testamentary capacity, s caveator need only show that any one of the essential elements of testamentary capacity is lacking. *In re Will of Kemp*, 234 N.C. 495, 499 (1951). A caveator cannot "establish lack of testamentary capacity where there [is] no specific evidence 'relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made.' " *In re Estate of Whitaker*, 144 N.C. App. 295, 298, 547 S.E.2d 853, 856 (quoting *In re Will of Buck*, 130 N.C. App. at 413, 503 S.E.2d at 130), *disc. review denied*, 354 N.C. 218, 555 S.E.2d 278 (2001). It is not sufficient for a caveator to present "only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which [a caveator's] witnesses based their opinions as to [the testator's] mental capacity." *In re Will of Buck*, 130 N.C. App. at 412, 503 S.E.2d at 130.

Here, the caveator's affidavits allege the decedent was suffering from cancer and dementia, and was taking strong pain medications in the months preceding his death and when he purportedly executed the 2007 Will less than one month prior to his death. Although the propounder asserted in her response to the caveat that the decedent did not have dementia, the decedent's death certificate, submitted as an

attachment to the caveat, lists "dementia" as a cause of death. The propounder is listed as the informant on the death certificate. As noted, decedent executed the purported 2007 Will on 3 April 2007 and died 2 May 2007. Viewed in the light most favorable to the caveator, as the nonmoving, genuine issue of material fact exists concerning decedent's testamentary capacity.

2. Undue Influence and Duress

In the context of a will caveat,

> [u]ndue influence is a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.

In re Estate of Loftin, 285 N.C. 717, 722, 208 S.E.2d 670, 674-75 (1974).

Our courts consider a number of factors to determine whether undue influence was exerted on the testator:

> 1. Old age and physical and mental weakness;
>
> 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision;
>
> 3. That others have little or no opportunity to see him;
>
> 4. That the will is different from and revokes a prior will;
>
> 5. That it is made in favor of one with whom there are no ties of blood;
>
> 6. That it disinherits the natural objects of his bounty;
>
> 7. That the beneficiary has procured its execution.

In re Will of McNeil, 230 N.C. App 241, 245-46, 749 S.E.2d 499, 503 (2013) (citation omitted).

Caveators are not required to demonstrate the existence of every factor to prove undue influence, because "undue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence." *Id.* (citation and quotation marks omitted). This Court has further clarified, "[w]hether these or other factors exist and whether executor unduly influenced decedent in the execution of the Will are

material questions of fact." *In re Will of Smith*, 158 N.C. App. 722, 727, 582 S.E.2d 356, 360, *review denied*, 357 N.C. 506, 588 S.E.2d 474 (2003).

While not synonymous, undue influence and duress are "related wrongs, and to some degrees overlap." *Link v. Link*, 278 N.C. 181, 191, 179 S.E.2d 697, 703 (1971). "Duress is the result of coercion and may be described as the extreme of undue influence and may exist even when the victim is aware of all facts material to his decision." *In re Estate of Loftin*, 285 N.C. at 722-23, 208 S.E.2d at 675. A caveator's allegations underlying her claims of undue influence and duress may be the same. *See In re Will of McNeil*, 230 N.C. App at 249 n.5, 749 S.E.2d at 505.

The caveator's affidavits, as submitted, create a genuine issue of material fact of whether the purported 2007 Will was procured by undue influence or duress. The affidavits assert the decedent's physical and mental weakness around the time of the 2007 Will's purported execution; the propounder's status as decedent's primary caregiver, and her refusal to allow the caveator to see the decedent on one occasion prior to his death; and the decedent's stated fear of the propounder and how he did not trust her.

Viewed in the light most favorable to the nonmoving party, the affidavits also emphasize the propounder's continued insistence that the decedent sign papers to give her all of his property. The affidavits assert that the decedent did not want to leave the propounder any of his property, and actually refused to do so. Whether the factors pertaining to undue influence exist and whether the propounder "unduly influenced decedent in the execution of the [w]ill are material questions of fact." *See In re Will of Smith*, 158 N.C. App. at 727, 582 S.E.2d at 360. When viewed in the light most favorable to the caveator, genuine issue of material fact exists to preclude summary judgment on the issues of undue influence and duress.

3. Proper Execution of the Will

For an attested written will to be valid, it must comply with the statutory requirements as set forth in N.C. Gen. Stat. § 31-3. *In re Will of Priddy*, 171 N.C. App. at 400, 614 S.E.2d at 458. "In a caveat proceeding, the burden of proof is upon the propounder to prove that the instrument in question was executed with the proper formalities required by law." *In re Will of Coley*, 53 N.C. App. 318, 320, 280 S.E.2d 770, 772 (1981). N.C. Gen. Stat. § 31-3, as effective in the present case, required:

> (a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section.
>
> (b) The testator must, with intent to sign the will, do so by signing the will himself or by having someone else in the testator's presence and at his direction sign the testator's name thereon.
>
> (c) The testator must signify to the attesting witnesses that the instrument is his instrument by signing it in their presence or by acknowledging to them his signature previously affixed thereto, either of which may be done before the attesting witnesses separately.
>
> (d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other.

N.C. Gen. Stat. § 31-3 (2011) (subsequently amended by N.C. Gen. Stat. § 31-3.3, effective 1 January 2012).

This Court has allowed caveators to challenge whether a will was properly executed, even where self-proving affidavits accompanied the notarized and signed will. *In re Will of Priddy*, 171 N.C. App. at 400-01, 614 S.E.2d at 458-59 (holding material issue of fact existed as to whether the testator complied with the will formalities where caveator presented evidence the testator did not sign in the presence of an attesting witness or acknowledge his signature to that witness, and the attesting witness did not sign in the presence of the testator).

Here, along with the allegations of lack of testamentary capacity, undue influence, and duress, three of the caveator's affidavits by blood relatives, stated the affiant was familiar with the decedent's signature, and that the signature on the 2007 Will was not the decedent's. Viewed in the light most favorable to the caveator, as the nonmoving party, genuine issue of material fact exists regarding whether the 2007 Will complied with the statutorily required formalities of execution. *Id.*

VIII. Conclusion

The trial court erred in ruling the caveator lacked standing to bring the caveat to the 2007 Will and by striking the caveator's four affidavits.

Because of the factual nature of issues presented during caveat proceedings, "[s]ummary judgment should be entered cautiously."

Seagraves, 206 N.C. App. at 338, 698 S.E.2d at 161. After our review and consideration of all the affidavits and other evidence presented in the record, and based upon our *de novo* review, genuine issues of material fact exist to render summary judgment improper. The trial court's order is reversed and this cause is remanded for trial. *It is so ordered.*

REVERSED AND REMANDED.

Judges McCULLOUGH and DILLON concur.

IN THE MATTER OF J.A.M.

No. COA16-563

Filed 20 December 2016

Child Abuse, Dependency, and Neglect—child neglect—sufficiency of findings of fact

The trial court erred by adjudicating a minor as a neglected juvenile. The trial court's findings of fact were not supported by clear, cogent, and convincing evidence.

Appeal by respondent from order entered 30 March 2016 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 5 December 2016.

Christopher C. Peace for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Richard Croutharmel for respondent-appellant.

Poyner Spruill LLP, by Caroline P. Mackie, for guardian ad litem.

TYSON, Judge.

Respondent-mother appeals from an order adjudicating her minor child, J.A.M., to be a neglected juvenile. We reverse.

I. Factual Background

Respondent-mother has a long history of prior involvements with the Mecklenburg County Department of Social Services, Youth and Family

Services Division ("YFS") dating back to 2007. This history is primarily related to reports of domestic violence with the fathers of six prior children. YFS filed juvenile petitions regarding Respondent-mother's other six children. Her parental rights to those children were terminated by order entered in April 2014. Respondent-mother began a relationship with J.A.M.'s father, which resulted in J.A.M.'s birth in late January 2016. J.A.M.'s father also had a prior history with YFS due to domestic violence, which led to the removal of a child from his custody in 2012.

YFS received a report of J.A.M.'s birth on 24 February 2016. A social worker went to Respondent-mother's home. The social worker found Respondent-mother's home to be appropriate for J.A.M. and that J.A.M. seemed to be healthy and well cared for. The social worker subsequently learned that police had not been called to the home.

Based solely upon the parents' prior histories with YFS, the social worker developed a Safety Assessment in an attempt to determine whether their previous issues had been addressed. Respondent-mother and J.A.M.'s father refused to sign the Safety Assessment. Respondent-mother asserted that they did not need involvement of services from YFS, because J.A.M. was being properly cared for and there were no on-going acts of domestic violence. Respondent-mother also declined to attend a meeting at YFS to determine how YFS would proceed on the report.

Despite the results of the home visit and investigation, YFS subsequently took nonsecure custody of J.A.M. and, on 29 February 2016, filed a petition alleging J.A.M. was a neglected juvenile. YFS alleged J.A.M. was not safe in the care of her parents based solely upon their prior histories. After a hearing on 30 March 2016, the trial court entered an order adjudicating J.A.M. to be a neglected juvenile. At the time of the hearing, Respondent-mother and J.A.M.'s father were no longer living together or involved in a relationship. The court continued custody of J.A.M. with YFS, ordered the parents to "address the issues that led their prior kids and this child [being removed from their] custody," granted the parents twice-weekly supervised visitation with J.A.M., ceased reunification efforts with Respondent-mother due to the termination of her parental rights to her prior children, and set the primary plan of care for J.A.M. as reunification with the father with a secondary plan of guardianship or adoption. Respondent-mother filed timely notice of appeal from the court's order.

II. Jurisdiction

Jurisdiction lies in this Court of right by timely appeal from final judgment of the court in a juvenile matter pursuant to N.C. Gen. Stat. § 7B-1001 (2015).

III. Issue

Respondent-mother argues the trial court erred in adjudicating J.A.M. to be a neglected juvenile, because the court's conclusions of law are not supported by findings of fact that are supported by clear, cogent and convincing evidence. We agree.

IV. Standard of Review

This Court reviews a trial court's adjudication of a child to be a neglected juvenile to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations and quotation marks omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010) (citation and quotation marks omitted).

V. Analysis

A neglected juvenile is defined in relevant part as:

> A juvenile . . . who lives in an environment injurious to the juvenile's welfare . . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where . . . another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2015).

To support an adjudication of neglect, the trial court's findings of fact must show "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (citation and quotation marks omitted).

A. Findings of Fact

The trial court made the following findings of fact in its order:

> Clear and convincing evidence juv. [sic] is neglected. [Respondent-mother]'s testimony was telling today. Additionally, parents failed to make any substantive progress in their prior cases which resulted in TPR for [Respondent-mother] and [Father]'s child was placed in the custody of that child's mother. Dept. [sic] attempted

> to engage parents when it received a referral and both parents declined to work [with] Dept. and reported not needing any services. [Respondent-mother] testified. MGM and SW Sup. West [sic] all testified. Previously [Respondent-mother]'s children were returned to her care and ended up back in [YFS'] custody due to the abuse of one of the juveniles and it appeared [Respondent-mother] was not demonstrating skills learned by service providers. [Father] did not dispute allegations in the petition. [Respondent-mother] has a [history] of dating violent men and [Father] in this case has been found guilty at least twice for assault on a female. [Respondent-mother] acknowledged being aware [Father] had been charged [with] assaulting his sister but [Respondent-mother] said she never asked [Father] if he assaulted his sister despite testifying about the "red flags" she learned in DV servs. [Respondent-mother] testified to having a child [with] the man who abused one of her kids. Dept. [sic] received a total of 12 referrals regarding the [Respondent-mother] and at least 11 referrals pertained to domestic violence. Ct. [sic] took into consideration all the exhibits (1-4) submitted by YFS when making its decision. To date, [Respondent-mother] failed to acknowledge her role in the juvs. [sic] entering custody and her rights subsequently being terminated.

The referenced exhibits attached were a certified copy of the father's criminal record, adjudication orders from 2012 and 2013 involving each parent's prior children, and the 2014 order terminating Respondent-mother's parental rights to her prior children.

Based on these findings, the court concluded:

> The child(ren) is/are neglected in that Juv. [sic] resides in an environment in which both parents have a [history] of domestic violence/assault and each parent had a child enter [YFS] custody that was deemed abused while in the care of each parent. All of juveniles' siblings were adjudicated neglected. No evidence the parents have remedied the injurious environment they created for the other children.

The last two sentences of this paragraph are conclusions instead of findings of fact and will be treated as such. *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 892-93 (citations and quotation marks omitted), *disc. review denied* 359 N.C. 321, 611 S.E.2d 413 (2004) (holding where

a finding of fact is essentially a conclusion of law, it will be treated as a conclusion of law which is reviewable *de novo* on appeal).

The court's "findings," which are more akin to abbreviated trial notes than actual findings, do not support its conclusion that J.A.M. is a neglected juvenile. The court's first finding, "[c]lear and convincing evidence juv. [sic] is neglected" is a conclusion of law, and the second finding, "[Respondent-mother]'s testimony was telling today" is meaningless, in that the court does not explain how Respondent-mother's testimony was "telling." Several of the court's other findings are simply procedural statements that cannot support any legal conclusion, including: "[Respondent-mother] testified. MGM and SW Sup. West [sic] all testified," "[Father] did not dispute the allegations in the petition," and "Ct. [sic] took into consideration all the exhibits (1-4) submitted by YFS when making its decision."

The trial court made three findings regarding J.A.M.'s current living situation: (1) YFS conducted a home visit, visited with J.A.M.'s parents, and that Respondent-mother and father stated they did not need services and declined to work with YFS; (2) although Respondent-mother knew J.A.M.'s father had been charged with assaulting his sister, she had never asked him about the assault; and, (3) Respondent-mother had never acknowledged her role in the termination of her parental rights to her prior children.

Respondent-mother does not challenge the first two findings, but contends the trial court's finding that she never acknowledged her role in the prior termination of her parental rights is unsupported by the evidence. We agree. While Respondent-mother testified that she was not personally involved in the physical abuse of one of her prior children, because she was upstairs asleep at the time, she admitted the termination of her parental rights to her prior children involved poor decisions and choices she made, and she was not trying to defend those past decisions and choices. This evidence directly contradicts the finding and there is no evidence in the record to the contrary. This finding cannot support the trial court's conclusion that J.A.M. is a neglected juvenile.

Other than the finding involving Respondent-mother's failure to ask J.A.M.'s father about his alleged assault on his sister, the only findings of fact made by the trial court which tend to support its conclusion J.A.M. is a neglected juvenile all pertain to the parents' history with their prior children. These findings include: (1) J.A.M.'s siblings were adjudicated neglected; (2) Respondent-mother and J.A.M.'s father did not make any substantive progress in their prior cases, leading to the termination of Respondent-mother's parental rights and the permanent placement

of the father's child with her mother; (3) Respondent-mother's prior children were returned to her care during the previous case, but subsequently removed due to the abuse of one child and Respondent-mother's failure to make progress on her case; (4) Respondent-mother has a history of dating violent men; (5) J.A.M.'s father has two prior convictions for assault on a female; (6) 11 of 12 referrals to YFS in Respondent-mother's previous juvenile case involved domestic violence; and, (7) Respondent-mother had a child with a man who had abused one of her children.

B. Lack of Evidence or Findings

The trial court failed to make any findings of fact regarding any current domestic violence. No evidence was presented of any instances of domestic violence between Respondent-mother and J.A.M.'s father or that either parent had engaged in domestic violence while in J.A.M.'s presence. Moreover, the father's last proven incident of domestic violence occurred more than 42 months prior to J.A.M.'s birth.

Similarly, Respondent-mother's most recent documented instance of domestic violence occurred in June 2012, more than 43 months prior to J.A.M.'s birth. Respondent-mother and J.A.M.'s father maintained an appropriate home, and both denied they needed services to alleviate concerns YFS had regarding their home. YFS presented no evidence such services were needed. No evidence supports the lack of suitability of J.A.M.'s current home environment.

The court's findings of fact are also notably silent regarding whether, in the intervening years since the conclusion of the parents' prior juvenile cases, the parents have remedied the injurious environments of their prior children.

The court found no evidence had been presented that the parents had remedied the issues that caused the prior injurious environments. Nevertheless, the burden of proof rests upon YFS to prove its allegations by clear, cogent, and convincing evidence. *In re K.J.D.*, 203 N.C. App. at 657, 692 S.E.2d at 441. The absence of evidence cannot support usurpation of parental rights. YFS must introduce relevant clear, cogent, and convincing evidence supporting any allegation of neglect, or any other dereliction of parental responsibility which it failed to do. *See* N.C. Gen. Stat. § 7B-805 (2015) ("The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence."). Additionally, the court's findings do not show J.A.M. suffered from or is at a substantial risk to suffer from any physical, mental, or emotional impairment as a consequence of living in Respondent-mother's home.

Due to the intervening years between the prior cases and the facts before us, we conclude the parents' past histories, coupled only with Respondent-mother's failure to inquire about an alleged incident of prior domestic violence by J.A.M.'s father, do not support a legal conclusion that J.A.M. is a neglected juvenile. *See In re A.K.*, 178 N.C. App. 727, 732, 637 S.E.2d 227, 230 (2006) (holding the trial court erred in relying solely on nine- and fifteen-month-old orders concluding a juvenile's sibling was neglected to support a conclusion that the juvenile was also neglected). No evidence supports the trial court's findings of fact. The findings do not support its conclusion that J.A.M. is a neglected juvenile because she lives in an environment injurious to her welfare.

VI. Conclusion

The trial court's findings of fact are not supported by clear, cogent, and convincing evidence. These findings do not support the trial court's conclusion that J.A.M. was neglected. The order appealed from is reversed. *It is so ordered.*

REVERSED.

Judges BRYANT and McCULLOUGH concur.

IN THE MATTER OF M.Z.M., T.Q.N.C.

No. COA16-705

Filed 20 December 2016

Constitutional Law—effective assistance of counsel—trial tactics

Respondent mother received effective assistance of counsel in a termination of parental rights case. While counsel's choice of tactics was "troublesome," respondent-mother failed to show prejudice or that counsel's conduct undermined the fundamental fairness of the proceeding.

Appeal by respondent from order entered 18 April 2016 by Judge Keith Gregory in Wake County District Court. Heard in the Court of Appeals 5 December 2016.

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

J. Thomas Diepenbrock for respondent-appellant.

Cranfill Sumner & Hartzog LLP, by Katherine Barber-Jones, for guardian ad litem.

TYSON, Judge.

Respondent-mother appeals from an order terminating her parental rights as to the minor children "M.Z.M." and "T.Q.N.C." We affirm the trial court's order.

I. Factual Background

On 25 March 2014, Wake County Human Services ("WCHS") filed a juvenile petition alleging that two-year-old M.Z.M. was abused and neglected and six-year-old T.Q.N.C. was neglected. Both children lived with Respondent-mother until WCHS took them into nonsecure custody on 25 March 2014. At the time the petition was filed, Respondent-mother was under arrest and detained in Wake County Detention Center on a charge of felonious child abuse. M.Z.M.'s biological father was alleged to be incarcerated in Pitt County, North Carolina, and the whereabouts of T.Q.N.C.'s putative father were unknown.

Pursuant to a stipulation of facts entered by Respondent-mother and WCHS, the trial court adjudicated M.Z.M. and T.Q.N.C. as abused and neglected juveniles as defined by N.C. Gen. Stat. § 101(1) and (15) (2015). While inconsequential to Respondent-mother's appeal of the termination of her parental rights, we note the trial court adjudicated T.Q.N.C. abused and neglected where WCHS's petition alleged T.Q.N.C. was neglected and did not allege abuse of T.Q.N.C. The court found:

> 5. [T.Q.N.C.] is of school age and has not been regularly enrolled in school by the parents.
>
> 6. The mother was living in a hotel for the four months prior to the filing of the petition while working and looking for permanent housing but otherwise the parents have not provided stable housing for the children and have had insufficient income to meet the needs of the children.
>
> 7. The children have been exposed to domestic violence in the home between the mother and her boyfriend, Carlos [A].
>
> 8. On or about March 19, 2014 [M.Z.M.] was seriously burned on his thigh, ear and buttocks and was in need

> of medical treatment for second degree burns that were causing pain and discomfort for the child. The mother is alleged to have caused these burns intentionally and has been charged with child abuse regarding these burns.
>
> 9. A serious physical injury was inflicted on [M.Z.M.] by other than accidental means while in the mother's home with Carlos [A]. There was a substantial risk of serious physical injury to [T.Q.N.C.] by other than accidental means.
>
> 10. The mother does not admit to intentionally causing these injuries but would stipulate that there is sufficient evidence from which the Court could find by clear and convincing evidence that the burns were not as a result of excusable neglect, happened while the children were in her care and that the mother did not seek medical treatment for the child as a result of being fearful of Carlos [A.] who was in the home when the injuries occurred. . . .
>
> . . . .
>
> 12. The mother remains in custody for the pending charges related to [M.Z.M.'s] abuse and neither putative father has stepped forward at this time to submit to be considered for placement of the children.
>
> . . . .
>
> 18. [M.Z.M. and T.Q.N.C.] do not receive proper care, supervision, or discipline from their parents and live in an injurious environment.

The trial court suspended Respondent-mother's visitation with the children while she remained incarcerated. It ordered Respondent-mother to enter into an Out of Home Services Agreement with WCHS to include a visitation plan and the following additional requirements: (1) obtain and maintain housing and income sufficient for herself and the children; (2) obtain a psychological evaluation and substance abuse assessment and follow any treatment recommendations; (3) abstain from drug use and submit to random drug screens; (4) complete a parenting class and "demonstrate skills learned;" and (5) maintain regular contact with her WCHS social worker.

Respondent-mother remained incarcerated pending trial at the time of the ninety-day review hearing on 14 July 2014. In its resulting order

entered 1 August 2014, the court noted that M.Z.M. "has been able to point to his burn and without prompting state that his mother's boyfriend Carlos did it." The court reiterated the requirements of Respondent-mother's case plan.

On 29 July 2014, Respondent pled guilty to felonious child abuse by grossly negligent omission, which resulted in serious bodily injury to M.Z.M. She received a suspended prison sentence and was released onto probation.

At a hearing on 12 January 2015, Respondent-mother did not appear and the trial court established a permanent plan of adoption for M.Z.M. and T.Q.N.C. The court found that Respondent-mother's whereabouts were unknown, she had failed to contact WCHS, and that WCHS had been unable to contact her. It further found that Respondent-mother had "failed to comply with her treatment plan and has made no progress in correcting the conditions that brought the children into foster care." The court relieved WCHS of further reunification efforts and directed Respondent-mother to comply with the conditions of her case plan "if she is interested in reunification."

WCHS filed a motion to terminate Respondent-mother's parental rights on 2 June 2015. Respondent-mother was arrested in September 2015 on new criminal charges of felonious obtaining property under false pretenses and possession of a counterfeit instrument, misdemeanor resisting a pubic officer, and for violating her probation. On 16 December 2015, the superior court revoked Respondent-mother's probation. The superior court activated her minimum 25 months to maximum 42 months sentence for felonious child abuse.

After a termination of parental rights hearing, and the court terminated Respondent-mother's parental rights on 18 April 2016. As grounds for termination, the court found that Respondent-mother had (1) "abused and neglected the children . . . and it is probable that there would be a repetition of the neglect if the children were returned to the care of the mother," (2) "willfully left the children in foster care for more than twelve (12) months without showing to the satisfaction of the court reasonable progress . . . in correcting the conditions which led to the removal of the children," and (3) "willfully abandoned the children for at least six months immediately preceding" WCHS's filing of the motion to terminate her parental rights. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2) and (7) (2015). The court further found that termination of Respondent-mother's parental rights to be in M.Z.M. and T.Q.N.C.'s best interests.

II. Jurisdiction

Jurisdiction lies in this Court of right by timely appeal from final judgment of the court in a juvenile matter pursuant to N.C. Gen. Stat. § 7B-1001 (2015).

III. Issue

On appeal, Respondent-mother claims she received ineffective assistance of counsel ("IAC") at the termination hearing.

IV. Standard of Review

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 692-93 (1984).

Pursuant to N.C. Gen. Stat. §§ 7B-1101.1 and 7B-1109(b) (2015), "[p]arents have a statutory right to counsel in all proceedings dedicated to the termination of parental rights. This statutory right includes the right to effective assistance of counsel." *In re Dj.L.*, 184 N.C. App. 76, 84, 646 S.E.2d 134, 140 (2007) (citations and quotation marks omitted).

IV. Analysis

A. Ineffective Assistance of Counsel

"A claim of ineffective assistance of counsel requires the respondent to show that counsel's performance was deficient and the deficiency was so serious as to deprive the represented party of a fair hearing." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996). Where an IAC claim is based on an allegation of defective performance by counsel, the respondent must show she was prejudiced by counsel's supposed deficiencies. *See In re L.C.*, 181 N.C. App. 278, 283, 638 S.E.2d 638, 641, *disc. review denied*, 361 N.C. 354, 646 S.E.2d 114 (2007); *see also In re Bishop*, 92 N.C. App. 662, 665-66, 375 S.E.2d 676, 679 (1989).

"The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

Respondent-mother faults counsel for failing to present any evidence or argument during the adjudicatory phase of the termination hearing. She asserts counsel's failure to advocate in any way whatsoever during the grounds phase of the termination proceeding denied her a fair hearing.

B. Phases of Hearing

A hearing to terminate parental rights includes an adjudicatory phase and, if necessary, a dispositional phase. *See* N.C. Gen. Stat. §§ 7B-1109, -1110(a), (c) (2015). In the adjudicatory phase, the trial court determines whether the petitioner has met its burden to show by "clear and convincing" evidence that grounds authorizing the termination of parental rights exist. N.C. Gen. Stat. § 7B-1111(b) (2015). "If the trial court concludes that the petitioner has met its burden of proving at least one ground for termination, the trial court proceeds to the dispositional phase and decides whether termination is in the best interests of the child." *In re L.A.B.*, 178 N.C. App. 295, 299, 631 S.E.2d 61, 64 (2006). "Under N.C. Gen. Stat. § 7B-1111(a), the trial court need only find that one statutory ground for termination exists in order to proceed to the dispositional phase and decide if termination is in the child's best interests." *Id.* at 298-99, 631 S.E.2d at 64.

C. Testimony

WCHS called two witnesses during adjudication: Respondent-mother and WHCS social worker Jeanette Johnson, who had been assigned to Respondent-mother's case since September 2014. Respondent-mother testified at length regarding the fathers' lack of involvement with M.Z.M. and T.Q.N.C.; her own conduct after absconding probation in July 2014; and her subsequent decisions to avail herself of substance abuse treatment, mental health services, and GED and parenting classes following her incarceration in September 2015. Ms. Johnson described the circumstances that led to M.Z.M. and T.Q.N.C.'s adjudications as abused and neglected juveniles in 2014; the requirements of Respondent-mother's court-ordered case plan; and her failure to contact WCHS, to visit or inquire about her children, or to work on her case plan. Ms. Johnson testified she had no contact with Respondent-mother prior to November 2015, when she learned through the Department of Public Safety and from Respondent-mother's mother that Respondent-mother was arrested and jailed in Edgecombe County.

Respondent-mother correctly asserts her counsel asked no questions of WCHS's witnesses, nor presented any evidence or argument

during adjudication, and told the trial court that he did not "wish to be heard." At disposition, however, counsel called Respondent-mother to testify and argued to the court that terminating her parental rights would be contrary to M.Z.M. and T.Q.N.C.'s best interests.

In its adjudicatory findings, the trial court recounted M.Z.M. and T.Q.N.C.'s prior adjudications as abused and neglected juveniles and listed the requirements of Respondent's case plan. In support of its conclusion that grounds exist to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (7), the court made the following additional findings:

> 16. The mother pled guilty to felony child abuse for the injuries [M.Z.M.] suffered. She was given probation and released from incarceration. The mother absconded from probation almost immediately upon her release from incarceration and she did not participate in case services or visits with the children.
>
> 17. The mother absconded from probation to use marijuana, cocaine, and alcohol and did not visit with the children for fear of being arrested at a visit. The mother was not regularly employed and lived from place to place without appropriate housing. She did not call to inquire into the well being of the children and did not provide gifts, letters, or financial support for the children.
>
> 18. The mother remained an absconder from probation until September 2015 when she was arrested on new charges. The mother did not contact the social worker when she was arrested. The social worker found that mother was incarcerated and sought the mother out.
>
> 19. The mother's probation was revoked and she is now serving an active sentence and has a projected release date of June 2017.
>
> 20. The mother has not visited with either child since they were removed from her care in March 2014. The mother has not had housing or income since March 2014. The mother never submitted to a psychological evaluation, never participated in parenting education, never had a Substance Abuse Assessment, and had no contact with the social worker.

Respondent-mother does not contest any of these adjudicatory findings. They are binding on appeal. *In re S.N.*, 194 N.C. App. 142, 147, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

With regard to counsel's lack of advocacy during the adjudicatory phase, Respondent-mother specifically cites counsel's failure to question her about the services she had accessed and utilized in prison, her "changed perspective on life" since September 2015, and the "likely" fact that she "was no longer in a relationship with" Carlos A. Respondent-mother suggests counsel should have "prepared [her] to testify" on these issues prior to the hearing. She further faults counsel for failing to subpoena her prison case manager to testify about the services she had accessed or to obtain a printout of her accomplishments from the case manager.

Regarding counsel's failure to cross-examine Ms. Johnson, Respondent-mother argues counsel could have asked the social worker about the services Respondent-mother had obtained while in prison and about M.Z.M.'s statements attributing his burns to Carlos A. Respondent-mother contends counsel should have argued that she was unlikely to repeat her prior neglect of her children, she had shown reasonable progress in correcting the conditions that led to their removal from the home, and her lack of involvement with the children or WCHS was not willful but the result of "unwise choices" caused by stress and depression. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (7).

"It is well established that attorneys have a responsibility to advocate on the behalf of their clients." *In re S.N.W.*, 204 N.C. App. 556, 560, 698 S.E.2d 76, 79 (2010). It is also true "[i]neffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy and trial tactics." *State v. Brindle*, 66 N.C. App. 716, 718, 311 S.E.2d 692, 693-94 (1984). The reviewing " 'court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004) (quoting *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694). Furthermore, "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

In *State v. Taylor*, 79 N.C. App. 635, 636-37, 339 S.E.2d 859, 860-61, *disc. review denied*, 317 N.C. 340, 346 S.E.2d 146 (1986), the defendant's counsel remained silent during the defendant's sentencing hearing,

a critical stage of criminal proceedings to which the right to effective assistance of counsel applies. While this Court found an "absence of positive advocacy" by counsel at sentencing, we concluded this conduct did not "constitute[ ] deficient performance prejudicial to the defendant." *Id.* Based upon the record, we found no reason to conclude that counsel's decision to remain silent was anything other than "strategy and trial tactics." *Id.* at 638, 339 S.E.2d at 861.

We reviewed the transcript of Respondent-mother's termination hearing in its entirety. It appears counsel's decision to essentially concede the existence of grounds for termination under N.C. Gen. Stat. § 7B-1111(a) was a tactical concession similar to counsel's silence in *Taylor*. The existence of these grounds had been previously stipulated to by Respondent-mother. While counsel's choice of tactics was "troublesome," Respondent-mother has failed to show prejudice or that counsel's conduct undermined the fundamental fairness of the proceeding. *Taylor*, 79 N.C. App. at 637, 339 S.E.2d at 861.

Among the statutory grounds for termination alleged by WCHS was that Respondent had "willfully abandoned the juvenile[s] for at least six consecutive months immediately preceding the filing of the . . . motion[.]" N.C. Gen. Stat. § 7B-1111(a)(7). The following standard applies when assessing the existence of grounds for termination under subdivision (a)(7):

> 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. The word "willful" encompasses more than an intention to do a thing; there must also be purpose and deliberation.

In re Adoption of Searle, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citations omitted). "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *Id.* at 276, 346 S.E.2d at 514.

WCHS filed its motion to terminate Respondent-mother's parental rights on 2 June 2015, making the period between 2 December 2014 and 2 June 2015 the determinative six months for purposes of N.C. Gen. Stat. § 7B-1111(a)(7). During her testimony at the termination hearing, Respondent-mother acknowledged: (1) she did no work on her case plan, (2) absconded and did not contact her WCHS social worker, and (3) never visited either M.Z.M. or T.Q.N.C. while she was free on probation, from 29 July 2014 to 20 September 2015.

Respondent-mother claimed, without supporting documentation, that she was employed during the first half of 2015. By her own admission, Respondent-mother chose not to visit her children or contact her social worker, for fear of being arrested. In light of her actions during the relevant six-month period, Respondent-mother has failed to show any reasonable probability the trial court's adjudication of grounds to terminate her parental rights under N.C. Gen. Stat. § 7B-1111(a)(7) would have been avoided, if counsel had proffered additional evidence or argument regarding Respondent-mother's access to services after being imprisoned in September 2015. *See*, *e.g.*, *In re B.S.O.*, 234 N.C. App. 706, 713, 760 S.E.2d 59, 65 (2014) (finding of fact that respondent-father willfully abandoned the children was not error where he made only one phone call to respondent-mother and his children during the six months immediately preceding the filing of the petition to terminate his parental rights); *In re Hendren*, 156 N.C. App. 364, 368, 576 S.E.2d 372, 376 (2003) (holding an incarcerated parent "will not be excused from showing interest in the child's welfare by whatever means available").

M.Z.M.'s attribution of his injuries to Respondent-mother's boyfriend was subordinate to her subsequent wholesale abandonment of her two children. The trial court's 1 August 2014 review order includes a finding that M.Z.M. had identified Carlos A. as the person who inflicted his burns. However, Respondent-mother pled guilty to felonious child abuse, she deliberately failed to disclose M.Z.M.'s injuries to her family, or to seek medical care for her seriously burned toddler.

Respondent-mother argues counsel acted unreasonably by withholding evidence and argument until the dispositional phase of the hearing. Counsel elicited testimony from Respondent-mother regarding her efforts to "better [her]self as a person and as a mother" by seeking out services while in prison, her plan to live with her parents following her release, and her desire to re-establish her relationship with M.Z.M. and T.Q.N.C. and "be the mother that [she] need[s] to be."

Counsel presented a thoughtful and reasoned argument in opposition to terminating Respondent-mother's parental rights during disposition. Describing Respondent-mother as on the cusp of a "profound change," counsel reviewed in detail each of the educational, substance abuse, and mental health services Respondent-mother had obtained during her most current incarceration. Counsel asked the court to allow M.Z.M. and T.Q.N.C. an "opportunity get to know that mother that they don't have today." To deny these children their "mother figure," he asserted, would deny them the "foundation" of knowing "who they came

from," how they came to live in foster care, and why "that's the best place for them" at this time.

Counsel recognized Respondent-mother was not prepared to take custody of her sons, but argued their best interests would be served by allowing them to develop a relationship with their mother, while "living in a safe stable positive foster family." At the conclusion of counsel's argument, the trial court commended counsel for an "excellent job" in representing Respondent-mother.

Respondent-mother allows that counsel's argument may have been "creative." She asserts the evidence presented by counsel had no relevance to the dispositional phase of a termination hearing. We disagree. "After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a). The court enjoys broad discretion in assessing a child's interests, *see In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013), and "may consider any 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). Moreover, the statutory criteria to be considered by the court include "[a]ny relevant consideration." N.C. Gen. Stat. § 7B-1110(a)(6).

The potential value to M.Z.M. and T.Q.N.C. of maintaining a relationship with Respondent-mother, as well as Respondent-mother's efforts and desire to remain a part of her children's lives, were thus plainly "relevant" to the court's dispositional determination under N.C. Gen. Stat. § 7B-1110(a). Although grounds may be found to exist at adjudication to support termination of parental rights, the trial court is not compelled to do so at disposition, if the "best interests" of the children would be served by continuing reunification efforts. N.C. Gen. Stat. § 7B-1110(b) (2015). The record shows the trial court thoughtfully weighed all factors in its order.

V. Conclusion

Respondent-mother's IAC claim is without merit and is overruled. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges BRYANT and McCULLOUGH concur.

IN RE S.A.A.

[251 N.C. App. 131 (2016)]

IN THE MATTER OF S.A.A.[1, 2]

No. COA16-540

Filed 20 December 2016

Juveniles—delinquency—sexual battery—simple assault

A juvenile's adjudication of delinquency based on sexual battery was vacated and remanded for entry of a new disposition order. The State failed to introduce sufficient evidence that the juvenile touched the tops of the girls' breasts for a sexual purpose. The simple assault charge was affirmed.

Appeal by Juvenile from orders entered 22 July 2015 by Judge Beverly Scarlett in Orange County District Court and order entered 22 October 2015 by Judge Kathryn W. Overby in Alamance County District Court. Heard in the Court of Appeals 1 November 2016.

Attorney General Roy Cooper, by Assistant Attorney General Janelle E. Varley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for Juvenile.

STEPHENS, Judge.

This appeal arises from Juvenile's adjudication as delinquent based upon petitions alleging he committed two counts each of simple assault and sexual battery against two female schoolmates by draping his arms around the girls' shoulders in order to smear a glowing liquid on them during an evening of Halloween trick-or-treating. Because the State failed to introduce sufficient evidence that Juvenile touched the tops of the girls' breasts for a sexual purpose, we vacate the adjudication of sexual battery and remand the case for entry of a new disposition order.

---

1. As noted *infra*, this matter originated in Orange County District Court, where the adjudication order was entered, but was transferred to Alamance County District Court in August 2015 where the disposition order was entered.

2. Pursuant to North Carolina Rule of Appellate Procedure 3.1(a), we use initials or pseudonyms to refer to all juveniles discussed in this opinion.

Factual and Procedural Background

On 20 April and 26 May 2015, the State filed petitions against Juvenile S.A.A. ("Scott"), alleging that he had committed two counts each of sexual battery and simple assault. On 21 July 2015, Scott appeared in Orange County Juvenile Court for an adjudication hearing before the Honorable Beverly Scarlett, Judge presiding. Evidence at the adjudication hearing tended to show the following: The petitions arose from events that took place on Friday, 31 October 2014, in Chapel Hill. On that Halloween evening, Scott, then a 13-year-old student at Culbreth Middle School, and three of his male friends went to the Southern Village neighborhood where many other Culbreth students were walking around, trick-or-treating, trying to scare each other, and acting "crazy." Scott was wearing a "crazy" costume, including a black body suit, "LED light teeth," and "glow gloves." After one of his gloves "busted," Scott began wiping glowing green liquid from the glove[3] on trees, signs, and "tons" of people.

Sixth-grade Culbreth students "Lauren" and "Melissa," both then age eleven, were trick-or-treating in Southern Village when they saw Scott walking with some other boys. Melissa testified that Scott asked the girls if they wanted drugs. As Lauren and Melissa walked away, Scott followed, coming up between the girls and draping an arm over each girl's shoulder. Lauren testified that Scott "rubbed this green glow stick stuff on" her, leaving glowing liquid on her shirt near her collar bone. Melissa testified that Scott reached his arm around her shoulder and "put this weird green glowing stuff" on her arm and back, also touching her "boobs" over her sweatshirt.

After the incident, Lauren and Melissa ran to the nearby home of Joe Rice, a friend of their parents. Lauren was upset that the glowing liquid was on her clothes, and Rice used wet paper towels to wipe off the material. Rice believed that "the glow stick was the primary way that [the girls] had been harassed." Lauren and Melissa then "trick or treated some more," returning to Lauren's house between 8:30 and 9:00 p.m.

When Melissa's father picked her up at about 10:00 p.m., she reported that a boy with glow paint on his hands had tried to grab her "chest or boobs." That night, Lauren told her mother that something had happened, but did not provide many details until the next morning, when she reported that a boy had "grabbed her from behind with glow stick material . . . on his hand and touched her." Neither Lauren's nor Melissa's parents contacted the police over the weekend.

---

3. Some witnesses referred to the liquid as coming from Scott's glove, while others referred to it as coming from a "glow stick."

However, when Lauren and Melissa returned to school the following Monday, they reported the incident to school resource officer Stan Newsome of the Chapel Hill Police Department. Newsome called Lauren's mother, explained that he would prepare an incident report, and discussed possible charges against Scott. About a month later when Newsome told Scott he was investigating an incident on Halloween, Scott responded, "Oh, the thing with the glow in the dark stuff." Newsome testified that Scott admitted wiping the glowing liquid on Melissa's and Lauren's shoulders, but denied touching their breasts.

At the adjudication hearing, Scott admitted putting the glow glove liquid on trees, signs, and some people. When asked why he did so, Scott replied, "Because it was Halloween." Scott testified that he did not remember seeing Lauren and Melissa on Halloween night. However, Scott's friend "Brandon," who had been trick-or-treating with Scott, testified that Scott touched a girl's shoulder with his leaking glow glove, and the girl asked Scott to get away from her. According to Brandon, in response, Scott apologized and walked away.

At the conclusion of the hearing, Judge Scarlett adjudicated Scott delinquent on all charges. In August 2015, Judge Scarlett transferred the case to Alamance County where Scott and his family had moved. On 10 September 2015, Scott appeared in Alamance County District Court for a dispositional hearing before the Honorable Kathryn W. Overby, Judge presiding. Judge Overby imposed a Level 1 sentence and ordered Scott to be placed on probation for 12 months. The disposition order was based upon the most serious offense before the district court, to wit, sexual battery. Scott gave notice of appeal at the hearing.

Discussion

On appeal, Scott argues that the district court erred by (1) denying his motion to dismiss the sexual battery petitions, (2) adjudicating him delinquent on a theory of sexual battery not stated in the petitions, (3) failing to make findings of fact in support of its dispositional order, and (4) imposing probation and drug and alcohol screenings. We vacate the court's adjudication of sexual battery as based on insufficient evidence, affirm the district court's adjudication of simple assault, and remand the case for entry of a new disposition order.

I. Motion to dismiss sexual battery petitions

Scott first contends that the district court should have allowed his motion to dismiss the sexual battery petitions because the State failed

to prove that Scott touched the breasts of Lauren and Melissa for the purpose of sexual arousal or sexual gratification. We agree.

As an initial matter, we address the State's contention that Scott failed to preserve this issue for appellate review. As Scott concedes, at the adjudication hearing, his attorney moved to dismiss the sexual battery petitions at the close of the State's evidence, but failed to renew the motion after Scott presented his case. To preserve an argument of error in a trial court's denial of his motion to dismiss, a juvenile must move to dismiss the petitions against him at the close of the State's evidence and again at the close of all the evidence. *In re Hodge*, 153 N.C. App. 102, 107, 568 S.E.2d 878, 881 (2002) ("[I]f a [juvenile] fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." (citation and internal quotation marks omitted)).

> We may suspend th[e] prohibition under [Appellate] Rule 2, however, to prevent manifest injustice to a party. When this Court firmly concludes, as it has here, that the evidence is insufficient to sustain a criminal conviction . . . it will not hesitate to reverse the conviction, *sua sponte*, in order to prevent manifest injustice to a party.

In re K.C., 226 N.C. App. 452, 455, 742 S.E.2d 239, 242 (citations and internal quotation marks omitted), *disc. review denied*, 367 N.C. 218, 747 S.E.2d 530 (2013). We exercise our discretion under Rule 2 to review the merits of Scott's appeal in order to prevent manifest injustice because we conclude that the evidence against Scott is insufficient to support an adjudication of delinquency as to sexual battery.

> We review a court's denial of a juvenile's motion to dismiss *de novo*. Where the juvenile moves to dismiss, the court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) of the juvenile's being the perpetrator of such offense. The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent's guilt.

Id. (citations, internal quotation marks, ellipses, and brackets omitted). However, if the evidence raises only a suspicion that the juvenile committed the offense, the motion to dismiss should be granted. *In re R.N.*, 206 N.C. App. 537, 540, 696 S.E.2d 898, 901 (2010). "This is true even though the suspicion so aroused by the evidence is strong." *In re Vinson*, 298 N.C. 640, 657, 260 S.E.2d 591, 602 (1979) (citation omitted).

The elements of sexual battery are met if a juvenile, (1) for the purpose of sexual arousal, sexual gratification, or sexual abuse, (2) engages in sexual contact with another (3) by force and against the will of the other person. N.C. Gen. Stat. § 14-27.5A(a) (2013).[4] In criminal cases involving adult defendants, the element of acting for the purpose of sexual arousal, sexual gratification, or sexual abuse may be inferred "from the very act itself[.]" *In re T.S.*, 133 N.C. App. 272, 275, 515 S.E.2d 230, 232 (citations omitted), *disc. review denied*, 351 N.C. 105, 540 S.E.2d 751 (1999). "However, . . . intent to arouse or gratify sexual desires may [not] be inferred in children under the same standard used to infer sexual purpose to adults." *Id.* at 276, 515 S.E.2d at 233. Rather, this Court has held that a sexual

> purpose does not exist without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting. Otherwise, sexual ambitions must not be assigned to a child's actions. The element of purpose may not be inferred solely from the act itself. . . . The mere act of touching is not enough to show purpose.

In re K.C., 226 N.C. App. at 457, 742 S.E.2d at 242-43 (citations and internal quotation marks omitted).

In *In re T.C.S.*, an almost-twelve-year-old juvenile was seen coming out of the woods holding hands with the five-year-old victim who "looked 'roughed up' with twigs and branches in her hair, barefoot, clothes on backwards, and tags hanging out[,]" and a witness saw the juvenile "appear[] to put his hands on his private parts while [the victim] was taking off her clothes." 148 N.C. App. 297, 302-03, 558 S.E.2d 251, 254 (2002). In addition, when another witness confronted the juvenile about what he was doing, the juvenile "smarted off" and told the adult witness his actions with the victim were "none of [her] business." *Id.* at 303, 558 S.E.2d at 254. This Court held that

> [t]he age disparity, the control by the juvenile, the location and secretive nature of their actions, and the attitude of the juvenile is evidence of the maturity and intent of the juvenile. Taking all of the circumstances in the light most favorable to the State, there is sufficient evidence of maturity and intent to show the required element of "for the purpose of arousing or gratifying sexual desire."

---

4. Section 14-27.5A was recodified as N.C. Gen. Stat. § 14-27.33 by Session Laws 2015-181, s. 15, effective 1 December 2015, and applicable to offenses committed on or after that date.

Id. In contrast, in *In re K.C.*, this Court considered an adjudication of delinquency on the basis of sexual battery where the fifteen-year-old juvenile, "Keith," was alleged to have touched and squeezed the buttocks of a fifteen-year-old classmate, "Karen," during school. 226 N.C. App. at 454, 742 S.E.2d at 241. Karen reported that, on a day when a substitute teacher was present, Keith had seated himself, not in his assigned place, but at a desk near a classroom bookshelf. *Id.* When Karen stood near Keith and bent over to re-shelve a book, "Keith 'touched and grabbed her.' Karen reacted by informing Keith: 'Don't do that.' Keith did not respond." *Id.* (brackets omitted). The evidence about Keith's intent and purpose in touching Karen's buttocks was conflicting:

> . . . Keith . . . admitted to touching Karen on the buttocks, "but he said it was an accident."
>
> Testifying in his own defense, Keith largely corroborated Karen's testimony leading up to the moment of contact. He explained that he had been sitting in his seat and "I had dropped my pencil and when I picked my pencil up, I accidentally hit [Karen's] butt, but I didn't squeeze it." Keith stated that he was seated during the entire event, having come into contact with Karen during the process of leaning down to get his pencil.
>
> . . . .
>
> When Karen was asked why she believed the contact was intentional, she responded: "You can't touch and grab someone and not be accident [sic] and especially if you're a boy." She also testified that Keith had said certain "nasty stuff" to her at the beginning of the school year. Specifically, Karen described an instance in which Keith purportedly asked her, "When are you going to let me hit?," which Karen took to mean, "When are you going to let me have sex with you?" When Keith was asked if he had ever "talked to Karen about anything in a sexual nature," he avowed that he had not.

Id. at 454, 457, 742 S.E.2d at 241, 243 (some brackets omitted). In holding this evidence insufficient "to raise more than a suspicion or possibility that Keith committed sexual battery[,]" we noted that

> Keith and Karen [were] the same age and there [was] no evidence that Keith exercised any particular control over the situation. The incident occurred in a public school

> room during the school day. Keith contends that the touching was accidental and also made a statement to that effect directly after the event. Further, Keith's alleged request to "hit" was made months before the moment of contact between him and Karen, with no evidence of any contact of any sort between the two of them from the beginning of the school year, presumably in late August, through late February.

Id. at 457-58, 742 S.E.2d at 243.

Here, we conclude that the evidence supporting an inference that Scott acted with "the purpose of arousing or gratifying sexual desire" when he touched Melissa's and Lauren's breasts is far weaker than that in *In re T.C.S.* and falls short even of the evidence held insufficient in *In re K.C.* At the time of the incident, Scott was 13 years old and the girls 11 years old, and all three were students at the same middle school. Scott consistently denied touching either girls' breast, instead contending that he had only put his hands around their shoulders. This account was supported by testimony from one of Scott's male friends who witnessed the incident and described Scott touching a girl's shoulder but not her breast. Neither the location nor the alleged manner of the touching was secretive in nature. Rather, Scott and the girls were on a public street with numerous other juveniles who were trick-or-treating, and many other young people were acting "crazy," running around, and generally behaving as children and young teens might be expected to do on Halloween night. The evidence was undisputed that Scott had been wiping the green glowing liquid from his glove on trees, signs, and other young people during the night—annoying, possibly even distressing and obnoxious, behavior—but not an obviously sexual act. Similarly, nothing about Scott's attitude suggested a sexual motivation in rubbing the glowing liquid on the girls. Neither girl testified that Scott made any sexual remarks to them, either on Halloween night or in any previous interactions with him. Further, according to Brandon, when another young girl—apparently neither Lauren nor Melissa—told Scott to stop putting the liquid on her on Halloween night, Scott stopped, apologized, and walked away. Finally, when the girls ran away after Scott touched them, Scott did not pursue or try to stop them, or attempt to exert control over them in any way. This evidence, even taken in the light most favorable to the State, does not support an inference that Scott touched Lauren's and Melissa's breasts for "the purpose of arousing or gratifying sexual desire." Accordingly, we vacate the adjudication of sexual battery, affirm the adjudication of simple assault, and remand for a new dispositional

order, the previous disposition having been based upon sexual battery as the most serious offense before the district court. In light of this result, we do not address Scott's additional arguments.

VACATED IN PART AND REMANDED.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF MARY ELLEN BRANNON THOMPSON

No. COA15-1380

Filed 20 December 2016

Abatement—incompetency proceeding—death of respondent

The trial court lacked subject matter jurisdiction in an incompetency proceeding to enter the Hinnant order and any other substantive orders after respondent's death because the matter abated upon respondent's death on 2 October 2014. The orders entered after respondent's death were vacated.

Appeal by guardian from order entered 20 April 2015 by Judge Patrice A. Hinnant in Forsyth County Superior Court. Heard in the Court of Appeals 11 August 2016.

Reginald D. Alston for appellee.

Sharpless & Stavola, P.A., by Molly A. Whitlatch, Frederick K. Sharpless, and Pamela S. Duffy, for appellant.

McCULLOUGH, Judge.

Bryan C. Thompson (appellant) appeals from an order entered in the incompetency proceedings of Mary Ellen Brannon Thompson (respondent) following respondent's death. For the following reasons, we vacate the orders entered after respondent's death.

I. Background

The history of this case includes a prior appeal to this Court which set out the background of this case up to that appeal. *See In re Thompson*, 232 N.C. App. 224, 754 S.E.2d 168 (2014). Those facts are as follows:

On 4 April 2007, a Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian was filed by Leslie Poe Parker [(petitioner)] in Forsyth County Superior Court. The petition alleged that respondent lacked the capacity to manage her own affairs or to make important decisions concerning her "person, family [sic] or property[.]" The same day, a notice of "Hearing on Incompetence and Order Appointing Guardian Ad Litem" was filed. A hearing was conducted on 26 April 2007 by Theresa Hinshaw, assistant clerk of Forsyth County Superior Court (clerk Hinshaw). Numerous individuals were present at the hearing, including [Calvin Brannon (Brannon)], who is the brother of respondent. After the hearing, clerk Hinshaw announced in open court that she found respondent to be incompetent, and she orally appointed [appellant] as guardian of the estate. On 3 May 2007, clerk Hinshaw signed and dated an order (incompetency order) finding "by clear, cogent, and convincing evidence that the respondent [was] incompetent." Additionally, clerk Hinshaw signed and dated an order authorizing issuance of letters appointing [appellant] guardian of the estate.

Thereafter, [Brannon] filed a "Petition for Removal of Guardianship of the Person" and a "Motion to Set Aside the Adjudication of Incompetence Order and Ask For a Rehearing[.]" Lawrence G. Gordon, Jr., Forsyth County Superior Court Clerk (clerk Gordon), signed and dated an order on 8 December 2009 denying the motions and concluded that the matters were time barred because appellant failed to timely appeal clerk Hinshaw's incompetency order. [Brannon] then appealed clerk Gordon's order to superior court. In an order entered 6 April 2010, Forsyth County Superior Court Judge James M. Webb (Judge Webb) dismissed both motions with prejudice.

On 27 March 2012, [Brannon] filed four motions giving rise to [the first] appeal. These motions were:

(a) for relief in the cause from a guardianship granted to [appellant] dated May 1, 2007;

(b) to declare that [petitioner] did not have the capacity to represent respondent in the filings of motions and petitions on April 4, 2007;

(c) to declare that [appellant] was not appointed the guardian of respondent after an adjudication of incompetence under G.S. 35A[-]1112(e) and G.S. 35A-1120[;]

(d) to declare [appellant's] act of filing a voluntary bankruptcy petition under 11 U.S.C. 301 as a state court guardian of the estate of respondent invalid.

These motions were heard before Susan Frye (clerk Frye), Forsyth Superior Court Clerk, and she entered an order on 4 May 2012 denying [Brannon's] motions. She also granted [appellant's] motion for sanctions. In her order, clerk Frye denied motions (a), (b), and (c) because clerk Gordon and Judge Webb had previously "clearly ruled" on [Brannon's] motions, "no appeals were ever entered[,]" "no new evidence was presented[,]" and "[t]he pleadings filed . . . [were] repetitious[.]" Clerk Frye declined to rule on motion (d) because she "[did] not have jurisdiction to hear this matter as the jurisdiction is presently under the Federal Bankruptcy Court." [Brannon] appealed clerk Frye's order to Forsyth County Superior Court. For the same reasons decreed by clerk Frye, Judge [Anderson D.] Cromer [(Judge Cromer)] entered an order on 20 November 2012 denying and dismissing with prejudice [Brannon's] motions (a), (b), and (c). Judge Cromer denied [Brannon's] motion (d) with prejudice because it was "baseless." He also granted [appellant's] motion for sanctions.

Id. at 225-26, 754 S.E.2d at 169-70. Brannon appealed the superior court order to this Court on 14 December 2012.

This Court heard the appeal on 20 November 2013 and issued its opinion on 4 February 2014 reversing and remanding to the superior court. *In re Thompson*, 232 N.C. App. 224, 754 S.E.2d 168 (2014). This Court agreed with Brannon's argument that "the incompetency order was invalid because judgment was never entered, and therefore the trial court erred in concluding that the incompetency order was the law of the case." *Id.* at 226, 754 S.E.2d at 170. Specifically, this Court held that the incompetency order was invalid because, although reduced to writing and signed, there was nothing in the record to indicate the order was filed with the clerk of court as required by N.C. Gen. Stat. § 1A-1, Rule 58, and therefore it was not entered. *Id.* at 228, 754 S.E.2d at 171. "Accordingly, the time period to file notice of appeal of clerk Hinshaw's order has not yet commenced. Furthermore, because clerk Hinshaw's

incompetency order is effective only after its entry, the order cannot be the law of the case." *Id.* (internal citation omitted). This Court then held that because the incompetency order was never entered, clerk Hinshaw had no jurisdiction to appoint Thompson as guardian of the estate because "[o]nly once the order is entered shall 'a guardian or guardians . . . be appointed[.]' " *Id.* at 228-29, 754 S.E.2d at 172 (quoting N.C. Gen. Stat. § 35A-1120). The sanctions on Brannon were also reversed. *Id.* at 232, 754 S.E.2d at 174.

After further remand of the matter to the clerk of superior court, Brannon filed a motion and supporting affidavit seeking an order that appellant's actions on behalf of the estate were without legal authority and to prevent appellant from taking further action on behalf of the estate. Brannon also asserted allegations of fraud by Thompson and the clerk's office, specifically clerk Hinshaw and clerk Frye.

A notice of hearing to be held on 10 April 2014 "to address the issuance of orders of incompetency and appointment of guardians" was filed on 3 April 2014 by clerk Frye. A guardian ad litem was appointed to represent respondent on 8 April 2014. On 8 April 2014, appellant filed a motion for continuance and a motion for the recusal of clerk Frye. Prior to the scheduled hearing, on 9 April 2014, clerk Frye entered an order (the Frye Order) that ordered as follows:

1. Order On Petition For Adjudication of Incompetence, dated and originally signed May 3, 2007, and attached hereto is entered *nunc pro tunc* effective May 3, 2007.

2. Order On Application for Appointment of Guardian [o]f [t]he Person, Joe Raymond, Director for the Forsyth County Department of Social Services dated and originally signed May 3, 2007, and attached hereto is entered *nunc pro tunc* effective May 3, 2007.

3. Order Authorizing Issuance of Letters To Bryan C. Thompson, dated and originally signed May 1, 2007, and attached hereto is entered *nunc pro tunc* effective May 3, 2007.

On the same day, petitioner filed a notice of voluntary dismissal. The notice of voluntary dismissal, however, was filed after the Frye Order. In an affidavit filed by petitioner on 15 April 2014, petitioner averred that she attempted to file the notice earlier but it was initially refused by the clerk's office. Petitioner contends the clerk's office refused her notice so that clerk Frye could file the Frye Order before the notice.

On 21 April 2014, Brannon filed two separate notices of appeal and requests for stay—the first from the Frye Order and the second from the individual orders that the Frye Order entered *nunc pro tunc*. Brannon's appeal came on for hearing in Forsyth County before the Honorable William Z. Wood, Jr. (Judge Wood), on 18 August 2014. After the hearing, but before Judge Wood entered a written order, respondent died on 2 October 2014. Judge Wood then entered a written order (the Wood Order) on 24 October 2014. In the Wood Order, Judge Wood found procedural deficiencies in the Frye Order and in Brannon's notices of appeal and requests for stay. Consequently, Judge Wood ordered that "the matter should be remanded to the Clerk of Superior Court to hear evidence and to make appropriate findings as to [respondent's] medical state, both now and if possible, from the medical records as they presently exist in April, 2007."

In a memo to clerk Frye dated 14 November 2014 and filed 17 November 2014, Brannon asserted there was no basis for any further hearings in the matter because guardianship terminated upon the death of respondent. Without mention of Brannon's memo, on 20 November 2014, clerk Frye ordered that Rockingham County Clerk of Superior Court J. Mark Pegram (clerk Pegram) conduct the hearing ordered by Judge Wood in Forsyth County Superior Court on 18 December 2014. Notice of the hearing was given and a guardian ad litem appointed. An amended notice of hearing and order for hearing signed by both clerk Frye and Judge Wood were entered prior to the matter coming on for hearing before clerk Pegram on 18 December 2014. During the hearing, clerk Pegram heard testimony of what witnesses recalled from the 26 April 2007 incompetency hearing. Based on the testimony, clerk Pegram entered an order on 5 February 2015 (the Pegram Order) in which he concluded "that as of April 26, 2007, [respondent], was in fact incompetent."

Brannon filed notice of appeal from the Pegram Order on 12 February 2015 and the appeal came on for hearing in Forsyth County Superior Court before the Honorable Patrice A. Hinnant (Judge Hinnant) on 19 March 2015. On 20 April 2015, Judge Hinnant entered an order (the Hinnant Order) that the Pegram Order "is stricken and has no force or effect[]" and, "[a]s a result of the abatement and lack of a filed stamped order of incompetence, the matter remains at the status determined by the Court of Appeals in its Opinion dated February 4, 2014, and all matters before the Court are dismissed." The Hinnant Order was based on the following findings:

> 1. All parties stipulated in open Court that Mary Ellen Brannon Thompson died on October 2, 2014;

2. On February 4, 2014, the North Carolina Court of Appeals Opinion was entered in this matter wherein the Court of Appeals decision determined that the Order of Incompetency dated May 3, 2007 was not effective or enforceable because it was never entered and therefore it could not be the law of the case. (See COA Feb 4, 2014 Opinion pp 8-9);

3. On April 9, 2015, the Honorable Susan Frye entered an Order that was subsequently overturned on appeal in a hearing on August 18, 2014, by the Honorable William Z. Wood, Jr.;

4. Judge Wood announced his decision in open court on the record and it was entered on October 24, 2014;

5. As stipulated above, Mary Ellen Brannon Thompson died on October 2, 2014;

6. This matter abated on October 2, 2014;

7. The Order pertaining to this matter entered on February 5, 2015 by the Honorable J. Mark Pegram, Rockingham County Clerk of Superior Court, is moot pursuant to N.C. Gen. Stat. Section 35A-1295 which states: (a) Every guardianship shall be terminated and all powers and duties of the guardian provided in Article 9 of this Chapter shall cease when the ward: (3) Dies. (See also: *In re Higgins* 160 N.C. App. 704 (2003)).

8. In accordance with the Court of Appeals February 4, 2014 decision, the May 3, 2007 Order of Incompetency is not the law of the case because it was not entered pursuant to the Court of Appeals decision or prior to the matter abating on October 2, 2014.

Following the entry of the Hinnant Order, on 21 April 2015, Brannon filed a "Notice of Claim on Bond for Bryan Thompson" with the clerk's office. The notice asserted that appellant "was never authorized to act as guardian of [respondent's] estate[,]" notified the clerk's office that the estate was seeking payment for the unbonded balance of the estate, and indicated the estate was willing to discuss resolution prior to suit.

On 20 May 2015, appellant filed notice of appeal from the Hinnant Order.

II. Discussion

Now on appeal, appellant challenges the orders entered after respondent died on 2 October 2014. Specifically, appellant argues that the trial court lacked subject matter jurisdiction to enter the Hinnant Order, and any other substantive orders, after respondent's death because the matter abated upon respondent's death on 2 October 2014. We agree and note that even the Hinnant Order, whether or not proper, ordered the Pegram Order "stricken" based on findings that the Pegram Order, entered 5 February 2015, was moot because the matter abated on 2 October 2014. In the Hinnant Order, the trial court cited N.C. Gen. Stat. § 35A-1295, which provides, in pertinent part, that "[e]very guardianship shall be terminated and all powers and duties of the guardian provided in Article 9 of this Chapter shall cease when the ward . . . [d]ies." N.C. Gen. Stat. § 35A-1295 (2015).

In addition to the mandate in N.C. Gen. Stat. § 35A-1295, this Court has addressed the abatement of incompetency proceedings in both *In re Higgins*, 160 N.C. App. 704, 587 S.E.2d 77 (2003), and *In re Nebenzahl*, 193 N.C. App. 752, 671 S.E.2d 71 (2008) (unpublished), available at 2008 WL 4911269.

In *Higgins*, the petitioner sought to have the respondent, her brother, declared incompetent. 160 N.C. App. at 705, 587 S.E.2d at 77. The petition for adjudication of incompetence, however, was dismissed by both the clerk and the superior court and the petitioner appealed to this Court. *Id.* Yet, during the pendency of the appeal, the respondent died. *Id.* at 706, 587 S.E.2d at 78. Instead of addressing the petitioner's arguments, this Court found "the dispositive issue [was] whether, when the trial court dismisses a petition for adjudication of incompetence, the action abates upon the death of the respondent during the pendency of the petitioner's appeal." *Id.* We held that the action did not survive. *Id.* In so holding, this Court first noted that " '[n]o action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives.' " *Id.* (quoting N.C. R. App. P. 38(a)). This Court then looked to N.C. Gen. Stat. § 28A-18-1 to determine whether the cause of action survived the respondent's death. *Id.* That statute, which remains the same in all material respects, now provides as follows:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of the person's estate.

(b) The following rights of action in favor of a decedent do not survive:

(1) Causes of action for libel and for slander, except slander of title;

(2) Causes of action for false imprisonment;

(3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

N.C. Gen. Stat. § 28A-18-1 (2015). After deciding the third exception in subsection (b) was the only applicable exception, this Court looked to the purpose of incompetency proceedings to determine whether the relief could not be enjoyed, or granting it would be nugatory after death. *Higgins*, 160 N.C. App. at 706-707, 587 S.E.2d at 78. Recognizing that the purpose of incompetency proceedings is to adjudicate an individual incompetent and to appoint a guardian to help the incompetent individual exercise their rights, this Court determined "the result that the petition seeks to accomplish is no longer necessary after a respondent dies." *Id.* at 707, 587 S.E.2d at 79. Thus, this Court held "a petition to declare a respondent incompetent does not survive the death of the respondent under N.C. Gen. Stat. § 28A-18-1. Thus, the appeal [in *Higgins*] abated upon the . . . death of the respondent . . . [and] has become moot and [was] accordingly dismissed." *Id.*

Similarly, in *Nebenzahl*, the petitioner sought to have the respondent, her husband, declared incompetent. 2008 WL 4911269, at *1. After the respondent's son's motion to dismiss the petition was stricken by the clerk, the respondent was determined to be incompetent. *Id.* The son's appeal to superior court was dismissed and the son appealed again to this Court. *Id.* Yet, the respondent died during the pendency of the appeal. *Id.* In dismissing the appeal as moot, this court relied on *Higgins*, but also addressed the son's argument "that either (1) vacating the order adjudicating [the r]espondent incompetent and appointing [the p]etitioner as guardian or (2) reversing the order dismissing [the son's] appeal would render the appointment of the guardian void *ab initio*, as if the guardianship never existed[,]" and "would subject any action taken by [the p]etitioner while acting as [the r]espondent's guardian to legal challenge." *Id.*, at *3. This Court, however, found no support for the son's arguments and "conclude[d], as [it] held in *Higgins*, that [the son's] appeal of the order adjudicating [the r]espondent incompetent abated with [the r]espondent's death." *Id.*, at *3. Although *Nebenzahl* is unpublished, we find it persuasive in the present case where it appears

respondent's estate seeks to recover for the actions of appellant while acting as guardian of the estate.

What is clear from the holdings of *Higgins* and *Nebenzahl* is that the incompetency proceedings abate upon the death of respondent because the proceedings no longer serve the purpose of protecting respondent's rights and are moot. *See Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dept. of Health and Human Servs.*, __ N.C. App. __, __, 776 S.E.2d 329, 333 (2015) ("A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.") (internal quotation marks and citation omitted). Thus, in the present case, the incompetency proceedings abated upon respondent's death on 2 October 2015 when the matter became moot. The trial court did not retain subject matter jurisdiction over the moot proceedings after that time. *See Id.* ("[A] moot claim is not justiciable, and a trial court does not have subject matter jurisdiction over a non-justiciable claim[.] Moreover, [i]f the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action for lack of subject matter jurisdiction.") (internal quotation marks and citations omitted).

The last order entered before respondent died and the matter abated was the Frye Order entered 9 April 2014. Although the hearing before Judge Wood occurred prior to respondent's death, applying this Court's analysis from the prior appeal in this case, it is clear the Wood Order was not entered until it was signed, dated, and filed with the clerk on 24 October 2014, after the matter abated. *Thompson*, 232 N.C. App. at 228, 754 S.E.2d at 171 (discussing the requirements of N.C. Gen. Stat. § 1A-1, Rule 58). Because the trial court lacked jurisdiction following the abatement of the incompetency proceedings, all orders entered after respondent's death—the Wood Order, the Pegram Order, and the Hinnant Order—are invalid and of no consequence.

Brannon does not argue that the matter did not abate, or that the trial court had jurisdiction, in response to appellant's argument that the trial court lacked jurisdiction to enter orders in the incompetency proceedings following respondent's death. Instead, Brannon asserts that this Court lacks subject matter jurisdiction and the appeal should be dismissed because appellant lacks standing to challenge the Hinnant Order. *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) ("Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction.") (internal quotation marks and citation omitted). Brannon contends appellant lacks standing because this Court's 4 February 2014 opinion in the prior

appeal in this case determined that appellant's appointment as guardian of the estate was without legal authority because the incompetency order dated 3 May 2007 was never entered and, therefore, not the law of the case.

Brannon's initial argument, however, ignores the Frye Order that re-entered the incompetency and guardianship orders *nunc pro tunc* 3 May 2007 after this Court's 4 February 2014 opinion. This is because Brannon further asserts that the Frye Order is invalid *ab initio*. In support of his assertion, Brannon alleges the clerk's office acted with bias and in dereliction of its duties to perpetuate fraud. However, Brannon's allegations of fraud were not litigated below and will not be decided for the first time on appeal.

Both parties recognize that the trial court has the inherent authority to correct clerical errors in the record to make it "speak the truth." *State v. Dixon*, 139 N.C. App. 332, 337-38, 533 S.E.2d 297, 302 (2000). Furthermore, both parties include the following statement of the law, verbatim, in their appellate briefs:

> In any case where a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk, the court has power to order that the judgment be entered *nunc pro tunc*, provided the fact of its rendition is satisfactorily established and no intervening rights are prejudiced. *State v. Trust Co. v. Toms*, 244 N.C. 645, 650, 94 S.E.2d 806, 810 (1956) (internal citations omitted); *Elmore v. Elmore*, 67 N.C. App. 661, 665, 313 S.E.2d 904, 908 (1984); *In re Watson*, 70 N.C. App. 120, 318 S.E.2d 544 (1984) (describing Clerk's authority under G.S. § 7A-103(9) as a "broad grant" of power which necessarily includes entry of orders *nunc pro tunc*.).

Brannon, however, contends that the error in the case is legal in nature and not clerical because this Court previously held the incompetency order dated 3 May 2007 was not the law of the case and, therefore, the clerk lacked jurisdiction to appoint appellant as guardian of the estate.

While Brannon is correct that we held the clerk lacked jurisdiction to appoint appellant as guardian of the estate, *Thompson*, 232 N.C. App. at 228-29, 754 S.E.2d at 172, that determination was solely the result of this Court's holding that the incompetency order was not the law of the case. But this Court's decision that the incompetency order was not the law of the case was based solely on the fact that the incompetency

order was never filed and, therefore, never properly entered. *Id.* at 228, 754 S.E.2d at 171. We hold that failing to properly enter the incompetency order is a clerical error that the clerk has the authority to correct, *nunc pro tunc*. Thus, the clerk did not err, or act contrary to this Court's 4 February 2014 opinion, when it entered the Frye Order on 9 April 2014. *See In re English*, 83 N.C. App. 359, 363, 350 S.E.2d 379, 382 (1986) ("[T]he [c]lerk is authorized by statute to [o]pen, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court. This broad grant includes the power to correct orders entered erroneously, whenever the [c]lerk's attention is directed to the error by motion or *by other means*.") (internal quotation marks and citations omitted). Once the incompetency order is properly filed and entered, jurisdiction to appoint a guardian certainly follows.

Because the Frye Order re-entered the incompetency and guardianship orders, appellant was guardian of the estate and had standing to appeal the Hinnant Order.

Appellant also raises substantive issues with the Hinnant Order on appeal. Yet, because we have held that the Hinnant Order is invalid because the matter abated upon respondent's death, we need not address the merits of appellant's other arguments. We simply take this opportunity to reiterate that the Wood Order, the Pegram Order, and the Hinnant Order were all entered after the incompetency proceedings became moot and abated. Consequently, the trial court lacked jurisdiction to enter the orders and the orders must be vacated.

III. Conclusion

For the reasons discussed above, all orders entered after the matter abated upon the death of respondent on 2 October 2014 are vacated. The last valid order is the Frye Order, which entered the incompetency and guardianship orders, *nunc pro tunc* 3 May 2007, on 9 April 2014.

VACATED.

Judges STEPHENS and ZACHARY concur.

KANELLOS v. KANELLOS

[251 N.C. App. 149 (2016)]

STASIE KANELLOS, PLAINTIFF
v.
IOANNIS JOHN KANELLOS, DEFENDANT

No. COA16-416

Filed 20 December 2016

1. Appeal and Error—interlocutory orders and appeals—final child custody and visitation order

Plaintiff's appeal from an interlocutory child custody order was immediately appealable under N.C.G.S. § 50-19.1. The child custody order was permanent since all issues relating to child custody and visitation had been resolved.

2. Child Custody and Support—order compelling mother to live in specific county and house—abuse of discretion

The trial court abused its discretion in a child custody case by requiring plaintiff mother to relocate to the former marital residence in Union County. The order was vacated to the extent it purported to compel plaintiff to reside in a specific county and house, because those matters fell outside the scope of authority granted to the district court in a child custody action.

Appeal by Plaintiff from order entered 2 February 2016 by Judge Joseph Williams in Union County District Court. Heard in the Court of Appeals 4 October 2016.

J. Clark Fischer for Plaintiff.

John T. Burns for Defendant.

STEPHENS, Judge.

Plaintiff appeals from an interlocutory order making an initial permanent child custody determination, contending that the district court erred in ordering Plaintiff and the parties' children to move back to the county where the parties lived before their separation, and to reside there in the former marital residence. We vacate the challenged order to the extent it purports to compel Plaintiff to reside in a specific county and house, because those matters fall outside the scope of authority granted to the district court in a child custody action.

Factual and Procedural Background

On 1 July 2014, Plaintiff Stasie Kanellos filed a complaint for child custody, child support, postseparation support, alimony, equitable distribution, and attorney's fees against Defendant Ioannis "John" Kanellos. The parties were married on 27 March 2007, and the union produced two children, a boy and a girl. On 25 June 2014, John moved out of the residence. The child custody matter came on for hearing on 23 September 2015, in Union County District Court, the Honorable Joseph Williams, Judge presiding. On 2 February 2016, the district court entered its child custody order.

Before the marriage, John owned a restaurant in Monroe and a house located at 8220 Sunset Hill Road in Waxhaw. Both towns are located in Union County. Following their marriage in May 2007, the parties resided in the Sunset Hill Road residence. Following the birth of her children, Stasie did not work outside of the home, and, although Stasie's mother would travel from her home in Lewisville to assist with child care, attend doctor's appointments, and clean the home, Stasie provided "90% of the child care for the two children." The evidence indicated that a frequent daily routine was for John to arrive home after work, take a short nap, spend one hour with the children, and then leave to go work out at the gym. Stasie also regularly took the children to Lewisville for several days at a time. During the course of the marriage, John was discovered to be having an extra-marital relationship, and, after first trying to repair the marriage though counseling, Stasie asked John to leave the marital residence. The parties agreed that John could spend time with the children on Wednesdays and alternating weekends, Fridays to Sundays. Still, the parties' relationship was strained: Stasie texted John that "the kids do not give a sh*t about you and are dead to you," told John that he did not deserve the kids, and told the eldest child that his father did not want to talk to him and that John was not his father. At the time of the 23 September 2015 hearing, Stasie and the children lived with Stasie's mother in Lewisville, the children were enrolled in school there, and Stasie had obtained employment in nearby Winston-Salem. Prior to relocating to Lewisville, Stasie had discussed the move with John, who objected. John asked Stasie to allow the children to stay with him every other week during the summer, but Stasie refused. Stasie also rejected John's request for additional visitation time for beach weekends. At some point after the parties' separation, John also relocated, moving from Waxhaw, in Union County, to Charlotte, in Mecklenburg County.[1]

1. At the hearing, John testified that he and the children would live in the former marital residence if he gained primary custody, but in his brief to this Court, John's

John testified that the three-hour travel time to the Lewisville area made it difficult for John to attend his son's 8:30 a.m. Saturday soccer games.

In its 2 February 2016 order, the district court concluded that both parties were fit and proper persons to have custody of the children, and thus, awarded the parties joint legal custody, with Stasie having primary physical custody and John enjoying visitation on alternating weekends. The court further determined that it was in the best interest of the children that they reside in Union County. Accordingly, the court ordered that Stasie and the children move back to Union County and live in the former marital residence, and that John continue to pay the mortgage and utilities for the home. From the custody order, Stasie appeals, arguing that the trial court abused its discretion by requiring that she relocate to the former marital residence in Union County. Stasie emphasizes that, at the time of the custody hearing, neither she nor John had resided in Union County for over a year, and contends that, where the children were settled in Forsyth County, the move would be highly disruptive to them.

Grounds for Appellate Review

[1] Initially, we must consider whether this interlocutory appeal is properly before us. Our review of the record in this matter and pertinent case law indicates that the 2 February 2016 order from which Stasie appeals is a permanent or "final" order as to child custody, and, thus, immediately appealable under our General Statutes.

"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. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (citation omitted), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "Generally, there is no right to appeal from an interlocutory order." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citations omitted). However, in 2013, our General Assembly enacted section 50-19.1, which provides:

> *Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for* absolute divorce, divorce from bed and board, *child custody*, child support, alimony, or equitable distribution *if the order or judgment*

---

appellate counsel states that John lived with his own parents in Charlotte at the time of the hearing.

> *would otherwise be a final order or judgment within the meaning of* [*section*] *1A-1, Rule 54(b), but for the other pending claims in the same action.*

N.C. Gen. Stat. § 50-19.1 (2015). In turn, under Rule 54(b) of our Rules of Civil Procedure, "[w]hen more than one claim for relief is presented in an action, . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . only if there is no just reason for delay and it is so determined in the judgment." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015). A judgment with a Rule 54(b) certification from the trial court is then immediately appealable. *Id.* The initial question for this Court is thus whether the order from which Stasie appeals is a final order as to child custody.

> In one sense, all child custody orders are temporary: they are subject to modification, and they terminate once the child reaches the age of majority. Yet a distinction is drawn in our statutes and in our case law between temporary or interim custody orders and permanent or final custody orders.
>
> A permanent custody order establishes a party's present right to custody of a child and that party's right to retain custody indefinitely. Permanent custody orders arise in one of two ways. If the necessary parties have entered into an agreement for permanent custody, and the trial court enters a consent decree which contains that agreement, the consent decree is a permanent custody order. In all other cases, permanent custody orders are those orders that resolve a contested claim for permanent custody of a child by granting permanent custody to one of the parties. They are issued after a hearing of which all parties so entitled are notified and at which all parties so entitled are given an opportunity to be heard.
>
> In contrast, temporary custody orders establish a party's right to custody of a child pending the resolution of a claim for permanent custody—that is, pending the issuance of a permanent custody order.

Regan v. Smith, 131 N.C. App. 851, 852-53, 509 S.E.2d 452, 454 (1998) (citations and internal quotation marks omitted).

"There is no absolute test for determining whether a custody order is temporary or final. A temporary order is not designed to remain in

effect for extensive periods of time or indefinitely." *Miller v. Miller*, 201 N.C. App. 577, 579, 686 S.E.2d 909, 911 (2009) (citations, internal quotation marks, and ellipses omitted). Generally, a child custody "order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (citations omitted). "If the order does not meet any of these criteria, it is permanent." *Peters v. Pennington*, 210 N.C. App. 1, 14, 707 S.E.2d 724, 734 (2011) (citation omitted). Further, it is the satisfaction of these criteria, or lack thereof, and not any designation by a district court of an order as temporary or permanent which controls. *See Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000); *see also Woodring v. Woodring*, 227 N.C. App 638, 643, 745 S.E.2d 13, 18 (2013) ("A trial court's designation of an order as 'temporary' or 'permanent' is neither dispositive nor binding on an appellate court.") (citation omitted).

Where this Court has determined that a child custody order is temporary because it did not "determine all the issues[,]" the remaining, undecided issues were child custody matters such as legal custody, ongoing holiday schedules, and the scope of visitation for the noncustodial parent. *See*, *e.g.*, *id.* at 644, 745 S.E.2d at 18 ("[The] order [appealed from] did not address [the] father's ongoing visitation, but rather provided [the] father with only three specific instances of *visitation* in 2010. Nor did the . . . order explicitly address *legal custody*. Thus, the order [did] not determine all the issues and was a temporary order." (citation and internal quotation marks omitted; emphasis added); *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (holding a custody order was temporary and did not determine all the issues because "it did not resolve *holidays* for the indefinite future") (emphasis added), *cert. denied*, *disc. review denied*, *and appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012); *Simmons v. Arriola*, 160 N.C. App. 671, 675, 586 S.E.2d 809, 811 (2003) ("The initial order in the present case does not specify *visitation* periods and, therefore, is incomplete and cannot be considered final." (emphasis added)); *see also Anzures v. Walbecq*, 781 S.E.2d 531 (2016) (unpublished), *available at* 2016 N.C. App. LEXIS 26 (holding a custody order was temporary because it did not resolve holiday schedules indefinitely and covered visitation only for a brief period). On the other hand, the Court has concluded that a custody order was permanent if all issues relating to child custody had been resolved, even if other matters remained pending. *See*, *e.g.*, *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546 (holding that an order was permanent because, *inter alia*, "the

court resolved *every issue dealing with custody*"). Likewise, the plain language of section 50-19.1 permits immediate appeal where an order "would otherwise be a final order . . . , but for the other pending claims in the same action." N.C. Gen. Stat. § 50-19.1. Thus, the clear intent of our General Assembly in enacting the statute was to permit immediate appeal of, *inter alia*, permanent child custody orders *despite the existence of still-pending claims* in the matter not related to custody.

The order here resolves *all issues related to child custody*, providing for the parties to share joint custody, with primary physical custody to Stasie, and sets out a detailed schedule for visitation and holidays that covers the indefinite future:

> A. The parties are awarded Joint Custody and [the children] shall reside primarily with the Plaintiff/Mother.
>
> B. The Defendant/Father shall have visitation on alternating weekends from Friday when school is out until Monday when school takes back in and on each Wednesday evening from the time school let[s] out until 8:00pm.
>
> C. The Defendant/Father shall have four non-consecutive weeks summer visitation and select his weeks by February 1 of each year.
>
> D. The Defendant/Father is to have the children in odd numbered years from 2pm Christmas [D]ay to 2pm New Year's [D]ay; the Plaintiff/Mother is to have the children for a like time period in the odd numbered years and Defendant/Father shall have the children in even numbered years from the time school is out for the Christmas break until 2pm Christmas Day; the Plaintiff/Mother is to have the children for a like period of time in the odd numbered years.
>
> E. The Defendant/Father is to have the children on Union County Spring/Easter school break during even numbered years and odd years the fall break for [the] Union County school system.
>
> F. The children are to be with the Plaintiff/Mother Thanksgiving from [the] time school is out until 3pm Friday and the remainder of the Thanksgiving weekend with the Defendant/Father.

> G. The Defendant/Father shall in addition have the following:
>
> Visitation in odd years
>
> 1. Martin Luther King, Jr. Holiday from Friday-Monday; to begin at school recess on Friday and continue until 6pm on Monday.
>
> 2. Memorial Day from school recess on Friday before holiday until 6pm of Memorial Day.
>
> 3. Independence Day/4th of July school recess (if school is in session) until 6pm of night before school is back in session[.]
>
> 4. Minor child's birthday from school recess (if school is in session) until 8:30pm.
>
> Visitation in even years
>
> 1. Easter break from school recess until 6pm of the night before school resumes.
>
> 2. Labor Day from school recess until 6pm the night before school resumes.
>
> H. Mother's Day to the Mother in all years from 10am until 6pm to supersede any other Visitation. Father's Day to the Father in all years from 10am until 6pm to supersede any other Visitation.

Because the order resolves *all issues regarding custody and visitation*, was not "entered without prejudice to either party[,]" and does not "state[] a clear and specific reconvening time[,]" *see Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677, it is a permanent order and therefore immediately appealable under section 50-19.1. Accordingly, Stasie's appeal is properly before this Court on the merits.

Merits of Stasie's Appeal

[2] On appeal, Stasie argues that the district "court abused its discretion by requiring [Stasie] to relocate to the former marital residence in Union County, when the undisputed evidence was that neither party had lived in Union County for over a year and the move would be highly disruptive to the children who were settled in Forsyth County with [Stasie] and her family." We agree that the portion of the district court's order purporting

to order Stasie to reside in Union County in the former marital residence must be set aside.

Following the custody, visitation, and holiday provisions quoted above, the court ordered:

> I. Until the remaining issues are heard on the merits, the children are to live in Union County, North Carolina and the Defendant/Father is to continue to pay the mortgage and utilities at the former marital residence. The Plaintiff shall return to live with the children on or before March 1, 2016.

By its plain language, this portion of the order purports to order Stasie and the children to move back to Union County from their current home in Forsyth County.[2] Although the issue of whether our district courts can order a party in a child custody proceeding to relocate to a specific location is a matter of first impression in this State, the pertinent statutory and case law leads us to conclude that the district court here acted in excess of its powers. Accordingly, we vacate paragraph I of the order.

Resolution of this appeal requires disentanglement of two closely related, yet distinct matters: the authority of a court in a child custody case (1) to award primary custody of a child and order visitation and (2) to control where a parent involved in a child custody matter may live. While the former is within the court's discretion, the latter is beyond the scope of the district court's authority.

Chapter 50 of our General Statutes provides: "An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2015). In fulfilling this directive, a district court retains significant discretion:

> The statute expresses the policy of the State that the best interest and welfare of the child is the paramount and controlling factor to guide the judge in determining the custody of a child. . . .
>
> In upholding the order of the [district] court we recognize that custody cases generally involve difficult decisions.

---

2. As noted *supra*, at the time the order was entered, no party lived in Union County: the children resided with Stasie in Forsyth County and John resided in Mecklenburg County.

> The [district court] judge has the opportunity to see the parties in person and to hear the witnesses. It is mandatory, in such a situation, that the [district court] judge be given a wide discretion in making his determination, and it is clear that his decision ought not to be upset on appeal absent a clear showing of abuse of discretion.

In re Stancil, 10 N.C. App. 545, 548, 179 S.E.2d 844, 847 (1971) (citation and internal quotation marks omitted).

However, while

> [i]t is well established that [district court] judges are vested with wide discretion in determining matters concerning child custody[,] . . . . [t]he . . . judge's discretion . . . can extend no further than the bounds of the authority vested in the . . . judge. *In proceedings involving the custody . . . of a minor child, the . . . judge is authorized to determine the party or parties to whom custody of the child shall be awarded, whether and to what extent a noncustodial person shall be allowed visitation privileges, . . . whether an order for child custody or support shall be modified or vacated based on a change in circumstances, and certain other related matters*. In addition, . . . judges have authority to enforce orders concerning child custody . . . by the methods set forth in [our General Statutes].

Appert v. Appert, 80 N.C. App. 27, 34, 341 S.E.2d 342, 346 (1986) (citations omitted; emphasis added) (holding that "trial judges in this State do not have authority to condition the receipt or payment of child support upon compliance with court-ordered visitation"). In other words, in child custody cases, the General Assembly has granted our district courts broad discretion and authority to (1) award custody of a child (and enforce such awards), (2) order visitation for the noncustodial parent,[3] and (3) resolve "certain other related matters." *Id.*; *see also* N.C. Gen. Stat. § 50-13.2(b) ("Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child.").

Here, the district court determined, in its discretion, that the best interest of the children was served by awarding primary physical

3. Chapter 50 also contains provisions for custody and visitation for nonparent parties, such as grandparents, in certain circumstances, but because those provisions are neither relevant nor informative in this matter, we do not discuss them herein.

custody to Stasie, with significant visitation provided to John. That decision is not contested by either party. The question before this Court is whether ordering Stasie and the children to relocate to Union County is the type of "related matter" or "term" that forms the third major prong of a district court's authority in resolving a child custody dispute.

Certainly, child custody orders may include directives that facilitate an ordered custody and visitation plan. *See*, *e.g.*, *Meadows v. Meadows*, __ N.C. App. __, __, 782 S.E.2d 561, 569 (2016) (approving term that a parent's visits be supervised and take place at a specific location to facilitate that supervision); *Burger v. Smith*, __ N.C. App. __, __, 776 S.E.2d 886, 894 (2015) (approving a trial court's ruling that, during periods of scheduled visitation, the noncustodial parent could travel with the child to Malawi where he worked as a missionary); *Gerhauser v. Van Bourgondien*, 238 N.C. App. 275, 277, 767 S.E.2d 378, 381 (2014) (noting in passing that a custody order "included provisions regarding payment for the children's travel expenses for visitation"); *Anderson v. Lackey*, 166 N.C. App. 279, 603 S.E.2d 168 (2004) (unpublished), *available at* 2004 N.C. App. LEXIS 1711 (reviewing an order of contempt where a custodial parent allegedly violated terms of a custody order requiring, *inter alia*, that she deliver the child to the other parent for visits and discuss those visits in a positive manner with the child). Further, district court judges regularly resolve disputes that directly implicate a child's relationship with each parent or academic and other activities. *See*, *e.g.*, *Cunningham v. Cunningham*, 171 N.C. App. 550, 561, 615 S.E.2d 675, 683 (2005) (approving a restriction barring the mother from using a specific babysitter who had been "interfering" with the children's relationship with their father); *Elrod v. Elrod*, 125 N.C. App. 407, 411, 481 S.E.2d 108, 111 (1997) (holding that a district "court in a child custody proceeding is not precluded from prohibiting in some circumstances, as a condition of the custody grant, the home schooling of the children") (citations omitted); *MacLagan v. Klein*, 123 N.C. App. 557, 565, 473 S.E.2d 778, 787 (1996) (affirming the district court's ruling regarding disputes over a child's religious training), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 170 (1997). However, we have found no case in this State wherein a district court judge purported to order a custodial parent and the minor children to move from one county to another and to live in a specific house.

To be sure, our courts regularly consider the relocation (or proposed relocation) of custodial parents when deciding whether to modify existing child custody orders.[4]

4. Modification of child custody awards is a two-step process. "A court order for custody of a minor child may be modified. . . . [if] the moving party shows there has been a

> In these . . . instances the question arises whether the person having custody of a child or to whom custody would otherwise be granted is to be tied down permanently to the state which awards custody. . . . The . . . court must make a comparison between the two applicants considering all factors that indicate which of the two is best-fitted to give the child the home-life, care, and supervision that will be most conducive to its well-being.
>
> In evaluating the best interests of a child in a proposed relocation, the . . . court may appropriately consider several factors including: The advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

Evans v. Evans, 138 N.C. App. 135, 141-42, 530 S.E.2d 576, 580 (2000) (citation and internal quotation marks omitted). As reflected in this language from *Evans*, where a custodial parent has moved or plans to do so and the noncustodial parent objects, our district courts have the authority to consider the factors quoted above and make an award of custody accordingly. That is, a court may determine either (1) that custody should remain with a parent who has relocated or (2) that it is in the child's best interest to switch custody to the parent who has not relocated. *See, e.g.*, *Green v. Kelischek*, 234 N.C. App. 1, 17, 759 S.E.2d 106, 116 (2014) (finding no abuse of discretion in a district "court's decision to modify the existing custody order such that [the former noncustodial parent] is entitled to school year custody of [the child] if [the former custodial parent] moves to Oregon"); *O'Connor v. Zelinske*, 193 N.C. App. 683, 691, 668 S.E.2d 615, 620 (2008) (finding no abuse of discretion in declining to change primary custody while allowing the custodial parent "the option to relocate to Minnesota. . . . [where] the advantages to

---

substantial change in circumstances affecting the welfare of the minor child. . . . Once . . . a substantial change in circumstances [is shown] . . ., the . . . court must determine whether a change in custody is in the best interest of the child." *Browning v. Helff*, 136 N.C. App. 420, 423-24, 524 S.E.2d 95, 98 (2000) (citations, internal quotation marks, some ellipses, and some brackets omitted).

the children outweigh the disadvantages"); *Cunningham*, 171 N.C. App. at 561-62, 615 S.E.2d at 684 (finding no abuse of discretion in declining to change primary custody where the custodial parent planned a possible move out of state in the future). Thus, if a court with jurisdiction in a child custody matter believes that a parent's relocation is not in the child's best interest, its recourse is to award primary custody to the other parent, as did the court in *Green*. 234 N.C. App. at 17, 759 S.E.2d at 116. However, district courts do not have authority to order that *a parent relocate* (or refrain from doing so).

Our district courts may consider *where each parent lives*, along with any other pertinent circumstances, in determining which parent should be awarded primary custody to facilitate the child's best interest. *See Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974) (noting that the district court "judge's concern is to place the child in an environment which will best promote the full development of his physical, mental, moral and spiritual faculties") (citations omitted). Put simply, a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options *as they exist*, and then choose which is in the child's best interest. *See Stanback v. Stanback*, 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965) ("A judgment awarding custody is *based upon the conditions found to exist at the time it is entered.*") (emphasis added). However, a court cannot order a parent to relocate in order to create a "new and improved" third option, even if the district court sincerely believes it would be in the child's best interest.

In sum, the district court here was free to make findings of fact regarding the relative benefits to the children of living with John in Mecklenburg County or with Stasie in Forsyth County, and to rely on those factual findings in deciding which parent should have primary physical custody. If the court believed Stasie's residence in Forsyth County rendered her the less beneficial choice to have primary custody of the children, it had the discretion to award primary custody to John. However, the court acted outside the scope of its authority in purporting to compel Stasie and the children to move back to Union County and reside in the former marital residence. Accordingly, we vacate paragraph I of the order.

VACATED IN PART.

Judge CALABRIA concurs.

Judge BRYANT concurs in result only.

LOPP v. ANDERSON

[251 N.C. App. 161 (2016)]

FREDERICK SAMUEL LOPP, Plaintiff
v.
JOEL ANDERSON, Individually and in his Official Capacity; KENT WINSTEAD, SHERIFF OF FRANKLIN COUNTY, in his Official Capacity; FRANKLIN COUNTY; GARRETT STANLEY, Individually and in his Official Capacity; ANDY CASTANEDA, Individually and in his Official Capacity; SHERRI BRINKLEY, Individually and in her Official Capacity; LOUISBURG POLICE DEPARTMENT; and THE TOWN OF LOUISBURG, Defendants

Nos. COA16-111 and COA16-112

Filed 20 December 2016

1. Appeal and Error—preservation of issues—failure to argue—sovereign immunity

Because plaintiffs failed to properly argue that relevant insurance policies served to waive sovereign immunity with respect to defendants Franklin County, Town of Louisburg, Louisburg Police Department, or defendants Joel Anderson, Garrett Stanly, Andy Castaneda, Sherri Brinkley, and Kent Winstead, acting in their official capacities, any such arguments were abandoned.

2. Appeal and Error—preservation of issues—failure to argue

Plaintiffs abandoned additional arguments including that Franklin County can be held liable for the acts of its elected sheriff or his deputies and any issues regarding defendant Louisburg Police Department based on failure to argue.

3. Police Officers—individual capacity claims—malice—public official immunity

The trial court erred by granting summary judgment in favor of defendant officers Garrett Stanly, Andy Castaneda, Sherri Brinkley, and Joel Anderson, in their individual capacities. The evidence raised an issue of material fact concerning whether defendant officers acted with malice in regard to Roddie's claims. However, the trial court did not err by granting summary judgment in favor of defendant officers Brinkley and Castaneda, in their individual capacities, based upon public official immunity, for Frederick's claims.

4. Police Officers—individual capacity claims—assault—battery—false imprisonment—malicious prosecution—sufficiency of evidence

The trial court erred by granting summary judgment in favor of all defendant officers. There was sufficient evidence, when viewed in the light most favorable to plaintiffs, to survive defendants' motions

for summary judgment on the individual capacity claims of assault and battery, false imprisonment, and malicious prosecution against all defendant officers in Roddie's action, and against Officer Stanly and Deputy Anderson in Frederick's action.

Appeal by Plaintiffs from orders entered 3 November 2015 by Judge Robert H. Hobgood in Superior Court, Franklin County. Heard in the Court of Appeals 22 August 2016.

Stainback, Satterwhite & Zollicoffer, PLLC, by Paul J. Stainback, for Plaintiffs-Appellants.

Womble Carlyle Sandridge & Rice, LLP, by Christopher J. Geis, for Defendants-Appellees Joel Anderson, Sheriff Kent Winstead, and Franklin County.

Pinto Coates Kyre & Bowers, PLLC, by Richard L. Pinto and Andrew G. Pinto, for Defendants-Appellees Garrett Stanley, Andy Castaneda, Sherri Brinkley, Louisburg Police Department, and Town of Louisburg.

McGEE, Chief Judge.

I. *Facts*

The events relevant to this appeal occurred on 28 June 2009. On that date, Roddie McKinley Lopp ("Roddie") lived with his parents, Mary Lopp and Frederick Samuel Lopp ("Frederick") (Frederick together with Roddie, "Plaintiffs") in Louisburg. Roddie had two young children ("the children"), whose mother was Jodie Braddy ("Jodie"). Roddie and Jodie never married, and Jodie subsequently married Doug Braddy ("Doug"). On 28 June 2009, Roddie and Jodie shared custody of the children under the terms of a custody order. Pursuant to this custody order, Roddie was to deliver the children to Jodie by 6:00 p.m. on 28 June 2009. Deviation from established transfer times could only be made by the "mutual consent" of Roddie and Jodie. Roddie contends his attorney spoke with Jodie's attorney prior to 28 June 2009, and an agreement was reached whereby Roddie would keep the children past 28 June 2009 to make up for times when Jodie had kept the children during Roddie's custodial periods. The record includes nothing beyond Roddie's testimony and affidavit supporting the existence of this agreement.

According to Jodie, after Roddie failed to appear by 6:00 p.m. on 28 June 2009, Jodie decided to drive to the Louisburg Police Department for assistance in retrieving the children. Jodie brought the custody order with her, which she showed to police officers. Jodi asked for assistance from the officers because she was worried that Roddie "could possibly get violent because [she and Roddie] had had such a physical history." Jodie also informed the officers that Roddie kept firearms in his house. After speaking with the on-duty magistrate, an officer informed Jodie that the Louisburg police would assist her.

Officers Garrett Stanly[1] ("Officer Stanly"), Andy Castaneda ("Officer Castaneda"), and Sherri Brinkley ("Officer Brinkley") were in the parking lot of the police station preparing to leave for Plaintiffs' house when Deputy Joel Anderson ("Deputy Anderson") of the Franklin County Sheriff's Department (Deputy Anderson, along with the above three officers "Defendant Officers"), passed by and agreed to join them. Defendant Officers headed to Plaintiffs' house, and Jodie and Doug followed in their own automobile.

The following is Roddie's account of the events that occurred at his home on 28 June 2009. Defendant Officers approached Roddie in his yard and "proceeded to confront him and insisted upon the return of the children to Jodi[e.]" Roddie told Defendant Officers that he wanted to call his attorney so his attorney could explain that an agreement had been reached allowing Roddie to keep the children for some extra period of time. According to Roddie's deposition testimony, he told Defendant Officers: " 'Well, I'm going to go in and call . . . my attorney and then get a copy of the consent order and show you.' " Roddie testified: "There was [sic] no words after that. All four of them took me down, beat me, kicked me, assaulted me." Roddie testified that he had done nothing to provoke Defendant Officers, and that all four Defendant Officers "assaulted" him. Roddie testified that all four Defendant Officers punched and kicked him as he was lying on the ground and already handcuffed. Roddie further testified that he believed Deputy Anderson attempted to shock him with a stun gun as Roddie was "getting into the [police] car[,]" even though he was not resisting. According to Roddie, Deputy Anderson placed his stun gun on him, and he felt a small "jolt," but "not like what

1. Although his name is written as "Garrett Stanley" on the complaint, orders granting summary judgment, and on notices of appeal, in his affidavit Officer Stanly struck out the spelling of "Stanley," and hand-wrote "Stanly," underneath his signature. We will use the spelling "Stanly" throughout the body of this opinion.

I'm used to seeing on TV[.]" Roddie believed the stun gun didn't "work[] completely right."

Concerning the treatment of Frederick, Roddie testified that, after he had been helped off the ground, he "looked back and [Frederick] was down" on the ground. Roddie testified that Officer Stanly and Deputy Anderson "were roughing [Frederick] up and cuffing him." Roddie further testified that by "roughing up" he meant Officer Stanly and Deputy Anderson were punching Frederick in the face and upper body. In an affidavit, Roddie stated:

> [A]s I was led away and taken to the police vehicle I saw my father, Frederick Lopp, who was then 83 years of age, thrown to the ground and assaulted in much the same manner as me, and he [had] to be taken to the hospital later that same night.

In his verified complaint, Frederick alleged that when he "saw his son . . . being wrongfully harmed and assaulted by" Defendant Officers, he asked Defendant Officers if they had a warrant and told Defendant Officers they had no right to be there. Frederick then walked toward Roddie and Defendant Officers, "but [Frederick] was thereafter thrown to the ground by [Defendant Officers]" and "beaten, handcuffed and generally assaulted[.]" Defendants have included in the record testimony and affidavits contradicting Plaintiffs' recitation of the events.

Plaintiffs filed complaints on 22 April 2014 alleging assault and battery, false imprisonment, and malicious prosecution against Defendant Officers, in both their official and individual capacities; and against Defendants Franklin County, the Town of Louisburg, the Louisburg Police Department, and Jerry Jones, as Sheriff of Franklin County, in both his official and individual capacity. By consent order entered 1 June 2015, Jerry Jones was dismissed as a Defendant in this matter, and Kent Winstead was substituted as a Defendant for Jerry Jones, solely in his official capacity as Sheriff of Franklin County. Defendants moved for summary judgment by motions filed 14 September 2015 and 16 September 2015.

Defendants argued that Defendant Officers, acting in their individual capacities, were entitled to public official immunity; and that the municipal Defendants, along with the individual Defendants acting in their official capacities, were protected from suit by governmental immunity. The trial court granted summary judgment in favor of all Defendants by orders entered 3 November 2015. Plaintiffs appeal.

II. *Analysis*

In Plaintiffs' sole arguments on appeal they contend that the trial court erred in allowing Defendants' motions for summary judgment "based upon issues of sovereign immunity and public officer immunity." We agree in part and disagree in part.

"Our standard of review of a trial court's order granting or denying summary judgment is *de novo*. Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Bryson v. Coastal Plain League, LLC*, 221 N.C. App. 654, 656, 729 S.E.2d 107, 109 (2012) (citations and quotation marks omitted).

> "On appeal from summary judgment, the applicable standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. "[W]e review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact."

Smith v. Harris, 181 N.C. App. 585, 587, 640 S.E.2d 436, 438 (2007) (citations omitted). However, this Court will only consider those arguments properly set forth in an appellant's brief. *Bryson*, 221 N.C. App. at 655, 729 S.E.2d at 108.

A. *Sovereign Immunity*

[1] The trial court granted summary judgment in favor of the municipal Defendants and the individual Defendants in their official capacities based upon sovereign immunity. The trial court based its orders granting summary judgment on the following:[2]

2. The orders granting summary judgment in Roddie's case and Frederick's case are identical in every relevant way, though there are some minor wording differences.

> 1. Defendants Joel Anderson, Sheriff Kent Winstead, Garrett Stanley, Andy Castaneda, and Sherri a/k/a Shari Brinkley, in their official capacities, by reason of sovereign and/or governmental immunity, because there was no liability insurance providing indemnity coverage because the only policy of insurance for Franklin County and the only policy of insurance for the Town of Louisburg for the time in question did not provide liability coverage for the alleged actions of Defendants Anderson, Winstead, Stanley, Castaneda, and Brinkley against Plaintiff.
>
> 2. Franklin County and the Town of Louisburg are entitled to sovereign and/or governmental immunity because the only policy of insurance for Franklin County and the only policy of insurance for the Town of Louisburg for the time in question preserves sovereign and/or governmental immunity for Plaintiff's claims, and, additionally, under North Carolina Law, a county may not be liable for the acts or omissions of a sheriff or his deputies.
>
> 3. Defendants Joel Anderson, Garrett Stanley, Andy Castaneda, and Sherri a/k/a Shari Brinkley, in their individual capacities, are entitled to public officer immunity in that said defendants did not act with malice, were not corrupt, and were not acting outside of or beyond the scope of their duties. Furthermore, Defendants Stanley, Castaneda, and Brinkley conducted the arrest of Plaintiff based on probable cause for acts committed in their presence which would induce a reasonable police officer to arrest Plaintiff. Additionally, because there was probable cause for the arrest of Plaintiff, none of the Plaintiff's North Carolina State Constitutional Rights have been violated as Defendants Anderson, Stanley, Castaneda, and Brinkley used the minimum amount of force necessary to safely arrest Plaintiff.
>
> 4. Defendant Louisburg Police Department is not a public entity that can be sued.

Concerning the issue of sovereign immunity, Plaintiffs make identical arguments. Their entire arguments are as follows:

> The Defendants have all asserted governmental immunity, and contend that they are entitled to immunity unless it is waived through the purchase of insurance. It is clear

> that both Franklin County and the City of Louisburg had acquired insurance, but the Defendants all contend that the acquisition of this insurance purportedly did not waive as a defense the defense of governmental immunity, and therefore the County and City are still entitled to that defense. That is absurd, in that it is a fallacy and contrary to public policy. Why would you purchase insurance which had a provision in it that it would allow the County to not waive governmental immunity as a defense? If that is the case, the County and City are spending money for feckless reasons.

Plaintiffs' arguments consist of declaratory statements unsupported by any citation to authority. Plaintiffs do not discuss the provisions of the insurance policies and, subsequently, Plaintiffs also fail to make any argument concerning the specific provisions of the policies that they contend served to waive sovereign immunity. Plaintiffs further fail to cite to any authority in support of any contention that the relevant insurance policies served to waive sovereign immunity. Plaintiffs' arguments violate Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, and these arguments are therefore abandoned. *McKinnon v. CV Indus., Inc.*, 228 N.C. App. 190, 196, 745 S.E.2d 343, 348 (2013) (citation omitted) ("Although plaintiff makes a passing reference to these statutes in his brief, he makes no specific argument that the trial court erred in denying his motion for attorney's fees under them. We therefore deem these issues abandoned. N.C.R. App. P. 28(b)(6) ('Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.')"); *N.C. Farm Bureau Mut. Ins. Co. v. Smith*, 227 N.C. App. 288, 292, 743 S.E.2d 647, 649 (2013) ("[Appellant] fail[s] to cite any controlling authority in support of this contention or otherwise explain why it has merit, and we accordingly deem the issue abandoned. *See* N.C.R. App. P. 28(b)(6) (2013) (providing that an appellant's argument 'shall contain citations of the authorities upon which the appellant relies').").

Because Plaintiffs fail to properly argue that relevant insurance policies served to waive sovereign immunity with respect to Defendants Franklin County, Town of Louisburg, Louisburg Police Department, or Defendants Joel Anderson, Garrett Stanly, Andy Castaneda, Sherri Brinkley, and Kent Winstead, acting in their official capacities, any such arguments are abandoned. *McKinnon*, 228 N.C. App. at 196, 745 S.E.2d at 348. We affirm the grant of summary judgment in favor of the municipal Defendants, and the individual Defendants in their official capacities.

Because Plaintiffs agreed, by consent order, to pursue Defendant Kent Winstead in his official capacity only, no claims remain against Defendant Kent Winstead.

B. *Additional Abandoned Arguments*

[2] Further, Plaintiffs do not argue on appeal that Franklin County can be held liable for the acts of its elected Sheriff or his deputies, so any such arguments are also abandoned. *Id.* In addition, Plaintiffs make no arguments in their briefs concerning Defendant Louisburg Police Department. Plaintiffs have therefore abandoned any arguments that the trial court erred in granting summary judgment in favor of Defendant Louisburg Police Department. *Id.*

C. *Public Official Immunity*

[3] Plaintiffs also contend the trial court erred in granting summary judgment in favor of Defendant Officers Garrett Stanly, Andy Castaneda, Sherri Brinkley, and Joel Anderson, in their individual capacities.

Defendants contend that, because the individual Defendants were public officials conducting their public duties, their actions were protected by public official immunity. Police officers engaged in performing their duties are public officials for the purposes of public official immunity: "a police officer is a public official who enjoys absolute immunity from personal liability for discretionary acts done without corruption or malice." *Campbell v. Anderson*, 156 N.C. App. 371, 376, 576 S.E.2d 726, 730 (2003) (citations omitted).

> The North Carolina rule is that a public official engaged in the performance of governmental duties involving the exercise of judgment and discretion may not be held liable unless it is alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties.

Showalter v. N.C. Dep't of Crime Control & Pub. Safety, 183 N.C. App. 132, 136, 643 S.E.2d 649, 652 (2007) (citation omitted). Plaintiffs have specifically alleged that Defendant Officers acted with malice.

> "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." As the moving party, defendants had "the burden of showing that no material issues of fact

> exist, such as by demonstrating through discovery that the opposing party cannot produce evidence to support an essential element of his claim or defense."

Id. (citations omitted).

1. *Roddie McKinley Lopp*

As discussed in greater detail above, Roddie testified and averred that all four Defendant Officers participated in taking him to the ground and punching and kicking him even though he was not resisting. Roddie further testified he was treated in that manner simply because he stated he was going to call his attorney to help clear up a misunderstanding about the custody agreement and his right to keep the children on 28 June 2009. There are multiple accounts from other witnesses who contradict Roddie's description of the events surrounding his arrest, but we must view the evidence in the light most favorable to Plaintiffs, since they are the non-moving parties. *Smith*, 181 N.C. App. at 587, 640 S.E.2d at 438. This Court previously addressed a similar fact situation in *Showalter*, where this Court held that denial of the police officer defendant, Trooper Emmons', motion for summary judgment was proper based upon the following evidence:

> In support of their motion for summary judgment, defendants offered the deposition testimony of plaintiff and his wife, and the affidavit of Trooper Emmons. Although Trooper Emmons averred in his affidavit that he did not act maliciously or with reckless indifference toward plaintiff, and that all of his actions were "based on probable cause," plaintiff testified in his deposition that the officer was angry, was "very loud and spitting," and that when he opened his car door in response to the officer's command, Trooper Emmons "maced" him, with some of the spray going inside plaintiff's car and contacting his wife. Plaintiff also testified that he told the officer that he needed his crutches, but the officer jerked him out of the car and handcuffed him, notwithstanding plaintiff's wife telling the trooper that plaintiff was disabled. The court must consider the evidence "in a light most favorable to the nonmoving party," and "[a]ll inferences of fact must be drawn against the movant and in favor of the nonmovant." When so considered, the foregoing evidentiary materials are sufficient to create a genuine issue of fact, material

> to the issue of immunity, as to whether Trooper Emmons actions were done with malice.

Showalter, 183 N.C. App. at 136, 643 S.E.2d at 652 (citations omitted).

In the present case, Roddie's deposition testimony was as follows: Defendant Officers came to his home and informed him that they were going to take his children from him and arrest him. Roddie tried to explain that his attorney and Jodie's attorney had reached an agreement whereby Roddie would keep the children for a few days beyond 28 June 2009, to make up for extra time Jodie had kept the children in the past. Defendant Officers were not interested in listening to Roddie, so Roddie said he was going to go inside and call his attorney so his attorney could explain the situation to Defendant Officers. At that moment, according to Roddie: "They took me down and assaulted me." Roddie testified that all four Defendant Officers "took him down" and then punched and kicked him in front of his children. Roddie was handcuffed and placed in the back of a police vehicle. Roddie testified that a stun gun was deployed for no reason while Defendant Officers were attempting to place him in the vehicle, but he did not think the stun gun functioned properly.

Although there is both affidavit and deposition testimony challenging Roddie's recitation of events, we must look at the evidence in the light most favorable to Roddie, as the non-moving party. We hold that, similar to the facts in Showalter, the record evidence raises an issue of material fact concerning whether Defendant Officers acted with malice. *See also Thompson v. Town of Dallas*, 142 N.C. App. 651, 656–57, 543 S.E.2d 901, 905–06 (2001) (unnecessarily rough treatment of the plaintiff by defendant officer, as forecast in the plaintiff's complaint, sufficient to survive summary judgment even though defendant forecast evidence to the contrary). Therefore, relevant to Roddie's complaint, it was error for the trial court to grant Defendants' motion for summary judgment in favor of Defendant Officers, acting in their individual capacities, based upon public official immunity.[3]

---

3. We also note that much of Roddie's argument in his brief before this court focuses on his contention that the officers had no legal authority to assist Jodie in retrieving the children according to the custody order, so the officers were acting "outside of and beyond the scope of [their] duties" simply by entering his property to assist Jodie in retrieving the children. The forecast of evidence does not show that the officers were acting outside or beyond the scope of their duties simply by assisting Jodie according to an existing custody order; it shows only that the officers may have used inappropriate force in dealing with Roddie and Frederick.

2. *Frederick Samuel Lopp*

Defendants tried to depose Frederick on two occasions — 15 January 2015 and 8 September 2015. Unfortunately, Frederick, who turned eighty-nine years old on 26 June 2015, was unable to answer coherently the questions asked of him on either occasion. Therefore, the only evidence in support of Frederick's claims consists of his verified complaint, and the deposition testimony and affidavit of Roddie.

Although Frederick could not participate in his attempted depositions, Frederick's verified complaint alleges that he was "thrown to the ground[,]" then "beaten, handcuffed and generally assaulted[.]" Frederick's complaint alleges that he suffered "severe injuries" including "lacerations to his face, head, back, knees, legs and wrists" that required medical attention. Further, Roddie's testimony and affidavit include testimony that Roddie witnessed Frederick being assaulted by Deputy Anderson and Officer Stanly and, more specifically, that these two officers were punching Frederick in the head and upper body as he was subdued on the ground.

For the same reasons discussed above concerning Roddie, we hold that, because there is a material conflict in the evidence asserted by Plaintiffs and Defendants, summary judgment in favor of Deputy Anderson and Officer Stanly based upon public official immunity relating to Frederick's complaint, was error. We further hold, however, that Frederick failed to present the trial court sufficient facts to support a finding of malice on the part of Officers Brinkley and Castaneda. Roddie's deposition testimony only implicated Deputy Anderson and Officer Stanly in the alleged mistreatment of Frederick, and Frederick was unable to give any testimony at all. We affirm the trial court's grant of summary judgment in favor of Officers Brinkley and Castaneda, in their individual capacities, based upon public official immunity, for Frederick's claims.

D. *Specific Individual Capacity Claims*

[4] We must now consider whether summary judgment should have been granted in favor of the individual Defendants for any of the specific claims Plaintiffs filed against them. *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (citation omitted) ("If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered."). We reiterate that none

of the following analysis applies to Officers Castaneda or Brinkley for Frederick's individual capacity claims because, as held above, they were protected by public official immunity from Frederick's individual capacity claims.

1. *Assault and Battery*

A law enforcement officer may be held liable for assault and battery in the course of an arrest if he or she uses excessive force in the course of that arrest.

> [A] civil action for damages for assault and battery is available at common law against one who, for the accomplishment of a legitimate purpose, such as justifiable arrest, uses force which is excessive under the given circumstances.
>
> Under the common law, a law enforcement officer has the right, in making an arrest and securing control of an offender, to use only such force as may be reasonably necessary to overcome any resistance and properly discharge his duties. "[H]e may not act maliciously in the wanton abuse of his authority or use unnecessary and excessive force." Although the officer has discretion, within reasonable limits, to judge the degree of force required under the circumstances, "when there is substantial evidence of unusual force, it is for the jury to decide whether the officer acted as a reasonable and prudent person or whether he acted arbitrarily and maliciously." Further, an assault and battery need not necessarily be perpetuated with maliciousness, willfulness or wantonness, and actual physical injury need not be shown in order to recover.

Myrick v. Cooley, 91 N.C. App. 209, 215, 371 S.E.2d 492, 496 (1988) (citations omitted). There are questions of material fact concerning whether Defendant Officers used excessive force, such as punching or kicking Plaintiffs, or deploying a stun gun, while facilitating the arrest of Plaintiffs. The trial court erred in granting summary judgment in favor of all Defendant Officers in their individual capacities for Roddie's assault and battery claims, and further erred in granting summary judgment in favor of Deputy Anderson and Officer Stanly in their individual capacities for Frederick's assault and battery claims.

2. *False Imprisonment*

Defendant Officers did not have a warrant to arrest Plaintiffs and, according to Defendants' evidence, they were not intending to arrest

Plaintiffs when they arrived at Plaintiffs' residence. Defendants' evidence suggests that Roddie "aggressively initiated contact with the [individual Defendants.]" However, Roddie's evidence, if believed, suggests that immediately after Roddie indicated that he wanted to call his attorney in order to clear up the custody issue, Defendant Officers "surrounded [Roddie], threw him to the ground, handcuffed him, [and] arrested him[.]" Roddie claims he did not initiate contact with Defendant Officers. Roddie further claims that he was beaten by Defendant Officers. Frederick, in his verified complaint, contended that, when he saw Defendant Officers assaulting Roddie, he "asked the said Defendants if they had a warrant and stated they had no right to be at said premises without a warrant." "Thereupon [Frederick] turned to walk toward the location within his yard where all of said persons were located, but [Frederick] was thereafter thrown to the ground by the individual Defendants[,]" and then "assaulted."

> False imprisonment is the illegal restraint of a person against his will. A restraint is illegal if not lawful or consented to. A false arrest is an arrest without legal authority and is one means of committing a false imprisonment. The existence of legal justification for a deprivation of liberty is determined in accordance with the law of arrest, which is set forth in Chapter 15A of the General Statutes.
>
> N.C.G.S. § 15A–401(b)(1) (Cum. Supp. 1994) provides that an officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed a criminal offense in the officer's presence. A warrantless arrest without probable cause is unlawful. Thus, the dispositive issue is whether defendant had probable cause to believe that plaintiffs had committed assaults upon him.
>
> The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established, it is a question of law for the court. However, if the facts are in dispute, the question of probable cause is one of fact for the jury. In this case, the material facts surrounding the incident are in dispute, and therefore the existence or nonexistence of probable cause is for the jury to determine. Accordingly, defendant was not entitled to summary judgment on this ground.

Marlowe v. Piner, 119 N.C. App. 125, 129, 458 S.E.2d 220, 223 (1995) (citations omitted). As in *Marlowe*, in the present case the facts are

in dispute concerning probable cause to arrest Plaintiffs on 28 June 2009. The trial court erred in granting summary judgment in favor of all Defendant Officers in their individual capacities for Roddie's false imprisonment claims, and further erred in granting summary judgment in favor of Deputy Anderson and Officer Stanly in their individual capacities for Frederick's false imprisonment claims.

3. *Malicious Prosecution*

As this Court explained in *Moore v. Evans*, 124 N.C. App. 35, 476 S.E.2d 415 (1996):

> In order to maintain an action for malicious prosecution, the plaintiff must demonstrate that the defendant "(1) instituted, procured or participated in the criminal proceeding against [the] plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of [the] plaintiff." "[M]alice can be inferred from the want of probable cause alone." As it is undisputed that defendant Evans initiated the criminal prosecution against Mr. Moore and that the prosecution ended with a dismissal of the charges against him, the only issue as to Mr. Moore's claim for malicious prosecution is whether defendant Evans had probable cause to initiate the criminal prosecution against him. Hence, a common element of each of the state claims alleged (false imprisonment and malicious prosecution) is the absence of probable cause.
>
> The test for whether probable cause exists is an objective one—whether the facts and circumstances, known at the time, were such as to induce a *reasonable* police officer to arrest, imprison, and/or prosecute another. In *Pitts*, our Supreme Court stated:
>
> > The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established it is a question of law for the court. Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury.

Id. at 42–43, 476 S.E.2d at 421–22 (citations omitted). Defendants do not dispute that the criminal proceedings were subsequently terminated in Plaintiffs' favor. We hold there is sufficient evidence to survive summary judgment on the fourth element of malicious prosecution.

Concerning the first element, Officers Stanly, Castaneda, and Brinkley do not dispute that they were involved in instituting the criminal proceedings. Deputy Anderson argues that he did not "institute" the criminal proceedings because neither he nor the Franklin County Sheriff's Office brought charges against Plaintiffs. However, it is not necessary that an individual be directly involved in charging a person, or filing civil claims against that person, in order to have participated sufficiently in "institut[ing], procur[ing] or participat[ing] in the criminal proceeding against [the] plaintiff[.]" *Id.* at 42, 476 S.E.2d at 421. "[W]here 'it is unlikely there would have been a criminal prosecution of [a] plaintiff' except for the efforts of a defendant, this Court has held a genuine issue of fact existed and the jury should consider the facts comprising the first element of malicious prosecution." *Becker v. Pierce*, 168 N.C. App. 671, 675, 608 S.E.2d 825, 829 (2005) (citation omitted). Because Deputy Anderson is identified by Plaintiffs as having participated in the subduing and arrests of both Roddie and Frederick, we hold there is sufficient evidence to survive summary judgment that Deputy Anderson instituted, procured or participated in the criminal charges brought against Plaintiffs.

Concerning the third element – probable cause:

> Our Supreme Court has defined probable cause with respect to malicious prosecution as:
>
> > "the existence of such facts and circumstances, known to [the defendant] at the time, as would induce a reasonable man to commence a prosecution." Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court.
>
> The test for determining probable cause is " 'whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge had no reasonable foundation.' "

Id. at 677, 608 S.E.2d at 829–30 (citations omitted). When we take the evidence in the light most favorable to Plaintiffs, as we must, *Smith*, 181 N.C. App. at 587, 640 S.E.2d at 438, we hold there is sufficient evidence, as set out above, for a trier of fact to determine that the charges against Plaintiffs "had no reasonable foundation." *Becker*, 168 N.C. App. at 677, 608 S.E.2d at 830.

Concerning the second element, Defendants argue there was insufficient evidence of malice to survive summary judgment. " 'Malice' in a malicious prosecution claim may be shown by offering evidence that defendant 'was motivated by personal spite and a desire for revenge' or that defendant acted with 'reckless and wanton disregard' for plaintiffs' rights." *Id.* at 676, 608 S.E.2d at 829 (citations and quotation marks omitted). If Plaintiffs' allegations are taken as true, Defendant Officers' actions could be found to have been done with " 'reckless and wanton disregard' for plaintiffs' rights." *Id.*

We hold there was sufficient evidence, when viewed in the light most favorable to Plaintiffs, to survive Defendants' motions for summary judgment on the individual capacity claims of assault and battery, false imprisonment, and malicious prosecution against all Defendant Officers in Roddie's action, and against Officer Stanly and Deputy Anderson in Frederick's action. We stress that our holdings should not be taken as the opinion of this Court concerning the relative strength of Plaintiffs' evidence as compared to the evidence supporting Defendant Officers. We simply hold that Plaintiffs have sufficiently forecast evidence creating issues of material fact, which must be decided by the trier of fact. We remand for further action on Plaintiffs' individual capacity claims against Defendant Officers, excepting Frederick's individual capacity claims against Officers Castaneda and Brinkley, which were properly disposed of on summary judgment.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges STROUD and INMAN concur.

MAUNEY v. CARROLL

[251 N.C. App. 177 (2016)]

NOLAN RUDOLPH MAUNEY, JR., PLAINTIFF
v.
STEPHANIE BROWN CARROLL, DEFENDANT

No. COA16-594

Filed 20 December 2016

1. Motor Vehicles—car accident—diminution of value—leased vehicle

The trial court did not err by granting summary judgment in favor of defendant on the "diminution in value" claim. Plaintiff failed to present competent evidence concerning the diminution in value of his lease interest in the Porsche.

2. Motor Vehicles—car accident—loss of use

The trial court erred by granting summary judgment in favor of defendant on the "loss of use" claim. Plaintiff presented evidence sufficient to create a material issue of fact.

Appeal by Plaintiff from order entered 28 March 2016 by Judge Yvonne Mims-Evans in Burke County Superior Court. Heard in the Court of Appeals 2 November 2016.

Law Offices of Jason E. Taylor, PC, by Lawrence B. Serbin and Jason E. Taylor, for the Plaintiff-Appellant.

Ball Barden & Cury, P.A., by Ervin L. Ball Jr., and Alexandra Cury, for the Defendant-Appellee.

DILLON, Judge.

Nolan Mauney, Jr., ("Plaintiff") appeals from the trial court's order of partial summary judgment in his suit against Stephanie Carroll ("Defendant") arising from a traffic accident which caused damages to a car Plaintiff was leasing.

I. Background

In March 2013, Plaintiff leased a new 2013 Porsche Boxter S from a dealership ("Lessor") for a period of 27 months. In October 2013, Plaintiff and Defendant were involved in a traffic accident. The accident caused damage to the Porsche. After the accident, Plaintiff had the Porsche repaired. The repairs were completed in November 2013, a little

over five weeks after the accident. Thereafter, Plaintiff continued driving the Porsche for approximately fifteen (15) months before trading it in to the Lessor for a newer Porsche model.

Plaintiff filed this action against Defendant seeking (1) "repair cost" damages, (2) "loss of use" damages for the time the Porsche was being repaired, and (3) damages for the "diminution in value" of the Porsche as a result of the accident.

Defendant moved for summary judgment. Following a hearing on the matter, the trial court granted Defendant *partial* summary judgment on Plaintiff's claim for (1) "loss of use" damages and (2) "diminution in value" damages.[1] Plaintiff timely appealed.

II. Analysis

On appeal, we review a trial court's grant of a motion for summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is appropriate when, viewed in a light most favorable to the non-moving party, the evidence presents "no genuine issue of material fact" and it is clear that "any party is entitled to a judgment as a matter of law." *Id.*; *see also* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

Here, Plaintiff challenges the trial court's grant of summary judgment for Defendant on Plaintiff's claims for "diminution in value" damages and "loss of use" damages. We conclude that Plaintiff failed to present competent evidence concerning the diminution in value of his lease interest in the Porsche; therefore, we affirm the trial court's grant of summary judgment in favor of Defendant on Plaintiff's "diminution in value" claim. However, Plaintiff *did* present evidence sufficient to create a material issue of fact regarding his entitlement to "loss of use" damages; therefore, we reverse the trial court's grant of summary judgment with respect to Plaintiff's "loss of use" claim and remand the matter for action consistent with this opinion. We address our resolution of each claim below.

---

1. Although Plaintiff appeals from an order for partial summary judgment, this appeal is not interlocutory. The record shows that Plaintiff subsequently took a voluntary dismissal with prejudice of his remaining claim. *See Goodman v. Holmes & McLaurin Attorneys at Law*, 192 N.C. App. 467, 471, 665 S.E.2d 526, 530 (2008) (holding that a plaintiff's voluntary dismissal of "[a] remaining claim . . . has the effect of making the trial court's grant of partial summary judgment a final order").

A. Diminution of Value Claim

[1] In the action, Plaintiff seeks "diminution in value" damages, that is, the difference in the fair market value of the Porsche before the accident and the fair market value of the Porsche after the accident. On appeal, Plaintiff argues that the trial court erred in granting Defendant's motion for summary judgment on this claim. We disagree.

It was Plaintiff's burden at the summary judgment hearing to present sufficient evidence to establish his claim for diminution in value damages. Plaintiff argues that although he is not the title owner of the Porsche, he is entitled to recover the diminution of value of the Porsche. As a lessee, Plaintiff does not have standing to seek damages for the diminution in value of the full ownership interest in the Porsche, as damages for this loss would be properly asserted by Lessor. *See Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002) (noting that standing is a "necessary prerequisite to a court's proper exercise of subject matter jurisdiction"). Further, Plaintiff admitted at his deposition that Lessor did not charge him for any diminution of value when Plaintiff traded in the Porsche.

Plaintiff also argues that he is entitled to recover for diminution in value of his leasehold interest. Even assuming that Plaintiff had a valid claim for diminution in value *of his lease interest*, Plaintiff failed to present competent evidence of the diminution in value of this interest. Rather, Plaintiff only offered evidence showing a diminution in value of the *full ownership interest* in the Porsche. Specifically, he offered the opinion of Collision Safety Consultants ("CSC"), a self-described "diminished value and post collision repair inspector," that the Porsche's total value was $68,000 before the accident and $60,000 after the accident.

Therefore, we conclude that the trial court properly granted summary judgment on Plaintiff's "diminution in value" claim.

B. Loss of Use Damages

[2] Plaintiff also seeks "loss of use" damages, contending that he is entitled to damages for the time he was deprived of use of the Porsche during the 37 days it was being repaired. We conclude that there was enough evidence to create a genuine issue of fact on this issue. Accordingly, we reverse the grant of summary judgment on this claim and remand the matter for further proceedings consistent with this opinion.

Our Supreme Court has held that *the owner* of a vehicle damaged by the negligence of another may recover damages for loss of use of

a vehicle during the time it is being repaired. *Roberts v. Pilot Freight Carriers, Inc.*, 273 N.C. 600, 606, 160 S.E.2d 712, 717 (1968). Specifically, in *Roberts* the Court held that *if* the damaged vehicle "can be repaired at a reasonable cost and within a reasonable time," the owner of the vehicle is "entitled to recover such special damages as he has properly pleaded and proven for the loss of its use during the time he was necessarily deprived of it." *Id.* The Court also held that the cost of renting a substitute vehicle "during the time reasonably necessary to . . . repair the [damaged vehicle] is the measure of [loss of use] damage *even though no other vehicle was [actually] rented.*" *Id.* at 607, 160 S.E.2d at 718 (emphasis added). *Roberts* involved damages to a business vehicle. Our Court has held that this same rule applies to personal and pleasure vehicles, stating that an owner is entitled to "loss of use" damages of a personal vehicle even if he did not actually rent a substitute vehicle while the damaged vehicle was being repaired:

> A loss of use recovery is generally allowed as to pleasure vehicles as well as business vehicles. Even though loss of use is allowed for pleasure vehicles, some courts have denied recovery unless an actual substitute is obtained. *We decline to hold that plaintiffs must actually rent a substitute to recover for loss of use of a pleasure vehicle.*

Martin v. Hare, 78 N.C. App. 358, 364-65, 337 S.E.2d 632, 636 (1985) (citations omitted) (emphasis added).

In the present case, Plaintiff is not the title owner of the Porsche. Plaintiff admitted this fact in his deposition testimony and by failing to respond to a request for admission which established that he was not the owner. Defendant therefore argues that Plaintiff lacks standing to seek "loss of use" damages. We disagree.

While Plaintiff is not the title owner, he did own a lease interest in the Porsche. Thus, it was Plaintiff who was deprived of his right to use the Porsche while it was being repaired. Lessor, the title owner, did not suffer any loss of use damage during this period because it had no right to use the Porsche for the duration of Plaintiff's lease.

We conclude that there was sufficient evidence before the trial court to create a genuine issue of material fact as to whether Plaintiff is entitled to "loss of use" damages based on whether the Porsche was repaired at a reasonable cost and within a reasonable time. *See Roberts*, 273 N.C. at 607, 160 S.E.2d at 718. Specifically, there was evidence that the Porsche was repaired in 38 days after the accident and that the

repairs cost $6,311.00. It is for a jury to determine whether the repair time and costs were reasonable.

We further conclude that there is a genuine issue of material fact regarding the *amount* of Plaintiff's "loss of use" damages. For example, Plaintiff offered a report showing that it would have cost him $400 per day to lease the identical make and model car, evidence which our Supreme Court held in *Roberts* is competent to measure "loss of use" damages. Further, the lease contract between Plaintiff and Lessor – which shows that Plaintiff had agreed to lease the Porsche for twenty-seven (27) months for a total cost of approximately $33,000, or about $40 per day – is some evidence of the cost to rent a replacement car. *See Sprinkle v. N.C. Wildlife Res. Comm'n*, 165 N.C. App. 721, 728-29, 600 S.E.2d 473, 478 (2004) (concluding that evidence of monthly finance payments made by the owner of a boat was appropriate to consider in measuring loss of use damages).

This is not to say that Plaintiff has established as a matter of law that he is, in fact, entitled to "loss of use" damages. For instance, Plaintiff has a duty to mitigate his damages, and there is evidence that Plaintiff refused offers from the insurance companies involved to provide a rental car while the Porsche was being repaired. Further, there was evidence that Plaintiff actually used another vehicle available to him while the Porsche was being repaired, evidence which a jury could consider in calculating "loss of use" damages. It is for a jury to wade through this evidence and other competent evidence that might be introduced at trial to determine what amount, if any, Plaintiff is entitled to recover for "loss of use" damages.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges ELMORE and HUNTER, JR., concur.

SUE MILLS, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA16-487

Filed 20 December 2016

1. Appeal and Error—Medicaid disability—agency decision—insufficiently detailed for review

In a case involving Medicaid disability benefits, the decision by the Department of Health and Human Services to deny benefits was remanded because the decision lacked the detailed analysis necessary for meaningful appellate review.

2. Public Assistance—Medicaid disability—provider's opinions—Social Security disability hearing

In a Medicaid disability benefit case in which benefits were denied and the case was remanded, the Department of Health and Human Services was directed to clarify the specific providers' opinions from the Social Security hearing that it relied upon and the weight which it gave the those opinions. While it would have been proper for the State Hearing Officer to consider the medical and psychological testimony produced during the Social Security hearing, it was error to make the blanket assertion that it was relying on the Social Security decision as a whole.

3. Public Assistance—Medicaid disability—nonexertional impairments

In a Medicaid disability benefits case in which disability was denied and the case was remanded, the Department of Health and Human Services was directed to evaluate petitioner's nonexertional impairments as compared to her exertional impairments. If her nonexertional impairments diminished her capacity to perform a full range of light work beyond the diminishment caused by her exertional impairments, vocational expert testimony would be used to determine whether jobs existed in significant numbers in the national economy that petitioner could do.

Appeal by petitioner from order entered 4 January 2016 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 19 October 2016.

Hyler & Lopez, P.A., by Robert J. Lopez, for petitioner-appellant.

Roy Cooper, *Attorney General*, *by Brenda Eaddy*, *Assistant Attorney General*, *for respondent-appellee.*

DAVIS, Judge.

This appeal requires us to address the analysis that must be undertaken in evaluating a claimant's application for Medicaid disability benefits. Sue Mills ("Petitioner") appeals from the trial court's order affirming a determination by the North Carolina Department of Health and Human Services ("DHHS") that she was not disabled and, therefore, not entitled to such benefits. After careful review, we vacate the trial court's order and direct the court to remand this case to DHHS for further proceedings consistent with this opinion.

Factual Background

Petitioner is a 54-year-old woman who has a history of illnesses and symptoms that began in the 1990s. During her thirties, she was employed as a housekeeper, resulting in "some deterioration" in her lower back. During her early forties, her lower back pain worsened, and she experienced anxiety, nerves, and depression. By the time she turned fifty, Petitioner was suffering from migraine headaches, continued anxiety and depression, pain in her lower back, problems using her hands, strain on her neck and shoulders, weakness in her legs, and a variety of other health-related issues.

Petitioner applied to the Social Security Administration ("SSA") for Social Security disability benefits in 2013. An administrative law judge (the "ALJ") conducted a disability hearing, and on 24 October 2013, the ALJ issued a decision (the "Social Security Decision") determining that Petitioner was not disabled. Petitioner appealed the Social Security Decision, and her appeal is currently pending in federal court.

Approximately eight months after the Social Security Decision was issued, Petitioner applied to the Haywood County Department of Social Services (the "DSS") for Medicaid disability benefits. On 23 July 2014, her application was denied. Petitioner appealed the decision to DHHS, and a hearing was held before State Hearing Officer Linda Eckert (the "SHO") on 8 October 2014.

On 16 October 2014, the SHO issued a Notice of Decision (the "Agency Decision"), which determined that: (1) Petitioner was 51 years of age and had obtained a GED; (2) she was not presently working and had not worked since May 2014; (3) Petitioner had no "relevant past

work"; (4) she had "a medical history of chronic pain, degenerative disc disease, thoracic compression fracture, vitamin D deficiency, chronic obstructive pulmonary disease, migraine headaches, esophageal reflux, hyperlipidemia, lumbar radiculopathy, lumbar spondylosis, osteopenia, varicose veins, carpal tunnel syndrome, [and] anxiety and depression"; and (5) "[b]y May 2015, the [Petitioner] will retain the ability to engage in light work . . . ."

The SHO then summarized Petitioner's medical history and made the following pertinent findings of fact:

> 6. In an October 2013 decision, the [SSA] Administrative Law Judge opined that the Appellant has the residual functional capacity to perform light work with occasional posturals; no climbing of ladders, ropes or scaffolds; frequent bilateral fingering; and avoidance of concentrated exposure to hazards. Appellant was also limited to simple, routine, repetitive work with occasional public contact. This opinion is given great weight as it is consistent with and supported by the objective evidence.
>
> 7. The Appellant's medically determinable impairments are at least theoretically capable of producing at least some of the general subjective symptoms alleged by the Appellant. However, the Appellant's testimony as to the specific intensity, persistence, and limiting effects of the pain and other subjective symptoms is not persuasive in view of the inconsistencies with the medical evidence. For example, the Appellant testified she experiences migraine headaches twice a month which are at a pain level of 20/10; however, the medical evidence does not reflect that the Appellant reported to the treating or examining physicians that she experiences such extreme symptoms. It is not credible that the Appellant could experience such extreme symptoms but fail to report them to the treating physicians.

Based on these findings of fact, the SHO made the following conclusions:

> 1. Appellant is not engaging in Substantial Gainful Activity as defined in 20 CFR 416.910.
>
> 2. Appellant's impairments of chronic pain, degenerative disc disease, vitamin D deficiency, chronic obstructive

pulmonary disease, migraine headaches, esophageal reflux, hyperlipidemia, lumbar radiculopathy, lumbar spondylosis, osteopenia, varicose veins, carpal tunnel syndrome, anxiety and depression are severe but do not meet or equal the level of severity specific in 20CFR [sic] Part 404, Appendix 1 to Subpart P (Listing of Impairments). Appellant's impairment of thoracic compression fracture is currently at a disabling severity, but is not expected to meet the duration requirement of remaining at a disabling severity for a period of twelve continuous months as specified in 20 CFR 416.909.

3. Considering the combination of all impairments and related symptoms, by May 2015 the Appellant will have the residual functional capacity . . . to engage in light work with occasional stooping and crouching; no climbing of ladders, ropes or scaffolds; frequent but not constant fingering; avoidance of concentrated exposure to heights and hazards; avoidance of concentrated exposure to dust and fumes; and to work that is low stress, nonproduction in nature and does not require extensive interaction with the general public. The effects of pain have been evaluated under 20 C.F.R. 404.1529 and Fourth Circuit law as set forth in Hyatt v. Sullivan, 899 F. 2d 329 (4th Cir. 1990)[.]

4. The Appellant's non-exertional limitations of occasional stooping and crouching; no climbing of ladders, ropes and scaffolds; frequent but not constant fingering; avoidance of concentrated exposure to heights and hazards; avoidance of concentrated exposure to dust and fumes; and to work that is low stress, nonproduction in nature and does not require extensive interaction with the general public do not significantly reduce the occupational base of light work available in the economy . . . . Considering the Appellant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy as specified in 20 CFR 416.966 that the Appellant can perform as Vocational Rule 202.13 being used as a framework directs a finding of "not disabled". . . .

5. Appellant does not meet the disability requirement specified in 20 CFR 416.920(g) and therefore is not found disabled or eligible for Medicaid.

As a result of these findings and conclusions, the SHO determined that the DSS had properly denied Petitioner's application for disability benefits. The Agency Decision became final on 16 October 2014 pursuant to N.C. Gen. Stat. § 108A-79(b).

On 19 November 2014, Petitioner filed a petition for judicial review in Haywood County Superior Court pursuant to N.C. Gen. Stat. § 108A-79(k). On 19 December 2014, DHHS filed a response along with a motion to dismiss the petition. Petitioner filed an amended petition on 29 July 2015.

On 2 November 2015, a hearing was held before the Honorable Bradley B. Letts. The trial court entered an order on 4 January 2016 containing the following findings of fact:

> 1. The issue before the administrative agency was whether petitioner qualified for Medicaid for the Disabled.
>
> 2. [DHHS] applied the Supplemental Security Income Standard found in the Social Security Act in order to determine whether Petitioner was qualified for Medicaid for the Disabled.
>
> 3. [DHHS] reviewed and analyzed the medical records contained in the official record before making its final decision. Petitioner has several chronic medical conditions, some of which [DHHS] recognized as severe.
>
> 4. [DHHS] reviewed and gave some weight to the functional capacity test result reported in the Social Security Administration Office of Disability Adjudication and Review decision of October 24, 2013. This decision found Petitioner was not under a disability and had the ability to work.
>
> 5. Based on evidence in the record, [DHHS] determined that Petitioner did not qualify for Medicaid for the Disabled.
>
> 6. This Court was informed in open court that Petitioner would not present additional testimony at the judicial review hearing.
>
> 7. Petitioner's additional evidence consists of medical records of physician appointments that Petitioner attended after her hearing before [DHHS]'s Hearing

Officer. These medical records contain the same or similar review of systems, assessments, diagnosis and/or prognosis as the medical records contained in the official record. As such, this additional evidence is merely cumulative of the medical records contained in the official record.

8. Petitioner has not established that any evidence presented to the hearing officer at the time of the hearing had been excluded.

The court then made the following conclusions of law:

1. This matter is properly before this court pursuant to N.C. Gen. Stat. §108A-79(k).

2. North Carolina Medicaid for the Disabled qualification standards are found in the federal Social Security Act. N.C. Gen. Stat. §108A-56.

3. This Court's standard of review for questions of law are *de novo*. The standard of review where petitioner has alleged the final decision was arbitrary, capricious, or unsupported by substantial evidence is the whole record standard of review. N.C. Gen. Stat. §150B-51.

4. [DHHS] correctly applied the five step sequential evaluation in its assessment of Petitioner's application for Medicaid for the Disabled. 20 CFR Part 416 *et seq*.

5. Substantial evidence exist[ing] in the official record show[s] that while some of Petitioner's illnesses are chronic and severe, a review of Petitioner's medical, social, vocational, and functional capacity evidence does not establish that she qualifies for Medicaid for the Disabled. [DHHS]'s determination of such does not indicate a lack of careful consideration.

6. A matter may be remanded back to the administrative agency if additional evidence is presented to the judicial review court that is material to the issues, not merely cumulative, and could not reasonably have been presented at the administrative hearing. In this matter the additional evidence was merely cumulative. Thus, remand to the agency for review of those records is not required. N.C. Gen. Stat. §150B-49.

> 7. The hearing officer did not exclude any evidence presented by Petitioner at the hearing. N.C. Gen. Stat. §108A-79(k).

Based on these findings and conclusions, the trial court affirmed the Agency Decision. Petitioner filed written notice of appeal on 2 February 2016.

Analysis

I. Standard of Review

Chapter 108A of the North Carolina General Statutes provides a claimant with the right to appeal an initial decision by a local department of social services denying her application for Medicaid disability benefits. *See* N.C. Gen. Stat. § 108A-79(a) (2015). Pursuant to the statute, the director (or the director's designated representative) is required to forward the claimant's request for an appeal to DHHS, which must then designate a hearing officer to conduct a *de novo* administrative hearing in accordance with Chapter 150B of the North Carolina General Statutes. *See* N.C. Gen. Stat. § 108A-79(d). If the claimant is dissatisfied with DHHS's final decision upon the agency's review of her claim, she may file a petition for judicial review in the superior court of the county in which the claim arose. N.C. Gen. Stat. § 108A-79(k).

Chapter 150B of the North Carolina General Statutes provides, in pertinent part, as follows:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2015).

"The standard of review for an appellate court upon an appeal from an order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court." *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62-63, 468 S.E.2d 557, 560 (1996) (citation omitted). In reviewing an agency decision, this Court applies the "whole record" test. *Fehrenbacher v. City of Durham*, 239 N.C. App. 141, 146, 768 S.E.2d 186, 191 (2015) (citation omitted). "The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Id.* (citation and quotation marks omitted). This "test does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Id.* (citation and quotation marks omitted).

II. Medicaid Disability Benefits

> Medicaid, established by Congressional enactment of Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., is a cooperative federal-state program providing medical assistance and other services to certain classes of needy persons. States which adopt the program and administer it in conformity with federal laws and regulations receive federal funds which defray a substantial portion of the program costs. Participation by a state in the Medicaid program is entirely optional. However, once an election is made to participate, the state must comply with the requirements of federal law. North Carolina adopted the Medicaid program through the enactment of Part 5, Article 2, Chapter 108 of the General Statutes, amended and recodified effective 1 October 1981 at Part 6, Article 2, Chapter 108A.

Lackey v. N.C. Dep't of Human Resources, 306 N.C. 231, 235, 293 S.E.2d 171, 175 (1982) (internal citations omitted).[1]

---

1. In addressing Petitioner's arguments on appeal, we therefore look for guidance to federal Social Security regulations and decisions by federal courts interpreting those regulations. *See Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 531-32, 372 S.E.2d 887, 890 (1988) ("Although federal court decisions interpreting the applicable

[1] In order to qualify for both Medicaid and Social Security disability benefits, a claimant must show that she is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A) (2012).

> [A]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

42 U.S.C. § 1382c(a)(3)(B).

The following five-step sequential evaluation process is used to determine whether a claimant is disabled:

> If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step. If we cannot find that you are disabled or not disabled at a step, we go on to the next step. Before we go from step three to step four, we assess your residual functional capacity. . . . We use this residual functional capacity assessment at both step four and at step five when we evaluate your claim at these steps. These are the five steps we follow:
>
> (i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled. . . .

---

statutes and regulations are not binding on North Carolina courts . . . we deem the well-reasoned federal decisions discussed herein to be persuasive authority." (internal citation omitted)); *see also Lackey*, 306 N.C. at 236, 293 S.E.2d at 175 ("These federal decisions . . . are not necessarily controlling on this court. However, we do deem them to be persuasive authority on the relevant issues." (internal citations omitted)).

> (ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirement in § 416.909, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled. . . .
>
> (iii) At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 to subpart P of part 404 of this chapter and meets the duration requirement, we will find that you are disabled. . . .
>
> (iv) At the fourth step, we consider our assessment of your residual functional capacity and your past relevant work. If you can still do your past relevant work, we will find that you are not disabled. . . .
>
> (v) At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education, and work experience to see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled. . . .

20 C.F.R. § 416.920(a)(4) (2016).

This Court has previously summarized this evaluation process as follows:

> (1) Is the individual engaged in substantial gainful activity? (2) If not, does the individual suffer from a severe impairment, i.e., an impairment that significantly limits his ability to engage in the basic work activities outlined in 20 C.F.R. Sec. 416.921? (3) Assuming the individual meets this threshold severity requirement, is the impairment so severe as to render the individual disabled without inquiry into vocational factors such as age, education, and work experience, i.e., does the impairment meet or equal those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? (4) If the severe impairment does not meet or equal those listed

> in Appendix 1, does it prevent the individual from doing past relevant work in light of his "residual functional capacity?" and, (5) If the severe impairment does prevent the individual from doing past relevant work, can the individual do other work, given his age, education, residual functional capacity, and past work experience?

Lowe v. N.C. Dep't of Human Resources, 72 N.C. App. 44, 48, 323 S.E.2d 454, 457 (1984).

"If the first three steps do not lead to a conclusive determination, the ALJ then [moves on to Step 4 to] assess[ ] the claimant's residual functional capacity, which is the most the claimant can still do despite physical and mental limitations that affect her ability to work." *Mascio v. Colvin*, 780 F.3d 632, 635 (4th Cir. 2015) (citation and quotation marks omitted). Once the claimant meets either Step 3 or Step 4, "[t]he burden then shifts to the agency to show that the claimant can perform alternative work existing in the national economy under [Step 5]." *Henderson*, 91 N.C. App. at 533, 372 S.E.2d at 891*; see also Mascio*, 780 F.3d at 635.

"[A] necessary predicate to engaging in substantial evidence review is a record of the basis for the [agency's] ruling." *Radford v. Colvin*, 734 F.3d 288, 295 (4th Cir. 2013) (citation omitted). This record "should include a discussion of which evidence the [agency] found credible and why, and specific application of the pertinent legal requirements to the record evidence." *Id.* (citation omitted). The agency's decision must "include a narrative discussion describing how the evidence supports each conclusion[.]" *Monroe v. Colvin*, 826 F.3d 176, 190 (4th Cir. 2016) (citation and quotation marks omitted). Moreover, the decision must "build an accurate and logical bridge from the evidence to [its] conclusion." *Id.* at 189.

In the present case, Petitioner contends that the SHO did not provide any "meaningful explanation" in how it reached its conclusion. Specifically, Petitioner argues that the Agency Decision lacked (1) a "function by function narrative discussion" to explain "how [her] residual functional capacity was established[;]" (2) a "discussion related to [the SHO's] evaluation of the effects of pain[;]" (3) a valid basis for attaching significant weight to the Social Security Decision; and (4) the use of vocational expert testimony to aid the SHO in determining whether Petitioner could find substantial gainful work in the national economy. As discussed more fully below, we agree with Petitioner that the Agency Decision is deficient in several material respects and that this case must be remanded for further proceedings.

A. Function-by-Function Narrative Discussion

Petitioner contends that the SHO was required to conduct a function-by-function narrative discussion to establish her residual functional capacity. We find instructive on this issue the Fourth Circuit's decision in *Mascio*. In that case, an agency decision denying a claimant's application for Social Security benefits determined at Step 4 that the claimant could no longer perform her past work based on her residual functional capacity. *Mascio*, 780 F.3d at 635-36. However, at Step 5 of the evaluation process, the agency determined that the claimant could perform other work and therefore was not disabled. *Id.* at 640.

On appeal, the claimant argued that during Step 4 of the evaluation process, the ALJ had erred in failing to conduct a function-by-function analysis in determining her residual functional capacity. She asserted that federal SSA regulations required such a "narrative discussion describing how the evidence supports each conclusion, citing specific medical facts (e.g., laboratory findings) and nonmedical evidence (e.g., daily activities, observations)." *Id.* at 636 (citation and quotation marks omitted).

While declining to adopt a *per se* rule that a function-by-function analysis is necessary in every case, the Fourth Circuit held that "remand may be appropriate where an ALJ fails to assess a claimant's capacity to perform relevant functions, despite contradictory evidence in the record, or where other inadequacies in the ALJ's analysis frustrate meaningful review." *Id.* at 636 (citation, quotation marks, brackets, and ellipsis omitted). The court stated the following:

> Here, the ALJ has determined what functions he believes [the claimant] can perform, but his opinion is sorely lacking in the analysis needed for us to review meaningfully those conclusions. In particular, although the ALJ concluded that [the claimant] can perform certain functions, he said nothing about [her] ability to perform them for a full workday. The missing analysis is especially troubling because the record contains conflicting evidence as to [the claimant's] residual functional capacity—evidence that the ALJ did not address.

Id. at 636-37.

For these reasons, the court observed that it was "left to guess about how the ALJ arrived at his conclusions" regarding the claimant's ability to perform "relevant functions" and that it "remain[ed] uncertain as to what the ALJ intended[.]" *Id.* at 637. Thus, the court concluded that

remand was necessary to cure these deficiencies in the agency's decision. *Id.*

While the facts of the present case are not identical to those in *Mascio*, the Fourth Circuit's opinion nevertheless demonstrates why the SHO's analysis here was inadequate. In conducting what was apparently intended to be Step 4 of the sequential evaluation process,[2] the SHO stated as follows:

> 3. Considering the combination of all impairments and related symptoms, by May 2015 the Appellant will have the residual functional capacity . . . to engage in light work with occasional stooping and crouching; no climbing of ladders, ropes or scaffolds; frequent but not constant fingering; avoidance of concentrated exposure to heights and hazards; avoidance of concentrated exposure to dust and fumes; and to work that is low stress, nonproduction in nature and does not require extensive interaction with the general public. The effects of pain have been evaluated under 20 C.F.R. 404.1529 and Fourth Circuit law as set forth in Hyatt v. Sullivan, 899 F. 2d 329 (4th Cir. 1990)[.]

In reaching this conclusion, however, the SHO did not explain with any degree of specificity at all the processes it used to conclude that Petitioner was able to engage in light work.[3] Thus, we believe that — as in *Mascio* — this is a case where "inadequacies in the [agency]'s analysis

---

2. It is not entirely clear from the Agency Decision whether the SHO found that Petitioner had met Steps 1 through 4. However, because the SHO proceeded to Step 5, we assume that the SHO first determined that Step 4 had been satisfied. We note that in its brief DHHS states that "the [SHO] found Petitioner had met her burden at step four." On remand, we direct DHHS to clearly articulate its application of each step of the sequential evaluation process.

3. 20 C.F.R. § 404.1567(b) provides the following definition of "light work":

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. § 404.1567(b) (2016).

frustrate meaningful review." *See Mascio*, 780 F.3d at 636 (citation and quotation marks omitted). Because the Agency Decision lacks the sort of detailed analysis necessary for meaningful appellate review, we direct DHHS on remand to provide a narrative discussion of whether Petitioner's limitations will prevent her from performing the full range of light work.

B. Evaluation of Credibility of Petitioner's Testimony as to Severity of Her Symptoms

[2] Petitioner next argues that the Agency Decision lacks a discussion of how the SHO weighed the credibility of Petitioner's testimony as to the intensity, persistence, and limiting effects of her symptoms. In *Mascio*, the claimant also asserted that the ALJ failed to properly analyze the credibility of her testimony as to the intensity, persistence, and limiting effects of her pain. *Id.* at 639. The claimant argued that the only grounds set out in the agency decision for rejecting her statements as to her pain were findings that she "(1) had not complied with follow-up mental health treatment; (2) had lied to her doctor about using marijuana; and (3) had been convicted for selling her prescription pain medication." *Id.*

The Fourth Circuit found that this lack of analysis as to the claimant's credibility constituted an additional error warranting remand. The court stated that "[n]owhere . . . does the ALJ explain how he decided which of [the claimant's] statements to believe and which to discredit, other than the vague (and circular) boilerplate statement that he did not believe any claims of limitations beyond what he found when considering [the claimant's] residual functional capacity." *Id.* at 640.

Here, the sole finding of fact in the Agency Decision regarding Petitioner's credibility was the following:

> 7. The Appellant's medically determinable impairments are at least theoretically capable of producing at least some of the general subjective symptoms alleged by the Appellant. However, the Appellant's testimony as to the specific intensity, persistence, and limiting effects of the pain and other subjective symptoms is not persuasive in view of the inconsistencies with the medical evidence. For example, the Appellant testified she experiences migraine headaches twice a month which are at a pain level of 20/10; however, the medical evidence does not reflect that the Appellant reported to the treating or examining physicians that she experiences such extreme

> symptoms. It is not credible that the Appellant could experience such extreme symptoms but fail to report them to the treating physicians.

This finding indicates that the SHO found Petitioner's testimony regarding her symptoms "not persuasive" because there were "inconsistencies with the medical evidence." However, the record reveals that Petitioner testified as to a number of other symptoms besides migraine headaches, including — without limitation — severe lower back pain, weakness in her legs, anxiety, and depression. Yet Finding No. 7 solely discusses Petitioner's testimony regarding her migraine headaches. Therefore, to the extent the Agency Decision attempted to impute the lack of credibility it attached to her testimony regarding the migraine headaches to her testimony regarding all of her remaining impairments, the agency erred.

C. Reliance on the Social Security Decision

Petitioner also challenges the degree of reliance the SHO placed on the Social Security Decision. Finding No. 6 of the Agency Decision states as follows:

> 6. In an October 2013 decision, the [SSA] Administrative Law Judge opined that the Appellant has the residual functional capacity to perform light work with occasional posturals; no climbing of ladders, ropes or scaffolds; frequent bilateral fingering; and avoidance of concentrated exposure to hazards. Appellant was also limited to simple, routine, repetitive work with occasional public contact. This opinion is given great weight as it is consistent with and supported by the objective evidence.

SSA regulations provide that "[a]dministrative law judges . . . are not bound by findings made by State agency or other program physicians and psychologists, but they may not ignore these opinions and must explain the weight given to the opinions in their decisions." SSR 96-6p, 1996 SSR LEXIS 3, 1996 WL 374180 (July 2, 1996). Thus, while it would have been proper for the SHO to consider the medical and psychological testimony produced during Petitioner's Social Security hearing, it was error for the SHO to simply make the blanket assertion that it was relying on the Social Security Decision *as a whole* as opposed to (1) identifying opinions from specific providers that were obtained during the Social Security hearing; and (2) explaining why it was according weight to those opinions. Therefore, we direct DHHS on remand to clarify which specific providers' opinions from the Social Security hearing

that it is relying upon — if any — and to explain the weight it is giving those opinions.

D. Vocational Expert Testimony

[3] Finally, Petitioner argues that DHHS erred in failing to produce vocational expert testimony at the 8 October 2014 hearing. She asserts that because she suffered from nonexertional impairments, such expert testimony was required and that the SHO erred in instead relying solely on the medical-vocational guidelines (commonly known as the "grids").[4]

20 C.F.R. § 404.1560 provides that "[w]e *may* use the services of vocational experts or vocational specialists, or other resources . . . to obtain evidence we need to help us determine whether you can do your past relevant work, given your residual functional capacity." 20 C.F.R. § 404.1560 (2016) (emphasis added). A review of federal caselaw applying 20 C.F.R. § 404.1560 reveals that vocational expert testimony is necessary only in certain circumstances during Step 5 of the evaluation process. *See*, *e.g.*, *Boylan v. Astrue*, 32 F.Supp.3d 238, 251-52 (N.D.N.Y. 2012) ("If the claimant has nonexertional impairments, the ALJ must determine whether those impairments 'significantly' diminish the claimant's work capacity beyond that caused by his or her exertional limitations. . . . [and if so], then the use of the Grids *may* be an inappropriate method of determining a claimant's residual functional capacity and the ALJ *may* be required to consult a vocational expert." (citations omitted and emphasis added)); *Sherby v. Astrue*, 767 F.Supp.2d 592, 595 (D.S.C. 2010) ("While not every nonexertional limitation or malady rises to the level of a nonexertional impairment, so as to preclude reliance on the grids, the proper inquiry is whether the nonexertional condition affects an individual's residual functional capacity to perform work of which he is exertionally capable." (citation, quotation marks, and ellipsis omitted)).

On remand, we direct DHHS to evaluate Petitioner's nonexertional impairments as compared to her exertional impairments. If it determines that Petitioner's nonexertional impairments significantly diminish her capacity to perform the full range of light work beyond the degree caused by her exertional impairments, DHHS shall use vocational

4. The "grids" are the Medical-Vocational Guidelines located in Appendix 2 of 20 C.F.R. § 404, subpart P. Appendix 2 provides information from the Dictionary of Occupational Titles regarding jobs that exist in the national economy that are classified by exertional and skill requirements. *See* 20 C.F.R. § 404.1569 (2016). Appendix 2 provides rules that determine whether a person is engaged in substantial gainful activity and whether the person is prevented by a severe medically determinable impairment from doing vocationally "relevant past work." *Id.*

expert testimony in order to determine whether jobs exist in significant numbers in the national economy that Petitioner can perform given her residual functional capacity.[5]

Conclusion

For the reasons stated above, we vacate the trial court's 4 January 2016 order and direct the court to remand this matter to DHHS for additional proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges INMAN and ENOCHS concur.

KENNETH I. MOCH, PLAINTIFF
v.
A.M. PAPPAS & ASSOCIATES, LLC, ART M. PAPPAS, AND
FORD S. WORTHY, DEFENDANTS

No. COA16-642

Filed 20 December 2016

1. Unfair Trade Practices—communications from an attorney—not covered by Act

The trial court did not err by dismissing plaintiff's claim for unfair or deceptive trade practices for failure to state a claim where there were underlying claims by defendants of libel but the actions complained of by plaintiff were taken by defendants' attorneys. N.C.G.S. § 75-1.1(b) does not include professional services within its purview; plaintiff may not bring a claim based upon letters sent by defendants' counsel.

2. Appeal and Error—preservation of issues—issue not raised below

Plaintiff was not entitled to relief on appeal on the basis of an abuse of process claim where the alleged abuse consisted of the

---

5. While DHHS argues that Petitioner was, in fact, examined by a vocational expert in connection with the Social Security hearing, the Agency Decision — as noted above — merely references the Social Security Decision as a whole rather than referring to any specific expert testimony elicited during that hearing. Moreover, we note that the Social Security hearing took place in 2013.

letters sent by counsel and subpoenas. Plaintiff did not make this argument below; moreover, plaintiff did not articulate on appeal how the facts would support a claim for abuse of process.

Appeal by plaintiff from order entered 25 February 2016 by Judge James E. Hardin, Jr. in Orange County Superior Court. Heard in the Court of Appeals 15 November 2016.

Spilman Thomas & Battle, PLLC, by Jeffrey D. Patton, Nathan B. Atkinson, and Erin Jones Adams, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael W. Mitchell, Christopher G. Smith, and Clifton L. Brinson; and Tharrington Smith, LLP, by Wade M. Smith, for defendants-appellees.

ZACHARY, Judge.

Kenneth I. Moch (plaintiff) appeals from an order dismissing his claims against A.M. Pappas & Associates, LLC, Art M. Pappas, and Ford S. Worthy (defendants) for abuse of process and unfair or deceptive trade practices. Plaintiff's complaint was dismissed pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted. On appeal plaintiff argues that the trial court erred and that his complaint included factual allegations that established all of the elements of both claims. We conclude that the trial court's order should be affirmed.

I. Factual and Procedural History

Defendant A.M. Pappas & Associates, LLC, is a company that manages investment funds and specializes in investments in the life sciences sector. Defendant Art M. Pappas is the company's managing partner, and defendant Ford S. Worthy is the company's chief financial officer. Beginning in 2011, defendants managed funds that included investments in Chimerix, Inc., a corporation involved in the development of anti-viral medical treatments. Plaintiff was the president and CEO of Chimerix, Inc. from April 2010 until April 2014, when he left Chimerix.

On 22 October 2014, plaintiff sent an anonymous email to the North Carolina State Treasurer, using an email account that plaintiff had created under the name "pappasventureswhistleblower@gmail.com." The email stated the following:

> To whom it may concern:
>
> I am writing this because of my concerns about the activities of Arthur Pappas at Pappas Ventures. I want to bring 3 things to your attention:
>
> 1. Potential misuse and misappropriation of funds. I have reason to believe that Mr. Pappas has diverted somewhere around $2 million of funds over the course of time, via expenses and payments to others. Mr. Worthy may know of this and be involved. I believe this would require an audit of the Pappas Ventures financials, as Mr. Pappas is skilled in hiding this misuse.
>
> 2. High employee turnover at Pappas Ventures. This is due to the instability and unpredictability of Mr. Pappas. There has been a very high turnover of personnel - partners and investment professionals, more than other venture funds. People leave this fund and do not trust him.
>
> 3. Perhaps not relevant, but there have been whispers of issues of domestic violence/hitting women. This would further damage the viability of the fund. I do not wish to be a gossip, but this is relevant to Mr. Pappas's moral code.
>
> Since there is no whistleblower hotline, I felt an obligation to contact people involved with Pappas Ventures and A.M. Pappas. I have now done all that I can to bring these issues to light, and my conscience is clear. What those of you copied on this email do individually or collectively is up to you.

Plaintiff later exchanged follow-up emails with an employee of the Department of State Treasurer and forwarded his email to others whom plaintiff describes as "investors in or collaborators with the funds managed by" defendants.

On 4 June 2015, defendants filed suit against the sender of the anonymous emails, whom defendants identified as "John Doe or Jane Doe," seeking damages for libel *per se* and libel *per quod*. On 12 October 2015, the law firm of Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P. (hereafter "Smith Anderson") sent a letter to plaintiff on the law firm's letterhead. The letter bore the heading "CONFIDENTIAL" and "FOR PURPOSES OF SETTLEMENT ONLY." (use of all capital letters and underlining in original). The letter stated the following:

Re: *A.M. Pappas & Associates, LLC, et al. v. John Doe or Jane Doe*

In the Superior Court of Durham County, North County; 15 CVS 3383

Dear Mr. Moch:

This law firm represents Pappas Capital, LLC (f/k/a A. M. Pappas & Associates, LLC), its affiliates, Arthur Pappas and Ford Worthy. We obtained evidence demonstrating that you are responsible for the defamatory and malicious emails from the previously anonymous email account: pappasventureswhistleblower@gmail.com, as described in the "Doe" lawsuit that we filed June 4 in Durham County Superior Court. A copy of that lawsuit is enclosed.

We will amend the "Doe" Complaint and name you as a defendant and immediately commence public litigation against you unless you agree to the following material settlement terms in principle by Friday, October 16, 2015:

[1.] A written retraction and apology;

[2.] Payment of $10 million, which is a figure discounted for settlement purposes of the net present value of the economic harm done to our clients. At trial, we will seek at least $25 million;

[3.] Complete disclosure and sharing of information that identifies anyone else involved with you in the defamatory emails. Based on the nature and quality of this information, we may be willing to compromise the financial settlement demand; and

[4.] Our clients will refrain from reporting you to law enforcement authorities or regulatory agencies for violation of [N.C. Gen. Stat. §] 14-196.3 and all other potential criminal violations, including federal violations.

Also enclosed with this letter is a document subpoena to you. That subpoena requires you to produce certain materials to us at our offices on October 20, 2015. You *may not destroy or alter any evidence* identified in the subpoena or that is relevant to this matter. You are *obligated by law* to preserve all relevant evidence. Failure to comply with

> this obligation is a criminal offense. You are on notice of this duty by virtue of receipt of this correspondence. We are, however, willing to work with you on the timing, scope, and method of production to ensure that the subpoena does not impose any undue burden and to protect the confidentiality of your personal information.
>
> Also enclosed is a testimony subpoena requiring you to appear at our offices on Saturday, October 24, 2015 to give your testimony in the lawsuit under oath.
>
> Separately, we are serving your spouse with a document subpoena for any relevant electronic and documentary evidence she may possess.
>
> This is a very serious matter.
>
> The defamatory, baseless accusations have caused serious damage to our clients and their business partners and they will be made whole.
>
> I urge you or your counsel to contact me immediately to begin the process of addressing this matter. My office number is on the letterhead. My cellphone is [omitted].

(emphasis in original).

On 19 October 2015, the law firm of Nelson Mullins Riley & Scarborough LLP (hereafter "Nelson Mullins") sent a letter to a Smith Anderson attorney, stating that the Nelson Mullins firm represented plaintiff, and objecting to the subpoenas issued by defendants on various grounds, including attorney-client privilege, spousal privilege, and an assertion that the subpoenas' production requests were unduly burdensome. On 6 November 2015, defendants filed a motion to compel plaintiff's production of the documents sought in their subpoenas. On the same day, Smith Anderson sent a letter to an attorney with the law firm Spilman Thomas & Battle, PLLC.[1] The letter was headed "SETTLEMENT CONFIDENTIAL" and "FOR YOUR EYES AND YOUR CLIENTS' EYES ONLY" and stated that:

> Re: *A.M. Pappas & Associates, LLC, et al. v. John Doe or Jane Doe*
>
> Durham County - 15 CVS 3383

1. The contents of the letter indicate that on 6 November 2015 plaintiff was represented by this law firm.

Dear Jeff:

Thank you for our conversation Wednesday afternoon. Our clients are very frustrated at the pace and the missed expectations and were prepared to take decisive action prior to your last minute phone call. But you provided meaningful information which has altered our trajectory in a way that preserves for a very short period the possibility of keeping the horse in the barn. In particular, you confirmed that Mr. Moch is the malicious emailer and that he will acknowledge that.

From here, there are two possible paths forward. The first is the settlement path which to be successful must be completed by November 30th. We are willing to meet November 17 and the incentive to Mr. Moch and Ms. Stolzman is that our clients will negotiate a significant reduced cap on damages -- including potentially a minimal settlement amount -- if you will provide the information that I mentioned to you on the phone. The document that I previously mentioned when we first spoke is Exhibit C to the complaint filed in the business court. You will want to look at paragraph 11. You and I can arrive at a method to ensure that your clients will receive the value for the information if it is disclosed and that they will not be in the position of giving information without receiving any promised value, nor us giving value for information that is not valuable.

That is the basic path to settlement. What follows is the immediate litigation alternative.

We have noticed your motion to quash the Google subpoena before Judge Hudson in Durham Superior Court on Monday, November 16. That notice is enclosed. That notice makes no reference to your client. Upon receiving your motion, we reviewed the Tolling Agreement to see if your action constituted a breach and concluded as you must have that the Tolling Agreement has no effect whatsoever on the *Doe* litigation.

Accordingly, we also enclose with this letter our motions to compel on the subpoenas to Mr. Moch and Ms. Stolzman, which do reference your clients. We have not filed these with the Court, but if we do not receive a

satisfactory response from your clients by close of business Wednesday of next week, we will file them with the Court and bring these on for hearing also.

At the hearing on the 16th, we will definitively identify Mr. Moch as the malicious emailer using cyber-fingerprints that definitively place him at the FedEx Kinko's at 114 West [Franklin Street,] Chapel Hill[,] on January 23 and accessing the Gmail account from that location, as well as the bevy of AT&T geolocation data placing Mr. Moch's cellphone in The Siena Hotel and the Durham South Regional Library when he conducted his malicious email activities from those locations.

We are pursuing every option and will exhaust them all. I also include the subpoena for video surveillance of the Public Storage self-storage facility at 515 S. Greensboro Road visited by Ms. Stolzman the day after she and her husband received their subpoenas, and the day before one of their vehicles went to Eubanks Road, the location of the Chapel Hill dump. I previously raised a concern about document preservation with your clients' prior counsel. If there is an issue, we will pursue every remedy.

We will also report Mr. Moch to the appropriate law enforcement authorities for cyberstalking. As we've discussed, Mr. Moch's email campaign, which was intended to harass and embarrass Mr. Pappas and Mr. Worthy, constitutes criminal cyberstalking in violation of N.C. Gen. Stat. 14-196.3. Mr. Pappas and Mr. Worthy have thus far refrained from reporting Mr. Moch to law enforcement. And, consistent with 2008 Formal Ethics Opinion 15, Mr. Pappas and Mr. Worthy are prepared as part of a settlement permanently to refrain from reporting Mr. Moch to law enforcement. If, however, we are unable to agree on the next steps in the settlement process as set forth in this letter, Mr. Moch's conduct will immediately be reported to the proper authorities.

In addition to all of the foregoing, by at latest November 30 we will have no choice but to file a complaint publicly identifying Mr. Moch as the anonymous emailer and describing in detail his malicious intent and

> his failed attempts to hide his tracks. At that point, we will bring this matter to the attention of Chimerix for indemnity to which Mr. Pappas is entitled, and Mr. Moch is contractually obligated to respond to Chimerix' requests for information. So we will be able to get by right through the Court or potentially Chimerix all information for which we presently are willing to give your clients significant value in order to avoid full litigation.
>
> We will stand down on all these immediate litigation issues for the Tolling Period and withdraw our notice of hearing for November 16 on all issues if we can follow the roadmap that we initially discussed, i.e., (i) you provide fulsome document production as we have discussed before our November 17 meeting, which includes third party involvement (indicating and fully disclosing whether you have the Linsley information we are requesting, but not producing the information yet); (ii) we simultaneously give [you] our detailed damages disclosure; (iii) we meet November 17 and discuss a method to ensure value is received for third-party information to be provided by Mr. Moch by both Mr. Moch and us, and we address the required acknowledgement.
>
> All of this would be settlement confidential disclosures and discussions.

On 18 November 2015, defendants filed an amended complaint naming plaintiff as the defendant instead of "John Doe or Jane Doe." On the same date, plaintiff filed suit against defendants, asserting claims for abuse of process and unfair or deceptive trade practices. On 30 November 2015, defendants filed a motion to dismiss plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(6). Plaintiff filed an amended complaint on 7 January 2016 and defendants filed an amended motion for dismissal on 8 January 2016. Following a hearing conducted on 13 January 2016, the trial court entered an order on 25 February 2016, granting defendants' motion and dismissing plaintiff's claims with prejudice. Plaintiff noted a timely appeal to this Court.

II. Standard of Review

N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015) allows a party to move for dismissal of a claim or claims based on the complaint's "[f]ailure to state a claim upon which relief can be granted[.]" "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). "[T]he well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (internal quotation omitted). "When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7-8 (2015) (citing *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (other citation omitted)). "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, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

"When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b) (6) motion without converting it into a motion for summary judgment." *Schlieper v. Johnson*, 195 N.C. App. 257, 261, 672 S.E.2d 548, 551 (2009). Moreover:

> Although it is true that the allegations of [the plaintiff's] complaint are liberally construed and generally treated as true, the trial court can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint. Furthermore, the trial court is "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences."

Laster v. Francis, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009) (citing *Schlieper* and quoting *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008)). "When reviewing pleadings with documentary attachments on a Rule 12(b)(6) motion, the actual content of the documents controls, not the allegations contained in the pleadings[.]" *Schlieper* at 265, 672 S.E.2d at 552 (citing *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001)).

III. Plaintiff's UDTPA Claim

[1] N.C. Gen. Stat. § 75-1.1 (2015) provides in relevant part that:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citation omitted). In the present case, we conclude that plaintiff's complaint discloses on its face that the acts upon which plaintiff rests his claim were not "in or affecting commerce."

As noted above, N.C. Gen. Stat. § 75-1.1(b) provides that, for purposes of the statute, "commerce" "does not include professional services rendered by a member of a learned profession." "[T]he practice of law has traditionally been considered a learned profession, as indeed it is. Furthermore, this Court has . . . applied the exemption in the context of a law firm. Thus, we conclude that . . . a law firm and its attorneys . . . are members of a learned profession." *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000) (citing *Sharp v. Gailor*, 132 N.C. App. 213, 217, 510 S.E.2d 702, 704 (1999). "Although no bright line exists, we think that the exemption applies anytime an attorney or law firm is acting within the scope of the traditional attorney-client role." *Reid*, 138 N.C. App. at 267, 531 S.E.2d at 236.

We have carefully examined the allegations of plaintiff's complaint and have accepted as true the factual allegations in the complaint. We have, however, disregarded conclusory allegations that state legal conclusions or unwarranted inferences of fact, such as plaintiff's assertion that defendants acted "in retaliation for [plaintiff's] exercising his First Amendment rights[.]" We have also disregarded allegations with no obvious relevance to the issue of whether plaintiff's complaint states a claim for unfair or deceptive trade practices. For example, the complaint contains a number of allegations that appear to be included in order to establish matters such as (1) the basis for plaintiff's alleged concerns about defendants' business practices; (2) the fact that the policies of the North Carolina State Treasurer support transparency and accountability; (3) the sufficiency of an audit conducted by defendants in response

to plaintiff's anonymous emails; (4) plaintiff's speculations as to the amount of damages that defendants incurred as a result of the emails; and (5) whether defendants' counsel acted in violation of the Code of Professional Responsibility. Allegations addressed to these issues or to similarly peripheral matters do not contribute to the determination of whether the material factual allegations of plaintiff's complaint state a claim for relief.

Moreover, we have disregarded allegations that are directly contradicted by the documents attached to or referenced in plaintiff's complaint. For example, plaintiff's complaint alleges that the letters from defendants' counsel regarding settlement negotiations "falsely threaten[ed]" plaintiff that failure to obey their subpoenas would "be a criminal offense." In fact, the letters do not state that "failure to obey" a subpoena is a criminal offense, but only that the *destruction of evidence* that had been subpoenaed is a violation of criminal law. Having conducted a detailed review of plaintiff's complaint, accepting its well-pleaded factual allegations as true while disregarding other allegations as discussed above, we conclude that plaintiff's claim for unfair or deceptive acts rests entirely upon the contents of the two letters sent from defendants' counsel to plaintiff or plaintiff's counsel.

This Court has held that a party may not bring a claim for unfair or deceptive practices based upon the actions of the defendant's counsel. In *Davis Lake Community Ass'n v. Feldmann*, 138 N.C. App. 292, 530 S.E.2d 865 (2000), the plaintiff, the homeowners' association of a planned development community, sued residents of the community to recover delinquent homeowners' assessments. The homeowners filed a counterclaim against the plaintiff for unfair debt collection and later sought to amend their counterclaim to join plaintiff's counsel as a required party. The *Davis Lake* opinion reviewed *Reid v. Ayers*, in which this Court held that in order to state a claim for unfair debt collection, a complaint must not only allege facts stating a violation of the specific regulations applicable to debt collection but must also satisfy "the more generalized requirements of all unfair or deceptive trade practice claims," which exclude from the definition of "commerce" the "professional services rendered by a member of a learned profession." *Davis Lake*, 138 N.C. App. at 296, 530 S.E.2d at 868-69. The *Davis Lake* Court held that the exception for learned professions stated in N.C. Gen. Stat. § 75-1.1 precluded the defendants from joining plaintiff's counsel in their counterclaim. We then held that:

> We again emphasize that defendants only have a valid claim against plaintiff, not its counsel. Thus, in proceeding

> with their claim, defendants must focus on those alleged unfair debt collection practices employed exclusively by plaintiff. Any acts engaged in by plaintiff's counsel, even if cloaked in terms of a principal-agent relationship, fall within the learned profession exemption and thus outside the purview of the NCDCA.

Davis Lake, 138 N.C. App. at 297, 530 S.E.2d at 869 (emphasis added). We conclude that *Davis Lake* is controlling on the issue of whether plaintiff can bring a claim against defendants based upon letters sent by defendants' counsel, and that plaintiff may not do so.

In arguing for a different result, plaintiff does not cite controlling authority to the contrary. Plaintiff makes the conclusory assertion that the holding of *Davis Lake* "was not unbridled or without limits," but fails to articulate how the present case exceeds the "limits" of that case. Plaintiff also identifies factual differences between the alleged actions of the counsel in *Davis Lake* and those of counsel in the present case, without proffering a basis upon which these factual differences would change our legal analysis. In addition, plaintiff cites *Huff v. Gallagher*, 521 B.R. 107 (Bankr. E.D.N.C. 2014), in support of his position. "We note initially that a decision of the Bankruptcy Court is not binding on this Court." *In re Foreclosure of Bass*, 217 N.C. App. 244, 254, 720 S.E.2d 18, 26 (2011), *rev'd on other grounds*, 366 N.C. 464, 738 S.E.2d 173 (2013). Furthermore, the opinion in *Huff* fails to acknowledge our holding in *Davis Lake*, or to distinguish it. As a result, *Huff* is neither controlling nor persuasive authority.

Moreover, plaintiff fails to identify any specific acts alleged in his complaint that (1) were undertaken by defendants alone and not by defendants' counsel, and (2) could support a claim for unfair or deceptive practices. In his reply brief, plaintiff states that his complaint "asserted various acts undertaken directly by Defendants that underlie his claims," citing paragraphs Nos. 1, 26, 38, 41, 45, 46, 59, 72, 81, 82, and 86. We have examined these allegations and conclude that they consist of general background information, the discussion of irrelevant matters such as plaintiff's speculation on the extent of the damages suffered by defendants, conclusory assertions that are not supported by factual allegations, and the merits of the terms of settlement that were offered by defendants' counsel in their letters. We hold that plaintiff's complaint failed to allege facts that, if true, would establish that the acts complained of were "in commerce" as the term is defined in N.C. Gen. Stat. § 75-1.1(b), and that the trial court did not err by dismissing this claim. As a result, we need not address the parties' arguments regarding

whether plaintiff's complaint stated facts supporting the other elements of a claim for unfair or deceptive trade practices.

IV. Plaintiff's Claim for Abuse of Process

[2] "Abuse of process is the misapplication of civil or criminal process to accomplish some purpose not warranted or commanded by the process." *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 602, 646 S.E.2d 826, 831 (2007) (internal quotation omitted). "Two elements must be proved to find abuse of process: (1) that the defendant had an ulterior motive to achieve a collateral purpose not within the normal scope of the process used, and (2) that the defendant committed some act that is a 'malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ.' " *Id.* (quoting *Stanback*, 297 N.C. at 200, 254 S.E.2d at 624) (emphasis in original). However, "[t]here is no abuse of process where it is confined to its regular and legitimate function in relation to the cause of action stated in the complaint." *Stanback* at 201, 254 S.E.2d at 624.

On appeal, plaintiff makes a number of arguments to support his contention that the letters sent by defendants' counsel and defendants' issuance of subpoenas constitute "abuse of process in violation of North Carolina law." Plaintiff asserts that defendants should not have issued subpoenas in connection with their "John Doe" lawsuit, given that defendants had information indicating that plaintiff was the person who had sent the emails; that the subpoenas were issued with the "ulterior motive" of "forc[ing plaintiff] to the negotiating table," or, alternatively, were issued with the "ulterior purpose" of pressuring plaintiff to provide testimony for defendants in another civil case. However, at the hearing on this matter, plaintiff's counsel made the following argument regarding plaintiff's claim for abuse of process:

> PLAINTIFF'S COUNSEL: To touch on the abuse of process very quickly: The defendants want to characterize it as a mere issuance of a subpoena. That's not the im-- that's not the abuse of the process. It's the totality of the circumstances and the idea that you have to appear within -- appear on a Saturday for a deposition, produce some 55 subsets of documents and, oh, yeah, by the way, this is all coming under the context of a letter which will demand money again as we have alleged that you're not entitled to. That's the abuse of the process.

"Our appellate courts have 'long held that where a theory argued on appeal was not raised before the trial court, the law does not permit

parties to swap horses between courts in order to get a better mount [on appeal].' " *State v. Portillo*, __ N.C. App. __, __, 787 S.E.2d 822, 832 (2016) (quoting *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (internal quotation omitted)). Before the trial court, plaintiff argued that the "totality of the circumstances" of the issuance of subpoenas constituted an abuse of process, based on the facts that the subpoenas required the taking of a deposition on a Saturday, the subpoenas requested the production of numerous documents, and the subpoenas were attached to a letter that conditioned an offer to settle upon plaintiff's payment of money to defendants. Having relied upon this argument at trial, plaintiff may not raise new arguments on appeal, to which defendants had no chance to respond at trial and on which the trial court had no opportunity to rule. On appeal, plaintiff fails to articulate how the facts noted above would support a claim for abuse of process, and we conclude that plaintiff is not entitled to relief on the basis of this argument.

For the reasons discussed above, we conclude that the trial court did not err by dismissing plaintiff's complaint, and that its order should be

AFFIRMED.

Judges CALABRIA and INMAN concur.

THE NEWS AND OBSERVER PUBLISHING COMPANY, ET AL., PLAINTIFFS
v.
PAT MCCRORY, AS GOVERNOR OF NORTH CAROLINA, ET AL., DEFENDANTS

No. COA16-725

Filed 20 December 2016

Appeal and Error—preservation of issue—sovereign immunity

An appeal in a public record case was dismissed as interlocutory where defendants contended that the trial court order involved sovereign immunity but did not properly plead, raise, or argue the affirmative defense. Sovereign immunity was raised only obliquely, at best, in a hearing on a motion for partial summary judgment. The record on appeal made clear that plaintiffs were taken completely by surprise when the order resulting from the hearing included an ambiguous reference to the issue.

Appeal by Defendants from order entered 29 April 2016 by Judge John O. Craig, III in Wake County Superior Court. Heard in the Court of Appeals 1 November 2016.

Southern Environmental Law Center, by Kimberley Hunter and Douglas William Hendrick; Stevens Martin Vaughn & Tadych, PLLC, by Hugh Stevens, C. Amanda Martin, and Michael J. Tadych; and North Carolina Justice Center, by Carlene McNulty, for Plaintiffs.

Robinson, Bradshaw & Hinson, P.A., by David C. Wright, III and Erik R. Zimmerman; and Robert F. Orr, for Defendants; Office of General Counsel, by General Counsel Robert C. Stephens, Jr., Deputy General Counsel Jonathan R. Harris, and Deputy General Counsel Lindsey E. Wakeley, for Defendant McCrory.

STEPHENS, Judge.

This appeal arises from a partial grant of judgment on the pleadings in favor of Plaintiffs. Defendants argue that Plaintiffs' claims are barred by the doctrine of sovereign immunity, or, in the alternative, that Plaintiffs' claims are either precluded under the principles of declaratory and mandamus relief in this State, or are moot. In light of our well-established precedent regarding interlocutory appeals, only Defendants' sovereign immunity contentions could provide them a path to immediate appellate review. However, because the record in this matter reveals that Defendants did not properly plead or argue sovereign immunity in the trial court, we dismiss this appeal as not properly before us.

Factual and Procedural Background

Although we do not reach the merits of this interlocutory appeal, a brief review of the origins of the case provides helpful context in understanding this matter of significant public import. Defendants Pat McCrory, as Governor of North Carolina; John E. Skvarla, II, as Secretary of the North Carolina Department of Commerce; Donald R. van der Vaart, as Secretary of the North Carolina Department of Environment and Natural Resources; Dr. Aldona Z. Wos, as Secretary of the North Carolina Department of Health and Human Services; Frank L. Perry, as Secretary of the North Carolina Department of Public Safety; William G. Daughtridge, Jr., as Secretary of the North Carolina Department of Administration; Anthony J. Tata, as Secretary of the North Carolina Department of Transportation; Susan W. Kluttz, as Secretary of the North Carolina Department of Cultural Resources; and Lyons Gray, as

Secretary of the North Carolina Department of Revenue (collectively, "the Administration") are our State's governor and his appointees, either currently or formerly[1] serving as the heads of various State agencies. Plaintiffs The News and Observer Publishing Company ("N&O"); The Charlotte Observer Publishing Company ("The Observer"); Capitol Broadcasting Company, Incorporated ("WRAL"); Boney Publishers d/b/a The Alamance News; ZM INDY, Inc. d/b/a Indy Week ("Indy"); and Media General Operations, Inc., are media entities that provide news services to the citizens of our State via print and online newspapers, broadcast television stations, and online news websites. Plaintiffs The Southern Environmental Law Center ("SELC") and The North Carolina Justice Center d/b/a NC Policy Watch are not-for-profit corporations chartered in our State that, *inter alia*, seek to inform the public about various matters of public concern and to advocate for policies that they believe will benefit the people and environment of North Carolina.

As part of their regular activities, Plaintiffs frequently make requests for access to and copies of government documents, records, and other information pursuant to our State's Public Records Act ("the Act"). *See* N.C. Gen. Stat. § 132-1(b) (2015) (providing that, because "public records and public information compiled by the agencies of [our] government . . . are the property of the people[,] . . . . it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law"). Each Defendant, in his or her official capacity, is a public "agency" as defined in the Act and a custodian of public records under the Act. *See* N.C. Gen. Stat. § 132-1(a). The essence of Plaintiffs' claims is that, since Defendant McCrory took office in January 2013, the Administration has implemented policies and procedures in order to frustrate the purpose of the Act by (1) intentionally delaying or wrongfully denying access to public records so that Plaintiffs cannot provide timely and thorough information to the public about the Administration's decisions, actions, and policies, and (2) imposing or requesting unreasonable and unjustified fees and charges in connection with requests made under the Act.

---

1. Some of the named Defendants have left the Administration since the commencement of this lawsuit. As of the date this opinion is filed, McCrory, Skvarla, van der Vaart, Perry, and Kluttz are still serving in their positions, while Vos, Daughtridge, Tata, and Gray have been replaced. Rick Brajer is the current Secretary of the Department of Health and Human Services, Kathryn Johnston is the current Secretary of the Department of Administration, Nick Tennyson is the current Secretary of the Department of Transportation, and Jeff Epstein is the current Secretary of the North Carolina Department of Revenue.

Plaintiffs allege several examples of the Administration's delaying tactics, including, *inter alia*:

> • That Indy requested copies of Defendant McCrory's travel records on 8 November 2013, spent the next 17 months narrowing and refining the scope of its request, engaged an attorney to pursue the request, and yet still received no records until 13 March 2015, when redacted records were turned over with no explanation then or now regarding the redactions.
>
> • That WRAL requested travel records from Defendant McCrory in February 2015, but had not received the records as of July 2015.
>
> • That N&O requested certain correspondence between members of the Administration regarding the State's sale of the Dorothea Dix property to the City of Raleigh in July 2014, but received no records until 9 June 2015. N&O's subsequent request for additional records connected to the Dix sale has resulted in no records being turned over. WRAL requested similar records in October 2014 but also received no records until 9 June 2015.
>
> • That SELC requested records from the Department of Transportation about a possible expansion of Interstate 77 to include High Occupancy Toll ("HOT") lanes in January 2014 and did not receive records until May 2015—after a contract to construct the HOT lanes had already been signed.
>
> • That WRAL requested email from Defendant McCrory's office related to the proposed move of the State Bureau of Investigation from the Office of the Attorney General in May 2014, but the request was not fulfilled until June 2015, after WRAL threatened litigation over the Administration's nonresponse.
>
> • That NC Policy Watch submitted a public records request in August 2013 to the North Carolina Department of Health and Human Services ("HHS") for records related to a departmental salary freeze and certain subsequent salary increases, but these records have never been provided.
>
> • That The Observer requested a database from the Office of the State Medical Examiner ("OSME")—part of

HHS—that included information compiled by the OSME about every death investigated by medical examiners since 2001, and, in response, HHS provided inaccurate and incomplete data, only turning over the complete database after a one-year delay and threats of legal action.

• That The Alamance News requested records from the Department of Commerce on 11 July 2014 related to certain economic development projects in Alamance and Orange counties, but no records were received as of July 2015.

On 21 July 2015, Plaintiffs commenced this action by the filing of a complaint and issuance of summonses in Wake County Superior Court. Plaintiffs filed an amended complaint ("the Complaint") on 22 July 2015. The Complaint seeks entry of orders (1) "in the nature of a writ of mandamus requiring [the Administration] to comply" with the Act; (2) compelling the Administration to provide any public records requested under the Act, but not yet provided; (3) declaring that certain of the Administration's policies and procedures violate the Act; (4) declaring that, under the Act, the Administration may not collect fees for inspection of public records absent a request for copies of the records; and (5) awarding reasonable attorney fees as permitted under the Act. The Administration filed its answer on 25 September 2015, and, on 17 February 2016, moved for partial judgment on the pleadings pursuant to Rule of Civil Procedure 12(c). *See* N.C. Gen. Stat. § 1A-1, Rule 12(c) (2015). On 26 February 2016, Plaintiffs moved for partial judgment on the pleadings and to compel discovery. The motions came on for hearing at the 23 March 2016 session of Wake County Superior Court, the Honorable John O. Craig, III, Judge presiding.

By order entered 29 April 2016 ("the order"), the trial court denied in part and granted in part the Administration's motion for partial judgment on the pleadings, granted in part Plaintiffs' motion to compel discovery, and postponed ruling on Plaintiffs' motion for partial judgment on the pleadings. Specifically, the trial court dismissed Plaintiffs' claims "pertaining to any public records requests made by any persons other than Plaintiffs . . . to Defendants named" in the complaint, but denied the Administration's motion to dismiss Plaintiffs' claims for declaratory relief under the Act, and relief in the nature of a writ of mandamus with regard to public records requests "that have not yet been acted upon in whole or in part"—that is, where the Administration has not yet produced requested public records. The court also denied the Administration's motion to dismiss "to the extent [it] attempt[ed] to dismiss Plaintiffs' claims on grounds that the General Assembly did not authorize Plaintiffs

to assert such claims against [the Administration], including as set forth particularly in the sovereign immunity discussion in *Nat Harrison Assocs., Inc. v. North Carolina State Ports Authority*, 280 N.C. 251, 258 (1972) and related cases."[2] In connection with this portion of its ruling, the court noted that, while "the procedures and remedies prescribed by [the Act] are exclusive[,] . . . . a request for declaratory relief appears to be the best, if not the only, procedural method [by] which the provisions of [the Act] can be interpreted and construed." Finally, the trial court denied the motions of both parties with regard to Plaintiffs' claims that the Act does not permit the assessment of special service fees where only *inspection* of public records—rather than *copies* of the records—is sought.[3]

On 3 May 2016, four days after the order was filed, the trial court advised counsel for Plaintiffs and the Administration that it was considering filing a supplemental order to clarify that any issue regarding sovereign immunity would not be ruled upon at that time and requesting that the Administration refrain from filing a notice of appeal until the supplemental order could be filed. On 5 May 2016, the trial court provided Plaintiffs and the Administration with a draft of its supplemental order which clarified that the issue of sovereign immunity had not been properly raised in the trial court. The following morning, the Administration gave written notice of appeal from the order. On 12 May 2016, the Administration filed in the trial court a motion to stay proceedings pending appeal.

On the same day the Administration moved for a stay, the trial court filed its supplemental order denying the Administration's motion for a stay and seeking "to clarify [the order] by modifying a specific portion of said order to reflect the [c]ourt's original intent, as well as to clarify the [c]ourt's position as to a recent defense asserted by the" Administration. Specifically, the supplemental order stated:

> Paragraph One of the [o]rder denied a portion of the [Administration's] motion for judgment on the pleadings, insofar as it pertained to the defense of sovereign

---

2. The meaning and effect of this portion of the order is discussed in greater detail *infra*.

3. Thus, the record reflects that the trial court did not postpone ruling on all aspects of Plaintiffs' motion for partial judgment on the pleadings, having denied the motion in regard to the special service charge "[a]t this juncture . . . ."

> immunity, but stated that the question of sovereign immunity could be revisited after completion of the limited discovery permitted in the [o]rder. Upon further reflection, the [c]ourt stated in an email to counsel for the parties, on May 3, 2016, that it would have been more appropriate to take the matter under advisement during the pendency of discovery, rather than characterizing the matter as a provisional denial. However, after conducting additional research, the [c]ourt finds it would be inaccurate to consider the matter as "under advisement" and that the defense of sovereign immunity is not yet ripe for the [c]ourt's consideration [because] . . . .
>
> . . . . while the [Administration] reserved the right "to assert additional affirmative defenses as discovery warrants and to the extent permitted by law" in their Answer . . . , they have not filed a motion to amend their Answer under Rule 15 of the Rules of Civil Procedure. North Carolina case law is clear that sovereign immunity must be raised as an affirmative defense under Rule 8(c) of the Rules. . . . The [c]ourt is aware of the line of appellate cases which hold that the defense of sovereign immunity is more than a mere affirmative defense, as it shields a defendant entirely from having to answer for its conduct at all in a civil suit. . . . *But the action before this* [c]*ourt is one in which the North Carolina General Assembly has expressly waived sovereign immunity . . . . The* [*Administration is*] *decidedly not immune from an action brought under* [*Section*] *132-9*. If this [c]ourt ultimately finds sovereign immunity to be applicable concerning certain pleadings raised by [P]laintiffs (*e.g.*, because Chapter 132 does not waive sovereign immunity in such a fashion), the defense would only narrowly apply to a mere portion of the Plaintiffs' [c]omplaint. . . . When combined with the [Administration's] decision not to raise the defense of sovereign immunity via a motion to amend their Answer up to this point, the [c]ourt is of the opinion that an appeal is premature and that discovery should go forward.

(Emphasis added). Thus, in addition to denying the Administration's motion to stay discovery pending resolution of this appeal, the supplemental order sought to either "clarify" or "modify" the order to explain there was no trial court ruling on sovereign immunity because the

trial court did not believe that the Administration had properly raised that matter.

Grounds for Appellate Review

All parties agree that this appeal is interlocutory. "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. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (citation omitted), *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "However, N.C. Gen. Stat. § 1-277 . . . allows a party to immediately appeal an order that either (1) affects a substantial right or (2) constitutes an adverse ruling as to personal jurisdiction." *Can Am S., LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307, *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014).

As appellant, it is the Administration's burden to establish an exception that will permit immediate review of the order. *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.") (citations omitted). The only basis for immediate appellate review asserted by the Administration is that the order involved a ruling on a claim of sovereign immunity. An interlocutory order ruling on a motion for judgment on the pleadings pursuant to Rule 12(c) based upon "sovereign immunity affects a substantial right and warrants immediate appellate review." *Webb v. Nicholson*, 178 N.C. App. 362, 363, 634 S.E.2d 545, 546 (2006) (citation omitted).

This aspect of our State's jurisprudence is clear: in an appeal from an interlocutory order denying a Rule 12 (c) motion based upon sovereign immunity,[4] this Court may reach the merits of arguments grounded in

4. "[I]n most immunity-related interlocutory appeals, we have declined requests that we consider additional non-immunity-related issues on the merits." *Bynum v. Wilson Cty.*, 228 N.C. App. 1, 7, 746 S.E.2d 296, 300 (2013) (citing *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 764-65 (2010); *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 384-85, 677 S.E.2d 203, 207-08 (2009), *disc. review denied*, 363 N.C. 806, 690 S.E.2d 705 (2010); *Boyd v. Robeson Cty.*, 169 N.C. App. 460, 464-65, 621 S.E.2d 1, 4, *disc. review denied*, 359 N.C. 629, 615 S.E.2d 866 (2005)), *rev'd in part on other grounds*, 367 N.C. 355, 758 S.E.2d 643 (2014).

sovereign immunity where that issue was properly pled and argued in the trial court. Our review of the record here reveals that the Administration did neither in this case, and, accordingly, we dismiss this appeal.

I. When and how sovereign immunity must be raised in the trial court

Our Supreme Court has held that sovereign immunity "is more than a mere affirmative defense, as it shields a defendant entirely from having to answer for its conduct at all in a civil suit . . . ." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation omitted).

> It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit. By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute.

Can Am S., LLC, 234 N.C. App. at 125, 759 S.E.2d at 309 (citations and internal quotation marks omitted). As the Administration concedes, "[o]rdinarily, the failure to plead an affirmative defense results in a waiver [of that defense] unless the parties agree to try the issue by express or implied consent." *Burwell v. Giant Genie Corp.*, 115 N.C. App. 680, 684, 446 S.E.2d 126, 129 (1994) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 8(c) (2015); *see also Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 598, 394 S.E.2d 643, 649 (1990) (noting that "failure to plead [an affirmative defense] is a bar to this issue being raised on appeal") (citation omitted), *disc. review denied*, 328 N.C. 89, 402 S.E.2d 824 (1991). The Administration did not plead sovereign immunity in its answer[5] and does not contend that Plaintiffs agreed—either implicitly or explicitly—to try the issue of sovereign immunity by consent.

---

5. At oral argument before this Court, the Administration observed that sovereign immunity may be raised via Rule of Civil Procedure 12(b)(6) and noted that its answer stated as an affirmative defense that Plaintiffs "fail[ed] to state a claim upon which relief may be granted." *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2015). However, the Administration did not mention sovereign immunity as the basis for a Rule 12(b)(6) dismissal in its answer, in its motion for partial judgment on the pleadings, or during oral argument at the motion hearing. Accordingly, case law permitting immediate appellate review of interlocutory Rule 12(b)(6) dismissals based upon sovereign immunity claims is inapplicable here. *See Murray v. Univ. of N.C. at Chapel Hill*, __ N.C. App. __, __, 782 S.E.2d 531, 536 ("[A]lthough [the] defendant's motion to dismiss referred to Rule 12(b)(6) as well as Rule 12(b)(1), the motion did not mention sovereign immunity. During the oral argument, where [the] defendant raised the sovereign immunity doctrine for the first time,

Instead, the Administration cites case law holding that, although "the better practice [is] to require a formal amendment to the pleadings[,]" generally, "unpleaded defenses, when raised by the evidence, should be considered in resolving a motion for summary judgment[,]" *N.C. Nat'l Bank v. Gillespie*, 291 N.C. 303, 306, 230 S.E.2d 375, 377 (1976), and specifically, that an unpled defense of sovereign immunity should be considered in ruling on a motion for summary judgment where "both parties knew or should have known that an action against a governmental entity . . . raises a question of sovereign immunity." *Mullis v. Sechrest*, 126 N.C. App. 91, 96, 484 S.E.2d 423, 426 (1997) (citing *Dickens v. Puryear*, 45 N.C. App. 696, 698, 263 S.E.2d 856, 857-58, *rev'd in part on other grounds*, 302 N.C. 437, 276 S.E.2d 325 (1981)), *rev'd on other grounds*, 347 N.C. 548, 495 S.E.2d 721 (1998). The Administration asserts that the holdings in these appeals from summary judgment orders should apply equally to a ruling on a motion for judgment on the pleadings. Assuming *arguendo* that the Administration is correct on that point, the factual circumstances and procedural posture of each cited case renders it inapplicable to this matter.

The above-quoted language from *Mullis*, for example, was part of this Court's analysis of whether the trial court abused its discretion in allowing the "defendants to amend their answer to assert the defense of sovereign immunity." 126 N.C. App. at 94, 484 S.E.2d at 425. Here, in contrast, the Administration did not move to amend its answer, and nothing in the record suggests that either party contemplated sovereign immunity as a possible defense prior to or at the motion hearing. The Administration also cites *Craig* for the proposition that the order here affects a substantial right and is thus immediately appealable, but in that case unlike in the matter at bar, the defendant explicitly asserted the defense of governmental immunity in its answer. 363 N.C. at 335, 678 S.E.2d at 352. Accordingly, *Craig*, like *Mullis*, is inapposite.

The Administration's reliance on *Gillespie* and *Dickens* is similarly misplaced. The *Gillespie* appeal arose from a suit by a bank against a debtor to collect on promissory notes, and the bank's "evidence and

---

[the] defendant relied only on Rules 12(b)(1) and 12(b)(2) in arguing that the complaint was barred by sovereign immunity and did not rely upon Rule 12(b)(6). . . . Further, since neither [the] defendant's written motion nor its oral argument at the hearing relied on Rule 12(b)(6) in connection with the sovereign immunity defense, the case law authorizing interlocutory appeals for denial of a Rule 12(b)(6) motion based on sovereign immunity does not apply."), *disc. review as to additional issues allowed*, __ N.C. __, 787 S.E.2d 22 (2016). Review of *Murray* on the basis of a dissent is currently pending in our Supreme Court.

[and the debtor's] admissions establish that [the debtor] executed the five notes upon which this action rests, thereby establishing a *prima facie* case." 291 N.C. at 306, 230 S.E.2d at 377-78. "Nowhere in his answer did [the debtor] assert the defenses[, to wit, that he had an oral agreement with the bank regarding repayment of the notes,] *raised by his affidavits filed in opposition to the motion for summary judgment*." *Id.* at 306, 230 S.E.2d at 377 (emphasis added). In that limited circumstance, our Supreme Court held that,

> in light of the policy favoring liberality in the amendment of the pleadings, either the answer should be deemed amended *to conform to the proof offered by the affidavits* or a formal amendment permitted, the affidavits considered, and the motion for summary judgment decided under the usual rule pertaining to the adjudication of summary judgment motions.

Id. at 306, 230 S.E.2d at 377 (citations, internal quotation marks, and brackets omitted; emphasis added).

Here, in contrast, it is undisputed that the Administration did not raise the defense of sovereign immunity in its motion for partial judgment on the pleadings or in any affidavit attached thereto. The Administration asserts that sovereign immunity *was* raised at the motion hearing, but there is a critical difference between raising an unpled affirmative defense that would operate as a complete bar to an action in an affidavit attached to a motion and raising such a defense *at the hearing on the motion*. In the former situation, the opposing party is made aware of, and given an opportunity to prepare a response to, the unpled defense, by both written response in opposition to the motion and at the hearing. Thus, the holding in *Gillespie* is explicitly aimed at preventing an overly technical exclusion of a possibly valid affirmative defense from being considered even though the opposing party has been made aware of it. On the other hand, where, as here, the matter of sovereign immunity—a *complete* defense to the entire lawsuit—is raised at best only obliquely in the midst of the hearing on a motion for *partial* judgment on the pleadings, the opposing party is denied any chance to prepare a response.

Our Supreme Court has directly addressed whether a party may raise an unpled affirmative defense for the first time at a motion hearing. In *Dickens v. Puryear*, although the defendant did not plead the statute of limitations—an affirmative defense—in his answer and did not refer to the statute of limitations in his motion for summary judgment, the Court noted that the

> *plaintiff was not surprised by the limitations defense and had full opportunity to argue and present evidence relevant to the limitations questions.* The [p]laintiff's complaint [was] cast in terms of the tort of intentional infliction of mental distress rather than assault and battery. This demonstrates [the] plaintiff's awareness that the statute of limitations was going to be an issue. [The p]laintiff did present evidence and briefs on the question before [the trial court]. Thus, . . . [the] affirmative defense was clearly before the trial court. . . . [The] defendants' failure expressly to mention this defense in their motions [was] not held to bar the court's granting the motions on the limitations ground.

302 N.C. 437, 443, 276 S.E.2d 325, 329-30 (1981) (internal quotation marks omitted; emphasis added). However, our Supreme Court cautioned that

> if an affirmative defense required to be raised by a responsive pleading is sought to be raised for the first time in a motion for summary judgment, *the motion must ordinarily refer expressly to the affirmative defense relied upon.* Only in *exceptional circumstances where the party opposing the motion has not been surprised and has had full opportunity to argue and present evidence* will movant's failure expressly to refer to the affirmative defense not be a bar to its consideration on summary judgment.

Id. at 443, 276 S.E.2d at 329 (emphasis added). Simply put, the circumstances in *Dickens* indicated that the plaintiff was not prejudiced by the technical failure of the defendant to plead and reference an affirmative defense because it was clear that the plaintiff understood the issue was contested and not only had the opportunity to respond, but *had* responded.

Here, on the other hand, rather than an elevation of substance over form—the goal noted in both *Dickens* and *Gillespie*—the result urged by the Administration would be to allow a technicality of form—the passing mention of an affirmative defense at a hearing—to utterly bar the majority of Plaintiffs' claims without providing them the opportunity to make *any* substantive response. This type of "gotcha" result is not due to a mere technical failure to comply with Rule 8. It is precisely the type of unjust and inequitable outcome about which our Supreme Court cautioned in *Dickens*. It is undisputed that the Administration's answer did not assert sovereign immunity as an affirmative defense,

the issue was not mentioned in its motion for partial judgment on the pleadings or any of the Administration's other filings in the trial court, neither party briefed the issue of sovereign immunity, and Plaintiffs were not prepared to and did not argue the issue at the motion hearing. Indeed, the record on appeal makes clear that Plaintiffs did not believe that the issue of sovereign immunity was raised at all at the hearing and were taken completely by surprise when the resulting order included an ambiguous reference to the issue, ultimately causing the trial court to file its supplemental order to clarify that the question had not been properly raised or argued at the hearing.

In sum, precedent reveals that the affirmative defense of sovereign immunity must generally be raised in a defendant's answer or by motion, and the circumstances here do not fall into any of the narrow exceptions to that rule permitted in the cases cited by the Administration.[6] Thus, the affirmative defense of sovereign immunity was not before the trial court because the "failure expressly to refer to the affirmative defense [was] a bar to its consideration on" the Administration's motion for partial judgment on the pleadings. *See id.*

Despite having failed to plead the defense in its answer or motion or briefs in support of its position on its motion, and notwithstanding the undisputed fact that Plaintiffs were thus denied any opportunity to respond to the defense, the Administration contends that it did raise and argue the issue of sovereign immunity during the motion hearing. The transcript of the hearing belies this assertion.

At the hearing, the Administration began by making extensive arguments on mootness and exclusivity of the Act's remedies, after which counsel for the Administration informed the trial court that he "want[ed] to raise one other point[:]"

> So you start from the proposition that there—that we say that *these really are exclusive remedies*. And, again, I told you I would remind you of a statement in *Shella vs. Moon* . . . . But if it were not apparent that these remedies

6. The Administration also cites cases in which trial court rulings on Rule 12(b)(6) motions to dismiss based upon a plaintiff's failure to allege the defendant's waiver of sovereign immunity have been approved. *See, e.g.*, *Paquette v. Cty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (noting that our appellate courts have "consistently disallowed claims based on tort against governmental entities *when the complaint failed to allege a waiver of immunity*") (citations omitted; emphasis added), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). However, the Administration did not move to dismiss Plaintiffs' complaint on this basis and makes no argument in this regard in its effort to establish a ground for appellate review of the order.

were limited, as we said, and comprehensive, the Court in *Shella* says—and this is right in the wheelhouse of the court[']s case. It deals with *the mootness issue*.

So if you're dealing with a mootness issue, you're having to ask a question what are the remedies? So have the remedies been satisfied? So this is not dicta. This is not—they're not side stepping, they're not commenting for the good of the populous [sic]. They are making a decision in a case about mootness.

In the *Shella* case, dealing with a 132-9 issue where the documents have been produce[d], is this quote: "The only recovery provided for by this statute is the opportunity to inspect public records."

And from our standpoint, not to be cute, but "only" means "only." So we know when it's indisputable that there's no declaratory relief that is available under that statute. Now, I told you I was going to hand up that case; the only case I'm going to hand you.

I want to raise one other point that we did not directly raise in our brief, but I think it's important here.

[The trial court accepted a case handed up by counsel.]

And this case, this proposition has been cited in several cases. As best I can tell it began with this case[,] this *North Carolina Port Authorities* case in 1972. It's this principle which is located on Page 4 of the opinion. I've highlighted it. If you'll see that highlighted provision.

But, if court is with me, what that says is that, in this case, it says the [S]tate is immune from suit unless and until it is expressly consented to be sued. It is for the [G]eneral [A]ssembly to determine when and under what circumstances the [S]tate may be sued.

And when statutory provision—and we think this is what the public records law is—*when statutory provision has been made for an action against the* [*S*]*tate, the procedure described by the statute must be* [*followed and*] *the remedies thus supported* [sic] *are, they underlined this word, "exclusive."*

> So if you considered the fact the way the statute has set out the remedies, you consider then the judicial statement of the Court of [A]ppeals in *Shella* that this is all that they are; *the only remedy is* [*to compel*] *inspection*.[7] And you considered this line of cases *where because* [*of*] *a waiver of sovereign immunity there must be exclusivity* unless you risk a balance and create a cause of action the legislature didn't authorize *when it waived immunity*.
>
> [For a]ll of those reasons[,] we say we would urge the [c]ourt strongly to consider to say [sic] that declaratory judgment in this context really isn't a[] judicial add on that was not authorized. That's the first part of what we would urge the [c]ourt to reconsider or consider further with respect to that issue.

(Emphasis and italics added). This excerpt makes clear that trial counsel did not assert sovereign immunity as a bar to the entire action, but rather, argued only that, *because the Act is a waiver of sovereign immunity*, its remedy provisions are exclusive and do not include declaratory judgments. This understanding of counsel's argument is further supported by a review of the case referred to—*Nat Harrison Assocs., Inc. v. N.C. State Ports Auth.*, 280 N.C. 251, 185 S.E.2d 793, *reh'g denied*, 281 N.C. 317 (1972). The section of that case to which the

---

7. In *Shella v. Moon*, the plaintiff sought release of documents related to a condemnation proceeding against her by filing an order to compel disclosure pursuant to section 132-9. 125 N.C. App. 607, 608-09, 481 S.E.2d 363, 364 (1997). After all litigation connected to the condemnation was concluded, a representative of our State's Department of Transportation offered the records for the plaintiff's review. *Id.* at 609, 481 S.E.2d at 364. After the State defendants moved for summary judgment, the "plaintiff moved to amend [her] complaint to add certain [additional] defendants and request compensatory and punitive damages." *Id.* The trial court granted summary judgment to the defendants, thereby denying the plaintiff's motions, and from that ruling, the plaintiff appealed. *Id.* This Court noted that "the only recovery provided for by this statute [section 132-9] is the opportunity to inspect public records" and held that, because "she has been granted the relief she sought by initiating this action under [section] 132-9[,] . . . her case must be dismissed [as moot]." *Id.* at 610, 481 S.E.2d at 364-65. In citing *Shella* in support of the Administration's exclusive *remedy* argument, its trial counsel appears to be conflating the concepts of recovery and remedy. "Recovery" is defined as "[t]he regaining or restoration of something lost or taken away[;] [t]he obtainment of a right to something (esp. damages) by a judgment or decree[; or a]n amount awarded in or collected from a judgment or decree[,]" while a "remedy" is a "means of enforcing a right or preventing or redressing a wrong; legal or equitable relief." *Black's Law Dictionary* 1302, 1320 (Deluxe 8th ed. 2004). Plaintiffs here, unlike the plaintiff in *Shella*, are not asking to *recover* damages from the Administration. Rather, Plaintiffs seek the *remedy* of a declaratory judgment. As such, while *Shella* may be pertinent regarding the Administration's mootness argument, it is unavailing in connection with its exclusive remedies contention.

Administration's trial counsel referred is the following:

> An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State. The State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued. *When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive.* The right to sue the State is a conditional right, and the terms prescribed by the Legislature are conditions precedent to the institution of the action.

Id. at 258, 185 S.E.2d at 797 (quoting *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 172, 118 S.E.2d 792, 795 (1961)) (citations, internal quotation marks, and ellipsis omitted). No issue regarding sovereign immunity was presented to our Supreme Court in *Nat Harrison Assocs.*, which concerned a contractor's suit against a State agency, seeking to recover damages after the agency retained the contractor's final payment as liquidated damages for construction delays. *Id.* at 255, 185 S.E.2d at 795. The question before the Court was whether "the trial judge correctly found that there was no provision in the contracts for recovery of damages for delays or for losses by reason of the devaluation of the German mark." *Id.* at 259, 185 S.E.2d at 797. Thus, the quotation from *Great Am. Ins. Co.* was cited not in regard to any issue of sovereign immunity, but instead, as part of the analysis of whether the statute permitting suits by contractors against the State for monies owed would allow the contractor to recover for damages not provided for in its individual contract with the State agency. *See id.* at 258-59, 185 S.E.2d at 797. The Court answered that the contractor could not so recover because,

> [u]nder the provisions of [section] 143-135.3, the plaintiff is only entitled to recover 'such settlement as he claims to be entitled to under terms of his contract' and since [the] plaintiff's claims as set out in the second and third counts of its complaint did not arise under the terms of its contracts, the court properly entered summary judgment on these two counts.

Id. at 259, 185 S.E.2d at 797-98. Neither the case nor language cited by the Administration to the trial court concerned sovereign immunity,

but rather supported its contention regarding *exclusivity of remedies where sovereign immunity has been waived*, the very argument the Administration had all along advanced here in the court below. The trial court appreciated that the Administration was making an exclusivity argument, not a sovereign immunity argument, as reflected by its response that it was "fully aware of the limitations that the case law imposes on the *exclusivity* question." (Emphasis added). Thus, the record on appeal and the hearing transcript demonstrate that the Administration did not raise and argue sovereign immunity as a basis for partial judgment on the pleadings, instead advancing only arguments on mootness and exclusivity of remedies.

In conclusion, the Administration's failure to properly plead, raise, or argue the affirmative defense of sovereign immunity below was "a bar to its consideration on" the motions being heard in the trial court, and, to the extent the order purported to address that matter,[8] it is of no effect. The interlocutory order appealed from presents no issue of sovereign immunity entitling the Administration to immediate appellate review, and, accordingly, this appeal is

DISMISSED.

Judges BRYANT and CALABRIA concur.

8. While no party took appeal from the supplemental order, we note that it appears the trial court did not intend to rule on the question of sovereign immunity for precisely the reasons discussed in this opinion.

PATILLO v. GOODYEAR TIRE & RUBBER CO.

[251 N.C. App. 228 (2016)]

SHAWN F. PATILLO, PLAINTIFF
v.
GOODYEAR TIRE AND RUBBER COMPANY, EMPLOYER, LIBERTY MUTUAL INSURANCE GROUP, CARRIER, DEFENDANTS

No. COA16-636

Filed 20 December 2016

1. Workers' Compensation—effort to find suitable employment—conclusion not supported by evidence

The Industrial Commission erred by concluding that plaintiff had failed to make a reasonable effort to find suitable employment where that conclusion was not supported by competent evidence. There is no general rule for determining the reasonableness of an employee's job search, but the Commission must explain its basis for its determination of reasonableness.

2. Workers' Compensation—futility of employment search—advisory opinion not given

In a worker's compensation case remanded on other grounds, the Court of Appeals declined plaintiff's request to instruct the Commission to consider whether it would be futile for him to seek other employment in light of the decision in his Social Security Disability claim. It is not the proper function of courts to give advisory opinions.

3. Workers' Compensation—Form 22 not filed—not necessary

The Industrial Commission did not err in a workers' compensation case by not making a finding regarding defendant's failure to submit a Form 22 (used in calculating wages). The Commission's findings were sufficient to address all matters in controversy; the Commission denied plaintiff's request for indemnity compensation, and a Form 22 was not necessary.

4. Workers' Compensation—Parsons presumption—properly applied

In a workers' compensation case, the presumption in *Parsons v. Pantry*, 126 N.C. App. 540, was properly applied to plaintiff's continuing back pain. The presumption applied only to the "very injury" determined to be compensable; plaintiff's continuing back pain was a future symptom allegedly related to the original compensable injury.

5. Workers' Compensation—Parsons presumption—not rebutted

The Industrial Commission did not err in a workers' compensation case by concluding that defendants failed to rebut the *Parsons* presumption (that further medical treatment is directly related to a compensable injury that has been shown initially). Defendants failed to present evidence showing that the medical treatment was not directly related to the compensable injury; the medical testimony did not show that plaintiff's low back pain was separate and distinct from his work injury.

6. Workers' Compensation—findings—testimony

The Industrial Commission in a worker's compensation case made sufficient findings of fact concerning the testimony of two medical witnesses. The Commission made no findings regarding one witness's testimony but did not wholly ignore or disregard the evidence. The other witness did not incorrectly opine on causation; rather, he did not testify on causation, and the Commission's findings about his testimony were not in error.

Appeals by Plaintiff and Defendants from an Opinion and Award filed 28 April 2016 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 16 November 2016.

Law Offices of Kathleen G. Sumner, *by Kathleen G. Sumner and Law Office of David P. Stewart*, *by David P. Stewart*, *for Plaintiff-Appellant.*

Hedrick Gardner Kincheloe & Garofalo, *LLP*, *by Matthew J. Ledwith and M. Duane Jones*, *for Defendant-Appellants.*

HUNTER, JR., Robert N., Judge.

Shawn F. Patillo ("Plaintiff") and Goodyear Tire & Rubber Company ("Employer") and Liberty Mutual Insurance Company (collectively, "Defendants") appeal from an Opinion and Award filed 28 April 2016 by the Full North Carolina Industrial Commission. We reverse and remand in part and affirm in part.

I. Factual and Procedural Background

On 16 February 2011, Employer filed a Form 19 (Employer's Report of Employee's Injury or Occupational Disease to the Industrial Commission). On 7 October 2011, Plaintiff filed a Form 18 (Notice of Accident to Employer and Claim of Employee, Representative, or

Dependent), stating he was injured as a result of a flatbed accident at his place of employment on 16 February 2011. On the same day, Plaintiff filed a Form 33 (Request that Claim be Assigned for Hearing), requesting compensation for days missed, disability pay, payment of medical expenses/treatment, and attorney's fees and costs.

The parties executed a consent order on 28 March 2012. The Defendants admitted an accident occurred at Goodyear and Plaintiff sustained "some level of contusion to the lower back as a result of [the] accident[,]" but disputed the extent of injury beyond the contusion.

On 24 October 2013, Deputy Commissioner Keischa M. Lovelace heard Plaintiff's case. The parties stipulated to the employee-employer relationship, the insurance carried by Employer, and that Employer should provide a Form 22 for wage calculation. Deputy Commissioner Lovelace issued an Opinion and Award on 18 December 2014. The Opinion and Award found and concluded Plaintiff sustained a compensable injury, which was causally related to Plaintiff's lower back pain. Deputy Commissioner Lovelace awarded Plaintiff temporary total disability compensation beginning 6 March 2012 until the time of the hearing, but denied Plaintiff's request for temporary total disability compensation from 13 May 2011 to 6 March 2012. Employer gave proper notice of appeal to the Full Commission ("the Commission") on 23 December 2014.

On 8 July 2015, the Commission filed an Interlocutory Order and reopened the record for the receipt of additional evidence. The Commission ordered the parties to confer and agree on a physician to conduct Plaintiff's medical evaluation.

On 22 July 2015, Plaintiff filed a motion with the Commission, proposing seven physicians to conduct Plaintiff's medical evaluation. On 23 July 2015, Employer filed a Motion to Amend, Clarify, and/or Consideration, asking the Commission to allow both parties to depose medical providers who examined Plaintiff. On 3 August 2015, Employer filed a response to Plaintiff's motion, arguing Plaintiff's motion was moot. On the same day, Plaintiff filed a response, arguing there was no need for evidence on the issue of disability and additional evidence was only needed regarding causation.

In response, Commissioner Bernadine S. Ballance issued an order on 27 August 2015, holding Employer's 23 July 2015 motion in abeyance. Commissioner Ballance also ordered the parties to comply with the 8 July 2015 order by 30 September 2015. On 29 August 2015, Plaintiff

filed a Motion for Additional Direction regarding the 8 July 2015 Order. On 30 September 2015, Plaintiff filed a response to the 8 July 2015 Order.

The Commission filed its Opinion and Award on 28 April 2016. The Commission found the following facts.

Plaintiff, a forty-nine year old male at the time of the hearing, worked at Employer since August 2007. At the time of the incident, Plaintiff worked as a press operator. As a press operator, Plaintiff transferred uncured[1] tires from a flatbed trailer onto the loader pan of the press machine for curing. Plaintiff monitored fifteen presses, ensuring the machines operated properly and removing tires after they cured.

In the early morning of 16 February 2011, Plaintiff unloaded tires from a stationary, unattached flatbed to a press machine loader pan. Nearby, a trucker drove a powered industrial truck with an attached flatbed down the press row. The flatbed attached to the truck "jackknifed" the unattached flatbed, which hit Plaintiff in his lower back and knocked Plaintiff to the floor. Plaintiff immediately felt pain from his back to his hips and legs, and Plaintiff was unable to stand up.

Immediately following the collision, a "Code Blue" was called, indicating an accident occurred. Workers from the onsite medical clinic arrived and transported Plaintiff to the clinic. Plaintiff complained of pain in his left lower back, groin, and hip area. The onsite medical clinic treated Plaintiff, scheduled him for an evaluation the next day, and recommended Plaintiff only perform "off-standard"[2] work. Plaintiff arrived at the onsite medical clinic before his shift on the evening of 16 February 2011 for his examination. Plaintiff informed his evaluator the pain had worsened since the night before and Plaintiff would not be capable of lifting tires due to the pain. The onsite medical clinic team recommended "off-standard" work.

On 17 February 2011, Leslie A. Byrne ("Nurse Byrne"), a nurse practitioner at the onsite medical clinic, evaluated Plaintiff. Plaintiff, once again, complained of pain in the left side of his back, left hip, and left knee. Plaintiff displayed contusions. Nurse Byrne restricted Plaintiff to

---

1. "Curing" a tire is the cooking process for tires. Before a tire enters the pressing machine, it is a "green tire." A press operator removes the green tires from a flatbed and places them on a loader pan, to be placed into a presser, where the tires are cooked. After the tire is pressed, it is considered a cured tire.

2. "Off-standard" means Plaintiff did not fully perform all of his job functions and received assistance with performing his job.

"off-standard" work with help with large tires. Plaintiff worked "off-standard" until 4 April 2011.

From 16 February 2011 to 13 May 2011, Plaintiff received treatment from the onsite medical clinic. The treatment included pain medication and physical therapy. Physical therapy ended on 22 March 2011, when Plaintiff reported less frequent and less intense pain.

On 5 April 2011, Plaintiff returned to on-standard work. While performing his regular job duties, Plaintiff's back pain increased. Plaintiff told Nurse Byrne he wanted a second opinion regarding his back injury. Although Nurse Byrne prescribed various medications, Plaintiff still reported back pain.

Not only did Plaintiff seek medical care at Employer's onsite clinic, he also went to Physician's Express urgent care on 20 February 2011. The next day, Plaintiff sought treatment at Northside Urgent Care for pain resulting from the injury.

Plaintiff applied for a wind-up operator position at Employer. Employer hired Plaintiff for this position. However, after training, Plaintiff failed the certification test to be a wind-up operator because he could not physically perform the job tasks.[3] Consequently, Plaintiff returned to his press operator position on 5 April 2011.

While visiting Northside Urgent Care on 30 April 2011 for his asthma, Plaintiff complained of lower back pain. Physician Assistant Aubrey Reid ordered a Magnetic Resonance Image ("MRI") of Plaintiff's lumbar spine. On 12 May 2011, Plaintiff received an MRI. On 13 May 2011, Physician Assistant Kerry Clancy saw a small meningioma or nerve sheath tumor in Plaintiff's lumbar spine. As a result, Clancy restricted Plaintiff to two weeks of sit-down work and scheduled a neurosurgical evaluation. Employer received notice of Plaintiff's restriction to sit-down work, but Employer indicated on its "Modified Work Authorization Form Medical Department" no modified work was available. Notably, Employer indicated on the form Plaintiff's injury was "non-occupational."[4] Employer did not assign Plaintiff to a sit-down work only position. Plaintiff has not worked since 13 May 2011. On 14 June 2011, Physician Assistant

---

3. The Opinion and Award did not address why Plaintiff could not physically perform the job tasks. However, Plaintiff testified a wind-up operator must work the crane and bend down to cut plywood with a saw. Due to Plaintiff's back pain, he could not perform these tasks.

4. "Non-occupational" means the injury was not related to Plaintiff's job.

Clancy treated Plaintiff for lower back pain. Plaintiff's medical provider restricted him to sit-down work only for two weeks.

Plaintiff reported to Dr. David Jones on 1 November 2011. Dr. Jones reviewed Plaintiff's lumbar spine MRIs. Dr. Jones was concerned about lesions on Plaintiff's lumbar spine and put the work-related back pain "on the back burner." On 21 December 2011, Dr. Jones referred Plaintiff to Dr. Gabriel Pantol, a neurologist.

Dr. Pantol evaluated Plaintiff on 6 March 2012 and 11 May 2012. Dr. Pantol opined Plaintiff's spine lesions were asymptomatic and Plaintiff's back pain was not related to the lesions or sarcoidosis. Dr. Pantol recommended Plaintiff be evaluated by a pain specialist for his back pain.

On 13 May 2011, Plaintiff reported to Dr. Robert Ferguson, an expert in internal medicine. Based on Dr. Ferguson's testimony, the Commission found Plaintiff's restriction to "sit-down work" related to his injury and low back pain and he needed to be evaluated for the spinal lesions. Additionally, Plaintiff had complained of back pain, which limited his capacity to perform his job duties continuously from the date of injury.

Employer never filed an Industrial Commission form to admit or deny Plaintiff's claim. Additionally, Employer never indicated to the Industrial Commission whether Plaintiff's claim was being treated as "medical only." With regard to the parties' consent order, the Commission found the consent order resulted in a rebuttable presumption Plaintiff's lower back injury was related to his compensable 16 February 2011 injury and resulting back contusion.

By consent of the parties, Plaintiff reported to Dr. John Buttram, a neurosurgeon, on 25 April 2012. Dr. Buttram diagnosed Plaintiff with non-mechanical back pain and recommended conservative treatment from a physiatrist. Dr. Buttram did not address restrictions for Plaintiff's non-mechanical back pain. Dr. Buttram opined to a reasonable degree of medical certainty "a contusion to the paraspinous musculature[5] is a reasonable assumption for Plaintiff's non-mechanical back pain, and if severe enough, his injury could prevent him from returning to the kind of work that he did before."

The Commission found Plaintiff's work-related injury caused his contusion and resulting non-mechanical back pain. The Commission

---

5. "Paraspinous musculature" is defined as the muscles adjacent to the spinal column. Paraspinal, Merriam-Webster, http://www.merriam-webster.com/medical/paraspinal (last visited Nov. 30, 2016).

explicitly relied on, and gave great weight to, Dr. Buttram's, Dr. Pantol's, and Dr. Ferguson's opinion testimonies. The Commission further found Defendants failed to rebut the presumption that Plaintiff's need for medical treatment was causally related to the 16 February 2011 injury. Moreover, even without the presumption, the Commission found Plaintiff proved the 16 February 2011 injury caused his lower back contusion and continuing non-mechanical back pain.

Turning to the issue of disability compensation, on 13 May 2011, Plaintiff's medical providers assigned him to sit-down work only. However, Employer was unable to accommodate Plaintiff's work restrictions, and Plaintiff did not return to work on 13 May 2011.[6] Plaintiff was restricted to "sit-down only" work until 6 March 2012, when he reported to Dr. Pantol. At his deposition on 21 March 2014, Dr. Pantol first opined, to a reasonable degree of medical certainty, Plaintiff was disabled and unable to work when Dr. Pantol saw him on 6 March 2012 and May 2012. However, on cross examination, Dr. Pantol limited his opinion of Plaintiff's disability to the 11 May 2012 visit. Dr. Pantol did not think the 6 March 2012 visit was a basis to remove Plaintiff from work.

Based upon Dr. Pantol's testimony and a review of the record, the Commission found Plaintiff failed to prove he was totally incapable of working in any employment since 6 March 2012. The Commission further found since 6 March 2012, Plaintiff failed to show he made a reasonable effort to find suitable employment, or due to preexisting conditions and his work related restrictions, a search would have been futile.[7] The Commission noted Plaintiff's testimony indicating he still considered himself an employee of Employer, which means Plaintiff may have been on a leave of absence or a non-work related disability.

Regarding the 8 July 2015 Order, the Commission found the parties failed to comply with the order, and also failed to comply with the 28 August 2015 Order. Specifically, the parties failed to agree on a physician or a letter to send to a physician for a medical evaluation of Plaintiff. As such, the Commission reconsidered the record and found the 8 July 2015 and 28 August 2015 Orders should be vacated.

---

6. There are no findings in the record regarding *why* Employer was unable to accommodate Plaintiff's work restrictions.

7. There are no findings in the Opinion and Award regarding why the Commission found Plaintiff failed to show he made a reasonable effort to find suitable employment, or due to preexisting conditions and his work related restrictions, a search would have been futile. The lack of findings is at issue on appeal.

Accordingly, the Commission concluded based on a preponderance of the evidence, the *Parsons* presumption applied to Plaintiff's injury, due to the parties' Consent Order. Defendants failed to rebut the *Parsons* presumption. The Commission further concluded, even without the presumption, Plaintiff proved the 16 February 2011 injury caused the contusion and the continuing non-mechanical back pain. The Commission awarded payment for all related medical treatment for Plaintiff's contusion and causally related injuries.

Turning to disability, the Commission concluded Plaintiff failed to prove he had been totally incapable of working since 6 March 2012. Additionally, the Commission concluded Plaintiff failed to show he made a reasonable effort to find suitable employment, or due to preexisting conditions and his work related restrictions, a search would have been futile.

Plaintiff filed notice of appeal of the Commission's Opinion and Award to this Court on 4 May 2016. Defendants filed notice of appeal on 2 June 2016.

II. Jurisdiction

This Court has jurisdiction over appeals from the Industrial Commission pursuant to N.C. Gen. Stat. § 7A-29(a) and N.C. Gen. Stat. § 97-86 (2016).

III. Standard of Review

Review of an Opinion and Award of the Industrial 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 'court'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 is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274. "This Court does not weigh the evidence; if there is any competent evidence which supports the Commission's findings, we are bound by their findings even though there may be evidence to the contrary." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 597, 532 S.E.2d 207, 210 (2000) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981)).

IV. Analysis

A. Plaintiff's Appeal

We review Plaintiff's contentions in three parts: (1) the conclusion of law regarding whether Plaintiff made a reasonable effort to find suitable employment; (2) findings regarding the Form 22; and (3) Plaintiff's motion to dismiss Defendants' appeal.

1. Conclusion of Law Number Nine

[1] On appeal, Plaintiff contends the Commission erred by concluding Plaintiff failed to make a reasonable effort to find suitable employment. We agree.

Under North Carolina Workers' Compensation Law, an employee must prove three factual elements to support the legal conclusion of disability:

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Medlin v. Weaver Cooke Constr., LLC, 367 N.C. 414, 420, 760 S.E.2d 732, 735 (2014) (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)). An employee can establish disability in one of four ways:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted). An employee can prove the first

two statutory elements through any of the four methods listed in *Russell*, "but these methods are neither statutory nor exhaustive." *Medlin*, 367 N.C. at 422, 760 S.E.2d at 737.

Regarding an employee's efforts to obtain employment, there is no general rule for determining the reasonableness of an employee's job search. *Gonzalez v. Tiny Maids, Inc.*, ___ N.C. App. ___, ___, 768 S.E.2d 886, 894 (2015). Rather, "[t]he Commission [is] free to decide" whether an employee "made a reasonable effort to obtain employment under the second Russell option." *Perkins v. U.S. Airways*, 177 N.C. App. 205, 214, 628 S.E.2d 402, 408 (2006).

"Further, the Commission 'must make specific findings of fact as to each material fact upon which the rights of the parties in a case involving a claim for compensation depend. Thus, the Commission must find those facts which are necessary to support its conclusions of law.' " *Salomon v. Oaks of Carolina*, 217 N.C. App. 146, 152, 718 S.E.2d 204, 208 (2011) (quoting *Johnson v. Herbie's Place*, 157 N.C. App. 168, 172, 579 S.E.2d 110, 113 (2003)).

Here, Plaintiff contends Conclusion of Law Number Nine is not supported by the Commission's findings of fact. Specifically, Plaintiff argues the Commission failed to make the requisite findings of fact regarding Plaintiff's search for employment. The crux of Plaintiff's argument is Plaintiff was not required to search for employment outside of Employer for his search to be considered "reasonable". Defendants contend Plaintiff's search for employment was insufficient to establish disability under *Russell*.

Regarding Plaintiff's employment, the Commission found the following:

> 49. On the issue of disability, on May 13, 2011, Plaintiff was assigned the following restrictions: "sit down work only . . . two weeks; scheduling neurosurgery." Defendant-Employer was unable to accommodate Plaintiff's sedentary restrictions and Plaintiff did not return to work on or about May 13, 2011. Plaintiffs "sit down only" work restrictions were continued by various medical providers until March 6, 2012, when Plaintiff presented to Dr. Pantol for a neurosurgical evaluation. On March 6, 2012, Dr. Pantol ruled out neuro-sarcoidosis and determined that Plaintiff's non-work related spinal lesions were asymptomatic. During his examination and treatment of Plaintiff, Dr. Pantol also addressed Plaintiff's ongoing non-mechanical

back pain related to his compensable February 16, 2011 injury by accident.

50. Plaintiff is not seeking disability compensation prior to his March 6, 2012 evaluation with Dr. Pantol.

51. Plaintiff contends, based upon the deposition testimony of Dr. Pantol and the evidence presented, that he has proven he was temporarily totally disabled as of March 6, 2012 and continues to be temporarily totally disabled. At his March 21, 2014 deposition, Dr. Pantol was asked to give an opinion on the issue of whether Plaintiff's non-mechanical back pain was disabling. During direct examination, Dr. Pantol was asked: "Okay. And do you have an opinion within a reasonable degree of medical certainty whether Mr. Patillo was disabled and unable to work at the time you saw him on March 6, 2012 and May 2012?" Dr. Pantol answered, "Yes, from the description, that pretty much any type of activity would worsen his pain." However, during cross-examination, Dr. Pantol was asked, "Okay. So then your opinion regarding the work only involves the May 11, 2012, visit, correct?" He answered, "That would be it exactly." During re-direct examination, Dr. Pantol was again asked his opinion regarding Plaintiff's disability and testified, "Based on my first visit [March 6, 2012] . . . with a pain level of one or two, I don't think is a basis [to remove Plaintiff from work]. On the second visit [May 11, 2012], I would probably take him out of work for at least a couple of days of rest." Considering the totality of his testimony, the Full Commission finds that Dr. Pantol opined that he would have removed Plaintiff from work due to his non-mechanical back pain for a period of approximately three days.

52. Dr. Buttram testified that he did not assign any work restrictions to Plaintiff and it would have been speculative for him to assign retroactive restrictions as of the date of his deposition.

53. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that, except for the three days in May 2012 when Dr. Pantol felt Plaintiff should have been removed from work, Plaintiff has not proven on this record that he has been totally incapable of working in any employment since March 6, 2012.

> Plaintiff is not seeking indemnity compensation prior to March 6, 2012, the date of his evaluation with Dr. Pantol. Since March 6, 2012, Plaintiff has not shown that he made a reasonable effort to find suitable employment, or that due to preexisting conditions and his work related restrictions, it would have been futile for him to seek suitable employment. Plaintiff testified at the hearing before the Deputy Commissioner that he still considered himself to be an employee of Defendant-Employer. The evidence indicates that he may have been on a leave of absence or a non-work related disability.

Based on these findings, the Commission concluded:

> 9. On the issue of disability, the Full Commission concludes that, except for the three days in May 2012 when Dr. Pantol felt Plaintiff should have been removed from work, Plaintiff has not proven on this record that he has been totally incapable of working in any employment since March 6, 2012. Plaintiff is not seeking indemnity compensation prior to March 6, 2012, the date of his evaluation with Dr. Pantol. Since March 6, 2012, Plaintiff has not shown that he made a reasonable effort to find suitable employment, or that due to preexisting conditions and his work related restrictions, it would have been futile for him to seek suitable employment. Plaintiff testified at the hearing before the Deputy Commissioner that he still considered himself to be an employee of Defendant-Employer. N.C. Gen. Stat. § 97-29; *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762,425 S.E.2d 454 (1993).

We conclude the Commission's Conclusion of Law Number Nine is not supported by competent evidence. The order and opinion contains no explanation for the Commission's determination of "reasonableness." *Franklin v. Broyhill Furniture Indus. Inc.*, No. COA10-1334, 2011 WL 3890989, at *6-*7 (unpublished) (N.C. Ct. App. Sept. 6, 2011) (requiring the Commission to explain the basis for its determination of "reasonableness"). *See also Freeman v. Rothrock*, 202 N.C. App. 273, 277-79, 689 S.E.2d 569, 572-74 (2010) (affirming an award of disability when the Commission explained the basis for its determination of "reasonableness").

In *Franklin*, this Court reversed and remanded in part an Opinion and Award where the Commission failed to explain its determination

of "reasonableness." 2011 WL 3890989, at *6-*7, *12. The Commission found the following in regards to the reasonableness of a job search:

> At the hearing before the Deputy Commissioner, Plaintiff testified that he has attempted to obtain employment as a truck driver since his termination with Defendant. Plaintiff's job search log was introduced into evidence and indicated that since his termination on May 29, 2008, Plaintiff made weekly contacts to various companies that employ truck drivers. Plaintiff testified that any available positions were not within his physical restrictions. The undersigned finds by the greater weight of the evidence that Plaintiff has conducted a reasonable job search without success and that Plaintiff's inability to find or hold other employment is related to his work injury.

Id. at *5. The *Franklin* court relied on *Freeman v. Rothrock*, 202 N.C. App. 273, 689 S.E.2d 569, and held "the Commission's finding that Plaintiff had conducted a reasonable search for employment was not supported by sufficient factual findings." *Id.* at *7. The Court characterized the Commission's determination of reasonableness as "unsupported" and "conclusory." *Id.* at *7. The Court concluded:

> the Commission was required to make findings of fact explaining the reason that it deemed Plaintiff's job search to be "reasonable" and that its failure to make such findings constituted an error of law requiring us to reverse this portion of the Commission's order and remand this case to the Commission for further proceedings not inconsistent with this opinion, including the making of adequate findings of fact . . . .

Id. at *7.

We note *Franklin* is not a published decision. However, we hold the *Franklin* Court's requirement for an explanation of the determination of "reasonableness" is persuasive. As such, we hold the Commission must explain its basis for its determination of "reasonableness." Here, the Commission's finding regarding Plaintiff's search is merely a conclusion that Plaintiff's search for employment was unreasonable. Such a conclusory finding is insufficient to support the Commission's conclusion regarding Plaintiff's failure to establish his disability because he failed to make a "reasonable" job search. Accordingly, we reverse this portion of the Opinion and Award and remand to the Commission

for further proceedings not inconsistent with this opinion. *See Munns v. Precision Franchising, Inc.*, 196 N.C. App. 315, 319, 674 S.E.2d 430, 434 (2009) (remanding to Commission when the Commission failed to make necessary findings).

[2] In Plaintiff's brief, he asks this Court to instruct the Commission on remand "to consider whether, in light of the fully favorably decision in his Social Security Disability claim, he has met his burden of proving that it would futile for him to seek other employment under the third prong of *Russell*."

However, "it is not a proper function of courts 'to give advisory opinions . . . .' " *Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, 382 (1994) (quoting *Adams v. N. Carolina Dep't of Natural and Econ. Res.*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978)). It is the Commission's role to determine whether Plaintiff meets the third prong of *Russell*. Thus, instructing the Commission on remand whether Plaintiff has met his burden under *Russell* would result in this Court issuing an advisory opinion. As such, we decline Plaintiff's invitation to advise the Commission on this issue.

2. Form 22

[3] Plaintiff next argues the Commission committed reversible error by failing to make a finding regarding Defendants' failure to submit a Form 22. We disagree.

It is well established the Commission is required to address all issues necessary to resolve a Plaintiff's claim. *See Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). A Form 22 (Statement of Days Worked and Earnings of Injured Employee) is an aid in calculating average weekly wages, pursuant to N.C. Gen. Stat. § 97-2(5), when indemnity compensation is granted.

In this case, the parties stipulated Defendants would provide a Form 22. Deputy Commissioner Lovelace ordered Defendants to provide a Form 22 within thirty days of the order. In the Commission's order, the Commission found and concluded the following:

> The parties stipulated that Defendants would provide a Form 22 for calculation of Plaintiff's wages. The Industrial Commission file does not contain a Form 22. This Opinion and Award does not address Plaintiff's average weekly wage and compensation rate. Defendants shall provide a Form 22 to Plaintiff.

In its Award, the Commission denied Plaintiff's claim for indemnity compensation. Additionally, the Commission stated the following: "This Opinion and Award does not address Plaintiff's average weekly wage and compensation rate. Defendants shall provide a Form 22 to Plaintiff."

Plaintiff argues he is entitled to a specific finding acknowledging Defendants failed to comply with the order. Plaintiff contends the Commission's duty to "resolve all matters in controversy before it" requires the finding. *Joyner*, 92 N.C. App. at 482, 374 S.E.2d at 613. Plaintiff points to several opinions and awards, in which either a deputy commissioner or the Commission found an employer failed to submit a Form 22. *See Thompson v. N.C. Centel Tel.*, 2000 WL 1562940 at *2, I.C. No. 706622 (2000); *McLaughlin v. Sandoz Chem. Corp.*, 1998 WL 710019 at *5, I.C. No. 371437 (1998).

Defendants argue a Form 22 was not required because disability was not awarded by the Commission. Thus, Defendants contend, the Commission did properly determine all issues in controversy before it.

In this case, the Commission's findings are sufficient to address all matters in controversy. A Form 22 is used for wage calculation upon the grant of indemnity compensation. *See* N.C. Gen. Stat. § 97-2(5). Here, the Commission denied Plaintiff's request for indemnity compensation. Thus, a Form 22 was not necessary pursuant to the Commission's Award, and Plaintiff was not entitled to a specific finding regarding Defendants' failure to submit a Form 22. Accordingly, this assignment of error is without merit.[8]

3. Motion to Dismiss Defendants' Appeal

Lastly, Plaintiff contends Defendants failed to timely file notice of appeal. In his argument, Plaintiff reasserts the arguments included in his Motions to Dismiss, filed 20 July 2016 and 26 July 2016. This Court denied Plaintiff's motions to dismiss in orders entered 5 August 2016.

B. Defendants' Appeal

We review Defendants' contentions in three parts: (1) applicability of the *Parsons* presumption; (2) whether Defendants rebutted the *Parsons* presumption; and (3) whether the Commission properly considered the entirety of the medical expert testimony.

---

8. Although a Form 22 was not required because the Commission denied Plaintiff's request for indemnity compensation, a Form 22 would be necessary if the Commission awards indemnity compensation upon remand.

1. Whether the *Parsons* Presumption Applies

[4] Defendants argue the *Parsons* presumption does not apply because "Plaintiff's non-mechanical back condition is not 'the very injury' Defendants accepted pursuant to the consent order." We disagree.

In *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), this Court held after a workers' compensation claimant meets the initial burden of proving the compensability of an injury, there arises a presumption that further medical treatment is directly related to the compensable injury. 126 N.C. App. at 541-42, 485 S.E.2d at 869. *See also Miller v. Mission Hosp., Inc.*, 234 N.C. App. 514, 519, 760 S.E.2d 31, 35 (2014). The presumption exists because "[t]o require plaintiff to reprove causation each time [he] seeks treatment for the very injury that the Commission has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the Act in favor of injured employees." *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869.

However, the *Parsons* presumption is not without limits. The presumption applies only to "the very injury" determined to be compensable. *Clark v. Sanger Clinic, P.A.*, 175 N.C. App. 76, 79, 623 S.E.2d 293, 296 (2005); *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128,135-36, 620 S.E.2d 288, 292-94 (2005). Although limited to the very injury of compensability, "[t]he presumption of compensability applies to future symptoms allegedly related to the original compensable injury." *Perez*, 174 N.C. App. at 136-37, 620 S.E.2d at 293 n.1.

Here, the parties' consent order stated:

> Defendants, in this Consent Order, agree to admit that Employee was involved in an accident during the course and scope of his employment with Employer-Defendant on February 16, 2011, and admit that Employee sustained some level of contusion to the lower back as a result of such accident. The parties continue to dispute the extent of injury beyond a contusion.

At the outset, we note the *Parsons* presumption applies to the parties' consent order. *See id.* at 135-36, 620 S.E.2d at 293 (applying the *Parsons* presumption where employer admitted compensability of the plaintiff's injury). The dispute here regards the extent of the *Parsons* presumption.

Defendants contend the *Parsons* presumption does not apply to Plaintiff's ongoing back pain because the parties only consented to the

compensability of a contusion on Plaintiff's back, not to Plaintiff's continuing back pain. Plaintiff argues "[w]hether the presumption of compensability is limited to the 'very injury' previously determined to be compensable is irrelevant in this case, because [Plaintiff] alleged (and the Full Commission ultimately found) that his current low back pain is related to the 'very injury' determined to be compensable in the Consent Order."

Here, the Full Commission properly applied the *Parsons* presumption to Plaintiff's continuing back pain. The parties' consent order resolved the compensability of Plaintiff's contusions. Plaintiff's continuing back pain is a "future symptom allegedly related to the original compensable injury[,]" with Plaintiff's contusions being the compensable injury. *Id.* at 136-37, 620 S.E.2d at 293 n.1. As such, Plaintiff was entitled to a rebuttable presumption that his continuing back pain was directly related to the original compensable injury. Therefore, our next inquiry is whether Defendants rebutted the *Parsons* presumption.

2. Whether Defendants Rebutted the *Parsons* Presumption

[5] Defendants next argue the Commission erred in concluding Defendants failed to rebut the *Parsons* presumption. We disagree.

Once the *Parsons* presumption applies, the burden rests on the Defendants to rebut the presumption. "The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Id.* at 135, 620 S.E.2d at 292 (citing *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999)).

Regarding whether Defendants rebutted the *Parsons* presumption, the Commission concluded:

> 3. The *Parsons* presumption is rebuttable. In order to rebut this presumption, Defendants have the burden of producing evidence showing Plaintiff's non-mechanical back pain and his need for medical treatment for his non-mechanical back pain are unrelated to the compensable injury. Defendants must present expert testimony or affirmative medical evidence tending to show that the treatment Plaintiff seeks for his current low back condition is not directly related to his admittedly compensable back injury. *Id.*; *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 136-37, 620 S.E.2d 288, 293 (2005).

> 4. Where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. *Click v. Pilot Freight Carriers*, 300 N.C. 164, 265 S.E.2d 389 (1980). Additionally, the entirety of causation evidence must meet the reasonable degree of medical certainty standard necessary to establish a causal link. *Holley v. ACTS. Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003); *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 538 S.E.2d 912 (2000). Defendants did not present sufficient medical evidence to rebut the *Parsons* presumption. *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997); *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288 (2005); *Carr v. HHS (Caswell Ctr.)*, 218 N.C. App. 151, 720 S.E.2d 869 (2012).

Defendants point to testimony from Physical Therapist Frank Murray and Dr. David Jones. First, regarding Dr. Murray's testimony, Dr. Murray did not testify to a reasonable degree of medical certainty regarding causation between Plaintiff's back pain and his work injury. Defendants point to the following piece of testimony from the cross-examination of Dr. Murray:

> A. [O]n the 22nd of March he had been feeling better overall, is what he reported. So, I discharged him. And then when he returned on April 5th, he had had an increase in pain.
>
> Q. Okay. And when he reported the increasing pain, he reported that it occurred the prior weekend, when he was not working. Is that correct?
>
> A. Yes.
>
> Q. And do you have an opinion or would you agree that the presentation on April 5th of 2011 was secondary to the reported activities or the reported flare-up at home the weekend prior to that examination?
>
> A. Would I agree that that was -- what it was related to, in other words?
>
> Q. Correct.
>
> A. Yes.

However, this testimony does not adequately show Plaintiff's current low back pain is separate and distinct from his work injury. As such, the testimony from Dr. Murray does not rebut the *Parsons* presumption.

Defendants next point to testimony from Dr. Jones. Specifically, Defendants point to the following exchange in their direct examination of Dr. Jones:

> I don't think that there is a[n] association between . . . his back pain, and that trauma he suffered. . . whatever back pain he had, for a short time after the injury, was probably related to the injury itself. Why he had long term, chronic back pain, I cannot answer. . . .

However, Defendants mischaracterize Dr. Jones's testimony. In that part of his deposition, Dr. Jones testified regarding lesions Plaintiff suffered on his spine, which were admittedly not related to Plaintiff's injury at work.

A full review of Dr. Jones's testimony shows Dr. Jones never gave testimony to a reasonable degree of medical certainty regarding causation for Plaintiff's long term, continuing back pain. In fact, in the same excerpt included in Defendants' brief, Dr. Jones further testified he did not "spend any time with [Plaintiff] in any of our visits talking about his back pain and the likely causation of that." Additionally, Dr. Jones testified:

> Q. And so, Doctor, fast-forwarding to today, if [Plaintiff] was still having back complaints as of today, would you have an opinion as to whether such current back complaints would, more likely than not, be related to the 2011 incident or to some other cause?
>
> A. It's so – and it's really hard for me to form any opinion regarding that because I never really spent time with him talking about that. So I don't know that I have a strong opinion one way or the other, as far as the etiology of his back pain, just because that was never my focus and I never thought these lesions were the cause of his back pain. So again, I put the work related injury and the back pain on the back burner and tried to find a diagnosis for him . . . . So literally, I don't know if I have a real strong opinion [ ] as to whether or not his current pain or residual pain or whatever pain he's had over the years is related to that trauma or not.

On cross-examination, the following exchange occurred:

> Q: Doctor, you just said that nothing you just read changed your opinions on causation. You had not given us any opinion on causation, is that correct, in this case?
>
> A. No.
>
> Q: That's not ---
>
> A: I have---
>
> Q: ---correct?
>
> A: No, I have not given any opinions regarding causation. I don't have an opinion regarding causation.
>
> Q: Okay. And to be clear, you have general medical opinions, but no specific medical opinions on [Plaintiff] and his facts involving his workers' compensation case?
>
> A: I have no opinion regarding causation for him. I don't know myself, I don't know -- even if I could try to read these notes and come up with an opinion, I don't know yet what I would think. I really have no opinion regarding causation. It wasn't my focus ever seeing him.

Defendants failed to present evidence showing the medical treatment was not directly related to the compensable injury. *See Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292. Neither Dr. Murray nor Dr. Jones testified regarding causation between Plaintiff's back pain and the work injury. Accordingly, we hold the Commission did not err in concluding Defendants failed to rebut the *Parsons* presumption and this assignment of error is without merit.[9]

3. Entirety of Medical Evidence

[6] Next, we consider whether the Commission erred by failing to make sufficient findings of fact to resolve all of the material issues raised by the evidence. In particular, Defendants argue the Commission failed to make sufficient findings regarding testimony of Defendants' witnesses, Dr. Murray and Dr. Jones. We disagree.

---

9. Because we hold the Defendants did not rebut the *Parsons* presumption, the burden to prove causation did not shift back to Plaintiff. *Miller*, 234 N.C. App. at 519, 760 S.E.2d at 35 ("If the defendant rebuts the *Parsons* presumption, the burden of proof shifts back to the plaintiff.") (citation omitted). As such, we need not address whether Plaintiff proved causation without the *Parsons* presumption, as argued in Defendants' brief.

"In a workers' compensation case, the Industrial Commission is the finder of fact." *Peagler*, 138 N.C. App. at 601, 532 S.E.2d at 212. It is exclusively within the Commission's province to determine the credibility of the witnesses and the evidence and the weight each is to receive. *Floyd v. First Citizens Bank*, 132 N.C. App. 527, 528, 512 S.E.2d 454, 455 (1999) (citation omitted). "In making these determinations, the Commission may not wholly disregard or ignore the competent evidence before it." *Peagler*, 138 N.C. App. at 601, 532 S.E.2d at 212 (citation omitted).

However, "[t]he Commission is not required . . . to find facts as to all credible evidence" and is "not required to make findings as to every detail of the credible evidence." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000) (citation omitted); *Woolard v. N. Carolina Dep't of Transp.*, 93 N.C. App. 214, 218, 377 S.E.2d 267, 269 (1989) (citation omitted). "Instead the Commission must find those facts which are necessary to support its conclusions of law." *London*, 136 N.C. App. at 476, 525 S.E.2d at 205.

Defendants argue the Commission failed to make proper findings regarding Dr. Murray's and Dr. Jones's testimony. Specifically, Defendants contend the Commission wholly failed to consider testimony from Dr. Murray, and that the Commission's findings regarding Dr. Jones's testimony are in error.

Here, the Commission made no findings directly regarding Dr. Murray's testimony. However, the Commission explicitly stated it received the deposition testimony of Dr. Murray into evidence. Additionally, Finding of Fact Number Eleven discusses Plaintiff's visits with Dr. Murray. As such, the Commission did not "wholly disregard or ignore the competent evidence before it." *Peagler*, 138 N.C. App. at 601, 532 S.E.2d at 212.

Regarding Dr. Jones's testimony, Defendants incorrectly assert Dr. Jones opined as to the causation issue. However, as explained *supra*, Dr. Jones did not testify regarding causation. As such, the Commission's findings regarding Dr. Jones's testimony were not in error.

Because the Commission did not fail to properly consider the evidence before it, this assignment of error is without merit.

V. Conclusion

For the foregoing reasons, we reverse and remand in part, and affirm in part the Commission's Opinion and Award.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

Judges STROUD and DAVIS concur.

STATE v. CURLEE

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

STATE OF NORTH CAROLINA, PLAINTIFF
v.
DOUGLAS EUGENE CURLEE, DEFENDANT

No. COA16-515

Filed 20 December 2016

Criminal Law—appointed counsel—waived, then requested

The trial court's denial of defendant's request for appointed counsel and its ruling that defendant had waived the right to appointed counsel were not supported by competent evidence. Defendant had waived appointment of counsel before one judge and obtained continuances while he sought to hire counsel, but he was unsuccessful and his request for appointed counsel before another judge was refused. The second judge relied on the prosecutor's erroneous statement that defendant had been told at the last continuance that he would be forced to proceed pro se if he could not hire the private attorney. The first judge did not warn defendant that he would be forced to proceed pro se if he could not hire private counsel and did not make any inquiry to ascertain that defendant understood the consequences of representing himself.

Appeal by defendant from judgment entered 29 February 2016 by Judge Kevin M. Bridges in Davie County Superior Court. Heard in the Court of Appeals 3 November 2016.

Attorney General Roy Cooper, by Associate Attorney General Rory Agan, for the State.

Willis Johnson & Nelson PLLC, by Drew Nelson, for defendant-appellant.

ZACHARY, Judge.

Douglas Eugene Curlee (defendant) appeals from judgment entered upon his convictions for felonious larceny from a merchant and having attained the status of an habitual felon. On appeal, defendant argues that the trial court erred by finding that, at a hearing conducted two months prior to the date of trial, defendant had refused the appointment of counsel and that defendant was warned at that hearing that if he were unable to hire an attorney, he would have to proceed to trial *pro se*. For the reasons that follow, we agree.

I. Factual and Procedural History

On 6 February 2013, defendant was arrested and charged with larceny from a merchant, in violation of N.C. Gen. Stat. § 14-72.11(2) (2015), which provides that a person "is guilty of a Class H felony if the person commits larceny against a merchant . . . [b]y removing, destroying, or deactivating a component of an antishoplifting or inventory control device[.]" On 7 February 2013, defendant completed an affidavit of indigency, requested the appointment of counsel, and trial counsel was appointed to represent him on the charge of larceny from a merchant. On 19 May 2014, defendant was indicted on the charge that he had attained the status of an habitual felon. On 30 May 2014, defendant signed a waiver of the right to assigned counsel, because he was attempting to hire attorney Michael J. Parker.[1] Between May 2014 and May 2015, defendant's trial was continued several times to enable defendant to obtain funds with which to retain Mr. Parker as trial counsel. On 11 May 2015, defendant appeared in court before Judge Kevin Bridges. Mr. Parker informed the court that defendant had not retained him and that, if the court would not agree to continue the case, Mr. Parker would then move to withdraw as defendant's counsel. After some discussion, which is described in detail below, the court agreed to continue the case for two months, to give defendant more time in which to pay Mr. Parker for his representation.

On 29 June 2015, Mr. Parker filed a motion to withdraw as defendant's counsel because defendant had failed to pay for Mr. Parker's representation.[2] On 6 July 2015, defendant appeared before the trial court

---

1. On 23 June 2014, defendant signed another waiver of counsel on which he checked the box next to the statement "I waive my right to all assistance of counsel, which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do." However, there is no other indication in the record that defendant ever expressed a wish to proceed *pro se*, and no record of the inquiry by a trial judge that is required by N.C. Gen. Stat. § 15A-1242 (2015). "The execution of a written waiver is no substitute for compliance by the trial court with the statute[;] [a] written waiver is something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not . . . an alternative to it." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations and quotation omitted). Moreover, contrary to the assertion by the State on appeal, the trial court *did not* find that defendant "had previously waived his right to an attorney in court" and did not make findings pertinent to the requirements for determining that a defendant who wishes to represent himself has been properly informed of, and understands, the consequences of his decision.

2. Mr. Parker's motion also alleged that defendant had "failed and refused to cooperate with and follow the advice of counsel." However, Mr. Parker did not pursue this contention in court, and there is no record evidence regarding defendant's alleged failure to cooperate with his counsel.

for a hearing on Mr. Parker's motion to withdraw. The court allowed Mr. Parker's motion to withdraw, and defendant asked for counsel to be appointed. Based upon certain representations by the prosecutor, which are discussed in detail below, the trial court found that on 11 May 2015 defendant had refused Judge Bridge's offer to appoint counsel and had been warned that he would have to proceed *pro se* if he did not hire counsel by 6 July 2015. The trial court found that defendant had waived the right to a court-appointed attorney.

Defendant represented himself at his trial, which began on 7 July 2015, the day after the hearing on Mr. Parker's motion. Following the presentation of evidence, the arguments by defendant and the prosecutor, and the trial court's instructions to the jury, the jury retired to deliberate. While the jury was deliberating, defendant left the courthouse and failed to return. The trial court found that defendant had voluntarily waived his right to be present at all stages of his trial, continued with trial proceedings in defendant's absence, and ordered that defendant's bond be revoked and an order issued for his arrest. The jury returned a verdict finding defendant guilty of larceny from a merchant. A separate proceeding was conducted on the charge that defendant had attained the status of an habitual felon. The jury found that defendant was an habitual felon. The trial court entered a prayer for judgment continued, and explained to the jury that it could not sentence defendant until he was brought before the court.

Defendant was arrested in January of 2016, and appeared before Judge Bridges for sentencing on 29 February 2016. Defendant was sentenced to 103 to 136 months' imprisonment. He gave notice of appeal in open court.

II. Standard of Review

On appeal, defendant does not raise any issues pertaining to the substantive merits of his conviction of larceny from a merchant or the sentence imposed upon his conviction. Instead, defendant challenges the trial court's denial of his request for appointed counsel, on the grounds that the trial court's findings were not based upon competent evidence.

> "It is well settled in this jurisdiction that 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. Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is

> evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

State v. Rollins, 231 N.C. App. 451, 453-54, 752 S.E.2d 230, 233 (2013) (quoting *Mecklenburg Cnty. v. Simply Fashion Stores, Ltd.*, 208 N.C. App. 664, 668, 704 S.E.2d 48, 52 (2010)).

III. Discussion

On appeal, defendant argues that the trial court erred by denying his request for the appointment of counsel, on the grounds that the court's findings were unsupported by competent evidence. In analyzing this issue, we first note that certain relevant facts are uncontradicted, including the following:

> 1. Defendant was arrested on 6 February 2013, and counsel was appointed to represent him the following day.
>
> 2. On 30 May 2014, defendant signed a waiver of the right to appointed counsel.
>
> 3. Between May 2014 and May 2015, defendant's case was continued three times to allow defendant time to obtain funds with which to retain attorney Michael J. Parker to represent him.
>
> 4. On 11 May 2015, Mr. Parker and defendant appeared before Judge Bridges. Mr. Parker told the court that defendant had not paid him and that if the case were not continued he would move to withdraw. Defendant told the court that he had lost his job but that he expected to be able to pay Mr. Parker in a month and a half. The court continued the case for two months.
>
> 5. On 6 July 2015, defendant appeared before the trial court. Mr. Parker moved to withdraw as defendant's counsel because defendant had not fully retained him. Defendant asked for the appointment of counsel. The prosecutor made certain representations to the trial court concerning the proceedings on 11 May 2015. The trial court ruled that defendant had waived the right to appointed counsel.

"An indigent defendant's right to appointed counsel in a criminal prosecution is guaranteed by both the North Carolina Constitution and the Sixth Amendment to the United States Constitution." *State v. Holloman*, 231 N.C. App. 426, 429, 751 S.E.2d 638, 641 (2013) (citation

omitted). However, there are several circumstances under which an indigent defendant may lose the right to appointed counsel. First, a defendant may waive his right to appointed counsel:

> A criminal defendant may "waive his [constitutional] right to be represented by counsel so long as he voluntarily and understandingly does so." Once given, however, "a waiver of counsel is good and sufficient until the proceedings are terminated or until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him." The burden of establishing a change of desire for the assistance of counsel rests upon the defendant.

State v. Sexton, 141 N.C. App. 344, 346-47, 539 S.E.2d 675, 676-77 (2000) (quoting *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999)). A defendant may also waive the right to be represented by counsel, instead electing to proceed *pro se*. " 'Once a defendant clearly and unequivocally states that he wants to proceed *pro se*, the trial court . . . must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel.' " *State v. Blakeney*, __ N.C. App. __, __, 782 S.E.2d 88, 93 (2016) (quoting *State v. Thomas*, 331 N.C. 671, 674, 417 S.E.2d 473, 476 (1992)). "A trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242." *Id.* In addition, a criminal defendant who engages in serious misconduct may forfeit the right to appointed counsel. *Blakeney*, __ N.C. App. at __, 782 S.E.2d at 93-94.

Another situation that arises with some frequency in criminal cases is that of the defendant who waives the appointment of counsel and whose case is continued in order to allow him time to obtain funds with which to retain counsel. By the time such a defendant realizes that he cannot afford to hire an attorney, his case may have been continued several times. At that point, judges and prosecutors are understandably reluctant to agree to further delay of the proceedings, or may suspect that the defendant knew that he would be unable to hire a lawyer and was simply trying to delay the trial. It is not improper in such a situation for the trial court to inform the defendant that, if he does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date, he will be required to proceed to trial without the assistance of counsel, *provided that* the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C. Gen. Stat. § 15A-1242.

> [D]efendant neither voluntarily waived the right to be represented by counsel, nor engaged in such serious misconduct as to warrant forfeiture of the right to counsel without any warning by the trial court. As a result, the trial court was required to inform defendant that if he discharged his attorney but was unable to hire new counsel, he would then be required to represent himself. The trial court was further obligated to conduct the inquiry mandated by N.C. Gen. Stat. § 15A-1242, in order to ensure that defendant understood the consequences of self-representation.

Blakeney at __, 782 S.E.2d at 98.

In the present case, the parties have offered arguments regarding, *inter alia*, whether defendant showed "good cause" for withdrawing his waiver of appointed counsel or whether he engaged in behavior that might have supported the trial court's conclusion that he had forfeited the right to appointed counsel. We conclude, however, that on the facts of this case, we are not required to resolve these issues.

Our resolution of this appeal requires review of the hearings conducted in May and July of 2015. At the 11 May 2015 hearing before Judge Bridges, the State was represented by Assistant District Attorney Wendy Terry, and defendant was represented by Michael Parker. Ms. Terry explained the current status of the case to the court:

> MS. TERRY: Mr. Parker has, I think, made an appearance for the defendant previously for the purpose of having the case continued so that this gentleman could retain him in full. This is Mr. Curlee's third appearance on the trial list. We continued it so he would have the opportunity of getting his counsel retained the last two times, if it pleases the Court. I have spoken with Mr. Parker. Mr. Parker indicates to me that Mr. Curlee has not been able to make the appropriate arrangements[.] . . . I want to address the [issue of] counsel.

Mr. Parker explained that defendant had not paid him the amount required for representation and informed the court that "[i]f your Honor will not continue the case, it will be my motion to withdraw." Judge Bridges discussed the matter with defendant, who informed him that he had lost his job due to repeated absences occasioned by the prosecutor's directive that defendant remain in the courtroom "all week." The court asked defendant if was presently able to retain Mr. Parker, and defendant responded "No sir, not now, I don't." Ms. Terry conceded that

defendant had been asked to be available in case his case was reached on the calendar, but that the State was "not being ugly about it in any way." The court then engaged in the following dialogue with defendant:

> THE COURT: Mr. Curlee, how long will it take you to hire your lawyer if I were to give you that time? Are you currently employed?
>
> THE DEFENDANT: I just got another job last week then I have to be in court this week. I don't know what will happen today on that. I would say at least a month, month and a half.
>
> THE COURT: I assume he signed a waiver for the file at some point?
>
> MR. PARKER: He originally had court-appointed counsel, Judge.
>
> THE CLERK: There's a waiver signed.
>
> THE COURT: What was the date of the waiver?
>
> THE CLERK: 6-23-14.
>
> THE COURT: All right. Sir, in June of last year you signed a waiver, I presume, to hire your own counsel. I also presume back when you signed the waiver you were gainfully employed?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And so the difference would be in the interim you lost your job?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: So if I were to continue the case to give you time, I could continue the case, give you time to hire a lawyer. If I don't continue the case, I presume you still would want some kind of counsel based on the change of circumstances?
>
> THE DEFENDANT: (Defendant nodding.)
>
> THE COURT: Meaning he lost his job in the interim which would delay the case either way. I will grant the motion and keep Mr. Parker at least viable at this point. How long are you telling me it will take to hire your lawyer?

> MS. TERRY: There's a July 6th term of court.
>
> THE COURT: July 6th. Mr. Curlee, you need to be ready then, sir. Is he free to go at this time then? Is there anything else that I need to know about that may be pending?
>
> MS. TERRY: No, sir.
>
> THE COURT: You are free to go. Be back July 6th.

The transcript thus establishes that at the 11 May 2015 hearing the judge was informed (1) that after signing a waiver of appointed counsel, defendant lost his job and was not presently able to retain Mr. Parker, (2) that if the case were not continued, Mr. Parker would move to withdraw as counsel, and (3) that, if the court did not continue the case, defendant would "want some kind of counsel based on [his] change of circumstances." The trial court concluded that, regardless of whether the case was continued to give defendant more time to retain Mr. Parker or, alternatively, Mr. Parker was allowed to withdraw, defendant had "lost his job in the interim which would delay the case either way." In other words, there would either be a delay caused by a continuance, or a delay caused by the need to appoint counsel for defendant.

Faced with this situation, the court did *not* seek input from defendant as to whether he would prefer to have counsel appointed or instead to work towards being able to hire Mr. Parker, and the court did not offer to appoint counsel for defendant at that time. Instead, the court decided on its own to continue the case in order to "keep Mr. Parker at least viable at this point." Significantly, at the 11 May 2015 hearing, Judge Bridges did *not* address the possibility that defendant might be unable to retain Mr. Parker even with a continuance. The court told defendant generally to "be ready" for trial on 6 July 2015. However, the court did *not* warn defendant that if he were unable to hire Mr. Parker, defendant would be forced to proceed *pro se*. Nor did the court make any inquiry to ascertain that defendant understood the consequences of representing himself.

On 6 July 2015, defendant appeared before the trial court. Mr. Parker had moved to withdraw due to defendant's failure to retain him, but represented defendant at the start of the hearing, before his motion was granted. The State was again represented by Ms. Terry. At the outset of the hearing, Ms. Terry stated the following:

> MS. TERRY: . . . Mr. Curlee is number one on the trial list. He was on the trial list term before last in front of the Honorable Judge Bridges. He had not finished -- despite

> the age of the case -- this is a 2013 case -- had not finished hiring an attorney. Judge Bridges gave him a two-month continuance so he could do that. In the interim he has not finished paying Mr. Parker. Mr. Parker filed a motion to withdrawal, if it pleases the Court. Judge Bridges instructed him that he should be ready to go with or without an attorney. I tender the Court Mr. Parker on his motion.

Ms. Terry's statement to the trial court that Judge Bridges "instructed [defendant] that he should be ready to go with or without an attorney" is completely inaccurate. Judge Bridges did not give defendant such a warning and, in fact, said nothing whatsoever about the possibility of defendant's being forced to represent himself. In response to Ms. Terry's proffer of Mr. Parker to the court, Mr. Parker agreed that defendant's failure to pay him constituted the grounds for his motion to withdraw, and informed the court that he wished to withdraw and that defendant "will have a motion to continue or request a court-appointed counsel." Thereafter, the parties engaged in the following dialogue:

> THE COURT: Mr. Curlee, anything you want to say about Mr. Parker's motion to withdraw?
>
> THE DEFENDANT: I have to say then, I lost my job. I just couldn't work. I just started back.
>
> THE COURT: The Court would grant Mr. Parker's motion to withdraw.
>
> MR. PARKER: Thank you, your Honor.
>
> THE COURT: And, Mr. Curlee, did you have any motions at this time?
>
> THE DEFENDANT: I would like to see if the Court could appoint me an attorney.
>
> THE COURT: When did Mr. Curlee sign a waiver?
>
> MS. TERRY: He had appointed counsel. He had Miss Hamilton-Dewitt whom he released. If I can approach with the Court file, I will let your Honor make her own determination in this matter. I can tell you that Judge Bridges offered Mr. Curlee court-appointed counsel two terms ago. He declined his offer, Mr. Curlee declined and wanted to hire an attorney. Judge Bridges told him he needed to be ready one way or the other this term of court.

Again, Ms. Terry's representation to the trial court was inaccurate and wholly unsupported by anything in the 11 May 2015 transcript. After the trial court heard from Ms. Terry, the hearing continued:

> THE COURT: For the record, the Court finds that Miss Hamilton-Dewitt was appointed February 7th of 2013. The case was continued until February 14th of 2013. That the case was continued until such time that on June 23rd, 2013, Mr. Curlee signed a waiver and was given an opportunity to hire an attorney, that the matter has been continued a year. The Court finds on information and belief that on the last court date, which was two months ago, that Judge Bridges granted a two-month continuance to the defendant. At that time Judge Bridges indicated that the matter would be tried with or without an attorney. That Judge Bridges gave the defendant an opportunity at that time to request a court-appointed attorney. Mr. Curlee indicated he wanted to hire his own attorney. That as of today he still has not done so. That Mr. Curlee is asking for a continuance and asking for a court-appointed attorney today. However, the Court finds this case is an old case. That it is first on the trial list that was duly published. That this is a 2013 case. The Court finds that Mr. Curlee knowingly and voluntarily waived his right to a court-appointed attorney on a previous court date and that he was given the opportunity to hire an attorney for several court dates. That he was put on notice two months ago that the case would be heard this term. The Court would deny the motion for court-appointed attorney.

It is clear from a review of the transcript that the trial court's ruling was based, at least in part, on Ms. Terry's misrepresentation that, at the 11 May 2015 hearing, (1) defendant was asked if he wanted counsel appointed at that point, (2) defendant was warned that the case would be tried in July regardless of whether defendant were able to hire Mr. Parker, and (3) defendant was explicitly warned that if he had not retained counsel by 6 July 2015, he would be forced to proceed to trial *pro se*. None of these representations are accurate.

We wish to be clear that this Court has no basis upon which to believe that Ms. Terry intentionally misrepresented the facts of this case to the trial court, and note that she spoke to the court without the benefit of a transcript. On the other hand, we note that in its appellate brief, the State is less than forthcoming about the history of this matter. For

example, the State asserts that in response to the trial court's inquiry, Ms. Terry "informed the trial court of the previous hearing, and the declaration of Judge Bridges that the appellant needed to be ready on 6 July 2015." This is a misrepresentation of the facts, and fails to acknowledge that Ms. Terry did *not* simply state that Judge Bridges had told defendant to "be ready" but had instead made several affirmative representations that were inaccurate. Indeed, the State omits *any* mention of either Ms. Terry's statements or the trial court's findings regarding defendant having allegedly been "warned" that he would have to represent himself if he was unable to hire Mr. Parker. As the State *does* have a transcript available for reference, this crucial omission is puzzling.

We also wish to emphasize that we are expressing no opinion on the substantive issues related to the appointment of counsel beyond our holding that the trial court's ruling was not supported by competent evidence. We offer no opinion, for example, on whether Judge Bridges might properly have warned defendant that he would have to proceed *pro se* if he did not hire an attorney, or on whether the trial court might properly have found, if it had been provided with accurate information, that defendant had waived his right to counsel.

We conclude that the trial court's denial of defendant's request for appointed counsel and its ruling that defendant had waived the right to appointed counsel were not supported by competent evidence. "A trial court does not reach a reasoned decision, and thus abuses its discretion, when its findings of fact are not supported by competent evidence." *Point Intrepid, LLC v. Farley*, 215 N.C. App. 82, 86, 714 S.E.2d 797, 800 (2011) (citing *Leggett v. AAA Cooper Transp., Inc.*, 198 N.C. App. 96, 104, 678 S.E.2d 757, 763 (2009)). As a result, defendant's conviction must be

REVERSED.

Judges STROUD and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
JUSTON PAUL JOHNSON, DEFENDANT

No. COA16-465

Filed 20 December 2016

1. Appeal and Error—appealability—no findings or conclusions—relevant evidence not disputed

Appellate review of the denial of defendant's speedy trial motion to dismiss was not precluded despite the trial court's failure to articulate findings or conclusions. None of the evidence relevant to the motion was disputed.

2. Constitutional Law—right to speedy trial—length and reason for delay

The trial court did not err by denying defendant's speedy trial motion to dismiss charges of assault with a deadly weapon inflicting serious injury with a sentencing enhancement for possessing or wearing a bulletproof vest. The primary cause of the delay was a backlog at the State Bureau of Investigation's Crime Lab, but the 18 months used by the Crime Lab to process forensic testing of evidence was a neutral reason for the delay. Unlike the docket, which is controlled by the prosecutor, a backlog of evidence to be tested is within control of a separate agency.

3. Constitutional Law—speedy trial—last-minute assertion of right

The trial court did not err by denying defendant's speedy trial motion to dismiss charges of assault with a deadly weapon inflicting serious injury with a sentencing enhancement for possessing or wearing a bulletproof vest. The eleventh-hour nature of defendant's motion carried minimal weight in determining whether defendant was denied his right to speedy trial.

4. Constitutional Law—speedy trial—no prejudice from delay

The trial court did not err by denying defendant's speedy trial motion to dismiss charges of assault with a deadly weapon inflicting serious injury with a sentencing enhancement for possessing or wearing a bulletproof vest. Defendant was not prejudiced by the delay between his arrest and trial, although he raised the questions of witnesses' memories and the ability to confer with counsel since he was incarcerated.

5. Assault—with a deadly weapon inflicting serious injury—participation in attack

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury where the victim was attacked by two men and it was undisputed that defendant did not shoot the victim. Defendant was acting in concert with the other man; it would have been reasonable for a finder of fact to infer from the evidence that defendant intended to help his girlfriend in taking her children against the will of her estranged husband, that defendant sought and obtained the assistance of the other man, and that they brought to the victim's address weapons and other equipment.

6. Assault—bulletproof vest enhancement—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge that he committed assault while wearing or having in his immediate possession a bulletproof vest. The evidence was sufficient to allow a reasonable inference that defendant either wore or had in his immediate possession a bulletproof vest during the assault.

Appeal by Defendant from judgment entered 10 December 2015 by Judge Beecher R. Gray in Onslow County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General James D. Concepcion, for the State.

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

INMAN, Judge.

A criminal defendant whose trial is delayed because of a backlog of forensic laboratory testing and who does not properly assert his speedy trial right until a trial has been scheduled has not been deprived of his constitutional right to a speedy trial.

Juston Paul Johnson ("Defendant") appeals from a judgment finding him guilty of assault with a deadly weapon inflicting serious injury with an enhancement that at the time of the commission of the felony, Defendant was in possession or wore a bulletproof vest. Defendant argues he was denied a fair and speedy trial, and that the trial court erred in failing to dismiss the assault with a deadly weapon inflicting

serious injury charge and the enhancement for the bulletproof vest for insufficient evidence. After careful review, we conclude that Defendant received a trial free of constitutional or other error.

Factual & Procedural Background

Evidence presented at trial tended to show the following:

Shortly after 9:15 pm on Friday, 23 August 2013, Anthony Sutton ("Mr. Sutton") had just parked his vehicle and was walking in the parking lot outside his apartment at 400 Hammock Lane in Jacksonville when a man wearing a bulletproof vest and gloves drew a gun and pointed it at his face. Mr. Sutton struck the man in the face and ran into the backyard of his apartment building. Mr. Sutton then heard a pop and felt a stinging sensation in the back of his left leg. He continued running until he lost feeling in his left leg and fell to the ground. The man with the gun jumped on Mr. Sutton, asked him if he wanted to die, and fired another shot. Mr. Sutton felt a burning sensation in his head like the feeling in his leg and believed he had been shot in the head.

Mr. Sutton grabbed the gun and fought with his assailant for it. Mr. Sutton then noticed another person in the yard, whom he at first thought was a neighbor coming to help him. But the other person joined in the fight, grabbed Mr. Sutton's hand that was on the gun, and placed a handcuff on Mr. Sutton's wrist. The person tried to handcuff both of Mr. Sutton's wrists, but Mr. Sutton punched him in the chest. The person with the handcuffs then put his hand inside Mr. Sutton's shorts and reached for his keys, then fell or moved to the ground, and then ran away. Mr. Sutton and the man with the gun continued to struggle, and Mr. Sutton heard his children screaming. At that point, Mr. Sutton released his grasp on the gun and tried to run toward the building. He then heard a third shot, his right leg went numb, and he fell again. After a few seconds, Mr. Sutton got up and ran to the front of the building. He reached the front of the adjacent apartment building, 600 Hammock Lane, when other people tackled him, told him to sit down, and began giving him first aid.

Mr. Sutton did not recognize either of his assailants. Although he saw that the man with the gun was wearing a bulletproof vest, he did not notice whether the second man was wearing a vest. When he hit the second man in the chest, "it didn't feel like flesh. It felt like it was padded. But [he didn't] really know what [the man] on."

Jacksonville police officers responded to a 911 call reporting shots fired outside of Mr. Sutton's apartment building and stopped a vehicle they

encountered driving away from the call location. Inside the vehicle they found Latasha Sutton (' "Ms. Sutton"), Mr. Sutton's estranged wife, in the driver's seat; Defendant in the front passenger seat; and Dwayne Robinson ("Mr. Robinson") in a rear passenger seat. A child was sitting in Ms. Sutton's lap and another child was sitting in the backseat near Mr. Robinson. Officers found a handgun belonging to Defendant in the center console. Officers found another handgun, which had recently been fired, under the floorboard of the backseat where Mr. Robinson was sitting. Officers also found a set of walkie talkies turned on and set to the same channel, a map, handcuffs, rope, and three or four bulletproof vests in the vehicle. One bulletproof vest was on the front floorboard on the right passenger side where Defendant was sitting at the time police stopped the vehicle.

Defendant was ordered to exit the vehicle and was arrested and searched at the scene. Police found in his possession a pair of handcuffs and ten handcuff keys on a key chain. Police ultimately confiscated Defendant's pants. Forensic testing later determined that the pants were stained with Mr. Sutton's blood.

Police removed Ms. Sutton, Mr. Robinson, and the children from the vehicle. Ms. Sutton told one of the officers, "[n]one of this would have happened if you would have done your job yesterday." The officer recognized Ms. Sutton and Defendant from his response to a domestic disturbance call at the same location a day earlier, on 22 August 2013. Ms. Sutton told police on that date that she was entitled to take custody of her children, who were in Mr. Sutton's apartment. Police officers were unable to assist Ms. Sutton and instructed her and Defendant to leave.

Lawrence Herndon ("Mr. Herndon"), Mr. Sutton's next-door neighbor, was in his apartment on the evening of 23 August 2013 when he heard a loud popping noise. When he heard another pop, Mr. Herndon went to the back window of his apartment and saw three people struggling outside about 20 feet away. He saw one of the three people standing up above another person on the ground, pointing the gun down at the person's neck. He saw the third person going through the pockets of the person who was on the ground. Mr. Herndon told his wife to call 911 and heard another gunshot and saw someone, whom he later identified as Defendant, running toward the front of the area between his building and an adjacent apartment building. Mr. Herndon then heard a woman and children screaming, and when he opened his front door, he heard someone say "they took the kids." Mr. Herndon walked outside his front door and found Mr. Sutton lying on the sidewalk. Mr. Herndon then

realized that Mr. Sutton was one of the three people who had been struggling in the back of the building. Mr. Herndon noticed that Mr. Sutton was handcuffed and bleeding.

Jacksonville police officers arrived within a few minutes of the 911 call. Officers asked Mr. Herndon if he could identify one or more of three people standing in front of a patrol car. Mr. Herndon identified Mr. Robinson as the person who had been holding the gun to Mr. Sutton's neck and he identified Defendant as the person who was reaching into Mr. Sutton's pockets when Mr. Robinson was holding the gun on Mr. Sutton's neck. Mr. Herndon noticed that the man with the gun was wearing a bulletproof vest. He did not recall seeing Defendant wearing a bulletproof vest.

After being advised of his *Miranda* rights, Defendant provided a written statement to police providing the following information: Defendant had come with Ms. Sutton to Mr. Sutton's apartment complex in Jacksonville on 22 August 2013 to pick up Ms. Sutton's children. Mr. Sutton refused to let Ms. Sutton take the children. The next day, 23 August 2013, Ms. Sutton told Defendant that Mr. Sutton had violated a restraining order and that he was on probation. Defendant returned to Mr. Sutton's apartment complex that evening with the understanding that Ms. Sutton had legal authority to take custody of the children because Mr. Sutton had violated his probation. Defendant's friend, Mr. Robinson, also rode with them, and they agreed that Ms. Sutton would drive the vehicle back to Fayetteville after picking up the children. After the vehicle was parked at the apartments, Mr. Robinson stepped out. Defendant was sitting in the vehicle with Ms. Sutton when he heard gunshots. Defendant saw Ms. Sutton's children outside the apartment building. He put the children in the vehicle and waited with Ms. Sutton for Mr. Robinson. Mr. Robinson then returned to the vehicle and they were in the process of leaving when they were stopped by police.

Defendant was arrested on the night of the shooting and on the following day he was served with a warrant charging him with attempted first degree murder. Defendant initially waived his right to court-appointed counsel, but eventually counsel was appointed to represent him. On 13 October 2015, Defendant was charged in a superseding indictment with attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and wearing or having in his immediate possession a bulletproof vest during the commission of the other charged felonies. On 24 October 2013, DNA evidence was collected from Defendant. From the time of his arrest until the jury

returned verdicts of guilty on 10 December 2015, Defendant was held in custody under a bond set at more than $500,000.[1]

On 14 November 2013, evidence including the pants Defendant wore on the night of the shooting and the DNA sample collected from Defendant was submitted to the State Bureau of Investigation Crime Lab for analysis. Having received no results after more than a year, the State submitted a "rush request" with the Crime Lab in January 2015. The Crime Lab released test results in May 2015 – more than 18 months after Defendant's arrest. After the test results were released, the case was set for trial, but the initial trial date of 5 October 2015 was continued at the request of Defendant's counsel to 9 November 2015.

On 23 September 2015, Defendant's counsel filed a motion to withdraw from the representation on the basis that he had been discharged by Defendant. On 2 October 2015, the same counsel filed a motion to dismiss the charges based on the alleged violation of Defendant's right to a speedy trial.

On 28 October 2015, again at the request of Defendant's counsel, the trial court postponed the trial from 9 November 2015 to 7 December 2015.

On 7 December 2015, Defendant informed the trial court that he wanted his counsel to continue representing him. The trial court then conducted a hearing on Defendant's speedy trial motion, orally denied the motion, and proceeded to impanel a jury for trial. Defendant gave notice of appeal in open court.

Analysis

I. Speedy Trial Motion

[1] Defendant contends the trial court erred in denying his motion to dismiss the charges against him based on the State's violation of his constitutional right to a speedy trial. We affirm the trial court's ruling.

The denial of a motion to dismiss on speedy trial grounds presents a question of constitutional law subject to *de novo* review. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). We therefore consider the matter anew and substitute our judgment for that of the trial court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

1. In a motion filed 2 October 2015 Defendant's counsel asserted that the bond amount was $750,000. The record does not include a bond order entered by the trial court.

The United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), established a four-part test to determine if a defendant had been denied his constitutional right to a speedy trial. *Id.* at 530, 33 L. Ed. 2d at 116-17. The four factors are (1) the length of delay between accusation (by indictment or arrest) and trial; (2) the reason(s) for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant resulting from the delay. *Id.* No single factor is dispositive; "[r]ather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.* at 533, 33 L. Ed. 2d at 118. The North Carolina Supreme Court expressly adopted the *Barker* factors in *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000), and noted that the same analysis applies to speedy trial claims asserted under Article I, Section 18 of the North Carolina Constitution.

Defendant notes that the trial court failed to articulate any findings of fact or conclusions of law. But the absence of findings and conclusions does not preclude review by this Court because none of the evidence relevant to Defendant's speedy trial motion was disputed. *See State v. Chaplin*, 122 N.C. App. 659, 663-64, 471 S.E.2d 653, 656 (1996) ("The information before the trial court is not in dispute and thus the failure of the trial court to make findings of fact does not prevent review by this Court."). Reviewing the undisputed evidence of record we proceed to apply the *Barker* analysis.

A. *Length of Delay*

[2] The length of delay between accusation and trial does not *per se* determine whether a defendant has been denied his speedy trial rights. *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721. The United States Supreme Court has noted that a delay approaching one year "marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry." *Doggett v. United States*, 505 U.S. 647, 652 n. 1, 120 L. Ed. 2d 520, 528 n. 1 (1992). In this case, Defendant was arrested and remained incarcerated for nearly 28 months before he was tried. This delay raises the question of reasonableness and requires us to consider the additional factors.

B. *Reason for the Delay*

"[D]efendant has the burden of showing that the delay [of his trial] was caused by the neglect or willfulness of the prosecution." *Grooms*, 353 N.C. at 62, 540 S.E.2d at 721. If Defendant makes a *prima facie* showing that the delay resulted from neglect or willfulness by the State,

the burden shifts to the State to provide a neutral explanation for the delay. *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003).

It is undisputed that the last four months of the delay of Defendant's trial resulted from his trial counsel's scheduling conflicts. It also appears that Defendant initially waived his right to appointed counsel but failed to retain counsel, so that counsel was appointed and first appeared for Defendant more than a month after his arrest. Seven months after his arrest, Defendant complained that his counsel had not spoken with him in two months. Ultimately, Defendant filed a *pro se* motion for appointment of new counsel, and Defendant's counsel filed a motion to withdraw from the representation. Delay caused by Defendant's indecision about counsel, counsel's lapse in communicating with Defendant, and counsel's scheduling conflicts should not be weighed against the State.

The primary cause of Defendant's delayed trial was a backlog at the State Bureau of Investigation's Crime Lab. The prosecution submitted evidence (including DNA evidence collected from Defendant after counsel was appointed to represent him in October 2013) to the Crime Lab for testing on 14 November 2013. The Crime Lab did not issue test results for another 18 months, in May 2015. Although the prosecution submitted a "rush request" with the Crime Lab in January 2015, it was not until April 2015 that the evidence was first tested for the presence of blood and other bodily fluids. When asked why testing did not start for more than a year after the evidence was submitted, Martha Traugott, a forensic scientist with the Crime Lab, testified that "[i]tems are usually worked in the order that we receive them." Erin Ermish, another Crime Lab scientist, testified that she first received evidence gathered in this case on 7 May 2015 and proceeded to conduct a DNA analysis. That was a few weeks before the Crime Lab issued its report. Ms. Ermish acknowledged that the State had submitted a "rush request" in January 2015. Asked by counsel for Defendant if she could explain the long delay in testing, Ms. Ermish testified that "due to the number of cases that had previously been submitted that were waiting to be worked, this case would have been worked in order when it was – when we go to that number."

When considering the factor of the reason for a delayed trial, "different weights should be assigned to different reasons." *Barker*, 407 U.S. at 531, 33 L. Ed. 2d at 117. More specifically:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily

> but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Id.

Defendant has not argued that the State deliberately delayed his trial, much less that the State delayed the trial to hamper his defense. Defendant concedes in his brief that "it is unclear the State had the ability to speed up" the testing process.

The undisputed testimony by Crime Lab scientists regarding a backlog of evidence to be tested provides an explanation analogous to that offered in *State v. Hammonds*, 141 N.C. App. 152, 160, 541 S.E.2d 166, 173 (2000), in which the trial court found that a congested court docket in Robeson County delayed the defendant's murder trial for more than four years following his arrest. *Id.* at 160, 541 S.E.2d at 173. " 'Our courts have consistently recognized congestion of criminal court dockets as a valid justification for delay.' " *Id.* (quoting *State v. Hughes*, 54 N.C. App. 117, 119, 282 S.E.2d 504, 506 (1981)). Unlike the management of a criminal court docket, which is within the control of the prosecutor, the management of a backlog of evidence to be tested is within the control of a separate agency, in this case the State Bureau of Investigation. While we acknowledge the holding in *Barker* that governmental responsibility for delay should be weighed against the State, Defendant has failed to make a *prima facie* showing that either the prosecution or the Crime Lab negligently or purposefully underutilized resources available to prepare the State's case for trial. For these reasons, we conclude that the 18 months used by the Crime Lab to process forensic testing of evidence in this case was a neutral reason for Defendant's delayed trial. *See also State v. Goins*, 232 N.C. App. 451, 453, 754 S.E.2d 195, 198 (2014) (concluding that a backlog at the Crime Lab was among "neutral" reasons for delay of the defendant's trial). Accordingly, this factor of the *Barker* analysis does not weigh in favor of Defendant.

C. *Defendant's Assertion of His Right to a Speedy Trial*

[3] The third factor to consider is whether and when a criminal defendant has asserted his right to a speedy trial. "The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531-32, 33 L. Ed. 2d at 117-18. A defendant is

not required to assert his right to a speedy trial in order to make a speedy trial claim on appeal. *Grooms*, 353 N.C. at 63, 540 S.E.2d at 722. But a defendant's failure to assert his speedy trial right, or his failure to assert the right sooner in the process, "does weigh against his contention that he has been denied his constitutional right to a speedy trial." *Id.* Here, Defendant first asserted his speedy trial right more than a year after he was arrested, and he did not properly[2] assert his right until October 2015 – more than two years after his arrest, after the State had obtained forensic test results from the Crime Lab, after the trial court had set the case for trial, and after Defendant's trial counsel had requested the trial date be continued. The eleventh-hour nature of Defendant's speedy trial motion carries minimal weight in his favor.

D. *Prejudice to Defendant*

[4] The final factor to consider is prejudice to Defendant caused by the delay between his arrest and trial. "A defendant must show actual, substantial prejudice." *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257. The constitutional right to a speedy trial addresses three concerns: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Grooms*, 353 N.C. at 63, 540 S.E.2d at 722 (citations and quotation marks omitted). Of these concerns, most important "is whether the prosecutor's delay hampered defendant's ability to present his defense[.]" *State v. Hughes*, 54 N.C. App. 117, 120, 282 S.E.2d 504, 506 (1981).

In *Hughes*, the defendant contended that because of delay, he could no longer contact three alibi witnesses, but he presented no evidence about when the witnesses became unavailable. 54 N.C. App. at 120, 282 S.E.2d at 506-07. This Court held that "[b]ecause [the] defendant has not demonstrated that his witnesses were available at any earlier time, we cannot conclude that the prosecutor's delay caused him prejudice." *Id.* at 120, 282 S.E.2d at 507.

---

2. Defendant filed a *pro se* motion to dismiss claiming that his right to a speedy trial had been violated on 30 March 2015. "Having elected for representation by appointed defense counsel, defendant cannot also file motions on his own behalf or attempt to represent himself. Defendant has no right to appear both by himself and by counsel." *Grooms*, 353 N.C. at 61, 540 S.E.2d at 721; *see also Spivey*, 357 N.C. at 121, 579 S.E.2d at 256 (holding that where the defendant was represented by counsel throughout his pretrial incarceration, and counsel did not file a speedy trial motion for nearly three years after the defendant's arrest, the "defendant's *pro se* assertion of his right to a speedy trial is not determinative of whether he was denied the right[]").

Defendant here contends that several witnesses' memories were affected by the delay between his arrest and trial. For example, he notes that Mr. Herndon could not recall seeing Defendant wearing a bullet-proof vest. Defendant contends that the lack of recall could have exculpated Defendant had it been presented when the witness's memory was clearer. However, without evidence that the witness would have testified more positively for Defendant at an earlier time, this Court can only speculate whether the lack of recall hampered the defense or the prosecution. *See Barker*, 407 U.S. at 534, 33 L. Ed. 2d at 119 (holding that the defendant's right to speedy trial was not violated when the trial transcript revealed only "very minor" memory lapses, and noting that one lapse was by a prosecution witness). Defendant also contends that because he was incarcerated, he was unable to confer adequately with his counsel. However, given Defendant's inability to obtain release on bond, we cannot conclude that Defendant would have obtained non-custodial contact with his counsel had his trial proceeded sooner.

Considering all of the *Barker* factors, we conclude that Defendant has failed to show that his constitutional right to a speedy trial was violated. We therefore affirm the trial court's denial of Defendant's motion to dismiss on that ground.

II. Acting in Concert

[5] Defendant argues that the trial court erred in denying his motion to dismiss the charge of assault with a deadly weapon inflicting serious injury, because the evidence was insufficient to support that charge against him. We disagree.

We review *de novo* a trial court's denial of a defendant's motion to dismiss. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). The test 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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quotation marks and citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). We review the evidence in the light most favorable to the State, drawing every reasonable inference in the State's favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 213 (1994). On the other hand, evidence which raises no more than a surmise, suspicion, or conjecture of guilt is insufficient to withstand the motion to dismiss even though the suspicion so aroused by the evidence is strong. *State v. Evans*, 279 N.C. 447, 453, 183 S.E.2d 540, 544 (1971).

If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant is the perpetrator, the motion to dismiss should be denied. *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005). When considering circumstantial evidence,

> the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.

State v. Thomas, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citations omitted).

To withstand a motion to dismiss a charge of assault with a deadly weapon inflicting serious injury, the State must produce substantial evidence that the defendant (1) assaulted the victim, (2) with a deadly weapon, (3) inflicting serious injury. *State v. Allen*, 193 N.C. App. 375, 378, 667 S.E.2d 295, 297-98 (2008). The term "serious injury" is defined by statute as physical or bodily injury resulting from an assault with a deadly weapon. *State v. Wallace*, 197 N.C. App. 339, 347-48, 676 S.E.2d 922, 928 (2009); *see also* N.C. Gen. Stat. § 14-32 (2015).

Here, jurors were provided sufficient evidence from which they could reasonably infer all of the factual elements of the charge against Defendant. Evidence that Mr. Sutton was shot three times with a gun and required hospitalization and surgery for his wounds satisfies the elements of assault with a deadly weapon and infliction of serious injury. The closer question is whether the evidence was sufficient to allow a reasonable inference that Defendant was a perpetrator of the crime.

It is undisputed that Mr. Robinson, and not Defendant, shot Mr. Sutton. So Defendant could only be found guilty of assaulting Mr. Sutton with a deadly weapon inflicting serious injury based upon a theory of acting in concert. The theory of acting in concert extends criminal liability to a person who, although not the perpetrator of a crime, joins with the perpetrator in a common purpose which results in the crime.

> If two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

State v. Mann, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (2002) (citations omitted).

The evidence presented at trial established the following facts: Defendant and Ms. Sutton, who lived in Fayetteville, drove on a Thursday to Mr. Sutton's residence in Jacksonville, where the Suttons engaged in a dispute over custody of their children until police arrived and required Defendant and Ms. Sutton to leave without the children. The next evening, Defendant drove his vehicle, along with Mr. Robinson and Ms. Sutton, from Fayetteville back to Mr. Sutton's residence in Jacksonville, carrying in the vehicle firearms, bulletproof vests, and walkie talkie radios that were turned on and set to the same channel. The vehicle was waiting in Mr. Sutton's apartment parking lot when he arrived home that evening. Mr. Robinson, who did not know Mr. Sutton, shot Mr. Sutton and asked him if he wanted to die. Defendant assisted Mr. Robinson in restraining Mr. Sutton, placed a handcuff on one of Mr. Sutton's wrists, tried without success to cuff both of Mr. Sutton's wrists, searched Mr. Sutton's pockets, and escorted the Suttons' children from Mr. Sutton's apartment to the vehicle where Ms. Sutton was waiting. After neighbors found Mr. Sutton bleeding from gunshot wounds, Defendant sped away from the scene in the vehicle with Ms. Sutton, Mr. Robinson, and the children.

This evidence allows a reasonable inference that Defendant brought Mr. Robinson to Jacksonville, armed and equipped with bulletproof vests and walkie talkies, to take the children away from Mr. Sutton by force. Taking children by force and against the will of their custodial parent is a crime. Although it may have been possible for Defendant to take the children without confronting Mr. Sutton, without using a gun, a bulletproof vest, or a walkie talkie to communicate with a partner, a natural consequence of the purpose included a confrontation and use of weapons and other equipment available to Defendant and Mr. Robinson at the crime scene.

Defendant argues that absent evidence that he was "anywhere near" Mr. Robinson when the shots were fired "or in a position to assist or even waiting to assist" him during the shooting, the evidence was insufficient to show that he was present during the crime. We are unpersuaded. Mr. Sutton's blood was found on Defendant's pants. Defendant had traveled from another county for the second time in two days to visit the home of his girlfriend's estranged husband following a custody dispute. Defendant had in his possession several sets of handcuffs and a firearm. After Mr. Robinson first shot Mr. Sutton, and while Mr. Robinson and Mr.

Sutton were struggling over the gun, Defendant aided Mr. Robinson in the assault. The North Carolina Supreme Court has held:

> One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator.

State v. Price, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971).

It would have been reasonable for a finder of fact to infer from the evidence presented at trial that Defendant intended to assist his girlfriend in taking her children against the will of her estranged husband, that Defendant sought and obtained the assistance of Mr. Robinson, and that they brought to Mr. Sutton's address weapons and other equipment for the purpose of succeeding in the effort that had failed the previous day.

Based on the reasonable inferences arising from the evidence presented at trial, we conclude that the trial court did not err in denying Defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury.

III. Bulletproof Vest Enhancement

[6] Defendant argues that the trial court erred in denying his motion to dismiss the charge that he committed assault while wearing or having in his immediate possession a bulletproof vest. We disagree.

Mr. Sutton testified at trial that he could not see what Defendant was wearing during the assault, but that when he punched Defendant's chest, it felt padded. A police officer who interviewed Mr. Sutton at the hospital testified that Mr. Sutton told him both attackers wore bulletproof vests. Police who stopped Defendant's vehicle immediately following the shooting found a bulletproof vest lying on the floor of the front passenger side of the vehicle where Defendant was sitting. This evidence was sufficient to allow a reasonable inference that Defendant either wore or had in his immediate possession a bulletproof vest during the assault. For this reason, the trial court did not err in denying Defendant's motion to dismiss the enhancement charge.

Conclusion

For all of the reasons explained above, we conclude that the trial court did not violate Defendant's constitutional right to a speedy trial and that Defendant has failed to demonstrate any error in his trial.

NO ERROR.

Judges DAVIS and ENOCHS concur.

STATE OF NORTH CAROLINA
v.
KEVIN JOHN KIRKMAN, DEFENDANT

No. COA16-407

Filed 20 December 2016

1. Appeal and Error—improper notice of appeal—certiorari—Rule 2

Defendant's petition for certiorari was allowed and, to the extent defendant challenged a guilty plea not normally appealable, Rule 2 of the Rules of Appellate Procedure was invoked where defendant did not give a proper notice of appeal from his motion to suppress and sought to challenge the procedures in his plea hearing.

2. Search and Seizure—knock and talk—observations at front door

An objection to a "knock and talk" search actually concerned the issue of whether there was probable cause to issue a search warrant where defendant was not home, there was no "talk," and officers applied for a search warrant based on what they observed at the front door, as well as the claims of a confidential informant which had led to the "knock and talk."

3. Search and Seizure—warrant—confidential informant—truthful

An officer's statement in an affidavit attached to a search warrant regarding prior truthful statements by a confidential informant met the irreducible minimum circumstances to sustain a warrant. A valid search warrant was issued.

4. Appeal and Error—improper notice of appeal—resentencing

Defendant's argument that the trial court was divested of jurisdiction when he appealed from the first, erroneous judgment against him was not considered where defendant had conceded that his notice of appeal was defective. Certiorari was granted.

5. Sentencing—resentencing—greater sentence—opportunity to withdraw plea

The trial court erred by resentencing defendant to a sentence greater than that provided in his plea agreement without giving him the opportunity to withdraw his plea.

Appeal by defendant from order entered 4 September 2015 by Judge Eric C. Morgan and appeal by defendant upon writ of certiorari from judgment entered 10 November 2015 by Judge Richard L. Doughton in Superior Court, Guilford County. Heard in the Court of Appeals 6 October 2016.

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

David Weiss, for defendant-appellant.

STROUD, Judge.

Defendant appeals order denying his motion to suppress and judgment for drug-related convictions. The trial court properly denied defendant's motion to suppress and had jurisdiction to correct defendant's sentence since defendant's defective notice of appeal did not divest the trial court of jurisdiction. But as the State concedes, the trial court erred by not giving defendant an opportunity to withdraw his plea upon resentencing him. As explained in more detail below, we therefore affirm the order denying the motion to suppress but reverse the judgment and remand.

I. Background

On or about 18 March 2013, defendant was indicted for maintaining a dwelling for keeping or selling marijuana and two counts of trafficking in marijuana. In March of 2014, defendant filed a motion to suppress "any and all evidence" seized from his home, alleging that the officers did not establish probable cause for the search warrant which authorized the search of his home. On 4 September 2015, the trial court denied

defendant's motion to suppress and made the following findings of fact which are not contested on appeal:

> 1. On or about January 1, 2013, Officer C.S. Bradshaw of the Greensboro Police Department received information from a confidential source, that defendant was growing and selling marijuana.
>
> 2. In the application for the search warrant received in evidence as State's Exhibit 1, Officer Bradshaw, noting that the confidential informant was reliable, set out further specific information provided by the confidential informant, including the following: (a) that defendant was growing and selling marijuana from his residence . . . (b) that there was a large grow operation in the home, and (c) that there were generators running the lights. Officer Bradshaw further stated that the confidential informant was familiar with the appearance of illegal narcotics and that all previous information from the confidential informant had proven to be truthful and accurate to the best of Officer Bradshaw's knowledge.
>
> . . . .
>
> 11. Officers Bradshaw, Trimnal and Armstrong then decided to perform a "knock and talk" procedure to make inquiry further at the residence.
>
> 12. Officer Bradshaw testified that he had substantial experience in investigating narcotics matters, had made numerous arrests specifically related to marijuana, and had received specific training as to narcotics and the indications of marijuana growing activity such as mold and condensation, resulting from humidity, on the windows of marijuana "grow houses."
>
> . . . .
>
> 14. As Officer Bradshaw approached the house on the walkway to the front door, Officer Bradshaw noticed, in plain view to the right of the doorway, windows on the front right of the home that had substantial mold and condensation, as seen in State's Exhibits 3 and 4. In Officer Bradshaw's training and experience, this

was consistent with the heat and humidity associated with marijuana growing operations.

15. When Officer Bradshaw reached the front porch, he also heard, from the front porch, a loud sound consistent with an electrical generator running inside the home, which was also consistent with the information provided by the confidential informant.

. . . .

19. When Officer Trimnal approached the left side door and knocked, he smelled the odor of marijuana, and Officer Bradshaw also came over to the left side door, and he also smelled the odor of marijuana plainly and from outside the left side door of the home.

. . . .

21. Officers Bradshaw and Armstrong then sought the Warrant[.]

On 3 November 2015, defendant filed a written notice of appeal from the order denying his motion to suppress. On 10 November 2015, defendant pled guilty pursuant to an *Alford* plea to all of the charges against him, and the trial court entered judgment sentencing defendant to 25 to 30 months imprisonment. After receiving notification from the North Carolina Department of Public Safety that defendant's minimum and maximum terms of imprisonment as set forth in the judgment were incorrect, on 12 February 2016, the trial court entered another judgment sentencing defendant instead to 25 to 39 months imprisonment. In May of 2016, based upon his recognition of a defect in his notice of appeal, defendant filed a petition for writ of certiorari before this Court.

II. Petition for Writ of Certiorari

[1] According to defendant's petition "he lost the right of appeal by failing to give proper notice of appeal, and on the further ground that in Issue III of his brief, he seeks to challenge the procedures employed in his plea hearing, for which there is no right of appeal." The trial court rendered its decision to deny defendant's motion to suppress, and thereafter defendant entered into a plea agreement. On the same day as defendant's sentencing hearing and *before* judgment was entered, defendant's attorney filed a notice of appeal from the order denying defendant's motion to suppress. Thereafter, defendant did not file a timely appeal from the order denying his motion to suppress, and in

fact, even his oral notice to appeal given immediately after judgment was rendered appears to give notice of appeal only of the denial of his motion to suppress and not the actual judgment sentencing him.

A few months later, the trial court resentenced defendant to correct a prior error; this correction resulted in defendant's maximum sentence increasing by nine months although his minimum sentence remained the same. Defendant did not appeal the resentencing judgment but has since filed this petition for certiorari. The State "concede[s] that it was error for the trial court, at the new sentencing hearing[,] . . . not to allow defendant an opportunity to withdraw his plea where the sentence was greater than what he agreed to in his plea agreement[,]" and thus it would be appropriate for this Court to consider defendant's appeal.

Pursuant to North Carolina Rule of Appellate Procedure 21, we allow defendant's petition for certiorari. *See State v. Biddix*, ___ N.C. App. ___, ___, 780 S.E.2d 863, 866 (2015) ("N.C. Gen. Stat. § 15A–1444(e) states a defendant who enters a guilty plea may seek appellate review by certiorari, Appellate Rule 21(a)(1) is entitled Certiorari, and provides the procedural basis to grant petitions for writ of certiorari under the following situations: (1) when the right to prosecute an appeal has been lost by failure to take timely action[.]" (citation and quotation marks omitted)). Furthermore, to the extent defendant's appeal invokes challenges to his guilty plea not normally appealable, we invoke Rule 2 of the Rules of Appellate Procedure in order "to prevent manifest injustice" as this is a rare situation where *both parties* concede the trial court erred in sentencing defendant. N.C.R. App. P. 2; *see Biddix*, ___ N.C. App. at ___, 780 S.E.2d at 868 ("Under Appellate Rule 2, this Court has discretion to suspend the appellate rules either upon application of a party or upon its own initiative. 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. This Court's discretionary exercise to invoke Appellate Rule 2 is intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." (citations and quotation marks omitted)). We thus turn to defendant's issues on appeal.

III. Motion to Suppress

Defendant first challenges the denial of his motion to suppress on two separate grounds: (1) the "knock and talk" was a mere "guise" which allowed officers to surround his home and far exceeded the scope of a proper "knock and talk" and (2) the search warrant was deficient because it was based on an unsubstantiated anonymous tip.

> The standard of review for a trial court's order denying a motion to suppress is 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. If a defendant does not challenge a particular finding of fact, such findings are presumed to be supported by competent evidence and are binding on appeal. The trial court's conclusions of law, however, are fully reviewable on appeal.

State v. Medina, 205 N.C. App. 683, 685, 697 S.E.2d 401, 403 (2010) (citations and quotation marks omitted).

A. Knock and Talk

[2] Defendant does not challenge any of the findings of fact regarding the knock and talk but only the conclusions of law determining the knock and talk was lawful. We first note that we will refer to the officers' approach to defendant's home as a "knock and talk," since that is the term used by defendant and in cases, although we also note that there was no "talk" in this case since no one answered the door after the officers knocked. The only evidence from the knock and talk was from the officers' observations from the exterior of the home of the conditions of the windows and hearing the sound of the generator. This was really a knock, look, and listen.

Yet defendant raises an interesting legal question not directly addressed by either party, since most knock and talk cases deal with *warrantless* searches. *See*, *e.g.*, *State v. Smith*, 346 N.C. 794, 800, 488 S.E.2d 210, 214 (1997) ("Knock and talk is a procedure utilized by law enforcement officers to obtain a consent to search when they lack the probable cause necessary to obtain a search warrant. That officers approach a residence with the intent to obtain consent to conduct a warrantless search and seize contraband does not taint the consent or render the procedure per se violative of the Fourth Amendment." (citation and quotation marks omitted)); *State v. Marrero*, ___ N.C. App. ___, ___, 789 S.E.2d 560, 564 (2016) ("A knock and talk is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant." (quotation marks omitted)); *State v. Dulin*, ___ N.C. App. ___, ___, 786 S.E.2d 803, 810 (2016) ("In *Grice*, police officers who approached the door of the defendant's home for a knock and talk noticed some plants growing in containers

in an unfenced area about fifteen yards from the residence. The officers recognized the plants as marijuana, seized them, and later arrested the defendant. The defendant argued that evidence of the plants should have been suppressed because the officers' warrantless search and seizure of the plants violated the Fourth Amendment, as the plants were within the curtilage of his home and thus were protected." (citation and quotation marks omitted)). In this case, based upon all of the information the officers already had, including the informant's tip, the further investigation which supported the tip, and the conditions which the officers observed outside the home, the officers then obtained a search warrant before going inside the home and ultimately seizing any of the property which defendant attempts to suppress in his motion.

Defendant's brief makes much of the "coercive" nature of the officers' approach to the home, since three officers simultaneously approached his front and side door. But again, this was a knock, look, and listen; there was no talking. Since defendant was not home at the time and no one else was in the home, as far as the record shows, we do not know who could have been coerced. Defendant further contends that "[n]o North Carolina appellate decision has analyzed, let alone approved practice whereby officers simultaneously go to multiple doors and surround the front of a home[.]" In one case, this Court did discuss that it was problematic in that particular situation for officers to go to the defendant's back door but did not address any issue regarding officers approaching front and side doors for a knock and talk. *See generally State v. Pasour*, 223 N.C. App. 175, 741 S.E.2d 323 (2012) (stating as the general facts that officers approached the front and side doors and only addressing the unlawful approach to the back door). However, even assuming *arguendo* that any information gained from the approach of the side door was unlawfully obtained and therefore should be suppressed, the fact remains that Officer Bradshaw lawfully approached from the front of the home where he heard the generator and noticed condensation and mold, all factors which in his experience and training were consistent with conditions of a home set up to grow marijuana.

When the officers approached defendant's home, they were in the process of seeking additional information to substantiate the claims of the confidential informant. The investigation started with the tip from the informant; then Officer Bradshaw did further investigation which fully supported the informant's claims. Only then did the officers approach defendant's home to do the knock and talk, and even approaching from the front door of the home, Officer Bradshaw was

able to observe conditions at the home which further substantiated the informant's tip. It is well established that an officer may approach the front door of a home, *see, e.g.*, *State v. Smith*, ___ N.C. App. ___, ___, 783 S.E.2d 504, 509 (2016) ("[I]n North Carolina, law enforcement officers may approach a front door to conduct 'knock and talk' investigations that do not rise to the level of a Fourth Amendment search." *See State v. Tripp*, 52 N.C. App. 244, 249, 278 S.E.2d 592, 596 (1981) ('Law enforcement officers have the right to approach a person's residence to inquire as to whether the person is willing to answer questions.') (internal citations omitted); *see also State v. Church*, 110 N.C. App. 569, 573–74, 430 S.E.2d 462, 465 (1993) ('[W]hen officers enter private property for the purpose of a general inquiry or interview, their presence is proper and lawful. . . . [O]fficers are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances.' ")), and if he is able to observe conditions from that position which indicate illegal activity, it is completely proper for him to act upon that information.

Ultimately, the officers did get a search warrant for the search which led to the seizure of defendant's contraband. Thus, the real issue is not the knock and talk, but whether there was probable cause to issue the search warrant. Defendant's challenge to the knock and talk is actually a challenge of the search warrant since information from the knock and talk is part of the factual basis for the issuance of the warrant. But the officers' observations at the house were only a small part of the information upon which the warrant was issued. Thus, we turn to defendant's next challenge, the confidential informant.

B. Confidential Informant

[3] Defendant contends that the search warrant was improperly issued because the confidential informant was not sufficiently reliable to form the basis of probable cause.

> In determining whether probable cause exists for the issuance of a search warrant, our Supreme Court has provided that the totality of the circumstances test is to be applied. Under the totality of the circumstances test,
>
> > the task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be

> found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

State v. Benters, 231 N.C. App. 295, 300, 750 S.E.2d 584, 588 (2013) (citations, quotation marks, ellipses, and brackets omitted), *aff'd*, 367 N.C. 660, 766 S.E.2d 593 (2014). In *State v. McKoy*, this Court explained that

> [t]his court has already established the irreducible minimum circumstances that must be set forth in support of an informant's reliability to sustain a warrant. In *Altman*, the affiant's statement that the confidential informant has proven reliable and credible in the past was held to meet the minimum standards to sustain a warrant. In the present case, the affiant's statement that the confidential informant had given this agent good and reliable information in the past that had been checked by the affiant and found to be true also meets this minimum standard.

16 N.C. App. 349, 351–52, 191 S.E.2d 897, 899 (1972) (citation, quotation marks, and ellipses omitted).

Here, the trial court found that the search warrant stated the

> confidential informant was reliable, [and] set out further specific information provided by the confidential informant, including the following: (a) that defendant was growing and selling marijuana from his residence . . . (b) that there was a large grow operation in the home, and (c) that there were generators running the lights. Officer Bradshaw further stated that the confidential informant was familiar with the appearance of illegal narcotics and that all previous information from the confidential informant had proven to be truthful and accurate to the best of Officer Bradshaw's knowledge.

In context, describing the informant as "reliable" is a succinct way of saying that the officer was familiar with the informant and the informant had provided accurate information in the past. In addition, the warrant affidavit stated, "All previous information provided by [the confidential informant] has proven truthful and accurate to the best of [Officer Bradshaw's] knowledge." We conclude that Officer Bradshaw's statement in the affidavit attached to the warrant regarding prior truthful statements provided by the confidential informant meets "the irreducible

minimum circumstances that must be set forth in support of an informant's reliability to sustain a warrant." *Id.* at 351–52, 191 S.E.2d at 899.

While defendant argues the confidential informant here should be viewed as anonymous, the record does not support this claim. Indeed, as we just noted, the warrant application supports the exact opposite conclusion. Officer Bradshaw had to know who the informant was to be aware of the informant's prior reliability. This was not an anonymous tip from an unknown person. Defendant's brief dwells upon various types of additional information that might have been provided to show the reliability of the informant; we agree that additional information would not be harmful or inappropriate, but it is also unnecessary. *See generally id.* at 351–52, 191 S.E.2d at 899. The search warrant stated that Officer Bradshaw had previously used information from the confidential informant and found it to be reliable. Officer Bradshaw then did additional investigation, all of which supported the informant's claims and established probable cause for issuance of the search warrant. *See id.* As a valid search warrant was issued, defendant's motion to suppress was properly denied. This argument is overruled.

IV. Resentencing

[4] Defendant's next two challenges address the trial court's resentencing after notification of an error in the range of his sentence from the North Carolina Department of Public Safety. Defendant first contends that the trial court was divested of jurisdiction because he had already appealed from the judgment. But defendant cannot have it both ways. Defendant has already conceded that his notice of appeal was defective, and thus jurisdiction was not with this Court, but rather still with the trial court. *See generally State v. Miller*, 205 N.C. App. 724, 696 S.E.2d 542 (2010) (determining that jurisdiction does not switch to this Court when a notice of appeal is defective). As discussed above, we granted review by certiorari to defendant for this very reason.

[5] Lastly, defendant contends that it was error for the trial court to resentence him to a sentence greater than that provided for in his plea agreement without giving him the opportunity to withdraw his plea; the State agrees with defendant. North Carolina General Statute § 15A-1024 provides that

> [i]f at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the

> defendant is entitled to a continuance until the next session of court.

N.C. Gen. Stat. § 15A-1024 (2013) (emphasis added). Since the trial court should have given defendant the opportunity to withdraw his plea in accordance with North Carolina General Statute § 15A-1024, we reverse and remand. *See State v. Oakley*, 75 N.C. App. 99, 104, 330 S.E.2d 59, 63 (1985) ("On remand, the defendant may withdraw his guilty plea at the resentencing hearing, if the judge decides to impose a sentence other than the original plea arrangement, N.C. Gen. Stat. Sec. 15A-1024 (1983), or he may seek to negotiate new terms and conditions under his original plea to the lesser included offense. Reversed in part and remanded for reinstatement of guilty plea and resentencing.").

V. Conclusion

For the foregoing reasons, we affirm the trial court's denial of defendant's motion to suppress, reverse defendant's judgment, and remand so that the trial court may afford defendant the opportunity to withdraw his plea before any new longer sentence may be imposed.

Affirmed in part; reversed in part; and remanded.

Judges McCULLOUGH and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
LUIS MIGUEL MARTINEZ

No. COA16-650

Filed 20 December 2016

1. Search and Seizure—traffic stop—search of vehicle—reasonable belief—evidence within vehicle

The trial court did not err in a prosecution for possession of a firearm by a felon by denying defendant's motion to suppress the search of his vehicle which revealed a firearm partially under the back seat after defendant was arrested for impaired driving. Based upon the totality of the circumstances, including defendant's actions and the officers' training and experience with regard to driving while impaired, the trial court properly concluded that the officers reasonably believed the vehicle could contain evidence of the offense.

2. Criminal Law—prosecutor's argument—defendant's failure to produce exculpatory evidence

The trial court did not err by overruling defendant's objection to the prosecutor's closing argument concerning defendant not testifying in a prosecution for possession of a firearm by a felon. While a prosecutor may not comment on a defendant's failure to take the stand, the defendant's failure to produce exculpatory evidence or to contradict the evidence presented by the State may be brought to the jury's attention by the State. Moreover, in this case, any error was harmless beyond a reasonable doubt.

3. Criminal Law—prosecutor's argument—scenario of the crime

The trial court did not abuse its discretion in a prosecution for possession of a firearm by a felon by allowing the prosecutor to make statements in his closing argument that allegedly asserted facts not in evidence. Prosecutors may create a scenario of the crime as long as the record contains sufficient evidence from which the scenario is reasonably inferable.

4. Criminal Law—prosecutor's closing argument—demonstration—no gross impropriety

Defendant did not show gross impropriety and the trial court did not commit reversible error by not intervening *ex mero motu* in a prosecution for possession of a firearm by a felon where the prosecutor pointed a rifle at himself during a demonstration. Defendant failed to show gross impropriety.

Appeal by defendant from judgment entered 5 October 2015 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 1 December 2016.

Attorney General Roy Cooper, by Assistant Attorney General Michael E. Bulleri, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellant Defender Daniel L. Spiegel, for defendant-appellant.

TYSON, Judge.

Luis Miguel Martinez ("Defendant") appeals from judgment entered after a jury found him guilty of possession of a firearm by a felon. We find no error.

I. Background

The State's evidence tended to show on 27 September 2014, at approximately 12:30 a.m., Winston-Salem Police Officer M.H. Saintsing observed a Chevrolet pick-up truck speeding 48 mph in a 35 mph zone near the intersection of Thomasville Road and Louise Road. Officer Saintsing performed a U-turn and followed the truck into a gas station parking lot, where it had just pulled in.

Officer Saintsing observed Defendant exit from the driver's side of the truck. A male passenger also exited from the truck, and both began walking toward the convenience store when Officer Saintsing activated his blue lights. Officer Saintsing approached Defendant and instructed him to get back into the vehicle. Defendant refused the officer's command, and continued toward the convenience store. After at least one subsequent command, Defendant returned to the location of the vehicle and threw the keys underneath the vehicle. The passenger attempted to re-enter the vehicle pursuant to the officer's commands, but was unable to because the door was locked.

Defendant denied being the driver of the truck, and stated he did not know who owned the truck. Officer Saintsing asked Defendant why the truck was not parked within a marked parking space, and Defendant stated "he just kind of pulled in." Officer Saintsing detected a strong odor of alcohol on Defendant, and contacted other officers to request assistance. Officers Gardner and Willey arrived, conducted a driving while impaired investigation, and formed the opinion that Defendant was impaired.

Defendant was unable to produce a driver's license. Officer Saintsing conducted a mobile computer search and learned Defendant's license had been suspended for a prior conviction of driving while impaired.

Defendant was arrested for driving while impaired. He was handcuffed and placed in the rear seat of one of the patrol cars, at least thirty feet away from his vehicle. Officer Gardner instructed Officer Willey to search the interior of Defendant's vehicle, incident to the arrest. Officer Gardner testified he had conducted between twenty and thirty driving while impaired investigations. At least fifty percent of these cases involved the discovery of evidence associated with driving while impaired inside the vehicle, such as open containers of alcohol. Officer Gardner stated he had been trained to search the vehicle under these circumstances. Defendant did not admit to drinking alcohol inside the vehicle.

Officer Willey discovered six beer bottles in the rear seat area of the vehicle. Some of the bottles were opened and some were not. A loaded

.22 caliber rifle was discovered, in a cocked position, halfway underneath the rear seat. The barrel of the rifle was pointed towards the passenger seat.

During routine booking questions, Defendant told officers he had stolen the truck from his father, the registered owner of the vehicle. No usable forensic evidence, such as fingerprints or DNA, was obtained from the rifle.

Prior to trial, Defendant filed a motion to suppress the search. The trial court concluded the search of the vehicle after Defendant's arrest was lawful based upon the officers' reasonable belief the vehicle could contain evidence of the offense of driving while impaired. The matter proceeded to trial. Defendant stipulated he had been convicted of felonious assault with a deadly weapon with intent to kill on 24 August 2010. The jury convicted Defendant of possession of a firearm by a felon, and Defendant was sentenced to an active prison term of 17 to 30 months. Defendant appeals.

II. Jurisdiction

Jurisdiction of right by timely appeal lies in this Court from final judgment of the superior court following a jury's verdict pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015). Defendant is entitled to appeal the denial of his motion to suppress pursuant to N.C. Gen. Stat. § 15A-979(b) (2015).

III. Issues

Defendant argues the trial court erred by: (1) denying Defendant's motion to suppress; and (2) failing to intervene during the prosecutor's closing argument.

IV. Denial of Defendant's Motion to Suppress

[1] Defendant argues his motion to suppress should have been granted, because the officers lacked particularized reasons to believe evidence of impaired driving would be found inside the vehicle. We disagree.

A. Standard of Review

The trial court's findings of fact on a defendant's motion to suppress are conclusive and binding upon appeal if supported by competent evidence. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). This Court determines whether the trial court's findings of fact support its conclusions of law. *Id.*

We review the trial court's conclusions of law on a motion to suppress *de novo*. *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646,

648, *disc. review denied*, 362 N.C. 89, 656 S.E.2d 281 (2007). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

Where, as here, a defendant fails to challenge the trial court's findings of fact, they are deemed to be supported by competent evidence and are binding on appeal. *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36, *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004).

B. Search Incident to Arrest

It is a "basic constitutional rule" that "searches conducted outside the judicial process, without prior approval by [a] judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 29 L. Ed. 2d 564, 576 (1971). "Among the exceptions to the warrant requirement is a search incident to a lawful arrest," which "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant*, 556 U.S. 332, 338, 173 L. Ed. 2d 485, 493 (2009) (citations omitted).

In *Arizona v. Gant*, the Supreme Court of the United States addressed the Fourth Amendment implications of a vehicle search following the driver's arrest. *Id.* at 335, 173 S.E.2d at 491. The Court warned of the danger of "giving police officers unbridled discretion to rummage at will among a person's private effects." *Id.* at 345, 173 L. Ed. 2d at 497. "A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, *when there is no basis for believing evidence of the offense might be found in the vehicle*, creates a serious and recurring threat to the privacy of countless individuals." *Id.* (emphasis supplied).

The Court established a rule designed to balance the individual's Fourth Amendment privacy interests with both officer safety and the need to collect evidence of the crime at issue.

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or it is reasonable to believe the vehicle contains evidence of the offense of arrest.* When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless

> police obtain a warrant or show that another exception to the warrant requirement applies.

Id. at 351, 173 S.E.2d at 501 (emphasis supplied).

The Court in *Gant* cited to Justice Scalia's concurrence in *Thornton v. United States*, 541 U.S. 615, 158 L. Ed. 2d 905 (2004) (Scalia, J., concurring), to explain its rationale. *Id.* at 343-49, 173 L. Ed. 2d at 496-99. In *Thornton*, Justice Scalia noted, "the fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging." 541 U.S. at 630, 158 L. Ed. 2d at 919 (emphasis in original).

This Court in *State v. Foy*, 208 N.C. App. 562, 563, 703 S.E.2d 741, 741 (2010) applied the holding in *Gant*. In *Foy*, the defendant was stopped after his driving caused the officer to believe he was intoxicated. *Id.* The officer discovered a revolver inside the defendant's truck, arrested the defendant for carrying a concealed weapon, and then searched the truck. *Id.*

This Court determined the search was valid as incident to arrest because the discovery of one concealed weapon provided the officers reason to believe that further evidence of this crime, such as another concealed weapon, ammunition, a receipt, or a gun permit, could exist inside the truck. *Id.* at 565-66, 703 S.E.2d at 743. Further, such evidence would be necessary and relevant to show ownership or possession, could serve to rebut any defenses offered by defendant at trial, and would aid the State in prosecuting the crime to its full potential. *Id.* This Court held, "[p]ermitting a search incident to arrest to discover offense-related evidence for the crime of carrying a concealed weapon is consistent with the United States Supreme Court's holding in *Gant*." *Id.* at 566, 703 S.E.2d at 743.

The question for the court on Defendant's motion to suppress is not whether it was reasonable for the officers to believe contraband may be found in the vehicle, but whether "evidence of the crime was reasonably believed to be present based on the nature of the suspected offense." *Id.* at 566, 703 S.E.2d at 743 (citing *Gant*, 556 U.S. at 351, 173 L. Ed. 2d at 501). Here, Defendant denied ownership, possession, and operation of the vehicle both verbally and by throwing the keys under the vehicle. Based upon the totality of the circumstances, including the strong odor of alcohol on Defendant, Defendant's effort to hide the keys and refusal to unlock the vehicle, and the officers' training and experience with regard to driving while impaired investigations, the trial court properly concluded the officers reasonably believed the vehicle could contain evidence of the offense. *Id.* Defendant's argument is overruled.

V. State's Closing Argument

[2] Defendant argues the trial court abused its discretion by overruling Defendant's objections to the State's closing argument. He also asserts the trial court should have intervened *ex mero motu* at various points during the prosecutor's closing argument after Defendant failed to object or request curative instructions.

A. Standard of Review

"Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984) (citation omitted), *cert denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). "[W]e will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976) (citations omitted). The reviewing court examines the full context in which the statements were made. *See, e.g.*, *State v. Lloyd*, 354 N.C. 76, 113-14, 552 S.E.2d 596, 622-23 (2001).

Where a prosecutor improperly comments on a defendant's constitutional right not to testify, a new trial is required unless the State can prove the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2015); *State v. Reid*, 334 N.C. 557, 556, 434 S.E.2d 193, 198 (1993).

Where a defendant fails to object to statements made by the prosecutor during closing argument, the standard of review is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979) (citation omitted).

B. Comment Upon Defendant's Right Not to Testify

The Constitution of the United States and North Carolina's Constitution preserve a criminal defendant's right not to testify. U.S. Const. amend. V; N.C. Const. art. I § 23. "[I]t is well-settled law that a defendant need not testify" and "that the burden of proof remains with

the State regardless of whether a defendant presents any evidence." *State v. Williams*, 341 N.C. 1, 13, 459 S.E.2d 208, 216 (1995) (citation and quotation marks omitted), *cert. denied*, 516 U.S. 1128, 133 L. Ed. 2d 870 (1996). The State "violates [this rule] if the language used [was] manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *State v. Parker*, 185 N.C. App. 437, 444, 651 S.E.2d 377, 382 (citation and quotation marks omitted), *disc. review denied*, 362 N.C. 91, 657 S.E.2d 26 (2007).

During opening statements, defense counsel asserted Defendant distanced himself from the truck and "acted nervous" because "he didn't want to get popped for driving while impaired." The prosecutor asserted the following during the State's closing argument:

> [PROSECUTOR]: First thing, you have the driver of the vehicle trying to distance himself from the vehicle. Why would you do that? Probably because you don't want the police to associate you with that vehicle. Now, I know the defense is going . . . to say "Well he did not want to get popped for DWI," I think is what they described it as in their opening.
>
> Well, think about this, and this will apply to all of the defense argument, the only evidence you heard in this case has been presented by the State. The State's evidence is uncontradicted so to the extent the defense makes any arguments at all, if their [sic] not based off of the evidence that the State has presented, they're not in evidence at all. See what I'm saying? *If they're saying "Well, he didn't want to get popped for DWI," well, then they need to put on evidence that he didn't want to get popped for DWI*, otherwise it's just an unsupported allegation floating out there.
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> [THE COURT]: Overruled.
>
> [PROSECUTOR]: Do you see what I'm saying here? They have an opportunity, the defense has an opportunity to put on evidence to support their arguments. They didn't take that opportunity here, so you can't assume the arguments that they are making are correct because they are unsupported. You see what I'm saying? *So if you want to come in here in this courtroom and tell 12 people, tell this jury,*

> *that "my client left that vehicle because he didn't want to get a DWI, not because he didn't want them to find the firearm in there," then you need to put on some evidence to support that and they haven't done that.*
>
> *I make no comment on the defendant's option or election not to testify in his case. We all know that's his constitutional right.* We have the right to remain silent. That's a sacred right under the Constitution but that is one thing that is quite different from the defense's failure to put on any exculpatory evidence or evidence of his innocence. Those are two –
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Sustained.
>
> [PROSECUTOR]: I want to make sure that I'm on sound legal grounds here. I don't want to say anything impermissible. This is what the Supreme Court of North Carolina had to say: "In closing arguments a prosecutor may not comment on the failure of the defendant to testify at trial." – I am not doing that – "However, it is permissible for the prosecutor to bring to the jury's attention a defendant's failure to produce exculpatory evidence or to contradict the evidence presented by the State."
>
> [DEFENSE COUNSEL]: Objection, Your Honor. (emphases supplied).

At this point, the trial court excused the jury. Outside the presence of the jury, the trial court warned the prosecutor he had "said enough about the defendant's election not to put on evidence" and directed the prosecutor to "move on to another subject." The prosecutor resumed his argument. Before concluding, he stated: "Once again the only evidence presented has been presented by the State[.]" The prosecutor further stated: "The defendant did not testify but you have heard him make some statements. You heard him on video."

Defendant argues his testimony would be the only plausible way to introduce evidence of the reason he wished to distance himself from the truck, and the jury naturally and necessarily understood the prosecutor's argument as a comment on Defendant's decision not to testify. Defendant further argues the prosecutor's explicit discussion of Defendant's right not to testify, while simultaneously denying he was commenting on that right, was itself improper and drew further attention to the previous

improper comments. *See State v. Roberts*, 243 N.C. 619, 621, 91 S.E.2d 589, 591 (1956) (prosecutor's statement that he had "not said a word" about the defendant's failure to testify was improper and added emphasis to the previous objectionable language).

Defendant relies on our Supreme Court's holding in *Reid*, that "any direct reference to [D]efendant's failure to testify is error and requires curative measures be taken by the trial court." 334 N.C. at 554, 434 S.E.2d at 196, In *Reid*, the Supreme Court awarded the defendant a new trial based upon the following statement of the prosecutor during closing argument:

> The defendant hasn't taken the stand in this case. He has that right. You're not to hold that against him. But ladies and gentlemen, we have to look at the other evidence to look at intent in this case[.]

Id.

"While it is true that the prosecution may not comment on defendant's failure to take the stand, 'the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument.' " *State v. Thompson*, 110 N.C. App. 217, 225, 429 S.E.2d 590, 594-95 (1993) (quoting *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982)). Moreover, "[w]hen defendant forecasts evidence in the opening statement, the State is permitted to comment upon the lack of evidence supporting such a forecast in closing argument." *State v. Anderson*, 200 N.C. App. 216, 224, 684 S.E.2d 450, 456 (2009).

During opening statement, defense counsel stated Defendant's reason for distancing himself from the truck was due to not wanting "to get popped" for driving while impaired. These comments and circumstances distinguish this case from the facts present in *Reid*. The prosecutor's statements, viewed as a whole and in context, summarize the evidence put before the jury and assert no evidence was presented to support defense counsel's assertions in his opening statement. *See id.*

Defense counsel presented a forecast of evidence explaining Defendant's actions and nervous behavior during the traffic stop were due to his fear of being arrested for driving while impaired. Viewed as a whole, the prosecutor's statements pertain to Defendant's failure to produce exculpatory evidence to contradict the State's theory of why Defendant attempted to distance himself from the truck. *Thompson*, 110 N.C. App. at 225, 429 S.E.2d at 594-95.

Presuming *arguendo* the prosecutor's statements constituted an impermissible comment on Defendant's right to remain silent and the trial court erred by failing to intervene or give a curative instruction *ex mero motu*, "[c]omment on an accused's failure to testify does not call for an automatic reversal but requires the court to determine if the error is harmless beyond a reasonable doubt." *Reid*, 334 N.C. at 557, 434 S.E.2d at 198.

Defendant was charged with and convicted of possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. The two elements of this offense are "that the defendant has a prior felony conviction, and a firearm in his possession." *State v. Hussey*, 194 N.C. App. 516, 521, 669 S.E.2d 864, 867 (2008). Because Defendant stipulated to his prior conviction for felonious assault with a deadly weapon with intent to kill, the only question before the jury was whether he possessed a firearm.

Uncontroverted evidence showed Defendant was stopped while driving his father's truck, and exited the vehicle before the officer stopped. He attempted to further distance himself from the vehicle by denying operation of the truck and knowledge of ownership of the truck, and by throwing the keys under the truck. The officers observed signs that Defendant had consumed alcohol. Upon searching the vehicle, the officers recovered a loaded and cocked rifle located in the backseat area. The rifle was discovered along with and on top of containers of alcohol, and had been placed into the rear of the truck with the butt facing the driver's door and the barrel pointing to the passenger seat.

Furthermore, the trial court charged the jury on the presumption of innocence, the State's burden of proving defendant's guilt beyond a reasonable doubt, and Defendant's failure to testify created no presumption against him. The jury is presumed to have followed the instructions of the trial court. *State v. Thornton*, 158 N.C. App. 645, 652, 582 S.E.2d 308, 312 (2003) (citations omitted). Any asserted error was harmless beyond a reasonable doubt. Defendant's argument is overruled.

C. Assertion of Facts Not in Evidence

[3] Defendant also argues the prosecutor improperly misled the jury during the closing argument by asserting facts not in evidence. In discussing the difference between actual and constructive possession, the prosecutor explained:

> PROSECUTOR]: "Possession of an article may be either actual or constructive. A person has actual possession of

> an article if the person has it on his person, is aware of its presence and either alone or together with others has both the power and intent to control its disposition or use." So that is actual possession. *Think about it his [sic] way, when Mr. Martinez is placing the rifle in the truck and it is in his hands, he has actual possession of it.*
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
>
> [THE COURT]: Overruled.
>
> [PROSECUTOR]: *When he closes the door and walks away from it a few steps now, he has constructive possession of it*, and I'll explain . . . . (emphases supplied).

Defendant argues that under the guise of explaining the law, the prosecutor was allowed to present a story to the jury in which Defendant, with the rifle "in his hands," placed it in the truck, closed the door and walked a few steps away. Though the rifle was found inside the vehicle he was driving, Defendant asserts no evidence established who placed the rifle in the vehicle.

"Prosecutors may, in closing arguments, create a scenario of the crime committed as long as the record contains sufficient evidence from which the scenario is reasonably inferable." *State v. Frye*, 341 N.C. 470, 498, 461 S.E.2d 664, 678 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). The facts presented to the jury showed in detail the location and placement of the rifle in the backseat of the vehicle with the barrel pointed towards the passenger seat. Defendant has failed to show "gross impropriety in the argument as would be likely to influence the verdict of the jury." *Covington*, 290 N.C. at 328, 226 S.E.2d at 640. Defendant has failed to show the trial court abused its discretion in allowing the statement. This argument is overruled.

D. Handling of the Rifle

[4] Defendant also argues the prosecutor improperly inflamed the jurors' emotions and "caused them to make a decision based on fear" by pointing the rifle at himself. To demonstrate that the "only [] logical way" the rifle could have been placed in the vehicle was from the driver's side, the prosecutor acted out what he believed it would have looked like had the rifle been placed in the vehicle from the passenger's side. In doing so, the prosecutor pointed the barrel of the rifle at himself. He then stated, "I can see some of you all just cringing when I was pointing that weapon towards myself even knowing it is unloaded and safe."

Defendant did not object to the prosecutor's handling of the rifle in front of the jury and related statements. He has failed to show such gross impropriety "that the trial court committed reversible error by failing to intervene *ex mero motu*." *Trull*, 349 N.C. at 451, 509 S.E.2d at 193. This argument is overruled.

Notwithstanding our conclusions that Defendant has failed to object or to show prejudice in the prosecutor's statements and demonstrations to warrant a new trial, we find the prosecutor's words and actions troublesome. Without hesitation, the prosecutor flew exceedingly close to the sun during his closing argument. Only because of the unique circumstances of this case has he returned with wings intact. *See* Bergen Evans, Dictionary of Mythology 62-63 (Centennial Press 1970). We emphasize, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict." Rev. R. Prof. Conduct N.C. St. B. 3.8 (Special Responsibilities of a Prosecutor) cmt. [1] (2015).

VI. Conclusion

The trial court properly concluded it was "reasonable [for the officers] to believe the vehicle contain[ed] evidence of the offense of arrest," and properly denied Defendant's motion to suppress. *Gant*, 556 U.S. at 345, 173 L. Ed. 2d at 497. Defendant has failed to show the prosecutor's purported comments on Defendant's decision not to testify and other statements and actions made during closing argument warrant the trial court's interventions *ex mero motu* or show prejudice for us to award a new trial.

Defendant received a fair trial, free of prejudicial errors he preserved and argued. We find no error in the trial court's denial of Defendant's motion to suppress, the jury's verdict, or the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges McCULLOUGH and DILLON concur.

STATE v. MILLER

[251 N.C. App. 297 (2016)]

STATE OF NORTH CAROLINA
v.
JUAN ANTONIA MILLER, DEFENDANT

No. COA16-424

Filed 20 December 2016

Search and Seizure—cocaine—traffic stop—extended—coerced consent to search

There was plain error in a case involving possession of cocaine where the cocaine was found in defendant's pocket after a traffic stop and the trial court did not exclude the evidence of cocaine as the fruit of an unconstitutional seizure. The officer saw defendant's vehicle in a high-crime area, and body camera footage revealed that the officer was more concerned with discovering contraband than issuing traffic tickets and that he unlawfully extended the traffic stop. Moreover, the body camera footage showed that the officer had turned defendant around to face the rear of the vehicle with his arms and legs spread before he asked for consent to search, which is textbook coercion.

Appeal by defendant from judgment entered 15 December 2015 by Judge Eric C. Morgan in Guilford County Superior Court. Heard in the Court of Appeals 21 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General John G. Batherson, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant.

ELMORE, Judge.

Police ordered Juan Antonia Miller (defendant) out of a vehicle during a traffic stop and searched him, finding a small bag of cocaine in his pocket. The cocaine, defendant argues, was the fruit of an unconstitutional seizure and the trial court committed plain error by failing to exclude it from evidence at trial. Upon plain error review, we hold that (1) the officer unlawfully extended the traffic stop; (2) assuming the seizure was lawful, defendant's consent was not valid; and (3) admitting the evidence at trial prejudiced defendant and seriously affects the integrity and public reputation of judicial proceedings. Defendant is entitled to a new trial.

I. Background

On the evening of 18 March 2014, Officer H.B. Harris was patrolling "problem areas" with the Vice and Tactical Narcotics Team of the Greensboro Police Department. He observed a vehicle turn left from Darden Road onto Holden Road and position itself in front of his unmarked patrol car. Officer Harris followed the car to Interstate 85 and decided to run its license plate through the DMV database. The search indicated that a "hold" had been placed on the tag because the owner had not paid the insurance premiums.

Officer Harris, who was wearing a body-mounted camera, pulled the vehicle over and approached the passenger-side window. The owner of the vehicle, Derick Sutton, was in the passenger's seat; defendant was in the driver's seat. Officer Harris asked defendant for his driver's license before informing the two occupants that he had stopped them for speeding and a potential tag violation. When he learned that Sutton was the registered owner of the vehicle, Officer Harris inquired about the status of his insurance. Sutton handed Officer Harris an insurance card to show that he had recently purchased car insurance. At Officer Harris's request, Sutton also produced his driver's license and told the officer that they were "coming from a friend's house on Randleman Road." Officer Harris testified that this "piqued his interest" because he "knew . . . they did not get on the interstate from Randleman Road, and Holden Road is a little distance away from Randleman Road." He then ordered Sutton to step out of the vehicle.

As Sutton complied, Officer Harris asked Sutton if he had any weapons or drugs on him. Sutton said he did not, and was then motioned to stand with another officer who had arrived on the scene. Officer Harris proceeded toward the driver's side and asked defendant to step out of the vehicle. As defendant complied, Officer Harris asked defendant if he had any weapons or drugs on him. Defendant also said he did not. According to Officer Harris's testimony, he then asked defendant, "Do you mind if I check?" to which defendant responded, "No," and placed his hands on the trunk of the vehicle. Officer Harris searched defendant and found a plastic corner-bag of cocaine in his left pocket.

The footage from the body camera was published to the jury at trial and, at the jury's request, once more during deliberations. Defendant was found guilty of possession of cocaine and sentenced to an active term of six to seventeen months of imprisonment. He gave notice of appeal in open court.

II. Discussion

Defendant argues on appeal that Officer Harris unlawfully extended the traffic stop and evidence of the cocaine should have been excluded as the fruit of an unconstitutional seizure. Defendant filed no motion to suppress and raised no objection to the evidence at trial but contends on appeal that the admission of the cocaine and Officer Harris's testimony thereof amounted to plain error. Alternatively, defendant argues that he received ineffective assistance of counsel based on his counsel's failure to file a motion to suppress.

The State argues in response that plain error review is not appropriate because the issue is constitutional, rather than evidentiary, and defendant waived any challenge to the lawfulness of the seizure. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("[P]lain error review in North Carolina is normally limited to instructional and evidentiary error." (citations omitted)); *see also State v. Canty*, 224 N.C. App. 514, 516, 736 S.E.2d 532, 535 (2012) ("Constitutional arguments not made at trial are generally not preserved on appeal." (citing *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856 (2001))), *writ of supersedeas and disc. review denied*, 366 N.C. 578, 739 S.E.2d 850 (2013). Had defendant raised the issue below, the State suggests, then the trial court would have scrutinized the facts and circumstances surrounding the traffic stop in greater detail. But because defendant remained silent at trial, the record is not sufficiently developed to reach a conclusion on the lawfulness of the seizure.

While we recognize the merit to the State's position,[1] this Court has applied plain error review to similar evidentiary challenges involving unpreserved constitutional claims. *See, e.g.*, *State v. Jones*, 216 N.C. App. 225, 229–30, 715 S.E.2d 896, 900–01 (2011), *appeal dismissed and disc. review denied*, 365 N.C. 559, 723 S.E.2d 767 (2012); *State v. Mohamed*, 205 N.C. App. 470, 474–76, 696 S.E.2d 724, 729–30 (2010). In cases where we have declined to do so, our Supreme Court has remanded for plain error review. *See, e.g.*, *State v. Bean*, 227 N.C. App. 335, 336–37, 742 S.E.2d 600, 602, *disc. review denied*, 367 N.C. 211, 747 S.E.2d 542 (2013). Accordingly, we must examine the evidence that was before the trial court "to determine if it committed plain error by allowing the

1. We also note that footage from an officer's body camera may not reveal the totality of the circumstances giving rise to a traffic stop. In some cases, however, it may be the best evidence of the interaction between an officer and a defendant. Because the footage was included in the record on appeal, it helps to alleviate concerns of reviewing an undeveloped record.

admission of the challenged [evidence]." *Mohamed*, 205 N.C. App. at 476, 696 S.E.2d at 730.

Plain error arises when the error is " 'so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting United *States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018 (1982)).

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

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (alterations, citations, and internal quotation marks omitted).

The Fourth Amendment protects "against unreasonable searches and seizures." U.S. Const. amend IV. "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). As such, "[t]he scope of the detention must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500 (1983); *see also Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) ("A relatively brief encounter, a routine traffic stop is more analogous to a so-called *Terry*-stop than to a formal arrest." (alterations, citations, and internal quotation marks omitted)).

The Supreme Court explained in *Rodriguez* that "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez*, 135 S. Ct. at 1614 (citations omitted). The stop may last no longer than is necessary to address the infraction. *Id.* "Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Id.* (citation omitted).

An officer's mission may include " 'ordinary inquiries incident to the traffic stop.' " *Id.* at 1615 (quoting *Illinois v. Caballes*, 543 U.S. 405, 408

(2005)). The Supreme Court has explicitly approved certain incidental inquiries, including "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* (citations omitted). It has also held that an officer may order occupants out of a vehicle during a lawful traffic stop to complete the mission safely. *See id.* ("[T]he government's 'legitimate and weighty' interest in officer safety outweighs the '*de minimis*' additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle." (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 110–111 (1977)) (citing *Maryland v. Wilson*, 519 U.S. 408, 413–15 (1997))). *But see State v. Reed*, ____ N.C. App. ____, ____, ____ S.E.2d ____, ____ (Sept. 20, 2016) (No. COA16-33) ("[A]n officer may offend the Fourth Amendment if he unlawfully extends a traffic stop by asking a driver to step out of a vehicle." (citation omitted)), *temporary stay allowed*, ____ N.C. ____, ____ S.E.2d ____ (Oct. 5, 2016) (No. 365A16-1). Measures designed to "detect evidence of ordinary criminal wrongdoing," on the other hand, "lack[ ] the same close connection to roadway safety as the ordinary inquiries" and are not part of the officer's mission. *Rodriguez*, 135 S. Ct. at 1615–16.

Before *Rodriguez* was decided, we held in *State v. Jackson*, 199 N.C. App. 236, 681 S.E.2d 492 (2009), that an officer's questions about the presence of weapons and drugs unlawfully extended a traffic stop which should have otherwise been completed. *Id.* at 242–44, 681 S.E.2d at 496–98. The officer had stopped the vehicle on suspicion that Roth, the registered owner, was driving without a license. *Id.* at 238, 681 S.E.2d at 494. Roth, who had recently moved back to North Carolina, produced a valid Kentucky driver's license. *Id.* The officer later acknowledged that the stop "was pretty much over" after she checked his license, but she began a separate investigation:

> [I asked Roth] if there was anything illegal in the vehicle. He advised no. I asked if there was, specific, like, weapons, marijuana, any kind of drugs. He said no. I asked him if I could search the vehicle. [He] replied—first he said "the vehicle?" as in a question. And then he replied, "You can search the vehicle if you want to."

Id. at 238–39, 681 S.E.2d at 494. The interrogation, we concluded, "was indeed an extension of the detention beyond the scope of the original traffic stop" because the officer's questions were "not necessary to confirm or dispel [her] suspicion that Roth was operating without a valid driver's license and it occurred after [the officer's] suspicion . . . had already been dispelled." *Id.* at 242, 681 S.E.2d at 496–97.

We recognize that, in contrast to *Jackson*, Officer Harris may not have completed the two-part mission of the stop. But an officer cannot justify an extended detention on his or her own artful inaction. As *Rodriguez* makes clear, it is not whether the challenged police conduct "occurs before or after the officer issues a ticket" but whether it "prolongs—*i.e.*, adds time to—the stop." *Rodriguez*, 135 S. Ct. at 1616 (citation and internal quotation marks omitted). The more appropriate question, therefore, is whether Officer Harris "diligently pursued a means of investigation" designed to address the reasons for the stop. *See United States v. Sharpe*, 470 U.S. 675, 686 (1985) (citations omitted).

After reviewing the footage of the traffic stop, it is wholly evident that Officer Harris was more concerned with discovering contraband than issuing traffic tickets. He readily accepted Sutton's insurance card as proof that Sutton had been paying the premiums, and he even testified at trial that he had no way to determine if the insurance card was invalid. Thereafter, Officer Harris took no action to issue a citation, to address the speeding violation, or to otherwise indicate a diligent investigation into the reasons for the traffic stop. Instead, he ordered Sutton and defendant out of the vehicle and began an investigation into the presence of weapons and drugs.

Such a detour, albeit brief, can hardly be seen as a safety precaution to facilitate the mission of the stop as much as "a measure aimed at detecting evidence of ordinary criminal wrongdoing." *See Rodriguez*, 135 S. Ct. at 1615 (citations and internal quotation marks omitted). And absent "the same close connection to roadway safety as ordinary inquiries," the exit order and extraneous questioning cannot be justified as a *de minimis* intrusion outweighed by the government's interest in officer safety. *Id.* at 1615–16; *see also State v. Bullock*, ____ N.C. App. ____, ____, 785 S.E.2d 746, 752 (May 10, 2016) (No. COA15-731) ("[U]nder *Rodriguez*, even a *de minimis* extension is too long if it prolongs the stop beyond the time necessary to complete the mission." (citation omitted)), *writ allowed*, ____ N.C. ____, 786 S.E.2d 927 (June 16, 2016) (No. 194A16). Rather, there must have been some alternative basis to prolong the stop. *Rodriguez*, 135 S. Ct. at 1615.

To extend a lawful traffic stop beyond its original purpose, "there must be grounds which provide the detaining officer with additional reasonable and articulable suspicion or the encounter must have become consensual." *Jackson*, 199 N.C. App. at 241–42, 681 S.E.2d at 496 (citing *State v. Myles*, 188 N.C. App. 42, 45, 654 S.E.2d 752, 755, *aff'd per curiam*, 362 N.C. 344, 661 S.E.2d 732 (2008)); *see Rodriguez*, 135 S. Ct. at 1615 ("An officer . . . may conduct certain unrelated checks during

an otherwise lawful traffic stop. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."); *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166 (2012) ("[T]o detain a driver beyond the scope of the traffic stop, the officer must have the driver's consent or reasonable articulable suspicion that illegal activity is afoot." (citations omitted)); *see also State v. Parker*, 183 N.C. App. 1, 9, 644 S.E.2d 235, 242 (2007) ("Without additional reasonable articulable suspicion of additional criminal activity, the officer's request for consent [to search] exceeds the scope of the traffic stop and the prolonged detention violates the Fourth Amendment." (citations omitted)).

The State does not allege—nor does the evidence show—that the encounter had become consensual. A consensual encounter is one in which "a reasonable person would feel free to disregard the police and go about his business." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (citations omitted). Minimally, defendant could not reasonably have felt that he was free to leave while Officer Harris still had his driver's license. *See Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497 ("Generally, an initial traffic stop concludes and the encounter becomes consensual only after an officer returns the detainee's driver's license and registration." (citations omitted)).

The State argues instead that Officer Harris had reasonable suspicion to extend the stop because he observed the vehicle while patrolling "problem areas," defendant gave "incongruent" answers to his coming and going questions, defendant "raised his hands in the air" as he stepped out of the vehicle, and defendant was driving the vehicle instead of Sutton, the registered owner. "An officer has reasonable suspicion if a 'reasonable, cautious officer, guided by his experience and training,' would believe that criminal activity is afoot 'based on specific and articulable facts, as well as the rational inferences from those facts.' " *Williams*, 366 N.C. at 116, 726 S.E.2d at 167 (citations omitted). In determining whether reasonable suspicion exists, "the totality of the circumstances—the whole picture—must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417 (1981). "While something more than a mere hunch is required, the reasonable suspicion standard demands less than probable cause and considerably less than preponderance of the evidence." *Williams*, 366 N.C. at 117, 726 S.E.2d at 167 (citations omitted).

Officer Harris's observation of the vehicle in a high-crime area is not sufficient, either by itself or in conjunction with the other "factors" identified by the State, to establish reasonable suspicion of criminal activity. *See Brown v. Texas*, 443 U.S. 47, 52 (1979) (holding that presence

in a high-crime area, "standing alone, is not a basis for concluding that [a defendant] was engaged in criminal conduct"). There was nothing "incongruent" about defendant's travel plans. Officer Harris found it suspicious that Sutton said they were "coming from a friend's house on Randleman Road" not because they were traveling in the opposite direction, but because Harris saw them merge onto the interstate from Holden Road—"which is a *little distance away* from Randleman Road." (Emphasis added.) As Officer Harris then approached the driver's side of the vehicle, defendant kept his hands in plain view above the steering wheel—a far cry from a signal of surrender and a gesture we cannot construe as "an indicator of culpability." And while the State notes "it is not clear why the defendant was driving the vehicle when it was registered to the passenger," it fails to elaborate on how this is more indicative of criminal activity than innocent travel.

Even assuming that the traffic stop was lawful up to the point when defendant consented to the search, as told by Officer Harris, we cannot conclude that his consent was valid. Officer Harris testified that defendant verbally agreed to the search and placed his hands on the trunk of the vehicle, but the footage from the body camera reveals a different version of the interaction. Officer Harris had defendant turned around, facing the rear of the vehicle with his arms and legs spread *before he asked for defendant's consent*. This was textbook coercion. If defendant did respond to Officer Harris's request—and it is still not apparent that he did—it was certainly not a free and intelligent waiver of his constitutional rights. *See State v. Vestal*, 278 N.C. 561, 578–79, 180 S.E.2d 755, 767 (1971).

III. Conclusion

The egregiousness of the violations in this case, apparent from the body camera footage, demands the conclusion that a fundamental error occurred at trial which both prejudiced defendant and seriously affects the integrity and public reputation of judicial proceedings. Because defendant is entitled to a new trial, we need not address his claim for ineffective assistance of counsel.

NEW TRIAL.

Judges STEPHENS and ZACHARY concurs.

STATE v. MOORE

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

STATE OF NORTH CAROLINA
v.
PIERRE JE BRON MOORE, DEFENDANT

No. COA16-493

Filed 20 December 2016

Probation and Parole—revocation—notice—revocation eligible violation

The State fulfilled its obligation of giving a probationer notice of the purpose of a revocation hearing and a statement of the violations alleged where the notices stated that that the pending charges constituted a violation of defendant's probation but did not state which condition had been violated. It was noted, however, that it is always the better practice for the State to expressly state the condition of probation alleged to have been violated.

Judge HUNTER, JR. dissenting.

Appeal by Defendant from judgment entered 15 January 2016 by Judge R. Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 19 October 2016.

Attorney General Roy A. Cooper, III., by Assistant Attorney General Jessica V. Sutton, for the State.

Allegra Collins Law, by Allegra Collins, for Defendant-Appellant.

DILLON, Judge.

Defendant Pierre Je Bron Moore was convicted of a number of charges and placed on supervised probation. While on probation, he was served with two probation violation notices. After a hearing on the matter, Judge Baddour entered a judgment revoking Defendant's probation and activating his suspended sentence. On appeal, Defendant contends that Judge Baddour lacked jurisdiction to revoke his probation, contending that the State failed to give him adequate notice that it was alleging a revocation-eligible violation. We disagree and thus affirm Judge Baddour's judgment.

I. Analysis

In North Carolina, a defendant's "probation may be reduced, terminated, continued, extended, modified, or revoked . . . ." N.C. Gen. Stat. § 15A-1344(a) (2016). However, with the passage of the Justice Reinvestment Act of 2011, it is "no longer true that [*any*] violation of a valid condition of probation is sufficient to revoke defendant's probation." *State v. Kornegay*, 228 N.C. App. 320, 323, 745 S.E.2d 880, 882 (2013) (emphasis added). Rather, the Act enumerates three ways a defendant's probation may be revoked: (1) the defendant commits a criminal offense; (2) the defendant absconds supervision; or (3) the defendant previously served two periods of confinement in response to a violation. N.C. Gen. Stat. § 15A-1344(a).

And where the State seeks to *revoke* someone's probation, it "must give the probationer notice of the [revocation] hearing and its purpose, including a statement of the violations alleged." N.C. Gen. Stat. § 15A-1345(e). That is, the violation report served on the probationer must put him "on notice that the State [is] alleging a revocation-eligible violation[.]" *State v. Lee*, 232 N.C. App. 256, 260, 753 S.E.2d 721, 723 (2014). Absent adequate notice that a revocation-eligible violation is being alleged, the trial court lacks jurisdiction to revoke a defendant's probation, unless the defendant waives the right to notice. *Kornegay*, 228 N.C. App. at 322, 745 S.E.2d at 883.

In the present case, Judge Baddour revoked Defendant's probation based on his determination that Defendant had committed new criminal offenses, a revocation-eligible violation. On appeal, Defendant argues that he did not receive adequate notice that the State "intend[ed] to prove [at the hearing] that [he] violated a condition of probation that could result in the revocation of probation[.]" *Kornegay*, 228 N.C. App. at 322, 745 S.E.2d at 882.

The notices to Defendant alleged that he violated his probation as follows:

> The Defendant has the following pending charges in Orange County . . . 15 CR 51309 flee/elude arrest W/MV 6/8/15, . . . 14 CR 052225 possess drug paraphernalia 6/16/15, 14 CR 052224 resisting public officer 6/16/15 . . . .

While the notices state that the pending charges constituted a violation of Defendant's probation, the notices fail to state expressly *which* condition of probation the State was contending had been violated. More specifically, the notices do not expressly indicate that the State was alleging

that Defendant had violated the condition that he not commit a new criminal offense.

Our Court has never explicitly held that certain "magic" words must be used in a notice to confer jurisdiction on a court to revoke probation. However, on a number of occasions, our Court has been called upon to determine whether certain wording in a violation report constituted adequate notice.

For instance, in *State v. Lee*, we held that the notice was adequate where the violation report alleged that the probationer had certain enumerated criminal charges pending *and that* by he had, therefore, violated the condition that he not commit a new criminal offense. *Lee*, 232 N.C. App. at 260, 753 S.E.2d at 723-24. Indeed, it was unambiguous that the State was alleging a revocation-eligible violation. In *Kornegay*, however, we held that the notice was not adequate where the State alleged that the probationer possessed illegal drugs *but further alleged* that said possession constituted a violation of a different condition, namely that he not possess illegal drugs. *Kornegay*, 228 N.C. App. at 322, 745 S.E.2d at 882. Violating the condition that the probationer not possess illegal drugs, though, is not a revocation-eligible violation. Therefore, it certainly would not have been clear to the probationer in *Kornegay* from the notice that the State was alleging that he had committed the revocation-eligible violation of committing a new criminal offense.

We conclude that Defendant had adequate notice that the State was alleging a revocation-eligible violation of the condition, namely that he not commit a new criminal offense. Specifically, we conclude that where the notice fails to allege specifically which condition was violated but where the allegations in the notice could only point to a revocation-eligible violation, the notice is adequate to confer jurisdiction to revoke probation. Here, the only condition of Defendant's probation to which his alleged pending charges could reasonably be referring to is the condition that he not commit a new criminal offense. There is no ambiguity.

Our result might be different had the report stated that Defendant had been charged with the crime of possessing illegal drugs, without referring to a specific condition of probation. In such case, Defendant would have had to guess whether the State was alleging that he committed a non-revocation-eligible violation of possessing illegal drugs *or* a revocation-eligible violation of committing a new criminal offense.

We note, though, that it is always the better practice for the State to *expressly* state which condition of probation it is alleging has been violated.

II. Conclusion

The General Assembly has stated that the State's notice must give the probationer notice of the purpose of the hearing and a statement of the violations alleged. N.C. Gen. Stat. § 15A-1345(e). We conclude that the State fulfilled its obligation in this case. Accordingly, we conclude that Judge Baddour properly exercised jurisdiction to revoke Defendant's probation, and we find no error.

NO ERROR.

Judge ELMORE concurs.

Judge HUNTER, JR., dissents by separate opinion.

HUNTER, JR., Robert N., Judge, Dissenting.

I respectfully dissent from the majority affirming the trial court and revoking Defendant's probation. Instead, I would vacate the trial court's judgment *ex mero motu* for lack of jurisdiction.

In probation revocations, the requirement of notice is imperative. Absent adequate notice, the trial court lacks subject matter jurisdiction. *State v. Kornegay*, 228 N.C. App. 320, 322, 745 S.E.2d 880, 882 (2013) (citing *State v. Tindall*, 227 N.C. App. 183, 187, 742 S.E.2d 272, 275 (2013)). To provide adequate notice, the "probation officer [must] specifically allege[ ] in the violation report that defendant . . . violated the condition that he not commit any criminal offense[,]" and Defendant must be "aware that the State [is] alleging a revocation-eligible violation and he [is] aware of the *exact violation* upon which the State relied." *State v. Lee*, 232 N.C. App. 256, 260, 753 S.E.2d 721, 723-24 (2014) (emphasis added).

The majority states, "Our Court has never explicitly held that certain 'magic' words must be used in a notice to confer jurisdiction on a court to revoke probation." However, the Court's definition of adequate notice in *Lee*, *Hancock*, and *Davis* and its identification of inadequate notice in *Tindall*, *Kornegay*, and *Jordan*, demonstrate the use of specific wording guides our Court's decision.

In *Lee*, *Hancock*, and *Davis*, this Court held the State provided adequate notice when the State used specific "commit no criminal offense" language. For example, in *Lee*, this Court held the State gave adequate notice when the "violation report *specifically* alleged that defendant

violated the condition of probation that he commit no criminal offense in that he had several new pending charges which were specifically identified . . . ." *Lee*, 232 N.C. App. at 259, 753 S.E.2d at 723 (emphasis added). The Court focused on the fact "[t]he probation officer specifically alleged in the violation report that defendant had violated the condition that he not commit any criminal offense." *Id.* at 260, 753 S.E.2d at 723-24. Additionally, the Court noted Defendant in *Lee* was "aware that the State was alleging a revocation-eligible violation and he was aware of the *exact violation* upon which the State relied." *Id.* at 260, 753 S.E.2d at 724 (emphasis added).

Further, this Court held in Davis:

> Defendant was provided with sufficient notice that his probation could be revoked by means of a probation violation report clearly indicating that: (1) Defendant had willfully violated the condition of his probation that he commit no criminal offense . . . . Therefore, unlike *Tindall* and *Kornegay*, Defendant was provided with adequate notice of the State's contention that he had committed a new criminal offense that was grounds for revocation . . . .

State v. Davis, No. COA 14-843, 2015 WL 892282, at *3 (unpublished) (N.C. Ct. App. March 3, 2015). Lastly, in *Hancock*, this Court held where specific "commit no criminal offense" is used, the "defendant need not be convicted of a criminal offense in order for the trial court to find that a defendant violated N.C. Gen. Stat. § 15A-1343(b)(1) by committing a criminal offense." *State v. Hancock*, ___ N.C. App. ___, ___, 789 S.E.2d 522, 526 (2016).

Similarly, our Court has held where specific "commit no criminal offense" language is lacking, the State did not provide adequate notice. In *State v. Jordan*, the trial court revoked Defendant's probation based on the violation "Other Violation: Defendant failed to report to superior court for pending probation violation on 12/3/2013." No. COA 14-931, 2015 WL 1201392, at *3-*4 (unpublished) (N.C. Ct. App. March 17, 2015) (all caps in original). The State alleged this violation constituted a criminal offense and was sufficient to support revocation. *Id.* at *3. However, this Court concluded "the fact that failure to appear can constitute a crime does not, in itself, provide adequate notice absent *clear indication* that the State is pursuing that violation as a criminal offense pursuant to N.C. Gen. Stat. § 15A-1343(b)(1)." *Id.* at *4 (emphasis added). This Court held "[a]dequate notice requires that a defendant be notified concerning *which alleged violations* the State intends to pursue for the purposes of probation revocation." *Id.* at *5 (emphasis added).

In *Tindall*, Defendant's probation officer filed a violation report alleging Defendant willfully violated two conditions of probation: (1) "not use, possess or control any illegal drug" and (2) "[to] participate in further evaluation, counseling, treatment or education programs . . . ." *Tindall*, 227 N.C. App. at 186, 742 S.E.2d at 275. This Court concluded the State failed to provide adequate notice. *Id.* at 187, 742 S.E.2d at 275. This Court highlighted the fact the report did not specifically allege Defendant committed a new criminal act. *Id.* at 186-87, 742 S.E.2d at 275. Thus, this Court held the trial court lacked jurisdiction. *Id.* at 187, 742 S.E.2d at 275.

In *Kornegay*, the State filed two violation reports alleging Defendant violated three conditions of probation: (1) he "not be in possession of any drug paraphernalia" (2) he "[p]ossess no firearm . . . or other deadly weapon," and (3) he "[n]ot use, possess or control any illegal drug or controlled substance . . . ." *Kornegay*, 228 N.C. App. at 321, 745 S.E.2d at 881 (brackets in original). Again, the reports did not specifically allege these behaviors violated the "commit no criminal offense" probation condition. *Id.* at 323, 745 S.E.2d at 883. This Court held the notice was inadequate and trial court lacked jurisdiction to revoke probation. *Id.* at 323-24, 745 S.E.2d at 883.

In this case, Defendant was convicted of various charges and placed on supervised probation and suspended sentencing. On 3 June 2015, Defendant's Probation Officer, Willie Atwater, filed violation reports and stated Defendant "willfully violated" certain conditions of probation and committed "other violation[s]." On both violation reports under "Other Violation," Probation Officer Atwater wrote the following:

> The Defendant has the following pending charges in Orange County. 15CR 051315 No operator[']s license 6/8/15, 15CR 51309 Flee/elude arrest w/mv 6/8/15. 13CR 709525 No operator[']s license 6/15/15, 14CR 052225 Possess drug paraphernalia 6/16/15, 14CR 052224 Resisting public officer 6/16/15, 14CR706236 No motorcycle endorsement 6/29/15, 14CR 706235 Cover reg sticker/plate 6/29/15, and 14CR 706234 Reg card address change violation.

(all caps in original)

The violation reports filed 3 June 2015 fail to provide adequate notice under our current case law. Merely alleging Defendant committed a new charge is not grounds for revocation. *Lee*, 232 N.C. App. at 260, 753 S.E.2d at 723. Further, the State failed to give notice of the *particular* revocation-eligible violation alleged by the State. *Id.* at 260-61, 753 S.E.2d at

723 ("because of the changes effected by the Justice Reinvestment Act, we have required that defendants be given notice of the *particular* revocation-eligible violation alleged by the State.") (emphasis added) (citations omitted). The violation report did not specifically allege Defendant "committed a criminal offense" when it listed the new charges under the heading "Other Violation." Further, the violation reports did not allege these new charges were revocation-eligible.

Because the probation violation reports fail to give Defendant adequate notice of the revocation-eligible conduct at issue, the trial court did not have subject matter jurisdiction to revoke Defendant's probation. Accordingly, I would vacate the trial court's judgment *ex mero motu*.

STATE OF NORTH CAROLINA
v.
KAP MUNG, DEFENDANT

No. COA16-470

Filed 20 December 2016

Motor Vehicles—driving while impaired—chemical analysis—not in native language

The trial court did not err in a driving while impaired prosecution by denying defendant's motion to suppress the results of a chemical analysis test where the officer informed defendant of his rights in English rather than in his native language of Burmese. As long as the rights delineated under N.C.G.S. § 20-16.2(a) are disclosed to a defendant, the requirements of the statute are satisfied and it is immaterial whether the defendant comprehends them.

Appeal by defendant from judgment entered 15 December 2015 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 November 2016.

Attorney General Roy Cooper, by Associate Attorney General J. Rick Brown, for the State.

Winifred H. Dillon for defendant-appellant.

ENOCHS, Judge.

Kap Mung ("Defendant") appeals from judgment entered upon his *Alford* plea to driving while impaired ("DWI"). On appeal, he contends that the trial court erred in denying his motion to suppress. Specifically, he asserts that the arresting officer failed to comply with the requirements of N.C. Gen. Stat. § 20-16.2(a) by ineffectually informing Defendant of his rights concerning a chemical analysis test. After careful review, we find no error.

Factual Background

From 11:00 p.m. on 28 September 2015 through 3:30 a.m. on 29 September 2015, officers with the Charlotte-Mecklenburg Police Department operated a DWI checkpoint on Idlewide Road in Charlotte, North Carolina. At approximately 1:27 a.m., Defendant, who was driving a Lexus sedan, pulled up to the checkpoint and was approached by Officer Nathan Crum ("Officer Crum").

Officer Crum asked Defendant, in English, for his driver's license and registration. Defendant provided his license, but was unable to produce his registration.

While Defendant was giving Officer Crum his license, Officer Crum observed that Defendant had red, bloodshot eyes. Officer Crum asked Defendant if the address on Defendant's license was correct, and Defendant answered in slurred speech that yes, it was. At this point, Officer Crum noticed a strong odor of alcohol emanating from Defendant and Defendant's car. Upon looking inside the vehicle, Officer Crum saw "a 24-ounce open container of an alcoholic beverage at [Defendant's] foot[.]"

Officer Crum ordered Defendant to get out of his car and Defendant complied. He then had Defendant perform a series of field sobriety tests including a horizontal gaze nystagmus test, a walk-and-turn test, and a one leg stand test — all of which Defendant failed. Officer Crum instructed Defendant on how to perform each test in English before he attempted it. Defendant stated to Officer Crum that he understood his instructions and proceeded to try to follow them.

Officer Crum next had Defendant perform two Alco-Sensor tests, each of which yielded positive results for the presence of alcohol in Defendant's system. At this point, Officer Crum placed Defendant under arrest for DWI. Defendant proceeded to plead with Officer Crum — in English — stating that "he couldn't get in trouble more, that he had already been arrested once for DWI" and that "he was here on a work visa and that he can't get in trouble again." After he was placed in the

back of Officer Crum's patrol car, Defendant repeatedly stated — in English — that he was sorry.

Officer Crum transported Defendant to the "BATmobile" for the purpose of performing a chemical analysis test on Defendant. Upon entering the BATmobile, Officer Crum read Defendant his rights under N.C. Gen. Stat. § 20-16.2(a) and provided Defendant with a written copy of these rights. Written copies of the rights were also posted on the wall of the BATmobile in both English and Spanish.

Officer Crum then instructed Defendant — in English — how to perform the chemical analysis test and Defendant stated that he understood and proceeded to follow Officer Crum's directions. The results of the test indicated that Defendant had a blood alcohol concentration of 0.13. At no point from the time he was stopped at the checkpoint through his performance of the chemical analysis test did Defendant express to Officer Crum that he did not understand his instructions or request an interpreter.

Defendant was charged with DWI. Defendant filed a motion to dismiss on the basis that the checkpoint was illegal; a motion to suppress based on lack of probable cause; and a motion to suppress the results of the chemical analysis test, which were heard before the Honorable Matt Josman in Mecklenburg County District Court on 21 August 2014.[1] Judge Josman denied these motions and Defendant appealed to Superior Court for a trial *de novo*.

On 30 November 2015, Defendant filed a motion to dismiss on the ground that the checkpoint was unconstitutional as well as a motion to dismiss for lack of probable cause for his arrest. That same day, he filed a motion to suppress the results of the chemical analysis test asserting that Officer Crum had violated N.C. Gen. Stat. § 20-16.2(a) by ineffectually informing him of his rights concerning the test due to the fact that he is originally from Burma and was not able to understand his rights or what was occurring on the ground that he did not speak English and was not provided a Burmese interpreter. On 11 December 2015, Defendant also filed a motion to dismiss on the same grounds set forth in his motion to suppress.

A hearing on Defendant's motions was held before the Honorable Carla N. Archie in Mecklenburg County Superior Court on 14 and

1. These motions are not included in the record on appeal, but were ruled upon by the district court as evidenced by its 21 August 2014 order denying them.

15 December 2015. Judge Archie denied Defendant's motions. Defendant then entered an *Alford* plea, reserving his right to appeal the trial court's denial of his motions.

The trial court sentenced Defendant to 12 months imprisonment, suspended sentence, and placed Defendant on 18 months supervised probation. Defendant gave oral notice of appeal at the close of the hearing.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Specifically, he contends that the results of the chemical analysis test should have been excluded due to the fact that Officer Crum failed to effectually inform him of his rights concerning the test pursuant to N.C. Gen. Stat. § 20-16.2(a). We disagree.

> This Court's review of a trial court's denial of a motion to suppress in a criminal proceeding is strictly limited to a determination of whether the court's findings are supported by competent evidence, even if the evidence is conflicting, and in turn, whether those findings support the court's conclusions of law. If so, the trial court's conclusions of law are binding on appeal. If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal. However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct.

State v. Scruggs, 209 N.C. App. 725, 727, 706 S.E.2d 836, 838 (2011) (internal citations, quotation marks, and brackets omitted).

N.C. Gen. Stat. § 20-16.2(a) (2015) provides as follows:

> (a) **Basis for Officer to Require Chemical Analysis; Notification of Rights.** — Any person who drives a vehicle on a highway or public vehicular area thereby gives consent to a chemical analysis if charged with an implied-consent offense. Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.
>
> Before any type of chemical analysis is administered the person charged shall be taken before a chemical

analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:

> (1) You have been charged with an implied-consent offense. Under the implied-consent law, you can refuse any test, but your drivers license will be revoked for one year and could be revoked for a longer period of time under certain circumstances, and an officer can compel you to be tested under other laws.
>
> (2) Repealed by Session Laws 2006-253, s. 15, effective December 1, 2006, and applicable to offenses committed on or after that date.
>
> (3) The test results, or the fact of your refusal, will be admissible in evidence at trial.
>
> (4) Your driving privilege will be revoked immediately for at least 30 days if you refuse any test or the test result is 0.08 or more, 0.04 or more if you were driving a commercial vehicle, or 0.01 or more if you are under the age of 21.
>
> (5) After you are released, you may seek your own test in addition to this test.
>
> (6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

Defendant is correct as a general proposition that "[w]here [a] defendant is not advised of [his] rights [under N.C. Gen. Stat. § 20-16.2(a)], the State's [chemical analysis] test is inadmissible in evidence." *State v. Gilbert*, 85 N.C. App. 594, 597, 355 S.E.2d 261, 263 (1987). Here, Defendant asserts that he was not adequately informed of his rights under N.C. Gen. Stat. § 20-16.2(a) due to the fact that English is not his first language and that, consequently, the failure of Officer Crum to

ensure that these rights were communicated to him in his native language of Burmese resulted in a violation of the statute.

Both Defendant and the State direct us to this Court's opinion in *State v. Martinez*, __ N.C. App. __, 781 S.E.2d 346 (2016), as the controlling authority concerning whether a non-English speaking defendant's rights under N.C. Gen. Stat. § 20-16.2(a) have been sufficiently disclosed to him so that the results of a chemical analysis test are properly admissible into evidence and not subject to suppression. In *Martinez*, the defendant's vehicle was pulled over by a police officer when he attempted to evade a DWI checkpoint. *Id.* at __, 781 S.E.2d at 347. The officer ordered the defendant out of his vehicle and began conducting field sobriety tests. During the performance of these tests, it became apparent to the officer that the defendant did not fully understand English, and that his first language was Spanish. *Id.* at __, 781 S.E.2d at 347.

The officer ultimately arrested the defendant for driving while impaired and transported him to the Wake County Jail in order to conduct a chemical analysis of his breath. *Id.* at __, 781 S.E.2d at 347. Prior to the test, the officer read the defendant his implied consent rights in English and gave him a Spanish language version of those same rights in written form. The officer called his dispatcher, who spoke Spanish, and placed him on speaker phone to answer any questions the defendant may have had regarding the test. Thereafter, the defendant signed the Spanish language version of the implied consent rights form and submitted to testing. *Id.* at __, 781 S.E.2d at 347. The defendant was ultimately found guilty of driving while impaired. *Id.* at __, 781 S.E.2d at 347.

On appeal to this Court, the defendant argued that N.C. Gen. Stat. § 20-16.2(a) "requires that a motorist be informed orally of his or her implied consent rights in a language he or she fully understands before being subjected to [chemical analysis] testing. According to Defendant, because he is not a native English speaker, and he was only orally informed of his implied consent rights in English before being subjected to breath alcohol testing, the results were inadmissible." *Id.* at __, 781 S.E.2d at 348.

We expressly disagreed with the defendant's position, holding as follows:

> Our Supreme Court has held that the purpose of this statute is to promote cooperation between law enforcement and the driving public in the collection of scientific evidence, thereby ensuring public safety while safeguarding

> against the risk of erroneous driving privilege deprivation. *Seders v. Powell*, 298 N.C. 453, 464-65, 259 S.E.2d 544, 552 (1979). The statute provides that a law enforcement officer or chemical analyst who administers a breath alcohol test based on a suspected commission of an implied consent offense "shall" inform the motorist suspected of the offense "orally and also . . . in writing" about his or her rights and the consequences of refusing to submit to testing. N.C. Gen. Stat. § 20-16.2(a). However, the statute also provides that a person who is unconscious or is otherwise unable to refuse testing may nevertheless be subject to testing and that the requirements related to informing the motorist of his or her rights and the consequences of refusal are inapplicable. *Id.* § 20-16.2(b). Thus, neither the plain language nor the statutory purpose of § 20-16.2 disclose a legislative intent by our General Assembly to condition *the admissibility* of chemical analysis test results on a defendant's subjective understanding of the information officers and chemical analysts are required to disclose before conducting the testing.

Id. at __, 781 S.E.2d at 348. This Court then went on to further unambiguously hold that "[i]n its enactment of the requirements of subsection (a) of N.C. Gen. Stat. § 20-16.2, we believe that the General Assembly intended to require the disclosure of the information set out in that subsection, but not to condition the admissibility of the results of chemical analysis on the defendant's understanding of the information thus disclosed. Therefore, we hold that the trial court did not err in allowing the test results to be admitted into evidence over Defendant's objection." *Id.* at __, 781 S.E.2d at 348. (internal citation omitted).

We believe that *Martinez'* holding is straightforward and expressly clear: The admissibility of the results of a chemical analysis test are not conditioned on a defendant's subjective understanding of the information disclosed to him pursuant to the requirements of N.C. Gen. Stat. § 20-16.2(a). Therefore, as long as the rights delineated under N.C. Gen. Stat. § 20-16.2(a) are disclosed to a defendant — which occurred in the present case — the requirements of the statute are satisfied and it is immaterial whether the defendant comprehends them.

Consequently, we reaffirm our holding in *Martinez* and find that in the present case Officer Crum fully complied with N.C. Gen. Stat. § 20-16.2(a) when he read Defendant his rights as to the chemical

analysis test in English and provided him written form copies of those rights. As a result, we hold that the trial court did not err in denying Defendant's motion to suppress.

Conclusion

For the reasons stated above, the trial court properly denied Defendant's motion to suppress.

NO ERROR.

Chief Judge McGEE and Judge BRYANT concur.

STATE OF NORTH CAROLINA
v.
JOSE JESUS RIOS, DEFENDANT

No. COA16-108

Filed 20 December 2016

1. Appeal and Error—preservation of issues—basis of objection apparent from context

An issue regarding the admission of evidence of defendant's prior incarceration was properly preserved for appellate review where defendant raised only general objections but the basis of the objection was apparent from the context.

2. Evidence—character—not in issue—prior incarceration testimony allowed—abuse of discretion

The trial court abused its discretion by allowing testimony concerning defendant's prior incarceration where defendant did not testify and it was apparent that the State elicited the testimony to show defendant's propensity to commit the crimes for which he was charged. The danger of unfair prejudice was grave and the failure to exclude the evidence amounted to an abuse of discretion.

Judge DILLON dissenting.

Appeal by defendant from judgments entered 18 June 2015 by Judge Stanley L. Allen in Guilford County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Roy Cooper, by Assistant Attorney General Stuart M. (Jeb) Saunders, for the State.

Gilda C. Rodriguez for defendant-appellant.

ELMORE, Judge.

Jose Rios (defendant) was convicted of trafficking in marijuana, conspiracy to traffic in marijuana, intentionally maintaining a dwelling for keeping and selling controlled substances, and possession of cocaine. Defendant appeals, arguing that the trial court erred in admitting evidence of his prior incarceration which was elicited by the State during cross-examination of defendant's witness. Because the evidence was inadmissible character evidence that prejudiced his defense, defendant is entitled to a new trial.

I. Background

On 27 June 2013, police executed a search warrant at 3108 Four Seasons Boulevard in Greensboro, where defendant lived with Oscar Morales and Junior Molina, the owner of the house. Morales was the only person in the house when police executed the warrant. Approximately twenty seconds elapsed from the time police knocked and announced their presence and when they entered the home.

Police first searched defendant's bedroom. Underneath the bed they found high-grade marijuana in a clear plastic jar and nine grams of cocaine in a tissue box. On top of an entertainment center was a box containing digital scales and 2,674 grams of marijuana in various plastic bags. They also found a wallet containing handwritten notes with names and contact information.

In Morales's bedroom, police found digital scales; an open box of sandwich bags; three canisters with false bottoms which are typically used to hide narcotics in transport; marijuana paraphernalia; a ledger describing different highs from different strands of marijuana; and 124 grams of marijuana, including 70.5 grams of compressed marijuana covered in plastic wrap. Officer Murphy testified that the marijuana found in Morales's bedroom was packaged the same way as that found in defendant's room.

The search of Molina's bedroom was less fruitful. Police found 4.5 grams of marijuana and a FedEx box with two vacuum-seal bags that had been cut open. The bags did not contain any marijuana residue

but police suspected the box had been used to ship narcotics. Officer Murphy testified that when drug traffickers "package marijuana in order to ship it across states, they will vacuum seal the marijuana one time and will wash it, put it inside of another vacuum seal bag and sometimes put it into a third vacuum seal bag, so you've got three layers, so basically one or two layers don't contain marijuana residue and the last one does."

During the search, police noticed a door leading to the garage secured by a hatch and padlock. They forced their way into the garage where they discovered a blue tote containing two large rectangular blocks of compressed marijuana wrapped in clear plastic, each weighing approximately ten pounds, and three one-gallon Ziploc bags, each containing about one pound of compressed marijuana. Next to the tote was a red cooler containing another square block of compressed marijuana weighing approximately twenty-eight pounds, and four vacuum-seal bags, each cut open and containing marijuana residue.

All told, police seized 57.25 pounds of marijuana from the house: 7.25 pounds from defendant's room, .25 pounds from Morales's room, 4.5 grams from Molina's room, and 49.5 pounds from the garage.

Ten latent fingerprints were pulled from the vacuum-seal bags in Molina's bedroom, along with six more prints from the two compressed marijuana blocks in the garage. The latent impressions were photographed and submitted to a print examiner, Doreen Huntington. Huntington compared eighty-four images taken from the impressions with the fingerprints of four individuals—including defendant. She selected four of the eighty-four images for comparison and concluded that one of the fingerprints from the vacuum-seal bags in Molina's bedroom matched defendant's right thumb print. The remaining three images could not be matched to any individual.

Defendant called his girlfriend, Charla Hodges, to testify at trial. Hodges testified that she knew defendant in high school, from 2004 to 2008, and they reconnected in 2011. They began dating in 2012 when Hodges was in graduate school at the University of North Carolina at Chapel Hill. Defendant was attending Guilford Technical Community College while at the same time working for a furniture company. They would visit each other on the weekends and sometimes study together. Hodges explained that between work, school, and visits to Chapel Hill, defendant spent a substantial amount of time away from his house.

Hodges would visit defendant in Greensboro "usually twice a month on the weekends" and was familiar with his residence. She thought he kept his room tidy but his bedroom door did not lock and it had a hole

at the bottom where it had been kicked in. Hodges testified that when defendant visited her in Chapel Hill, other people would use defendant's bedroom: "The reason I know that is because when I would come and visit we would find other articles of clothing that didn't belong to us, or we would be told that someone else stayed in the room while he was away."

During that time, Hodges testified, she never saw defendant use or possess drugs, and had never seen "any of this marijuana before, this 50-odd pounds." She did recall occasions when defendant's roommates had friends over and they smoked marijuana, but she and defendant did not participate and kept to themselves in defendant's room. Hodges also testified that she never saw defendant go in or out of the garage, and could not recall ever seeing a box on top of the entertainment center in his room. She explained that defendant would not have been able to lift that box because he was recovering from a surgery earlier that year: "He couldn't lift anything—I apologize for being graphic, but he couldn't even pull up his pants."

The State then cross-examined Hodges, leading to the following exchange:

> Q: You say that you saw him in high school and then you reconnected in 2011, is that right?
>
> A: Uh-huh.
>
> Q: There was some period of time you did not see him?
>
> A: Yes, sir.
>
> Q: He was not in Asheboro at that time?
>
> A: I'm not sure.
>
> Q: Do you have any idea where he was for, say, three and a half, four years?
>
> MR. COALTER: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> A: From what he has told me—well, yes, he did tell me where he was at that time, and he was incarcerated.
>
> Q: Okay. After that, Ms. Hodges, you say you and he reconnected, is that right?
>
> A: Uh-huh.

. . . .

Q: This all comes as something of a surprise, then, to you, Ms. Hodges.

A: Uh-huh. Very much so.

Q: But you were, before you reconnected with him, aware of his past.

A: No, uh-huh.

Q: But, in your words, you were aware that he had been incarcerated.

A: Yes. After he told me.

MR. COALTER: Well, objection, Your Honor. Move to strike.

THE COURT: Overruled. Motion denied.

MR. COLE: Nothing further, Your Honor.

At the conclusion of trial, the jury found defendant guilty on two counts of trafficking in marijuana, conspiracy to traffic in marijuana, intentionally maintaining a dwelling for keeping and selling controlled substances, and possession of cocaine. Defendant gave notice of appeal in open court.

II. Discussion

[1] On appeal, defendant argues that evidence of his prior incarceration was inadmissible character evidence elicited for the sole purpose of showing defendant's propensity to commit the crimes for which he was charged. We note that defendant raised only general objections to the testimony at trial. Because the basis of his objection is apparent from the context, however, defendant properly preserved this issue for appellate review. *See* 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 if the specific grounds were not apparent from the context.").

[2] Character evidence is generally not admissible to prove conduct in conformity therewith. N.C. Gen. Stat. § 8C-1, Rule 404(a) (2015). A criminal defendant may, however, offer evidence of his or her own pertinent character trait. N.C. Gen. Stat. § 8C-1, Rule 404(a)(1) (2015). If the defendant so elects to "open the door" to his or her character, "proof may be

made by testimony as to reputation or by testimony in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 405(a) (2015). The prosecution may then rebut with evidence of the defendant's bad character, including "relevant specific instances of conduct." N.C. Gen. Stat. § 8C-1, Rules 404(a)(1), 405(a).

Rule 404(b) more specifically prohibits "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2015). Such evidence may be admissible for some independently relevant purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* But the "bare fact" of a defendant's prior conviction is not admissible under Rule 404(b). *State v. Wilkerson*, 148 N.C. App. 310, 327–28, 559 S.E.2d 5, 16 (Wynn, J., dissenting), *rev'd per curiam for the reasons stated in the dissenting opinion*, 356 N.C. 418, 571 S.E.2d 583 (2002). Rather, "it is the facts and circumstances underlying the conviction that Rule 404(b) allows." *Id.* at 321, 559 S.E.2d at 12.

In contrast to Rule 404(b), Rule 609 does allow evidence of a prior conviction but only to impeach the credibility of a witness. N.C. Gen. Stat. § 8C-1, Rule 609 (2015); *see Wilkerson*, 148 N.C. App. at 320, 559 S.E.2d at 12 (Wynn, J., dissenting) ("[*P*]*rior convictions* are admissible under Rule 609, while *evidence of other crimes* is admissible under Rule 404(b)."). Prior convictions may not " 'be considered as substantive evidence that [a defendant] committed the crimes' for which he is presently on trial by characterizing him as 'a bad man of a violent, criminal nature . . . clearly more likely to be guilty of the crime charged.' " *State v. Carter*, 326 N.C. 243, 250, 388 S.E.2d 111, 116 (1990) (quoting *State v. Tucker*, 317 N.C. 532, 543, 346 S.E.2d 417, 423 (1986)); *see also State v. McClain*, 240 N.C. 171, 173, 81 S.E.2d 364, 365 (1954) ("The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." (citations omitted)).

Although in this case the State elicited testimony of defendant's prior *incarceration* rather than evidence of his *conviction*, there is no practical difference between the two. Each demonstrates to the jury that defendant committed a separate criminal offense in the past, and evidence that he was incarcerated necessarily includes the fact that he was convicted. Evidence of incarceration may, in fact, be more prejudicial where, as here, the jury is left to speculate as to the seriousness of the offense and the length of the sentence. And because defendant did not testify at trial, the State could not purport to attack his credibility

with evidence of his incarceration. It is readily apparent instead that the State elicited the testimony to show defendant's propensity to commit the crimes for which he was on trial.

The State contends nonetheless that equating evidence of incarceration with evidence of a conviction runs afoul of our decision in *State v. Goins*, 232 N.C. App. 451, 754 S.E.2d 195, *disc. review denied*, ____ N.C. ____, 763 S.E.2d 388 (2014). In that case, we rejected the argument that evidence of a defendant's recent incarceration amounts to "evidence of other crimes, wrongs, or acts" in violation of Rule 404(b). *Id.* at 458–59, 754 S.E.2d at 201. To the extent that Rule 404(b) contemplates the facts and circumstances *underlying* a conviction, *Wilkerson*, 148 N.C. App. at 321, 559 S.E.2d at 12 (Wynn, J., dissenting), then, admittedly, it would not include the bare fact of prior incarceration. Even so, like evidence of a conviction, evidence of incarceration is still character evidence under Rule 404(a). As such, it "is not admissible for the purpose of proving that [a person] acted in conformity therewith on a particular occasion" unless it fits within an enumerated exception. *See* N.C. Gen. Stat. § 8C-1, Rule 404(a)(1)–(3) (2015); *see also State v. Streater*, 197 N.C. App. 632, 647–48, 678 S.E.2d 367, 377 (2009) (treating testimony of previous incarceration as evidence of the defendant's bad character).

The State argues that, pursuant to Rule 404(a)(1), defendant offered evidence of his good character via Hodges's testimony, thereby opening the door for the State to rebut with evidence of defendant's bad character, i.e., his prior incarceration. Hodges did not testify as to defendant's reputation for being law-abiding, however, and she did not offer her opinion of the same. Her testimony was instead offered to support defendant's theory that the marijuana found in his room was attributable to Morales and Molina. The fact that Hodges had not seen defendant use or possess marijuana when she visited him was relevant to the defense, as were the facts that she saw defendant's roommates using marijuana, defendant's bedroom door was broken, and other people stayed in defendant's room when he visited Hodges. The State could rebut Hodges's testimony, as it did, by showing that there were long periods of time when Hodges was not at defendant's residence. But because defendant did not put his character in issue, the State could not purport to rebut Hodges's testimony with bad character evidence.

We might assume, as the State suggests, that defendant's prior incarceration had *some* other relevance. The nature of defendant's relationship with Hodges could have been a fact "of consequence to the determination of the action," N.C. Gen. Stat. § 8C-1, Rule 401 (2015), in which case defendant's incarceration was probative insomuch as it

showed a period of time when the two were not in contact with each other. Because Hodges had already testified that she did not see defendant for three years after high school, however, the probative value of defendant's precise whereabouts was minimal. The danger of unfair prejudice, in contrast, was decidedly grave such that the trial court's failure to exclude the evidence under Rule 403 amounts to an abuse of discretion. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2015) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."); *Wilkerson*, 148 N.C. App. at 327–28, 559 S.E.2d at 16 (Wynn, J., dissenting) (opining that where no exception applies, admitting the bare fact of a prior conviction violates Rule 403 because the evidence "is inherently prejudicial such that any probative value of the conviction is substantially outweighed by the danger of unfair prejudice" (footnote omitted)).

Finally, we think there is a reasonable possibility that, had the error not been committed, the jury would have reached a different result. *See* N.C. Gen. Stat. § 15A-1443(a) (2015). The evidence against defendant was largely—if not entirely—circumstantial, and a jury could have reasonably concluded that the marijuana and cocaine were attributable to defendant's roommates. Hodges's testimony presented a different picture of defendant, but evidence of his prior incarceration completely undercut his defense and gave the jury an alternative basis to convict.

III. Conclusion

The evidence of defendant's prior incarceration was not admissible, and because there is a reasonable possibility that, absent the evidence, the jury would have reached a different result, defendant is entitled to a new trial.

NEW TRIAL.

Judge HUNTER, JR. concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I find no prejudicial error in this case.

I agree with the majority that the prosecution's questioning of Defendant's girlfriend regarding Defendant's prior incarceration was error.

Nevertheless, to the extent that the prosecutor crossed the line, I do not believe that error was prejudicial. There was substantial evidence that Defendant was a resident of the three-bedroom house and was involved in the drug activity occurring there. For instance, in one of the bedrooms, officers found several pounds of marijuana on top of the dresser and under the bed, Defendant's personal documents, medication bearing Defendant's name, and Defendant's personal effects, along with other evidence establishing that Defendant stayed in that room and did not have a roommate. Also, officers discovered Defendant's thumbprint on drug packaging, which was found in another part of the house. Defendant's evidence was weak in comparison, comprising mainly of testimony from Defendant's girlfriend that Defendant was not involved, much of which was contradicted by the physical evidence.

There is a remote chance that the reference to Defendant's incarceration, which was for some undisclosed reason and undisclosed period in the prior decade, could have had some impact. However, based on the evidence of Defendant's guilt in this case (among other things, the drugs in his room and his thumbprint on the drug packaging material), I do not believe that there is a *reasonable* possibility that the trial would have ended differently had the jury not heard the reference to Defendant's prior incarceration.

STATE OF NORTH CAROLINA
v.
DWAYNE ROBINSON, DEFENDANT

No. COA16-490

Filed 20 December 2016

1. Criminal Law—defense of accident—wrongdoing by defendant

The trial court did not err in a prosecution for attempted first-degree murder and assault with a deadly weapon arising from a fight by not instructing the jury on the defense of accident. Even if the unrequested instruction had been given, it was not probable that the jury would have reached a different verdict.

2. Criminal Law—wearing or possessing bulletproof vest—alternative instruction

The trial court did not err by instructing the jury that, if it found defendant guilty of any the crimes charged (attempted first-degree

murder and assault with a deadly weapon), it was required to determine whether defendant wore or had in his immediate possession a bulletproof vest. Although defendant contended that the instruction was improper because it presented two alternative theories, only one of which was supported by the evidence, the evidence submitted was sufficient to allow jurors to find either of the alternative theories.

Appeal by Defendant from judgments entered 9 November 2015 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for Defendant-Appellant.

INMAN, Judge.

A person who, while carrying a loaded firearm, starts a physical fight and discharges the firearm injuring another person, is not entitled to a jury instruction on the defense of accident.

Dwayne Robinson ("Defendant") appeals from the judgments entered upon his convictions for attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and a sentencing enhancement for the assault charge based on the fact that Defendant was wearing or had in his immediate possession a bulletproof vest at the time of the assault. On appeal, Defendant first argues that the trial court committed plain error by failing to instruct the jury on the defense of accident. Additionally, Defendant argues that the trial court committed plain error in its instructions to the jury regarding the bulletproof vest. After careful review, we conclude that Defendant has failed to demonstrate plain error.

Factual and Procedural Background

Evidence presented at trial included the following:

On 23 August 2013, at approximately 10:30 p.m., Jacksonville Police Department officers were dispatched in response to a 911 call reporting shots fired near 600 Hammock Lane. Officers approaching the apartments in marked police cruisers from different directions observed a sports utility vehicle recklessly speeding away from the area. The

officers converged on the vehicle, drew their weapons, and ordered the vehicle's occupants to step out.

Latasha Sutton ("Ms. Sutton") was in the driver's seat. Justin Johnson ("Johnson"), Ms. Sutton's boyfriend, was in the front passenger seat. In the back seat, police found Defendant. Ms. Sutton's two young children were also in the vehicle. After removing all the occupants from the vehicle, officers detected the odor of gunpowder. Crime scene investigators then arrived and searched the vehicle. They found loaded handguns, handcuffs, ammunition, rope, gloves, a knife in its sheath, and bulletproof vests. Ms. Sutton told officers, "[n]one of this would have happened if you would have done your job yesterday." One of the officers had responded to a domestic disturbance at the same address a day earlier and had seen Johnson, Ms. Sutton, and Ms. Sutton's estranged husband, Anthony Sutton ("Mr. Sutton"). The Suttons were fighting over custody of their children.

After stopping the vehicle in which Defendant was riding, officers searched the area outside the call address and found Mr. Sutton lying on the sidewalk, handcuffed and bleeding from gunshot wounds. Officer Lonnie Horton observed that Mr. Sutton had been shot once in the back of his left leg, just behind his knee, and once in the front of his right thigh. Mr. Sutton was taken to the hospital and treated for his injuries.

Defendant testified at trial as follows: Defendant had never met Mr. Sutton or Ms. Sutton and had no knowledge of the Suttons' child custody dispute prior to the shooting that resulted in his arrest. Johnson lived in Fayetteville and Defendant lived right outside of Fayetteville. They had become friends years earlier when both were deployed in Iraq by the United States Army. Defendant telephoned Johnson on 23 August 2013 to invite him to a Fayetteville restaurant to celebrate Defendant's graduation from an Army leadership school. When Defendant arrived at Johnson's apartment at 6:00 p.m., Johnson asked Defendant to ride with him to pick up Johnson's girlfriend, Ms. Sutton, and to take her to pick up her children. Defendant assumed the children were in Fayetteville. After Johnson and Defendant picked up Ms. Sutton, Defendant fell asleep in the back of Johnson's vehicle. When he awoke, the vehicle was parked at an apartment complex in Jacksonville. Defendant exited the vehicle to stretch his legs and walked about 50 yards toward a nearby road.

Defendant testified that as he was walking back toward Johnson's vehicle, he was almost hit by an SUV that entered the parking lot. The SUV driver, Mr. Sutton, parked and started walking in Defendant's direction. Defendant confronted Mr. Sutton about nearly hitting him, but Mr.

Sutton said nothing and continued walking past him. Defendant then grabbed Mr. Sutton by the back of his shirt, pulled and shoved him down on the asphalt, and cursed at him. When Mr. Sutton stood up, Defendant hit him in the head. Defendant and Mr. Sutton then began wrestling and fighting in the parking lot. Defendant had a loaded .40 caliber gun in the waistband of his pants, for which he had a concealed carry permit. During the fight, Mr. Sutton pulled Defendant down to the ground. When Defendant stood up, his gun came loose, slid down his pants leg, and was caught in his shoe. As Defendant tried to retrieve the gun, Mr. Sutton grabbed for it as well, and the two continued to wrestle and fight for the gun. Mr. Sutton had one hand on the barrel of the gun and the other hand on Defendant's wrist. Defendant's finger was on the trigger of the gun. Defendant hit Mr. Sutton's hand off of the barrel, and the gun went off.

Defendant testified that after the gun discharged, the two men continued to wrestle in the rough grass behind Mr. Sutton's apartment building. The gun discharged again. Mr. Sutton then pulled away from the fight, and the gun discharged a third time. After the third shot, the gun was out of both Defendant's and Mr. Sutton's hands, and Defendant put Mr. Sutton into a chokehold to stop him from fighting. Johnson then called out to Defendant, and Defendant told Johnson they were in the yard behind the apartment. Johnson tackled Mr. Sutton and attempted to handcuff him, but Johnson was unable to handcuff both hands. Defendant and Johnson then ran away. Defendant denied pointing the gun at Mr. Sutton at any time that night. Defendant also denied wearing a bulletproof vest.

Mr. Sutton testified at trial as follows: He had just parked his car outside his apartment after 9:00 p.m. on 23 August 2013 and was standing in the parking lot and using his phone when he noticed a man wearing a bulletproof vest and gloves walking in his direction. Mr. Sutton thought it was odd that the man was wearing gloves because the weather was hot. He was not concerned about the vest because he was familiar with military service members exercising while wearing vests. When Mr. Sutton next looked up from his phone, the man was holding a gun to his face. Mr. Sutton struck the man in the face and ran, then heard a loud sound and his leg went numb, and he knew he had been shot. Mr. Sutton tried to continue running but fell. The man leaned over him and said, "do you want to die?" Mr. Sutton told the man that "he wasn't going to kill [any]body." Mr. Sutton heard the gun discharge a second time and believed he had been shot in the head. Mr. Sutton fought with the man for control of the gun, which resulted in the two men wrestling. While Mr. Sutton and the man were wrestling, another man approached

and tried to handcuff Mr. Sutton's hands together. Johnson also went through Mr. Sutton's pockets, grabbed Mr. Sutton's keys, and ran away. Mr. Sutton eventually let go of the gun, tried to run towards the building, and then heard a third gunshot.

Lawrence Herndon, a neighbor of Mr. Sutton's, testified that he was in his apartment that evening and looked out of his front window after he heard a "pop noise." He did not see anyone outside. Upon hearing a second "pop," Herndon looked out of his back window and saw Mr. Sutton on the ground and two people struggling with him. Of the two men fighting with Mr. Sutton, the taller man had a gun and was wearing a bulletproof vest. After seeing the taller man pointing a gun at Mr. Sutton's throat and hearing someone say the word "kill," Herndon told his wife to call 911. Herndon later identified Defendant and Johnson as the two men fighting with Mr. Sutton, and specifically identified Defendant as the man with the gun and bulletproof vest.

Defendant was indicted on charges of attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first degree kidnapping, felony conspiracy, and wearing a bulletproof vest during the commission of those crimes. On 9 November 2015, Defendant's case was called for trial in Onslow County Superior Court. The State declined to proceed on the kidnapping and a related conspiracy charge.

On 17 November 2015, the jury found Defendant guilty of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, and found that Defendant wore or had in his immediate possession a bullet-proof vest at the time of the felony. The jury found Defendant not guilty of conspiracy to commit first degree murder, conspiracy to commit assault with a deadly weapon with intent to kill inflicting serious injury, and conspiracy to commit assault with a deadly weapon inflicting serious injury. Defendant was sentenced to a minimum term of 192 months to a maximum term of 243 months for the attempted first degree murder charge and a minimum term of 157 months to a maximum term of 201 months for the assault with a deadly weapon with intent to kill inflicting serious injury charge, applying the bulletproof vest enhancement. Defendant appeals his convictions.

Analysis

I. Jury Instruction Regarding Defense of Accident

[1] Defendant argues that the trial court erred by failing to instruct the jury on the defense of accident because Defendant testified that his gun

discharged accidentally during the fight with Mr. Sutton. We hold that the trial court did not err in omitting the instruction and that, even if the trial court had instructed the jury regarding the defense of accident, it is not probable that jurors would have reached a different verdict.

Defendant's counsel did not request an instruction regarding the theory of accident. We therefore review for plain error. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). To show plain error, Defendant must establish "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). To prevail on appeal from the trial court's failure to instruct jurors on a defense, a defendant "must show that the requested instruction was not given in substance, and that substantial evidence supported the omitted instruction." *State v. White*, 77 N.C. App. 45, 52, 334 S.E.2d 786, 792 (1985) (citations omitted). "The trial court need only give the jury instructions supported by a reasonable view of the evidence." *Id.* at 52, 334 S.E.2d at 792 (citation omitted).

Although this Court usually considers the evidence in a light most favorable to the State when reviewing a criminal defendant's assignment of error, the standard is the opposite with respect to the omission of an instruction regarding a defense. "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted).

The State argues that Defendant was not entitled to an instruction on the defense of accident because Defendant admitted that he started the fight with Mr. Sutton prior to the shooting. "The law is clear that 'evidence does not raise the defense of accident where the defendant was not engaged in lawful conduct when [a shooting] occurred.' " *State v. Gattis*, 166 N.C. App. 1, 11, 601 S.E.2d 205, 211 (2004) (quoting *State v. Riddick*, 340 N.C. 338, 342, 457 S.E.2d 728, 731 (1995)).

The evidence, even considered in a light most favorable to Defendant, reveals that Defendant was engaged in wrongdoing when he shot Mr. Sutton. Defendant admitted that he physically assaulted Mr. Sutton and had his hand on the trigger of his gun when it discharged, injuring Mr. Sutton. Because by his own admission he was engaged in wrongful conduct when he shot Mr. Sutton. Defendant was not entitled to a jury instruction on the defense of accident.

Even assuming *arguendo* that Defendant was not precluded from asserting the defense of accident and that the trial court erred in not *sua sponte* instructing the jury on that defense, Defendant cannot establish plain error in light of other evidence presented. Two eyewitnesses—Lawrence Herndon and Mr. Sutton—testified that Defendant held a gun to Mr. Sutton's head. Mr. Sutton testified that he was first shot by Defendant in the back of his knee while running from him. Officer Lonnie Horton, one of the first officers responding to the shooting scene, testified that Mr. Sutton had an entry bullet wound in the back of his knee. We cannot conclude, in light of this evidence, that the jury probably would have reached a different result had it been instructed regarding the defense of accident.

II. Jury Instruction Regarding Bulletproof Vest

[2] Defendant next contends that the trial court erred in instructing the jury that, if it found Defendant guilty of any of the crimes charged, it was required to determine whether Defendant wore or had in his immediate possession a bulletproof vest at the time he committed such crime. We conclude that the trial court did not err in this instruction.

N.C. Gen. Stat. § 15A-1340.16C(a) provides:

> If a person is convicted of a felony and it is found as provided in this section that the person wore or had in his or her immediate possession a bullet-proof vest at the time of the felony, then the person is guilty of a felony that is one class higher than the underlying felony for which the person was convicted.

N.C. Gen. Stat. § 15A-1340.16C(a) (2015).

The trial court instructed the jury that if it found Defendant guilty of any offense, it must answer "yes" or "no" to the question, "Do you find that he wore, or had in his immediate possession, a bulletproof vest at the time he committed the offense?" The trial court instructed the jury that the burden of proof on this issue was on the State, and that the jury should answer "yes" to the question only if it found the fact beyond a reasonable doubt.

The North Carolina Constitution provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]" N.C. Const. art. I, §24. The unanimity requirement is not violated "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*[.]"

State v. Bell, 359 N.C. 1, 30, 603 S.E.2d 93, 113 (2004) (emphasis in original) (quoting *State v. Lyons*, 330 N.C. 298, 302–03, 412 S.E.2d 308, 312 (1991)).

Defendant contends that the instruction regarding the bulletproof vest was improper because it presented two alternative theories, only one of which was supported by the evidence. "Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, . . . this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction." *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987).

Defendant does not dispute that both Mr. Sutton and Lawrence Herndon testified that Defendant was wearing a bulletproof vest at the time of the shooting. However, Defendant argues that by relying on this testimony, the State has failed to contend that there was any evidence that could support an instruction that a bulletproof vest was in Defendant's immediate possession—as opposed to being worn by Defendant—at the time of the shooting.

In order to submit to a jury a criminal charge, including the enhancement based upon use of a bulletproof vest during the commission of a felony, the State must present substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citations omitted). To determine if evidence is sufficient, this Court views the evidence in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

Although Mr. Sutton and Lawrence Herndon testified that Defendant wore a bulletproof vest at the time of the shooting, Defendant denied wearing a vest. If jurors had believed Defendant's testimony raised a reasonable doubt regarding whether he had been wearing the vest, they could answer "yes" to the question on the verdict sheet only if they found beyond a reasonable doubt that a bulletproof vest was in Defendant's "immediate possession" at the time of the shooting.

The State introduced evidence sufficient to support a reasonable inference that a bulletproof vest was in Defendant's immediate possession at the time of the shooting. Police officers found a bulletproof vest in the back of the vehicle where Defendant had been sitting when fleeing the scene of the shooting. Forensic testing determined that the blood on the vest belonged to Mr. Sutton, whom Defendant shot.

Therefore, if jurors were not convinced beyond a reasonable doubt that Defendant was wearing the vest during the shooting, they could reasonably infer that the vest was in Defendant's immediate possession at the time he committed the offenses for which he was found guilty. Because the evidence submitted was sufficient to allow jurors to find either of the alternative theories submitted to them regarding Defendant's possession of a bulletproof vest at the time of the shooting—either by wearing it or having it in his immediate possession—Defendant's argument that the charge was improperly submitted to the jury is without merit and is overruled.

Conclusion

The evidence submitted at trial precluded a jury instruction on the defense of accident and supported a jury instruction on the charge that Defendant committed felony assault while wearing or having in his immediate possession a bulletproof vest. Accordingly, Defendant has failed to demonstrate plain error.

NO PLAIN ERROR.

Judges DAVIS and ENOCHS concur.

STATE OF NORTH CAROLINA
v.
LEONARD PAUL SCHALOW

No. COA16-330

Filed 20 December 2016

1. Indictment and Information—missing language—non-fatal defect—sufficient for lesser-included offense

An indictment for attempted first-degree murder was not fatally defective where it omitted the required "with malice aforethought" language. The indictment was sufficient to allege attempted voluntary manslaughter, for which defendant would have been sentenced had the trial under that indictment proceeded to a guilty verdict.

2. Constitutional Law—double jeopardy—non-fatal flaw in indictment—mistrial and re-prosecution

Defendant's double jeopardy rights were violated where the trial court erred by denying defendant's motion to dismiss after a

mistrial was erroneously declared in the initial prosecution after a jury was empaneled due to a defect in the indictment and defendant was subsequently tried and convicted under a new indictment. Attempted first-degree murder and the lesser-included offense of attempted voluntary manslaughter (for which defendant could have been tried under the first indictment) are considered one offense under double jeopardy.

3. Constitutional Law—double jeopardy—appellate stay dissolved—re-trial

A violation of defendant's double jeopardy rights at the trial court level was furthered at the appellate level where defendant was twice subjected to double jeopardy arising from a non-fatal defect in an indictment. The prosecution under the first indictment was erroneously dismissed after a jury was empaneled, the Court of Appeals granted and then dissolved a temporary stay, and defendant was convicted in a new trial under a new indictment.

Appeal by defendant from judgment entered 5 November 2015 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 3 October 2016.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

TYSON, Judge.

Leonard Paul Schalow ("Defendant") appeals from judgment entered after a jury convicted him of attempted first-degree murder in 15 CRS 50922. We vacate Defendant's indictment, conviction, and judgment entered thereon.

The original indictment in 14 CRS 50887 was not fatally defective and sufficiently alleged attempted voluntary manslaughter. No manifest necessity existed to declare a mistrial after the jury had been impaneled, and jeopardy attached under the indictment in 14 CRS 50887. Defendant's subsequent indictment, prosecution, and conviction in 15 CRS 50992 violated his constitutional right against double jeopardy. U.S. Const. amend. V; N.C. Const. art. I, § 19.

I. Background

A. Facts

Erin Henry Schalow and Defendant were married in 1997 and moved to North Carolina in 2010. Two years later, Mrs. Schalow was hired as a nurse at a long-term adult care facility located in Brevard. Defendant was not working at the time the incidents occurred.

Mrs. Schalow testified Defendant assaulted her almost daily from December 2013 to February 2014. Defendant kicked her with hard-toe boots; hit her with walking sticks and an aluminum crutch; and strangled her into unconsciousness at least three times. Defendant also attacked her with a knife at least two times. One of those attacks and injuries caused her to seek medical attention. Many times, their minor son was present in the next room during these attacks.

Mrs. Schalow also testified Defendant threatened to torture and kill her. Defendant told her to "make my peace with [their] son and make sure [she] could be there as much as possible for him in the short-term" because he was going to torture and kill her over an extended period of time.

Mrs. Schalow's supervisor and co-workers noticed and inquired about her injuries. Mrs. Schalow explained her injuries were from falling down stairs, slamming her hand in a car door, or running into a wall. Her co-workers did not believe these explanations, and eventually Mrs. Schalow confided to one co-worker that Defendant had hit her.

In late February 2014, Mrs. Schalow arrived at work bleeding from her temple and mouth, both of her eyes were blackened and swollen, her jaw was so swollen she could not talk, and she experienced difficulty walking. At this point, her supervisor called the police.

Henderson County Sheriff's Detective Dottie Parker interviewed Mrs. Schalow, who stated her husband had beaten her the night before. When Detective Parker observed Mrs. Schalow's injuries, she advised her to go the hospital immediately. Mrs. Schalow was admitted to the hospital with extensive injuries. She remained inpatient at the hospital for three weeks.

B. Procedural History

Defendant was charged and indicted for attempted murder of Mrs. Schalow in 14 CRS 50887. The caption of that indictment identified the offense charged as "Attempt First Degree Murder." The body of

the indictment alleged "the defendant named above unlawfully, willfully and feloniously did attempt to murder and kill Erin Henry Schalow."

The cause in 14 CRS 50887 was called for trial on 17 March 2015, the jury was impaneled, and the State presented evidence against Defendant. After the jury was excused following the first day of trial, Judge Powell alerted the parties to the fact the indictment failed to allege "with malice aforethought" as required to charge attempted first-degree murder under the short-form indictment statute, N.C. Gen. Stat. § 15-144. The court cited *State v. Bullock*, 154 N.C. App. 234, 243-45, 574 S.E.2d 17, 23-24 (2002), *appeal dismissed*, *disc. review denied*, 357 N.C. 64, 579 S.E.2d 396, *cert. denied*, 540 U.S. 928, 157 L. Ed. 2d 231 (2003), in which a similar error was made in an initial indictment for attempted first-degree murder. Judge Powell announced he would hear arguments on the validity of the indictment the following morning.

The next morning, the State requested that Judge Powell dismiss the indictment as defective, in order to allow the State to re-indict Defendant in a bill which properly charged attempted murder. Defendant offered up a memorandum of law; repeatedly asserted that jeopardy had attached; and, argued dismissal by the trial court would be improper. Defendant also argued the indictment properly charged the lesser-included offense of attempted voluntary manslaughter and was not fatally defective. Defendant cited *State v. Bullock* in support of his position asserting the indictment effectively charged attempted voluntary manslaughter. *Id.*

After hearing arguments from the parties, Judge Powell ruled the indictment was fatally defective and the court had not acquired jurisdiction to try the case. He dismissed the indictment and declared a mistrial. Defendant objected to this ruling.

Defendant was subsequently re-indicted in 15 CRS 50922 on 18 May 2015. As with 14 CRS 50887, the caption of 15 CRS 50922 identified the charged offense as "Attempt First Degree Murder." This indictment alleged "the defendant named above unlawfully, willfully and feloniously did *with malice aforethought* attempt to murder and kill Erin Henry Schalow by torture." (emphasis supplied). A box checked on the indictment in 15 CRS 50922 indicated it was a "superseding indictment."

On 22 May 2015, Defendant filed a motion to dismiss 15 CRS 50922, along with a supporting memorandum of law. In his motion and memorandum, Defendant argued his prosecution in 15 CRS 50922 was barred by the double jeopardy protections in the Fifth Amendment to the Constitution of the United States and Article I, Section 19 of the North Carolina Constitution.

Defendant's motion and memorandum addressed and asserted three related grounds. First, there was no fatal defect or variance in the indictment in 14 CRS 50887. Second, the trial court in 14 CRS 50887 abused its discretion in declaring a mistrial. Finally, Defendant argued once jeopardy attached on the dismissed indictment for attempted voluntary manslaughter in 14 CRS 50887, the Double Jeopardy Clause prohibited Defendant from being prosecuted again for the greater offense of attempted murder.

On 4 June 2015, Judge Thornburg conducted a hearing on Defendant's double jeopardy motion and denied Defendant's motion to dismiss. A written order was entered on 10 June 2015. Judge Thornburg found Judge Powell had correctly determined the indictment in 14 CRS 50887 was fatally defective and did not abuse his discretion in dismissing the indictment and declaring a mistrial at the previous trial. Judge Thornburg concluded "the law is settled that there is no double jeopardy bar to a second trial when a charge is dismissed because an indictment . . . is defective."

Prior to his second trial, Defendant filed a motion for temporary stay and petition for writ of supersedeas. He requested this Court to stay the proceedings until it resolved the issues in Defendant's contemporaneously filed petition for writ of certiorari. Defendant's writ of certiorari requested this Court to stay and reverse Judge Thornburg's orders denying Defendant's motion to dismiss and habeas relief. Defendant again asserted the double jeopardy provisions of the North Carolina Constitution and the Constitution of the United States prohibited further prosecution of him pursuant to the new indictment. This Court allowed and entered the temporary stay, but later denied Defendant's petitions and dissolved the stay "without prejudice to his right to seek relief on appeal from the final judgment."

At the second trial, Defendant again asserted his double jeopardy defense at the outset, and renewed his motion to dismiss on double jeopardy grounds after the close of the evidence. The trial court denied the renewed motion to dismiss.

The jury convicted Defendant of attempted first-degree murder with both premeditation and deliberation and by torture. Defendant was sentenced to a minimum term of 157 months and a maximum term of 201 months. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court as of right from a final judgment in a superior court. N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Issues

Defendant first argues jeopardy attached when the trial court dismissed the original indictment in 14 CRS 50887 and declared a mistrial absent any manifest necessity, and over Defendant's objection.

Defendant also argues the trial court erred in the subsequent trial by: (1) denying his motion to dismiss at the close of the State's evidence, where the evidence failed to show he committed any overt act with the intent to kill Mrs. Schalow; (2) allowing Detective Parker's testimony that she had elevated the charges against Defendant from assault to attempted murder; and, (3) failing to intervene *ex mero motu* when the prosecutor argued "a lot of thought" went into the decision to charge Defendant with attempted first-degree murder.

IV. Standard of Review

This Court reviews indictments alleged to be facially invalid *de novo*. *State v. Haddock*, 191 N.C. App 474, 476, 664 S.E.2d 339, 342 (2008). Facially invalid indictments deprive the trial court of jurisdiction to enter judgment in criminal cases. *Id.* This Court also reviews double jeopardy issues *de novo*. *State v. Baldwin*, __ N.C. App. __, __, 770 S.E.2d 167, 170 (2015). A trial court's decision to declare a mistrial due to manifest necessity is reviewed for abuse of discretion. *State v. Sanders*, 347 N.C. 587, 595, 496 S.E.2d 568, 573 (1998).

V. Sufficiency of an Indictment

[1] The State asserts the original indictment in 14 CRS 50887 was fatally defective, because it failed to allege any charge against Defendant. As such, the State argues the indictment did not confer jurisdiction upon the trial court and Defendant's constitutional right to be protected from double jeopardy was not violated. We disagree.

The Constitution of North Carolina provides: "no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. 1, § 22. Our Supreme Court has held:

> [a]n indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution

> for the same offense. The indictment must also enable the court to know what judgment to pronounce in the event of conviction.

State v. Coker, 312 N.C. 432, 434-35, 324 S.E.2d 343, 346 (1984); *see Haddock*, 191 N.C. App at 476-77, 664 S.E.2d at 342. Generally, courts do not favor quashing an indictment. *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953); *see* N.C. Gen. Stat. § 15-153 (2015) ("[The indictment] shall not be quashed . . . by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.").

A. Short-form Indictment for Attempted Voluntary Manslaughter

The North Carolina General Assembly statutorily authorized short-form indictments to provide "a method by which indictments can be certain to be sufficient to withstand constitutional challenges." *State v. McKoy*, 196 N.C. App. 650, 656, 675 S.E.2d 406, 411 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 586, 683 S.E.2d 215 (2009). N.C. Gen. Stat. § 15-144 sets out the requirements for short-form indictments for murder and manslaughter:

> it is sufficient in describing *murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder* (naming the person killed), and concluding as is now required by law; and it is sufficient in describing *manslaughter to allege that the accused feloniously and willfully did kill and slay* (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be.

N.C. Gen. Stat. § 15-144 (2015) (emphasis supplied).

In *State v. Jones*, 359 N.C. 832, 837-38, 616 S.E.2d 496, 499 (2005), our Supreme Court considered whether N.C. Gen. Stat. § 15-144 also permitted the use of a short-form indictment as sufficient to allege attempted first-degree murder. The Supreme Court considered N.C. Gen. Stat. § 15-144 in conjunction with N.C. Gen. Stat. § 15-170. *Id.* N.C. Gen. Stat. § 15-170 provides a defendant "may be convicted of the crime charged therein or of a less degree of the same crime, *or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime.*" N.C. Gen. Stat. § 15-170 (2015) (emphasis supplied).

The *Jones* Court noted that N.C. Gen. Stat. § 15-170 was relevant because "it reflects the General Assembly's judgment that, for purposes of the indictment requirement, attempt is generally treated as a subset of the completed offense." *Jones*, 359 N.C. at 837, 616 S.E.2d at 499. The Court held N.C. Gen. Stat. § 15-144 implicitly authorizes the State to use a short-form indictment to charge attempted first-degree murder. Based upon the principles in *Jones*, the State could properly use a short-form indictment to charge attempted voluntary manslaughter as a stand-alone offense, or as a lesser included offense to murder. *See id.*

B. Sufficiency of this Indictment under *State v. Bullock*

Defendant argues, while the original indictment omitted the words "with malice aforethought" and failed to properly assert attempted first-degree murder, the language in the original indictment was sufficient to allege the charge of attempted voluntary manslaughter. We agree.

In *Bullock*, the defendant was tried and convicted on attempted first-degree murder. *Bullock*, 154 N.C. App. at 236, 574 S.E.2d at 18. His indictment for attempted first-degree murder stated: "[t]he jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did attempt to kill and murder Yvonne Bullock." *Id.* at 244, 574 S.E.2d at 23. On appeal, the defendant argued the short-form indictment for attempted murder failed to allege "malice aforethought" as expressly required by N.C. Gen. Stat. § 15-144. *Id.* at 244, 574 S.E.2d at 24.

This Court agreed the indictment failed to properly allege attempted first-degree murder, but found that "the indictment sufficiently allege[d] a lesser-included offense." *Id.* at 245, 574 S.E.2d at 24. This Court clarified the *Bullock* indictment sufficiently alleged attempted voluntary manslaughter, as voluntary manslaughter "consists of an unlawful killing without malice, premeditation or deliberation." *Id.* As such, this Court did not vacate the indictment in *Bullock*, but held the proper remedy was to remand the case for resentencing on the lesser-included offense of attempted voluntary manslaughter and entry of judgment thereupon. *Id.*

In *State v. Yang*, 174 N.C. App. 755, 763, 622 S.E.2d 632, 647 (2005), *disc. review denied*, 360 N.C. 296, 628 S.E.2d 12 (2006), this Court relied on *Bullock* to hold the defendant's indictment, which insufficiently alleged attempted first-degree murder, was sufficient to allege attempted voluntary manslaughter. The *Yang* court explained that *Bullock* held "the indictment [in *Bullock*] did sufficiently allege the lesser-included offense of attempted voluntary manslaughter, notwithstanding the lack of the phrase 'malice aforethought.' " *Id.*

More recently in *Wilson*, this Court relied on *Bullock* to remand the defendant's case for resentencing on attempted voluntary manslaughter, where the indictment failed to allege attempted first-degree murder, but stated "the defendant named above unlawfully, willfully and feloniously did attempt to murder Timothy Lynch." *State v. Wilson*, 236 N.C. App. 472, 474-75, 762 S.E.2d 894, 895-96 (2014).

Had this Court concluded, in either *Bullock* or *Wilson*, the underlying indictments did not sufficiently allege any offense and were fatally defective, the trial court would have lacked jurisdiction to hear or impose sentences in either case. The appropriate remedy would have been to vacate both defendants' convictions, and not to remand for resentencing consistent with the lesser-included offense of attempted voluntary manslaughter.

The original indictment in 14 CRS 50887 failed to sufficiently allege attempted first-degree murder. However, had the trial proceeded and the impaneled jury returned a guilty verdict on attempted first-degree murder, as in *Bullock* and *Wilson*, that indictment would have supported a conviction and judgment sentencing Defendant of attempted voluntary manslaughter. *See Bullock*, 154 N.C. App. at 245, 574 S.E.2d at 24; *Wilson*, 236 N.C. App. at 474-75, 762 S.E.2d at 895-96.

Additionally, the original indictment apprised Defendant of the charges against him with sufficient certainty to enable him to prepare his defense. *See Coker*, 312 N.C. at 434-35, 324 S.E.2d at 346. Defendant expressly objected to the mistrial and dismissal of the indictment in 14 CRS 50887. Defendant was prepared to proceed with the trial on the issue of attempted voluntary manslaughter and requested the trial court to proceed on that charge. Once the State's failure to allege "with malice aforethought" in the original indictment in 14 CRS 50887 was discovered and communicated by Judge Powell, the court should have required the State to dismiss the charge against Defendant or to proceed with the trial on attempted voluntary manslaughter. *See State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987).

The indictment also enabled "the court to know what judgment to pronounce in the event of conviction." *Coker*, 312 N.C. at 434-35, 324 S.E.2d at 346. Judge Powell was aware of this Court's holding in *Bullock* and cited it upon realizing the omission of "with malice aforethought" in the original indictment. *See Bullock*, 154 N.C. App. at 244, 574 S.E.2d at 24. Based upon *Bullock* and *Wilson*, had the trial proceeded on the original indictment in 14 CRS 50887, the jury's conviction thereon would have supported a judgment and sentence of attempted voluntary

manslaughter. *See id.* at 245, 574 S.E.2d at 24; *Wilson*, 236 N.C. App. at 474-75, 762 S.E.2d at 895-96.

Under *de novo* review, the original indictment in 14 CRS 50887 was constitutionally and statutorily sufficient to invoke jurisdiction, allege attempted voluntary manslaughter, and was not fatally defective. *See id.* Since the indictment sufficiently alleged an offense upon which trial could have properly proceeded to judgment, it was error for the trial court to have concluded otherwise in 14 CRS 50887. This error was compounded in 15 CRS 50992 when, after the hearing of Defendant's double jeopardy motion, Judge Thornburg denied Defendant's motion to dismiss the indictment and concluded Judge Powell had "validly ruled the indictment was defective."

VI. Double Jeopardy

[2] With our determination that the indictment in 14 CRS 50887 was not fatally defective, we turn to whether the trial court erred in dismissing the indictment and declaring a mistrial based on manifest necessity, and the double jeopardy implications of that action.

The Fifth Amendment of the Constitution of the United States provides,

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V (emphasis supplied).

"It is a fundamental principle of the common law, guaranteed by our Federal and State Constitutions, that no person may be twice put in jeopardy of life or limb for the same offense." *State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977) (citing U.S. Const. amend. V; N.C. Const. art. I, § 19; *State v. Cutshall*, 278 N.C. 334, 180 S.E.2d 745 (1971)).

In a criminal prosecution, jeopardy attaches when a jury is impaneled to try a defendant on a valid bill of indictment. *Id.*; *Cutshall*, 278

N.C. at 344, 180 S.E.2d at 751. Once jeopardy attaches, it protects "a defendant from additional punishment and successive prosecution for the same criminal offense." *State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 658-59 (2008) (citation and quotation marks omitted); *see Gilliam v. Foster*, 75 F.3d 881, 893 (4th Cir. 1996), *cert. denied*, 517 U.S. 1220, 134 L. Ed. 2d 950 (1996) ("Among the protections provided by [the Double Jeopardy Clause] is the assurance that a criminal defendant will not be subjected to repeated prosecutions for the same offense." (citation and quotation marks omitted)).

While "the primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment," a separate body of double jeopardy law also protects a defendant's interest "in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made." *United States v. Scott*, 437 U.S. 82, 92, 57 L. Ed. 2d 65, 74-75, *reh'g denied*, 439 U.S. 883, 58 L. Ed. 2d 197 (1978). These protected interests arise in two situations: (1) when the trial court declares a mistrial, and (2) when the trial court terminates the proceedings in favor of the defendant on a basis that is not related to factual guilt or innocence. *Id.*; *see State v. Priddy*, 115 N.C. App. 547, 551, 445, S.E.2d 610, 613, *disc. review denied*, 337 N.C. 805, 449 S.E.2d 751 (1994).

This separate body of law under the Double Jeopardy Clause protects the defendant's "valued right" to have a particular tribunal to decide guilt or innocence, once jeopardy attaches. *Gilliam*, 75 F.3d at 893. As the Supreme Court of the United States has held:

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona v. Washington, 434 U.S. 497, 503-05, 54 L. Ed. 2d 717, 727-28 (1978) (footnotes omitted).

In 14 CRS 50887, jeopardy attached once the jury was duly impaneled under a valid indictment to try the case. *See Shuler*, 293 N.C. at 42,

235 S.E.2d at 231. Neither the State nor Defendant contends otherwise. Since the trial court's order did not constitute a "final determination of guilt or innocence," we analyze Defendant's double jeopardy claims under the separate body of double jeopardy law discussed in *Scott*. *Scott*, 437 U.S. at 92, 57 L. Ed. 2d at 74-75.

A. Trial Court's Declaration of a Mistrial

The trial court's order in 14 CRS 50887 stated: "I find that because the indictment is defective that the Court has no jurisdiction to try this case. And I dismiss the indictment. . . . I would find there's a manifest necessity that because the indictment is dismissed that a mistrial be declared." The briefs and arguments of both the State and Defendant proceed from the premise that the trial court's order functioned as a mistrial.

In their briefs and oral arguments to this Court regarding double jeopardy, the State and Defendant only argued whether manifest necessity existed for the trial court to declare a mistrial. *See Lee v. United States*, 432 U.S. 23, 32, 53 L. Ed. 2d 80, 88 (1977). We begin with the premise that, although the trial court both dismissed the indictment as defective and declared a mistrial, the court's order ultimately functioned as a mistrial and the manifest necessity analysis applies.

1. *Lee v. United States* and *Illinois v. Somerville*

In *Lee v. United States*, the Supreme Court reviewed an appeal in which the district court granted the defendant's motion to dismiss for failure of the indictment to charge either knowledge or intent as required by statute. *Id.* at 25-26, 53 L. Ed. 2d at 84-85. The district court's dismissal did not include any finding regarding the defendant's guilt or innocence. *Id.* at 29, 53 L. Ed. 2d at 86. In determining whether this order functioned as a "dismissal" or a "declaration of a mistrial" for the purposes of its double jeopardy analysis, the Court held that a trial court's label of its action is not determinative. *Id.* at 29-30, 53 L. Ed. 2d at 86-87. Rather, "[t]he critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged. A mistrial ruling invariably rests on grounds consistent with reprosecution, while a dismissal may or may not do so." *Id.* at 30, 53 L. Ed. 2d at 87.

The Supreme Court noted the indictment's failure to sufficiently allege the offense as required by statute, "like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided—absent any double jeopardy bar—by beginning anew the prosecution of the defendant." *Id.* The district court's dismissal of the indictment

plainly contemplated the State would re-indict the defendant at a later date. *Id.* at 30-31, 53 L. Ed. 2d at 87. Based on this reasoning, the Supreme Court held:

> the order entered by the District Court was functionally indistinguishable from a declaration of mistrial.
>
> We conclude that the distinction between dismissals and mistrials has no significance in the circumstances here presented and that established double jeopardy principles governing the permissibility of retrial after a declaration of mistrial are fully applicable.

Id. at 31, 53 L. Ed. 2d at 87-88. (footnote omitted).

In *Lee*, the Supreme Court referenced a similar Supreme Court case where it upheld a trial court's declaration of a mistrial over the defendant's objection due to a fatal defect in the indictment. *Lee*, 432 U.S. at 31 n.9, 53 L. Ed. 2d at 87; *see Illinois v. Somerville* 410 U.S. 458, 459, 35 L. Ed. 2d 425, 428 (1973) (holding there was manifest necessity to declare a mistrial). The Court in *Lee* noted "[t]here is no reason to believe that *Somerville* would have been analyzed differently if the trial judge, like the District Court here, had labeled his action a 'dismissal' rather than a mistrial." *Lee*, 432 U.S. at 31 n.9, 53 L. Ed. 2d at 87. Furthermore, a subsequent Supreme Court case recognized that "*Lee* demonstrated that, at least in some cases, the dismissal of an indictment may be treated on the same basis as the declaration of a mistrial." *Scott*, 437 U.S. at 94, 57 L. Ed. 2d at 76.

2. Trial Court's Order in 14 CRS 50887

In terminating the proceeding in 14 CRS 50887, the trial court labeled its actions as both a dismissal of a defective indictment for lack of jurisdiction, as in *Lee*, and a declaration of a mistrial, as in *Somerville*. Whatever the label, the trial court's decision to terminate the proceedings did not "contemplate[] an end to all prosecution," but was based upon the erroneous belief the indictment did not invoke jurisdiction and the State could constitutionally re-indict Defendant at a later date. *Lee*, 432 U.S. at 30, 53 L. Ed. 2d at 87. Based on *Lee*, its analysis of *Somerville*, and as subsequently recognized in *Scott*, a dismissal of a defective indictment may be treated as a mistrial. *Id.* at 31, 53 L. Ed. 2d at 86-87; *see Somerville*, 410 U.S. at 459, 35 L. Ed. 2d at 428; *Scott*, 437 U.S. at 94, 57 L. Ed. 2d at 76. Whether we ultimately review the trial court's order as a dismissal or a mistrial, the "double jeopardy principles governing

the permissibility of retrial after a declaration of mistrial are fully applicable" in this case. *See id.*

B. Mistrials and Manifest Necessity

The United States Court of Appeals for the Fourth Circuit has explained:

> if a criminal proceeding is terminated by mistrial without a final resolution of guilt or innocence, a defendant may be retried in certain circumstances. When a defendant seeks or consents to the grant of a mistrial, there is no bar to his later retrial. *But, when a defendant opposes the grant of a mistrial, he may not be retried unless there was a manifest necessity for the grant of the mistrial or the failure to grant the mistrial would have defeated the ends of justice.*

Gilliam, 75 F.3d at 893. (emphasis supplied) (citations and footnotes omitted).

North Carolina courts have also recognized an order of mistrial after jeopardy has attached may only be entered over the defendant's objection where "manifest necessity" exists. *State v. Odom*, 316 N.C. 306, 310, 341 S.E.2d 332, 334 (1986); *State v. Jones*, 67 N.C. App. 377, 381, 313 S.E.2d 808, 811-812, *disc. review denied*, 315 S.E.2d 699 (1984). If a mistrial results from manifest necessity, double jeopardy does not bar the State from retrying the defendant on the same offense. *Odom*, 316 N.C. at 310, 341 S.E.2d at 334. However, if manifest necessity does not exist and "the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial on the same charges must be granted." *Id.* (citations omitted); *see Gilliam*, 75 F.3d at 895.

"Whether a grant of a mistrial is manifestly necessary is a question that turns on the facts presented to the trial court." *Gilliam*, 75 F.3d at 895. Since a declaration of a mistrial inevitably affects a constitutionally protected interest, the trial court " 'must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.' " *Washington*, 434 U.S. at 514, 54 L. Ed. 2d at 733 (quoting *United States v. Jorn*, 400 U.S. 470, 486, 27 L. Ed. 2d 543, 557 (1971)).

As such, the trial court's discretion in determining whether manifest necessity exists is limited. *Jones*, 67 N.C. App. at 381, 313 S.E.2d at 812; *see U.S. v. Sloan*, 36 F.3d 386, 394 (4th Cir. 1994) (holding "manifest necessity" means a "high degree" of necessity is required for mistrial to be appropriate). The Fourth Circuit explained:

> First enunciated 170 years ago, this bedrock principle has been consistently reiterated and followed. Its basis is the Fifth Amendment's Double Jeopardy Clause . . . . Because jeopardy attaches before the judgment becomes final, it has been held that the double jeopardy clause protects a defendant's valued right to have his trial completed by a particular tribunal, and so prohibits the declaration of a mistrial absent manifest necessity.

Sloan, 36 F.3d 386 at 393 (citations and quotation marks omitted).

Our courts have set forth two types of manifest necessity: physical necessity and the necessity of doing justice. *State v. Crocker*, 239 N.C. 446, 450, 80 S.E.2d 243, 246 (1954). For example, physical necessity occurs in situations where a juror suddenly takes ill in such a manner that wholly disqualifies him from proceeding with the trial. *Id.* Whereas the necessity of doing justice "arises from the duty of the court to guard the administration of justice from fraudulent practices" and includes "the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law." *Id.* (citation and quotation marks omitted).

Both the Supreme Court of the United States and North Carolina courts have recognized that manifest necessity exists to declare a mistrial when the indictment contains a fatal defect, which deprives the court of jurisdiction. *Somerville*, 410 U.S. at 468-69, 35 L. Ed. 2d at 433-34; *State v. Whitley*, 264 N.C. 742, 745, 142 S.E.2d 600, 603 (1965) (citing *State v. Jordan*, 247 N.C. 253, 256, 100 S.E.2d 497, 499 (1957)). Thus, "[a] defendant is not subjected to double jeopardy when an insufficient indictment is quashed, and he is subsequently put to trial on a second, sufficient indictment." *State v. Oakes*, 113 N.C. App. 332, 340, 438 S.E.2d 477, 481, *disc. review denied*, 336 N.C. 76, 445 S.E.2d 43 (1994).

As noted, this Court does not favor dismissing indictments where the indictment is constitutionally sufficient to enable the court to proceed to judgment. *See Greer*, 238 N.C. at 327, 77 S.E.2d at 919; N.C. Gen. Stat. § 15-153. Unlike in *Somerville* and *Oakes*, in this case, the original indictment in 14 CRS 50887 was not fatally defective, it sufficiently alleged attempted voluntary manslaughter. *See Bullock*, 154

N.C. App. at 243-45, 574 S.E.2d at 23-24; *but see Somerville*, 410 U.S. at 468-69, 35 L. Ed. 2d at 433-34; *Oakes*, 113 N.C. App. at 340, 438 S.E.2d at 481. The trial court was aware of this Court's opinion in *Bullock* and cited it when it first realized the indictment had failed to allege "with malice aforethought."

The Supreme Court of the United States has emphasized the importance of "preserving the defendant's primary control over the course to be followed in the event of such [a prejudicial] error," *Lee*, 432 U.S. at 32, 53 L. Ed. 2d at 88 (citation and quotation marks omitted), and a defendant's a "valued right" to have his case heard before the original jury impaneled. *Washington*, 434 U.S. at 503-05, 54 L. Ed. 2d at 727-28. As noted below, in 14 CRS 50887, Defendant argued that based on *Bullock* the trial could and should properly proceed on attempted voluntary manslaughter.

Since the trial court retained jurisdiction, it could have proceeded on attempted voluntary manslaughter, and Defendant requested that the trial court proceed on that charge, no lack of jurisdiction or manifest necessity existed for the trial court to declare a mistrial to allow the State to re-indict Defendant. Judge Powell erred by ruling the indictment in 14 CRS 50887 was otherwise jurisdictionally defective to charge any crime to justify dismissal and by using this incorrect determination as a basis to declare a mistrial.

C. Dismissals and Mistrial based on Defendant's Motion or Consent

This case is distinguishable from those in which a dismissal or mistrial was entered based on the defendant's motion or consent. The Supreme Court of the United States has distinguished cases where the mistrial is entered pursuant to the defendant's motion or complicity, from those where the mistrial is entered over the defendant's objection. *See Scott*, 437 U.S. at 92-93, 57 L. Ed. 2d at 74-75; *Sloan*, 36 F.3d at 393 (holding there was no manifest necessity for the trial court to declare a mistrial over the defendant's objections).

The Supreme Court explained when a defendant moves for a mistrial:

> Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact. "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error." *United States v. Dinitz*, 424 U.S. 600, 609, 47 L. Ed. 2d 267 (1976). But "[t]he Double Jeopardy Clause

> does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions." *Id.* at 611.

Scott, 437 U.S. at 93-94, 57 L. Ed. 2d at 76.

Similarly, when a defendant moves for a dismissal on grounds not related to the basis of factual guilt or innocence the Supreme Court held:

> [T]he defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. . . . we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.

Id. at 98-99, 57 L. Ed. 2d at 79. Thus, if a *defendant* successfully seeks to avoid his trial prior to its conclusion by actions or a motion of mistrial or dismissal, the Double Jeopardy Clause is generally not offended by a second prosecution. *Id.* at 93, 57 L. Ed. 2d at 75.

1. *State v. Priddy*

North Carolina courts have also addressed this issue. In a case similar to the one here, this Court considered whether double jeopardy bars the State from appealing a trial court's order granting defendant's motion to dismiss for lack of jurisdiction. *Priddy*, 115 N.C. App. at 551, 445 S.E.2d at 613. In *Priddy*, the defendant moved to dismiss the case for lack of jurisdiction. *Id.* at 548, 445 S.E.2d at 611. The defendant in *Priddy* asserted the superior court lacked jurisdiction because the impaired driving charge was not initially tried in the district court. *Id.* at 548, 445 S.E.2d at 612. The superior court granted the defendant's motion to dismiss and the State appealed. *Id.* at 548, 445 S.E.2d at 611.

This Court held the superior court had jurisdiction over the impaired driving charge and the superior court erred in dismissing the indictment for lack of jurisdiction. *Id.* at 550, 445 S.E.2d at 612. Addressing the double jeopardy issue, this Court emphasized the defendant, not the State, moved to dismiss and the dismissal was "based solely upon the trial court's ruling that it had no jurisdiction and was entirely unrelated to the sufficiency of evidence as to any element of the offense

or to defendant's guilt or innocence." *Id.* at 551, 445 S.E.2d at 613. Based on *Scott*, this Court concluded double jeopardy did not bar the State's appeal or a retrial of the charge against the defendant. *Id.*

2. *State v. Vestal*

Another panel of this Court later distinguished *Priddy* and *Scott* in *State v. Vestal*, 131 N.C. App. 756, 509 S.E.2d 249 (1998). In *Vestal*, this Court held that double jeopardy barred the State from appealing the trial court's *sua sponte* order dismissing the case with prejudice, because the police department had violated an order from the trial court. *Id.* at 759, 509 S.E.2d at 252. The Court recognized that *Scott* and *Priddy*:

> mandate the rule against double jeopardy will not bar an appeal by the government *where the defendant took an active role in the dismissal*, because defendant essentially chose to end the trial and cannot later complain that he was 'deprived of his 'valued right to have his trial completed by a particular tribunal.'

Id. (emphasis supplied) (quoting *Scott*, 437 U.S. at 99-100, 57 L. Ed. 2d at 80). Unlike in *Scott* and *Priddy*, the defendant in *Vestal* did not take an active role in the process, which led to dismissal of the charge against him, but was "*involuntarily* deprived of his constitutional right to have his trial completed by the jury which had been duly empaneled and sworn." *Id.* at 760, 509 S.E.2d at 252 (emphasis supplied).

In *Priddy* and *Scott*, the defendants successfully sought termination of the original proceedings on grounds not related to factual guilt or innocence. The present case is similar to *Vestal*, where the defendant did not take any active role in acquiring dismissal. Here, Defendant actively argued against the trial court's order dismissing the indictment and declaring a mistrial in 14 CRS 50887. Although Defendant recognized the error in the indictment, he requested the trial proceed on the sufficiently alleged offense of attempted voluntary manslaughter. No manifest necessity existed to allow the trial court to declare a mistrial in 14 CRS 50887 over Defendant's persistent objections.

D. Greater and Lesser-Included Offenses under the Double Jeopardy Clause

Since we hold no manifest necessity existed to declare a mistrial in 14 CRS 50887 over the defendant's objection, we now consider the effects of the erroneous declaration. As noted earlier, if an "order of mistrial has been improperly entered over a defendant's objection, defendant's

motion for dismissal at a subsequent trial on the same charges must be granted." *Odom*, 316 N.C. at 310, 341 S.E.2d at 334.

Under the Double Jeopardy Clause, when one offense is a lesser-included offense of another, the two offenses are considered the same criminal offense. *Etheridge*, 319 N.C. at 50, 352 S.E.2d at 683 (citing *Brown v. Ohio*, 432 U.S. 161, 53 L. Ed. 2d 187 (1977); *State v. Revelle*, 301 N.C. 153, 270 S.E.2d 476 (1980)). Once jeopardy has attached to the lesser-included offense, a defendant may not thereafter be prosecuted for either the greater or lesser-included offenses. *See id.*; *Brown*, 432 U.S. at 169, 53 L. Ed. 2d at 196 ("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution . . . for a greater and lesser included offense."); *State v. Birckhead*, 256 N.C. 494, 499, 124 S.E.2d 838, 843 (1962) (holding that once the defendant had been placed in jeopardy on the lesser-included offense of assault with intent to commit rape, double jeopardy principles implicit in the law of the land clause of the state constitution prohibited his subsequent prosecution for the greater offense of rape).

Attempted voluntary manslaughter is a lesser-included offense of attempted first-degree murder and is considered as the same offense under the Double Jeopardy Clause. *See State v. Rainey*, 154 N.C. App. 282, 290, 574 S.E.2d 25, 30, *disc. review denied*, 356 N.C. 621, 575 S.E.2d 520 (2002); Etheridge, 319 N.C. at 50, 352 S.E.2d at 683. Once jeopardy attaches to one of these offenses, the defendant cannot be subsequently tried on the other. *See Brown*, 432 U.S. at 169, 53 L. Ed. 2d at 196.

Once Judge Powell declared a mistrial where no manifest necessity existed in 14 CRS 50887, the State was prohibited from retrying Defendant on either attempted first-degree murder or attempted voluntary manslaughter, since they are considered the same offense under the Double Jeopardy Clause. *See Etheridge*, 319 N.C. at 50, 352 S.E.2d at 683. As a result, pursuant to double jeopardy, Judge Thornburg also erred by denying Defendant's motion to dismiss prior to trial in 15 CRS 50992. *See Odom*, 316 N.C. at 310, 341 S.E.2d at 334.

VII. Defendant's Previous Writ of Certiorari to this Court

[3] After Judge Thornburg denied his motion to dismiss made at the start of the second trial, Defendant filed a motion for temporary stay and petition for writ of supersedeas. He also petitioned this Court for writ of certiorari. Defendant asserted the double jeopardy provisions of the North Carolina Constitution and the Constitution of the United States prohibited further prosecution of him on the new indictment in 15 CRS 50992.

Defendant had no statutory right to appeal Judge Thornburg's interlocutory order. *See State v. Shoff*, 118 N.C. App. 724, 456 S.E.2d 875 (1995) (dismissing the defendant's appeal from an order denying his motion to dismiss on double jeopardy grounds), *aff'd*, 342 N.C. 638, 466 S.E.2d 277 (1996). However, Appellate Rule 21 authorizes petition for review of a non-appealable interlocutory order by writ of certiorari. N.C. R. App. P. 21(a)(1) (2015).

We recognize this Court's order dissolving the temporary stay and denying Defendant's petitions for writs of supersedeas and certiorari "without prejudice," essentially furthered the violation of Defendant's constitutional rights. *See Abney v. United States*, 431 U.S. 651, 660-62, 52 L. Ed. 2d 651, 660-61 (1977) (holding the Double Jeopardy Clause protects a defendant not only from conviction after successive trial, but from even being subjected to a second trial); *State v. Watson*, 209 N.C. 229, 231, 183 S.E. 286, 287 (1936) (stating the rule against double jeopardy "not only prohibits a second punishment for the same offense, but it goes further and forbids a second trial for the same offense, whether the accused has suffered punishment or not, and whether in the former trial he has been acquitted or convicted" (citation omitted)).

By denying his writ of certiorari, Defendant was subjected to a subsequent trial and conviction prior to final determination of whether his constitutional right against double jeopardy would be violated by such prosecution.

VIII. Conclusion

The original indictment in 14 CRS 50887 was constitutionally and statutorily sufficient to provide jurisdiction, allege attempted voluntary manslaughter, and was not fatally defective. The trial court erred in finding otherwise.

Since the indictment was not fatally defective and the trial court retained jurisdiction, no manifest necessity existed to declare a mistrial over Defendant's objections. Once the State's failure to allege "with malice aforethought" in the original indictment was discovered and communicated by Judge Powell in 14 CRS 50887, he should have required the State to either dismiss the charge against Defendant or to proceed to trial on attempted voluntary manslaughter. *See Etheridge*, 319 N.C. at 50, 352 S.E.2d at 683.

North Carolina courts have clearly stated "where the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial on the same charges

must be granted." *Odom*, 316 N.C. at 310, 341 S.E.2d at 334. With a valid indictment and no manifest necessity to declare a mistrial, the State was barred from re-indicting Defendant on attempted murder or manslaughter. Judge Thornburg erred by denying Defendant's motion to dismiss the subsequent indictment in 15 CRS 50992. By denying his writ of certiorari, Defendant was subjected to a subsequent trial and conviction prior to final determination of whether his constitutional right against double jeopardy would be violated by such prosecution.

We do not address the merits of Defendant's other arguments regarding the trial in 15 CRS 50992, as we hold Defendant's double jeopardy rights were violated by his subsequent indictment, prosecution, trial, and conviction in 15 CRS 50992. We conclude Defendant's conviction by the jury and judgment entered thereon for attempted first-degree murder in 15 CRS 50922 must be vacated. *It is so ordered.*

VACATED.

Chief Judge McGEE and Judge DIETZ concur.

HARRY A. WILEY AND GERALD D. GILMAN, PLAINTIFFS
v.
L3 COMMUNICATIONS VERTEX AEROSPACE, LLC, DEFENDANT

No. COA16-460

Filed 20 December 2016

1. Jurisdiction—standing—failure to disclose claims in pending bankruptcy

Plaintiff lacked standing to pursue claims of discrimination and violation of the Wage and Hour Act in the trial court where he did not disclose those claims in his pending Chapter 13 bankruptcy proceeding.

2. Arbitration and Mediation—default—arbitration agreement—application not jurisdictional

The trial court had jurisdiction to enter a default judgment even though plaintiff had signed an arbitration agreement which deprived the court of authority to litigate the issues. Application of an arbitration clause is not a jurisdictional issue and can be waived by failure to timely invoke it.

3. Damages—default judgment—set aside as to damages

The trial court did not abuse its discretion in a case involving discrimination and wage claims by setting aside the damages portion of the trial court's initial default judgment. The size of the judgement, including punitive damages that had not been requested, was a relevant factor toward the existence of extraordinary circumstances, and defendant's conduct in the case and its innocent explanation for missing the deadline provided a reasonable basis for the trial court to set aside the damages portion of the judgment.

4. Judgments—default—verification pages added to complaint at trial—not amendments to complaint

The trial court did not abuse its discretion by entering a default and default judgment against defendant where defendant contended that plaintiff amended the complaint at the default judgment hearing by adding verification pages to the complaint. The trial court's comments indicated that it treated those verifications as affidavits attesting to the truth of the allegations in the complaint, not as amendments to the complaint, and those verifications had no impact on the allegations in the complaint.

5. Judgments—default—notice

Although defendant contended on appeal that plaintiff did not serve a motion for entry of default and notice of hearing as required by N.C.G.S. § 1A-1, Rule 6(d), the requirements of Rule 6(d) are not applicable to motions for entry of default because those motions are, by nature, heard *ex parte*.

6. Judgments—default—unsuccessful attempts to reach plaintiff's counsel—not an appearance

Defendant did not make an appearance before entry of a default judgment where defendant presented evidence of a series of unsuccessful attempts by its counsel to reach plaintiff's counsel in the hour before the default judgment hearing occurred. The Court of Appeals has never held that unsuccessful unilateral efforts to communicate with opposing counsel can constitute an appearance.

7. Appeal and Error—briefs—argument incorporated by reference—abandoned

The Court of Appeals rejected an attempt by defendant to incorporate an argument by reference due to the page limitations of the Court of Appeals, which defendant conceded it sought to avoid by referencing outside arguments rather than presenting them in the brief. The argument was treated as abandoned.

8. Appeal and Error—preservation of issues—evidentiary—no offer of proof—answers not apparent from record

Evidentiary issues were not preserved for appellate review where the answers to the challenged questions were not apparent from the record and there was no offer of proof.

9. Damages—arbitration agreement not presented at trial—no effect on calculation

Any error from defendant being prevented from presenting the parties' arbitration agreement in a trial for damages was harmless where defendant did not show that the exclusion would have affected the calculation of compensatory damages by the jury.

10. Damages—punitive—not pled

The trial court erred by submitting punitive damages to the jury where plaintiff did not properly plead punitive damages.

Appeal by defendant from judgment entered 17 September 2014 by Judge Lucy N. Inman, order entered 23 January 2015 by Judge Kendra D. Hill, and judgment entered 9 October 2015 and order entered 13 November 2015 by Judge Claire V. Hill in Cumberland County Superior Court. Cross-appeal by plaintiffs from order entered 9 October 2015 by Judge Kendra D. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 3 October 2016.

Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough and H. Addison Winters, and Phelps Dunbar LLP, by M. Nan Alessandra and Robert M. Kennedy, Jr., for defendant-appellant/cross-appellee.

Ryan McKaig, Lee Tart Malone, and Robert A. Buzzard for plaintiffs-appellees/cross-appellants.

DIETZ, Judge.

Plaintiffs Harry Wiley and Gerald Gilman secured a default judgment against Defendant L3 Communications Vertex Aerospace, LLC after the company mistakenly missed its deadline to respond to the complaint. The trial court later set aside the damages portion of its award and held a trial on damages. The jury awarded compensatory and punitive damages to both Wiley and Gilman, totaling more than $750,000 each.

As explained below, we affirm in part and vacate in part. We hold that Gilman lacked standing to pursue his claims because he failed to

disclose the claims in his pending bankruptcy proceeding. Consistent with other courts that have addressed this issue, we conclude that North Carolina's standing principles do not permit a Chapter 13 debtor to pursue a claim that the debtor concealed from the bankruptcy estate.

We affirm the award of compensatory damages to Wiley, but vacate the award of punitive damages. The complaint did not allege any aggravating factors supporting an award of punitive damages under Rule 9(k) of the Rules of Civil Procedure. Indeed, the complaint did not even contain the words "punitive damages" in the allegations or prayer for relief, much less an articulation of the grounds required by the rule. Accordingly, as explained more fully below, we vacate in part, affirm in part, and remand for entry of a new judgment consistent with this opinion.

Facts and Procedural History

On 14 July 2014, Plaintiffs Harry Wiley and Gerald Gilman filed a joint complaint against their former employer, Defendant L3 Communications Vertex Aerospace, LLC, with each asserting claims for discrimination based on age, physical ability, and race. Gilman also asserted a claim for violation of the North Carolina Wage and Hour Act. Plaintiffs served L3 with a summons and the complaint on 17 July 2014.

L3 failed to timely file an answer or other responsive pleading. On 21 August 2014, Wiley and Gilman moved for entry of default. That same day, the clerk entered a default against L3.

On 8 September 2014, Wiley and Gilman moved for default judgment. On 15 September 2014, their motion for default judgment came on for hearing. L3 did not appear at the hearing.

On 17 September 2014, the trial court granted the motion for default judgment. The trial court awarded Wiley $391,274.44 in compensatory damages and $1,173,823.32 in punitive damages. The court awarded Gilman $727,525.62 in compensatory damages and $2,182,576.86 in punitive damages.

On 16 October 2014, L3 moved to set aside the entry of default and default judgment. On 23 January 2015, the trial court denied L3's request to set aside the entire judgment, but granted the motion with respect to damages and scheduled a trial on damages.

On 21 September 2015, the jury awarded Wiley $273,353.48 in compensatory damages and $500,000.00 in punitive damages. It awarded Gilman $279,180.00 in compensatory damages and $500,000.00 in punitive damages. On 9 October 2015, the trial court entered written judgment on the jury's verdict.

L3 timely moved for judgment notwithstanding the verdict or, alternatively, a new trial. The trial court denied L3's post-trial motions.

L3 timely appealed. Wiley and Gilman timely cross-appealed.

Analysis

Both parties appeal from various trial court orders and judgments throughout this case. We first address several jurisdictional arguments asserted by L3, and then turn to the parties' challenges to the trial court's rulings throughout the default proceedings.

I. Gilman's Failure to Disclose His Claim to the Bankruptcy Court

[1] L3 argues that Gilman lacked standing to bring the claims asserted in the complaint because he had a pending bankruptcy and failed to inform the bankruptcy court of the existence of his legal claims. As explained below, we agree.

Standing is a jurisdictional issue. *Union Grove Mill. & Mfg. Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 478, *aff'd*, 335 N.C. 165, 436 S.E.2d 131 (1993). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple ex rel. Apple v. Commercial Courier Exp., Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). A defect in subject matter jurisdiction cannot be waived by a party's failure to appear. *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956); *Matter of Triscari Children*, 109 N.C. App. 285, 288, 426 S.E.2d 435, 437 (1993). Thus, if Gilman lacked standing, the trial court had no power to enter judgment in his favor, notwithstanding L3's default.

We thus turn to L3's argument that Gilman lacked standing because of his failure to notify the bankruptcy court of his claims. Gilman's causes of action arose when L3 terminated him on 11 April 2013. Gilman petitioned for Chapter 13 bankruptcy in the United States Bankruptcy Court for the Eastern District of North Carolina on 10 January 2014. Because Gilman's claims existed when he petitioned for bankruptcy, they are the property of the bankruptcy estate and Gilman was required by law to disclose the claims to the estate. *See* 11 U.S.C. §§ 541, 1007(h), 1306(a). Gilman did not properly disclose these claims to the bankruptcy court until after the jury entered its verdict.

In a Chapter 13 bankruptcy, both the debtor and the trustee of the bankruptcy estate have concurrent standing to bring non-bankruptcy causes of action belonging to the estate. *Wilson v. Dollar Gen. Corp.*,

717 F.3d 337, 343 (4th Cir. 2013). This concurrent standing results from the special character of a Chapter 13 bankruptcy, in which the debtor retains possession of the property comprising the bankruptcy estate and is permitted to use that property in various ways. 11 U.S.C. §§ 363, 1303, 1306(b), 1322.

But the fact that debtors have concurrent standing to bring claims in the Chapter 13 context does not mean that we can ignore Gilman's failure to disclose the claims in his bankruptcy proceeding. As the Fourth Circuit acknowledged in *Wilson*, although a Chapter 13 debtor has standing to bring such claims, the debtor does so "on behalf of the estate" and "for the benefit of the estate." *Wilson*, 717 F.3d at 343–44.

This special, vicarious nature of the debtor's standing leads us to conclude, as other courts have, that the debtor's standing is conditional on having properly disclosed his claims in the bankruptcy proceeding. *Cowling v. Rolls Royce Corp.*, No. 1:11-CV-01719-JMS, 2012 WL 4762143, at *4 (S.D. Ind. Oct. 5, 2012) (unpublished); *Calvin v. Potter*, No. 07 C 3056, 2009 WL 2588884, at *3 (N.D. Ill. Aug. 20, 2009) (unpublished); *Robson v. Tex. E. Corp.*, 833 N.E.2d 461, 473 (Ind. Ct. App. 2005). As these courts reasoned, disclosing the claim in the bankruptcy proceeding is a necessary prerequisite to pursuing a claim on behalf of the estate. Without disclosing the claim, the bankruptcy court cannot factor that potential claim (and possible recovery) into any repayment plan, and the bankruptcy trustee cannot exercise its authority to evaluate the debtor's actions and determine if it must intervene to ensure the litigation is resolved in the best interests of the estate. We agree with this reasoning and hold that, when a debtor has concealed the existence of a potential legal claim in a Chapter 13 bankruptcy proceeding, the debtor cannot be pursuing that claim "on behalf of or for the benefit of her bankruptcy estate" and thus lacks standing under North Carolina law. *See Calvin*, 2009 WL 2588884, at *3.

This outcome also is consistent with our State's strict rules concerning prerequisites to proper legal standing when suing on behalf of others. For example, a homeowner's association lacks standing, even in an actual controversy at the heart of the association's representative role, if it failed to first obtain authority to sue under its bylaws. *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, __ N.C. App. __, __, __ S.E.2d __, __ (2016). Similar rules apply to those suing on behalf of a corporation. *See Anderson v. SeaScape at Holden Plantation, LLC*, __ N.C. App. __, __, 773 S.E.2d 78, 88 (2015). We see no reason why we should depart from this standing precedent for debtors suing on behalf of the bankruptcy estate.

Accordingly, we hold that Gilman lacked standing to litigate these claims because he pursued it without properly disclosing it in his bankruptcy proceeding. As a result, the trial court lacked subject matter jurisdiction to adjudicate the claim. *See Estate of Apple*, 168 N.C. App. at 177, 607 S.E.2d at 16.

"Where there is no jurisdiction of the subject matter the whole proceeding is void ab initio and may be treated as a nullity anywhere, at any time, and for any purpose." *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941). Accordingly, we vacate the judgment and award in Gilman's favor.

II. Application of Mandatory Arbitration Agreement

[2] L3 next argues that the trial court lacked jurisdiction to enter the default judgment because Wiley signed an arbitration agreement that governed any claims concerning his employment. L3 contends that, under the arbitration agreement, the court lacked authority to litigate these disputes.

This argument is foreclosed by precedent from this Court holding that application of an arbitration clause is not a jurisdictional issue and can be waived by failure to timely invoke it. *Blankenship v. Town and Country Ford, Inc.*, 155 N.C. App. 161, 163, 574 S.E.2d 132, 133–34 (2002).

In *Blankenship*, the defendant argued "that the trial court erred in denying its motion to set aside the default judgment because the trial court lacked jurisdiction since the parties were subject to mandatory arbitration with respect to issues raised in plaintiffs' complaint." *Id.* at 166, 574 S.E.2d at 135. This Court rejected that argument, holding that the arbitration agreement was binding on the court only if the defendant appeared in court and invoked it:

> Arbitration pursuant to a valid agreement may be compelled by a court only upon application by a party to the agreement.
>
> Plaintiffs chose to file suit against defendant rather than seek arbitration pursuant to the agreement. It was incumbent upon defendant to assert its right to arbitrate. Because defendant failed to assert its right to arbitrate, this Court is not compelled to enforce the arbitration agreement. Moreover, we hold that the trial court did not err in denying the motion to set aside the default judgment based on the existence of an arbitration agreement.

Id. at 166–67, 574 S.E.2d at 135 (citations omitted).

This case is indistinguishable from *Blankenship*. Because L3 did not timely appear in court and invoke the arbitration agreement to compel arbitration, the trial court did not err in entering judgment notwithstanding the parties' agreement to arbitrate this dispute.

III. Decision to Set Aside Default Judgment on Damages

[3] Having addressed these jurisdictional arguments, we turn to the parties' challenges to the trial court's rulings throughout the default proceedings.

First, Wiley argues that the trial court erred by setting aside the damages portion of the court's initial default judgment under Rule 60(b). Wiley focuses his argument on Rule 60(b)(6), and we thus begin our analysis there, although the trial court's order did not specify the particular provision of Rule 60(b) on which it relied.

Wiley argues that Rule 60(b)(6) cannot support the trial court's ruling because L3 failed to satisfy either of the first two prongs of the three-part test applicable to motions under Rule 60(b)(6). As explained below, the trial court was well within its sound discretion in allowing relief under Rule 60(b)(6).

"A trial court's decision to grant or deny a motion to set aside an entry of default and default judgment is discretionary. Absent an abuse of that discretion, this Court will not reverse the trial court's ruling." *Basnight Const. Co. v. Peters & White Const. Co.*, 169 N.C. App. 619, 621, 610 S.E.2d 469, 470 (2005). "[W]e only find abuse of discretion where the trial court's judgment is manifestly unsupported by reason." *Bodie Island Beach Club Ass'n, Inc. v. Wray*, 215 N.C. App. 283, 290, 716 S.E.2d 67, 74 (2011).

To qualify for relief under Rule 60(b)(6), a movant must satisfy a three-part test: "(1) extraordinary circumstances exist, (2) justice demands the setting aside of the judgment, and (3) the defendant has a meritorious defense." *Gibby v. Lindsey*, 149 N.C. App. 470, 474, 560 S.E.2d 589, 592 (2002). Wiley does not argue that L3 lacks a meritorious defense. Thus, we limit our analysis to the first two prongs of the test.

This Court previously has recognized that the size of a default judgment award is a relevant factor to consider when determining whether extraordinary circumstances exist and whether justice would be best served by affording relief from judgment. *See Anderson Trucking Serv., Inc. v. Key Way Transp., Inc.*, 94 N.C. App. 36, 43, 379 S.E.2d 665, 669 (1989).

Here, the size of the judgment was quite large, totaling well over $4 million. Moreover, as explained in Part VI below, that judgment included a large award of punitive damages, which were not even requested in the complaint.

Finally, L3 provided an explanation for why it failed to timely respond to the complaint and, although the trial court ultimately chose to uphold the default judgment on liability, L3's conduct in the case and its innocent explanation for why it missed the deadline readily provide a reasonable basis for the court to set aside the default judgment on damages. Accordingly, we reject Wiley's argument and hold that, under the deferential standard of review, the trial court's decision was not an abuse of discretion. *See Wray*, 215 N.C. App. at 290, 716 S.E.2d at 74.

IV. L3's Motion to Set Aside Entry of Default and Default Judgment

[4] Next, L3 asserts several challenges to the trial court's initial entry of default and default judgment and the court's denial of its motion to set aside the default. As explained below, we must reject these arguments under the applicable, narrow standard of review.

A trial court's decision to enter a default judgment, as well as a clerk or lower court's entry of default, are both reviewable for abuse of discretion. *Lowery v. Campbell*, 185 N.C. App. 659, 665, 649 S.E.2d 453, 456 (2007), *aff'd per curiam*, 362 N.C. 231, 657 S.E.2d 354 (2008). The decision to grant or deny a motion to set aside a default judgment likewise is reviewed for abuse of discretion. *Basnight Const. Co.*, 169 N.C. App. at 621, 610 S.E.2d at 470. As noted above, "we only find abuse of discretion where the trial court's judgment is manifestly unsupported by reason." *Wray*, 215 N.C. App. at 290, 716 S.E.2d at 74. As a result, "[t]his Court seldom has found an abuse of discretion by the trial court in failing to set aside a default judgment." *Bailey v. Gooding*, 60 N.C. App. 459, 466, 299 S.E.2d 267, 271 (1983).

A. Attachment of Verifications at Default Judgment Hearing

L3 first argues that the trial court erred by entering the default judgment because Wiley amended the complaint at the default judgment hearing, thus reopening L3's time to file a responsive pleading. Specifically, at the default judgment hearing (where L3 was not present), the following exchange occurred between Wiley's counsel and the trial court:

> MR. BUZZARD: We have got copies of the affidavits that are in the binder that we handed up, which Ms. Malone has copies to file.

> MS. MALONE: And also the verifications for the complaint.
>
> THE COURT: Well that's what I was going to say—
>
> MS. MALONE: They were signed the date, or prior to the filing to [*sic*] the complaint.
>
> THE COURT: Okay.
>
> MS. MALONE: I had just held those in my file, but I think I should probably put them in the file.
>
> THE COURT: Yes. You can hand those up, and in light of the default all allegations in the complaint are deemed admitted and insofar as they are verified.
>
> MS. MALONE: That was a filed copy and also a copy of the files.
>
> THE COURT: And have been verified and can be treated as affidavits.

L3 argues that, by adding the verification pages to the complaint, Wiley amended the complaint under Rule 15 of the Rules of Civil Procedure, thereby reopening the time to file a responsive pleading. As explained below, we disagree.

Our determination turns on the context in which the verification pages were offered to the court. As other jurisdictions have observed, "adding a verification to a complaint is not, strictly speaking, an amendment to the pleading itself." *Chisholm v. Vocational Sch. for Girls*, 103 Mont. 503, 508, 64 P.2d 838, 842 (1936). Moreover, the purpose of providing additional time to file a responsive pleading following an amendment is to offer the party an opportunity to respond to the amended allegations. *Turner Halsey Co. v. Lawrence Knitting Mills, Inc.*, 38 N.C. App. 569, 573, 248 S.E.2d 342, 345 (1978). Of course, if the allegations were not amended, this underlying purpose is not implicated.

Here, although the court accepted the verification pages into the trial record, the court's comments indicate that it treated those verifications as affidavits attesting to the truth of the allegations in the complaint, not as amendments to the contents of the complaint. And, as Wiley points out, those verifications had no impact on the allegations in the complaint. Accordingly, we hold that, in the context of this default judgment hearing, the submission of verifications, attesting to the truth of the allegations in the complaint, did not amend the complaint and reopen the time to file a responsive pleading. We therefore reject L3's argument.

B. Failure to Serve Affidavit of Service

[5] L3 next argues that Wiley did not properly serve the motion for entry of default and a notice of hearing at least five days before the hearing on the motion, as required by Rule 6(d) of the North Carolina Rules of Civil Procedure. This argument is meritless. Rule 6(d) states that it applies to a written motion "other than one which may be heard *ex parte*." This Court has held that the requirements of Rule 6(d) are not applicable to motions for entry of default because, by their nature, these motions are heard *ex parte*. *G & M Sales of E. N.C., Inc. v. Brown*, 64 N.C. App. 592, 594, 307 S.E.2d 593, 594–95 (1983). This decision also is consistent with the text of Rule 55 which, as explained in more detail below, provides a different, three-day period in which to serve notice on a party who has appeared in the case in advance of the default judgment hearing. Accordingly, we reject L3's argument.

C. Appearance Before Entry of Default Judgment

[6] L3 next argues that it had made an appearance in this action before entry of default judgment and thus was entitled to notice of the default judgment hearing under Rule 55 of the Rules of Civil Procedure. We are not persuaded.

Rule 55(b)(2) provides that, where "the party against whom judgment by default is sought has appeared in the action, that party (or, if appearing by representative, the representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application." When a party entitled to notice under this provision does not receive it, the court must vacate the default judgment. *Stanaland v. Stanaland*, 89 N.C. App. 111, 115, 365 S.E.2d 170, 172 (1988).

"Generally, an appearance requires some presentation or submission to the court." *Cabe v. Worley*, 140 N.C. App. 250, 253, 536 S.E.2d 328, 330 (2000). Nevertheless, "a defendant does not have to respond directly to a complaint in order for his actions to constitute an appearance." *Roland v. W & L Motor Lines, Inc.*, 32 N.C. App. 288, 289, 231 S.E.2d 685, 687 (1977). Instead, "an appearance may arise by implication when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff." *Id.* For example, in *Coastal Federal Credit Union v. Falls*, this Court held that the defendants' negotiations with plaintiff's law firm over a payment plan could be sufficient to qualify as an "appearance" entitling the defendants to notice of a default judgment hearing. 217 N.C. App. 100, 103–07, 718 S.E.2d 192, 194–96 (2011).

Here, L3 has not identified any communications that could satisfy the appearance requirement. To be sure, L3 presented evidence of a series of unsuccessful attempts by its counsel to reach Wiley's counsel in the hour before the default judgment hearing occurred. But this Court has never held that unsuccessful, unilateral efforts to communicate with opposing counsel can constitute an "appearance" for purposes of Rule 55, and we are unwilling to do so here. We adhere to the rule established in *Roland*, which permits an appearance by implication only "when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff." *Roland*, 32 N.C. App. at 289, 231 S.E.2d at 687. Accordingly, we reject L3's argument.

D. Sufficiency of Facts Alleged to Support Claims Asserted

[7] Finally, L3 argues that the allegations in the complaint are insufficient to state a valid claim on which relief can be granted and, as a result, the court lacked authority to enter judgment on those claims. But L3 does not present any argument on this point, instead stating that "[t]he law and facts are detailed at R. pp. 194–205 and are incorporated by reference herein." In a footnote, L3 then states that the arguments in this case require "detailed exposition" and that "[d]ue to page limitations, the Court is respectfully referred herein to prior briefs in the Record on Appeal, which are incorporated by reference."

This Court and our Supreme Court repeatedly have rejected attempts by litigants to "incorporate by reference" arguments found elsewhere in the trial record. *See, e.g.*, *Fortner v. J.K. Holding Co.*, 319 N.C. 640, 641–42, 357 S.E.2d 167, 167–68 (1987); *Stark v. N.C. Dep't of Env't & Nat. Res., Div. of Land Res.*, 224 N.C. App. 491, 513, 736 S.E.2d 553, 567 (2012); *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 615–16, 659 S.E.2d 442, 453 (2008). This precedent is particularly important in this Court, which adheres to strict page or word limits for briefs—limits that L3 concedes it sought to avoid by referencing outside arguments rather than presenting them in the brief. Under Rule 28(b)(6), an issue "not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." We therefore treat this argument as abandoned.

V. Exclusion of Certain Evidence at the Trial on Damages

[8] We next turn to L3's arguments concerning the trial on damages. L3 first argues that the trial court erred by excluding certain evidence it sought to introduce at trial, including evidence related to the circumstances surrounding Wiley's discharge and the existence of the arbitration agreement. As explained below, we reject this argument.

As an initial matter, many of L3's evidentiary arguments are not preserved for appellate review. "A party must preserve the exclusion of evidence for appellate review by making a specific offer of proof unless the significance of the evidence is ascertainable from the record." *Griffis v. Lazarovich*, 161 N.C. App. 434, 438, 588 S.E.2d 918, 921 (2003).

Here, L3 challenges the trial court's refusal to permit L3 to ask various questions concerning the company's planned reduction in force, its employment practices, and the Plaintiffs' job performance. But the content and significance of the answers to these questions is not apparent from the record and there was no offer of proof. Accordingly, these issues are not preserved for appellate review. *See id.*

[9] L3 also argues that the trial court erroneously prevented it from presenting any evidence concerning the parties' arbitration agreement. The parties' arbitration agreement is in the record and thus this issue properly is preserved for appellate review. Nevertheless, we reject this argument because the exclusion of the arbitration agreement, even if error, was harmless.

> Appellate courts do not set aside verdicts and judgments for technical or harmless error. It must appear that the error complained of was material and prejudicial, amounting to a denial of some substantial right. The appellant thus bears the burden of showing not only that an error was committed below, but also that such error was prejudicial—meaning that there was a reasonable possibility that, but for the error, the outcome would have been different.

Faucette v. 6303 Carmel Rd., LLC, __ N.C. App. __, __, 775 S.E.2d 316, 323 (2015).

Here, even if we assume the contents of the arbitration agreement had some minimal relevance, L3 has not shown that the exclusion of that evidence would have affected the calculation of compensatory damages owed to Wiley.[1] "The sole purpose of the damages trial was to determine the harm to [Wiley] caused by" L3's discriminatory termination of his employment. *See Hien Nguyen v. Taylor*, 219 N.C. App. 1, 16, 723 S.E.2d 551, 562 (2012). The availability of the arbitration procedures would not have impacted the jury's calculation of these compensatory damages, and thus, exclusion of this evidence was harmless.

---

1. As explained in Part VI below, we vacate the award of punitive damages because Wiley failed to properly plead a request for punitive damages under Rule 9(k) of the Rules of Civil Procedure.

VI. Denial of Request for Punitive Damages

[10] Finally, L3 argues that the trial court erred by denying its motion for a directed verdict with respect to punitive damages. L3 contends that Wiley did not include a request for punitive damages or allege with particularity any of the aggravating factors that support punitive damages. L3 thus contends that the trial court should not have submitted that issue to the jury. We agree.

In 1994, our Supreme Court held in *Holloway v. Wachovia Bank & Trust Company* that "a plaintiff need not specially plead punitive damages as a prerequisite to recovering them at trial." 339 N.C. 338, 347, 452 S.E.2d 233, 238 (1994). Instead, the Court held that, "where a pleading fairly apprises opposing parties of facts which will support an award of punitive damages, they may be recovered at trial without having been specially pleaded." *Id.*

In 1995, apparently in response to *Holloway*, the General Assembly adopted Rule 9(k) of the North Carolina Rules of Civil Procedure. 1995 N.C. Sess. Laws ch. 514, § 3. That rule provides as follows: "A demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity." N.C. R. Civ. P. 9(k).

Thus, to recover punitive damages, "[P]laintiff's complaint must allege facts or elements showing the aggravating circumstances which would justify the award of punitive damages." *Hart v. Brienza*, __ N.C. App. __, __, 784 S.E.2d 211, 218 (2016). Those aggravating factors are "(1) fraud; (2) malice; or (3) willful or wanton conduct." *Id.*

Here, the complaint does not contain a request for punitive damages. Indeed, the words "punitive damages" are not contained anywhere in the complaint's allegations or in the prayer for relief. Moreover, there are no allegations of any of the aggravating factors that can support an award of punitive damages. See N.C. R. Civ. P. 9(k). Thus, we hold that Wiley failed to properly plead a request for punitive damages under Rule 9(k). As a result, the trial court erred by rejecting L3's argument and submitting the punitive damages issue to the jury.[2]

---

2. L3 also challenges the trial court's denial of its motion for a directed verdict with respect to the award of compensatory damages to Wiley but, as with other issues in its brief, presents no argument, instead incorporating by reference arguments made in the trial court and contained in the record on appeal. As explained in Part IV.D above, the Rules of Appellate Procedure do not permit parties to incorporate by reference arguments set out in other pleadings. Accordingly, these arguments are abandoned on appeal. *See Stark*, 224 N.C. App. at 513, 736 S.E.2d at 567.

Conclusion

For the reasons set out above, we affirm the trial court's judgment with respect to the compensatory damages awarded to Plaintiff Harry A. Wiley, we vacate the award of punitive damages to Wiley, and we vacate the judgment entered in favor of Plaintiff Gerald D. Gilman for lack of standing. This case is remanded for entry of a new judgment consistent with this opinion.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Chief Judge McGEE and Judge TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 DECEMBER 2016)

CITY OF GREENSBORO v. FEWELL No. 16-501	Guilford (10CVS4454)	Affirmed
CROWDER v. BALDOR ELEC. No. 16-403	N.C. Industrial Commission (Y06047)	Affirmed
GENTRY v. BROOKS No. 16-614	Madison (13SP52)	Affirmed
HARDIN v. COULSTON No. 16-694	Mecklenburg (15CVD18570)	Affirmed
HARMON v. HARMON No. 16-728	Rowan (16CVD473)	Reversed
HENDERSON v. HENDERSON No. 16-72	Mecklenburg (10CVD8288)	Affirmed
IN RE B.E. No. 16-494	Wake (15JA195-199)	Affirmed
IN RE C.A.G. No. 16-332	Sampson (12JA94)	Affirmed
IN RE D.J.W-P. No. 16-518	Wake (14JT90)	Affirmed
IN RE D.M. No. 16-503	Yancey (15JT25)	Affirmed
IN RE HENDRICK No. 16-256	Buncombe (15SPC1527)	Vacated and Remanded
IN RE K.A.E. No. 16-488	Hoke (13JT46)	Reversed
IN RE L.A.T. No. 16-602	Cabarrus (15JT85)	Affirmed
IN RE Q.W. No. 16-678	Mecklenburg (15SPC7408)	Affirmed
IN RE T.J.T. No. 16-576	Wake (15JT11)	Affirmed

INTEGON NAT'L INS. CO. v. KING No. 16-600	Forsyth (15CVS3315)	Affirmed
SADLER v. HALL No. 16-547	Jackson (15CVD590)	Affirmed
SHELLEY v. CTY. OF HENDERSON No. 16-475	Henderson (15CVS2084)	Affirmed
SNELSON v. SNELSON No. 16-257	Buncombe (12CV5629)	Dismissed.
SPARROW v. TYCO INTEGRATED SEC. No. 16-409	N.C. Industrial Commission (15-001839)	Affirmed
STATE v. BELL No. 16-326	Edgecombe (13CRS52923-25) (14CRS1138)	No prejudicial error
STATE v. BOWES No. 16-304	Alamance (12CRS52181-85)	No Error
STATE v. BROWN No. 16-730	Greene (14CRS50719) (15CRS128)	Affirmed
STATE v. COOPER No. 16-483	Columbus (13CRS50014) (13CRS50018)	No Error
STATE v. CROSBY No. 16-454	Mecklenburg (15CRS6239)	No prejudicial error
STATE v. FENNELL No. 16-441	Wayne (13CRS3633-34) (13CRS51936)	No Error
STATE v. FERRELL No. 16-622	Edgecombe (15CRS52017)	Affirmed
STATE v. LUCAS No. 16-73	Wake (11CRS213380)	Affirmed
STATE v. MITCHELL No. 16-448	Wake (13CRS224586)	No Error
STATE v. MOSS No. 16-584	Edgecombe (14CRS1837) (14CRS52688) (14CRS52720-21)	Remanded for Re-sentencing in part; affirmed in part

STATE v. PATTON No. 16-462	Mecklenburg (14CRS221522) (14CRS35556)	No Error
STATE v. RODRIGUEZ No. 16-76	Dare (11CRS51756) (11CRS51758)	Affirmed
STATE v. SHABAZZ No. 16-526	Iredell (13CRS51208-15)	Affirmed
STATE v. SHEPERD No. 16-270	Yancey (12CRS50713)	No Error
STATE v. SMALLWOOD No. 16-131	Beaufort (13CRS50055)	No error in part; No plain error in part
STATE v. WALKER No. 16-392	Brunswick (13CRS1660-61) (13CRS1663-64) (13CRS701341)	Remanded
STATE v. WHITAKER No. 16-521	Halifax (14CRS52238)	No Error
STATE v. WILLIAMS No. 16-514	Sampson (13CRS50173)	Dismissed
STATE v. WILSON No. 16-496	Lenoir (13CRS51601)	No Error
STATE v. YOUNTS No. 16-523	Randolph (13CRS53018) (13CRS53048)	Remanded for resentencing.
SYLVESTER v. SYLVESTER No. 16-637	Buncombe (16CVD71)	Vacated and Remanded

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS