251 N.C. App.—No. 3 **Pages 528-723**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 20, 2019

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OF
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[8]Appointed 1 August 2016. Term ended 31 December 2016. [9]Retired 31 December 2018. [10]Retired 31 December 2018.

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COURT OF APPEALS

CASES REPORTED

FILED 17 JANUARY 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Appeal and Error—argument not considered—conviction at issue already vacated—The Court of Appeals did not address whether the trial court committed plain error in reinstructing the jury on larceny from the person, because earlier in the same opinion the Court of Appeals vacated and remanded defendant's conviction for larceny of the person. **State v. Greene, 627.**

Appeal and Error—interlocutory orders and appeals—denial of pretrial motion in limine—no substantial right—Defendants' appeal of the trial court's denial of certain portions of their pretrial motion in limine was from an interlocutory order. Defendants failed to establish that their appeal affected a substantial right that would be lost or inadequately addressed absent immediate review. **Smith v. Polsky, 589.**

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Appeal and Error—swapping horses on appeal—Where the trial court concluded that plaintiff's amendment to his complaint was an impermissible attempt to add a new defendant after the statute of limitations had expired, the Court of Appeals declined to consider plaintiff's argument that he was entitled to relief because the one entity failed to file a certificate of assumed name and because it was merely the other entity's alter ego. Plaintiff failed to bring either theory before the trial court and could not swap horses on appeal. **Williams v. Advance Auto Parts, Inc., 712.**

ASSOCIATIONS

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Associations—homeowners'—assessments—proportion of common expenses —In a case involving a dispute over homeowners' association assessments, the Court of Appeals rejected defendant's argument that the trial court erred by instructing the jury that lot purchasers have a right to presume that they would pay a certain proportion of the common expenses as shown by the plat, and to presume the owners of every other lot on the plat would pay an equal sum pursuant to the plan of road maintenance contained in the covenants. Defendant failed to show any prejudice on the instruction. **Tater Patch Estates Home Owner's Ass'n v. Sutton, 686.**

Associations—homeowners'—assessments—roads—pro rata share—In a case involving a dispute over homeowners' association assessments, the Court of Appeals rejected defendant's argument that the trial court erred by instructing the jury that the law does not require defendant's lot to be adjacent to a subdivision road for her to be liable for road maintenance assessments by the association on that lot. The Declaration clearly indicated the intent to require all lot owners to pay a pro rata share of the road maintenance. **Tater Patch Estates Home Owner's Ass'n v. Sutton, 686.**

Associations—homeowners'—damage to property from work approved by association—question for jury—In a case involving a dispute over homeowners' association assessments, the trial court did not err by denying plaintiff association's motion for a directed verdict on defendant's counterclaim for damage allegedly

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CIVIL PROCEDURE

Civil Procedure—amendment to complaint—addition of party—after expiration of statute of limitations—Where plaintiff tripped and fell in an Advance Auto Parts store, filed a complaint that named the defendant as "Advance Auto Parts, Inc.," and—after the expiration of the statute of limitations—filed a notice of amendment to complaint adding "Advance Stores Company, Incorporated" as a named defendant, the trial court properly concluded that plaintiff's amendment was not the correction of a mere misnomer but an impermissible attempt to add a new defendant after the statute of limitations had expired. **Williams v. Advance Auto Parts, Inc., 712.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Confessions and Incriminating Statements—coercive police interview—failure to Mirandize—The trial court erred by denying defendant's motion to suppress inculpatory statements he made during a police interview in which he was shown a DNA analysis indicating that his DNA was recovered from under a murder victim's fingernails—at which time he should have been *Mirandized*—and then was questioned for hours in a coercive manner. In light of the overwhelming evidence of defendant's guilt, however, the error was harmless beyond a reasonable doubt. **State v. Johnson, 639.**

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conspiracy to possess stolen goods. The evidence showed that defendant made a phone call from jail to a Mr. Spencer, and thereafter Mr. Spencer showed up at the residence where the stolen pistol was located and admitted to "working with" defendant. **State v. Greene, 627.**

CONSTITUTIONAL LAW

Constitutional Law—effective assistance of counsel—alleged error on cross-examination of police officer—Where defendant was convicted for several theft-related offenses, defendant did not receive ineffective assistance of counsel. Even assuming defendant's attorney committed an error in his cross-examination of a police detective, defendant failed to show that but for counsel's unprofessional errors the result of the proceeding would have been different. **State v. Greene, 627.**

Constitutional Law—effective assistance of counsel—failure to object—failure to show prejudice—Defendant did not receive ineffective assistance of counsel based on his counsel's failure to object at trial to the admission of either the cocaine obtained from defendant's car or his incriminating statement admitting that the cocaine belonged to him rather than another person. Defendant failed to show any prejudice arising from his trial counsel's actions. **State v. Burton, 600.**

Constitutional Law—right to speedy trial—Barker factors—failure to challenge sufficiency of evidence—The trial court did not err by denying defendant's motions to dismiss the drugs and weapons charges against him based on an alleged violation of his constitutional right to a speedy trial. The trial court properly considered the factors articulated in *Barker*. Further, defendant did not challenge the evidentiary support for any of the trial court's findings, or argue that the court's findings did not support its conclusion of law. **State v. Evans, 610.**

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DIVORCE

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revocation, the Court of Appeals held that the trial court's failure to strictly follow the formal arraignment requirements of N.C.G.S. § 15A-928(c) was not reversible error. **State v. Silva, 678.**

SEARCH AND SEIZURE

Search and Seizure—traffic stop—motion to suppress evidence—reasonable suspicion—The trial court did not err in a drugs and weapons case by denying defendant's motion to suppress the evidence seized at the time of his arrest. The officer had the requisite reasonable suspicion to justify a traffic stop of defendant's car, and the trial court's findings of fact also supported this conclusion. Further, defendant failed to offer any appellate argument challenging the evidentiary basis for a conclusion that reasonable suspicion existed. **State v. Evans, 610.**

WORKERS' COMPENSATION

Workers' Compensation—severe burns—attendant care services—ordered by physician—Where plaintiff suffered severe burns at work and the Industrial Commission awarded him attendant care services until 31 December 2012 but denied reimbursement to his wife after that date, the Court of Appeals held that the Commission erred in its findings and conclusions regarding the need to compensate plaintiff's wife for her continuing services. While there was evidence supporting the reduction of compensation to two hours per day after 1 June 2012, there was no evidence that plaintiff's need for attendant care, as ordered by his physician, was over as of 31 December 2012. **Thompson v. Int'l Paper Co., 697.**

SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

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

BANKS v. HUNTER

[251 N.C. App. 528 (2017)]

TONY R. BANKS, PLAINTIFF
v.
KIMBERLY HUNTER, DEFENDANT

No. COA16-666

Filed 17 January 2017

Jurisdiction—subject matter jurisdiction—foreclosure—default judgment—order of divestiture—real property secured under deed of trust

The district court lacked subject matter jurisdiction to enter default judgment and order of divestiture as they pertained to ordering conveyance of title of defendant's real property secured under the deed of trust. The portion of the default judgment requiring defendant to convey her real property secured under the deed of trust to plaintiff was vacated. The order of divestiture, which terminated defendant's right, title, and interest in the real property and purported to vest it with plaintiff, was also vacated.

Appeal by defendant to review order entered 2 March 2016 by Judge Meader W. Harriss, III in Pasquotank County District Court denying defendant's motion for relief from judgment. Heard in the Court of Appeals 17 November 2016.

The Twiford Law Firm, by John S. Morrison, for plaintiff-appellee.

Gunther Law Group, by Timothy P. Koller; and The Law Office of Jason E. Gillis, by Jason E. Gillis, for defendant-appellant.

TYSON, Judge.

Kimberly Hunter ("Defendant") appeals from order denying her Rule 60(b) motion for relief from judgment. Defendant argues the trial court lacked subject matter jurisdiction and, alternatively, that it was error for the trial court to deny her motion for relief from judgment. We conclude the trial court lacked subject matter jurisdiction and partially vacate one of the underlying judgments and vacate another.

I. Background

On or about 7 February 2014, Tony R. Banks ("Plaintiff") loaned Defendant $3,606.46, evidenced by a promissory note dated 7 February 2014 executed by Defendant ("the Note"). The Note required Defendant

to repay the $3,606.46 within ninety days. In the event of default, Plaintiff would become the sole owner of Defendant's real property located at 1100 Possum Quarter Road in Elizabeth City, North Carolina ("Real Property").

The relevant language from the Note purporting to grant Plaintiff ownership of Defendant's property states: "[f]or Collateral, the property (house & land) at the address listed below which serves the purpose for this loan will be titled to me upon receipt of funds. If the borrower fails to make the payment when due, the loan will be considered in default and the lender will become the sole owner of the said listed property."

Four days later, on 11 February 2014, Defendant executed a deed of trust on the Real Property as security for the Note. The deed of trust was properly recorded in the Pasquotank County Register of Deeds that day. The deed of trust was signed by both parties and lists Plaintiff as both the trustee and the beneficiary. The deed of trust also includes a power of sale clause, stating, in relevant part:

> If, however, there shall be any default (a) in the payment of any sums due under the Note, this Deed of Trust or any other instrument securing the Note, and such default is not cured within ten (10) days from the due date, or (b) if there shall be default in any of the other covenants, terms or conditions of the Note and such default is not hereby, or any failure or neglect to comply with the covenants, terms or conditions contained in this Deed of Trust or any other instrument securing the Note and such default is not cured within fifteen (15) days after written notice, then and in any of such events, without further notice, it shall be lawful for and the duty of the Trustee, upon request of the Beneficiary, to sell the land herein conveyed at public auction for cash, after having first giving such notice of hearing and advertising the time and place of such sale in such manner as may then be provided by law, and upon such and any resales and upon compliance with the law then relating to foreclosure proceedings under power of sale to convey title to the purchaser in as full and ample manner as the Trustee is empowered.

After Defendant failed to repay the loan, on 16 October 2014 Plaintiff instituted an action in district court solely on the Note for specific performance and sought for the court to convey Defendant's Real Property to him.

Defendant was personally served. When she failed to file an answer, an entry of default was entered by the Pasquotank County Clerk of Court on 27 January 2015. Defendant was later served with a Motion for Default Judgment. After the hearing on the Motion for Default Judgment, the district court entered an order on 13 March 2015 for Defendant to pay Plaintiff's attorney's fees and court costs, and to execute a deed for all her right, title, and interest in the Real Property within ten days. In its order, the district court expressly retained jurisdiction to enter further orders, if necessary.

Defendant was served with the Default Judgment Order, but failed to comply. Plaintiff filed a Motion for Contempt on 17 June 2015 and sought an order to convey the Real Property to him. After a hearing on Plaintiff's motion on 24 June 2015, the district court entered an Order of Divestiture and Vesting, which purported to divest Defendant of her Real Property and vest it with Plaintiff, pursuant to Rule 70 of the N.C. Rules of Civil Procedure.

The time for timely appeal having expired, Defendant filed a Motion for Relief from Judgment and Order on 8 September 2015, pursuant to Rules 60(b)(3) and 60(b)(6) of the N.C. Rules of Civil Procedure. After hearing arguments from counsel and testimony of Defendant, the district court rendered an order denying Defendant's motion on 12 February 2016, and signed the order on 2 March 2016. On 23 March, Defendant filed timely notice of appeal from the district court's order denying her Rule 60(b) Motion for Relief from Judgment.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat § 7A-27(b)(2) (2015), which provides for appeal of right from any final judgment of a district court in a civil action.

III. Issues

Defendant argues for the first time on appeal that the district court lacked subject matter jurisdiction over Plaintiff's claim for specific performance to convey Defendant's Real Property securing the Note. Defendant also argues that the trial court abused its discretion in denying her Rule 60(b) motion.

We need not reach the issue of whether the district court abused its discretion in denying Defendant's Rule 60(b) motion. The district court lacked subject matter jurisdiction over Plaintiff's claim to transfer ownership of Defendant's encumbered Real Property to him by specifically enforcing the Note.

IV. Standard of Review

Subject matter jurisdiction is "[j]urisdiction over the nature of the case and the type of relief sought." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). (citation omitted) (alteration in original). Subject matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (citation omitted), *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). A court's lack of subject matter jurisdiction is not waivable and can be raised at any time, including on appeal. *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

V. Analysis

A. Subject Matter Jurisdiction

Defendant raises the district court's lack of subject matter jurisdiction before this Court. "Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (citations omitted).

"A court's subject matter jurisdiction over a particular case is invoked by the pleading." *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010) (citations omitted). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened." *Hopkins v. Hopkins*, 8 N.C. App. 162, 169, 174 S.E.2d 103, 108 (1970) (citations omitted). "A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (citation omitted).

B. Remedies for Mortgage Default

The remedies for default of debt and realizing upon real property secured as collateral are well settled. "A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt." *Walston v. Twiford*, 248 N.C. 691, 693, 105 S.E.2d 62, 64 (1958)

(citations omitted). "[A]n equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage." *Bunn v. Braswell*, 139 N.C. 135, 142 51 S.E. 927, 930 (1905) (quoting *Peugh v. Davis*, 96 U.S. 332, 337, 24 L. Ed. 775, 776 (1877)). Furthermore,

> While in a mortgage or deed of trust to secure a debt the legal title to the mortgaged premises passes to the mortgagee or trustee, as the case may be, the mortgagor or trustor is looked upon as the equitable owner of the land-with the right to redeem at any time prior to foreclosure. This right, after the maturity of the debt, is designated his equity of redemption.

Riddick v. Davis, 220 N.C. 120, 125, 16 S.E.2d 662, 666 (1941) (citations and internal quotation marks omitted).

North Carolina's public policy does not look favorably upon efforts to deprive a debtor and mortgagor of real property of his equity of redemption. *See Wilson v. Fisher*, 148 N.C. 535, 62 S.E. 622, 624 (1908) (holding, *inter alia*, that agreement between debtor and creditor to waive debtor's equity of redemption is void).

A long settled exception exists in North Carolina which makes it possible for a lender to cut off a mortgagor's equity of redemption:

> [I]f a lender, A, insists upon and takes a deed in absolute form from borrower B, to secure the obligation owed to A, upon an oral promise or representation that A will reconvey the land to B upon payment of the indebtedness at the appropriate time, parol evidence will not be admissible to show that the absolute deed and the oral agreement to reconvey upon payment of the indebtedness were intended to constitute a mortgage for security purposes only. In the absence of fraud, mistake, ignorance, or undue influence, parol evidence is inadmissible to show that such a deed in absolute form was intended as a mere mortgage.

James A. Webster, Jr., Webster's Real Estate Law in North Carolina § 13.05[2] (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2011) (footnotes omitted); *See, e.g.*, *Sowell v. Barrett*, 45 N.C. 50, 50 (1852) (dealing with this type of agreement and stating, "[i]n a bill filed to redeem property, conveyed to the [creditor] by a deed absolute on

its face, a Court of Equity will not relieve the plaintiff, upon mere proof of the parties' declarations. There must be proof of fraud, ignorance or mistake, or of facts inconsistent with the idea of an absolute purchase.")

Similarly, an equity of redemption may not exist when an absolute deed is conveyed by a grantor to a grantee, which is accompanied by a *written* agreement to reconvey to the grantor upon the payment of an agreed amount of money by an agreed upon time. *Obriant v. Lee*, 214 N.C. 723, 725, 200 S.E. 865, 867 (1939) (citation omitted). Unlike an oral agreement to reconvey, parol evidence can be introduced, even in the absence of fraud, mistake, ignorance, or undue influence, to prove the true character of the parties' agreement. *See Rice v. Wood*, 82 N.C. App. 318, 326, 346 S.E.2d 205, 210 (citation omitted), *disc. review denied* 318 N.C. 417, 349 S.E.2d 599 (1986).

If a preponderance of the evidence shows the parties intended for the agreement to be an option to purchase, and not a mortgage, then the grantor cannot assert an equity of redemption. *See Obriant*, 214 N.C. at 725, 200 S.E. at 867 (citation omitted). Also, if a preponderance of the evidence tends to show the parties intended for the agreement to be a mortgage, then the grantor (mortgagor) would retain an equity of redemption. *See id.* at 727, 200 S.E. at 868 (citation omitted).

Here, Defendant-debtor did not convey an absolute deed to the Plaintiff-lender that was accompanied by either a written or oral agreement for the Plaintiff-lender to reconvey the land upon payment of a specific sum of money. Defendant-debtor's obligation is evidenced by a promissory note, which was secured by a recorded deed of trust on Defendant-debtor's Real Property.

"A creditor can seek to enforce payment of a promissory note by pursuing foreclosure by power of sale, judicial foreclosure, or by filing for a money judgment, or all three options, until the debt has been satisfied." *Lifestore Bank v. Mingo Tribal Pres. Trust*, 235 N.C. App. 573, 574, 763 S.E.2d 6, 7 (2014), *disc. review denied*, 368 N.C. 255, 771 S.E.2d 306 (2015).

C. Foreclosure

In North Carolina, the term "foreclosure" is not defined by statute or case law. Other jurisdictions define "foreclosure" as "[a] legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property." *Eastern Savings Bank, FSB v. Esteban*, 129 Haw. 154, 155, 296 P.3d 1062, 1063 (2013) (citing *Black's Law Dictionary* 719 (9th ed. 2009)); *see also Ruiz*

v. 1st Fid. Loan Servicing, LLC, 829 N.W.2d 53, 57 (Minn. 2013) (citation omitted); *Wirth v. Commonwealth of Pennsylvania*, 626 Pa. 124, 160, 95 A.3d 822, 843 (2014) (citation omitted), *cert. denied sub nom. Houssels v. Pennsylvania*, __ U.S. __, 135 S. Ct. 1405, 191 L. Ed. 2d 362 (2015). North Carolina statutes provide for two means by which a foreclosure proceeding may be brought against real property: (1) foreclosure by judicial sale pursuant to N.C. Gen. Stat. § 1-339.1 *et seq.*, or, (2) if expressly provided within the deed of trust or mortgage, by power of sale under N.C. Gen. Stat. § 45-21.1 *et seq. Wolfe v. Wolfe*, 64 N.C. App. 249, 255, 307 S.E.2d 400, 404 (1983) (citations omitted), *disc. review denied*, 310 N.C. 156, 311 S.E.2d 297 (1984). These statutes provide the exclusive means for foreclosure in North Carolina. *Id.*

North Carolina previously recognized the common law "strict foreclosure," under which, if a mortgagor failed to satisfy his debt by a fixed date, a court would convey the mortgagor's interest in the collateral to the mortgagee without the need for a sale. *Bunn v. Braswell*, 139 N.C. at 142, 51 S.E. at 930. To avoid the harsh result that a mortgagor would lose "any and all interest in [his] land[,]" courts began to recognize the mortgagor's equity of redemption, the ability to redeem a mortgage debt within a reasonable time after default and before foreclosure. *Id.*

"[A] foreclosure by power of sale is a type of special proceeding, limited in scope and jurisdiction, in which the clerk of court determines whether a foreclosure pursuant to a power of sale should be granted." *Mingo*, 235 N.C. App. at 579, 763 S.E.2d at 10. A foreclosure by judicial sale "requires formal judicial proceedings initiated by summons and complaint in the county where the property is located and culminating in a judicial sale of the foreclosed property if the mortgagee prevails." *Phil Mech. Const. Co. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 3 (1985) (citation omitted).

Here, as indicated by the language in the Note stating "[f]or Collateral, the property (house & land) at the address listed below which serves the purpose for this loan will be titled to me upon receipt of funds," and the subsequently executed deed of trust containing a power of sale clause, Defendant's legal title to real property was conveyed to Plaintiff to hold as a trustee under the deed of trust, and not as an absolute deed. *Walston*, 248 N.C. at 693, 105 S.E.2d at 64.

Plaintiff did not file to only seek a money judgment to enforce payment of the promissory note, but instead also sought specific performance to have Defendant's Real Property judicially conveyed to him. Plaintiff's pursuit of specific performance in the district court to terminate Defendant's (the mortgagor's) interest in her property in order to

gain unencumbered title to satisfy Defendant's unpaid debt on the Note and extinguish Defendant's interest therein, by definition, constitutes a "foreclosure." *See Wirth*, 626 Pa. at 160, 95 A.3d at 843; *see also Black's Law Dictionary* 719 (9th ed. 2009). Because Plaintiff petitioned the district court to transfer Defendant's interest in the Real Property to him, without a sale, after default of repayment and the debt was not repaid by the time specified in the Note, Plaintiff sought a "strict foreclosure." *See Bunn*, 139 N.C. at 142, 51 S.E. at 930. This form of foreclosure is no longer recognized in North Carolina. *Id.*

Based on his complaint, Plaintiff did not seek a foreclosure pursuant to either N.C. Gen. Stat. § 1-339.1 *et seq.*, or N.C. Gen. Stat. § 45-21.1 *et seq.* The terms of the deed of trust grant Plaintiff the power to bring a power of sale foreclosure, which he did not utilize. He did not ask the court to order a sale of Defendant's Real Property. Both of the exclusive and statutory means of foreclosure require a sale of mortgaged property. *See*, *e.g.*, N.C. Gen. Stat. § 1-339.1 ("A judicial sale is a *sale* of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior or district court, including a *sale* pursuant to an order made in an action in court to foreclose a mortgage or deed of trust[.]" (emphasis supplied); N.C. Gen. Stat. § 45-21.1(a)(2) (" 'Sale' means a sale of real property or a sale of any leasehold interest created by a lease of real property pursuant to (i) an express power of sale contained in a mortgage, deed of trust, leasehold mortgage, or leasehold deed of trust or (ii) a 'power of sale', under this Article, authorized by other statutory provisions."). By not pursuing a foreclosure sale, Plaintiff was not seeking a foreclosure procedure allowed under either of our foreclosure statutes.

Additionally, in a foreclosure sale, the mortgagor-debtor is entitled to any excess proceeds, the amount obtained from the sale in surplus of the amount owed on the debt, less the costs of sale. *Smith v. Clerk of Superior Court*, 5 N.C. App. 67, 73-74, 168 S.E.2d 1, 5-6 (1969). Plaintiff's seeking of a judicial conveyance rather than a sale of the Real Property has the effect of depriving Defendant of any potential excess proceeds she is entitled to.

In analyzing the jurisdiction of the district court to grant relief that is not one of the exclusive means of relief provided by statute, our Supreme Court's analysis in *Boseman v. Jarrell* is instructive. In *Boseman*, the plaintiff had petitioned for and obtained from the adoption court a type of adoption that was not one of the three exclusive means of adoption provided by Chapter 48 of our General Statutes. *Boseman*, 364 N.C. at 546, 704 S.E.2d at 501. The Court held, *inter alia*, that because the plaintiff had petitioned for a type of adoption, not recognized in our exclusively

statutory adoption laws, the plaintiff's petition did not invoke the adoption court's subject matter jurisdiction. *Id.* at 547, 704 S.E.2d at 501.

The Court determined that because plaintiff failed to seek a type of adoption expressly allowed by the adoption statute, plaintiff's petition for adoption did not invoke the adoption court's subject matter jurisdiction and all actions in the proceeding before the adoption court, including the entry of the decree, were taken and entered without subject matter jurisdiction. *Id.* The Court held that because the General Assembly did not vest our courts with subject matter jurisdiction to create the type of adoption attempted, the adoption decree was void *ab initio*. *Id.* at 539, 704 S.E.2d at 496.

Here, as in *Boseman*, Plaintiff petitioned for a strict foreclosure of encumbered property under a deed of trust, a type of relief not afforded under our General Statutes. Plaintiff's petition for specific performance to transfer Defendant's Real Property to him, amounted to a strict foreclosure, which is unrecognized by our statutes providing for the exclusive means of foreclosure. *Wolfe*, 64 N.C. App. at 255, 307 S.E.2d at 404. Because a court's subject matter jurisdiction is invoked by the pleadings, Plaintiff failed to invoke the trial court's subject matter jurisdiction over the relief sought by seeking a type of foreclosure which is not allowed for by our foreclosure statutes. *See Boseman* at 546, 704 S.E.2d at 501. The actions taken before the district court, including the Default Judgment Order against Defendant, as it affects the conveyance of tile of Real Property secured by the deed of trust, were done without subject matter jurisdiction. The Default Judgment Order, to the extent it orders the conveyance of Defendant's Real Property, and the subsequent Order of Divestiture to enforce the Default Judgment, are void for lack of jurisdiction and are vacated.

VI. Conclusion

The district court is without subject matter jurisdiction to enter the Default Judgment Order and Order of Divestiture as they pertain to ordering conveyance of title of Defendant's Real Property secured under the deed of trust. The Default Judgment Order, to the extent it requires Defendant to convey her Real Property secured under the deed of trust to Plaintiff, is vacated. The Order of Divestiture, which terminates Defendant's right, title, and interest in the Real Property and purports to vest it with Plaintiff, is also vacated. *It is so ordered.*

VACATED.

Judges McCULLOUGH and DILLON concur.

BROOKLINE RESIDENTIAL, LLC v. CITY OF CHARLOTTE

[251 N.C. App. 537 (2017)]

BROOKLINE RESIDENTIAL, LLC AND RESIDENCES AT BROOKLINE LLC, PLAINTIFFS
v.
CITY OF CHARLOTTE; AND INTERNATIONAL FIDELITY INSURANCE COMPANY, DEFENDANTS

No. COA16-202

Filed 17 January 2017

Cities and Towns—performance bond—successor developer—enforcement

The trial court did not err by granting summary judgment in favor of defendants and denying plaintiff Brookline's cross-motion. Plaintiff, a successor developer, was not entitled to any of the relief sought in its pleadings because it lacked a legal basis to compel defendant City to enforce the performance bond that had originally been obtained by the prior developer to guarantee the construction of certain infrastructure improvements.

Appeal by plaintiffs from order entered 24 August 2015 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 August 2016.

Morningstar Law Group, by William J. Brian, Jr., Shannon R. Joseph, and Jeffrey L. Roether, for plaintiffs-appellants.

Senior Assistant City Attorney, Lina E. James, for defendant-appellee City of Charlotte.

Johnston, Allison & Hord, P.A., by Martin L. White and Munashe Magarira, for defendant-appellee International Fidelity Insurance Company.

DAVIS, Judge.

This case presents the issue of whether a successor developer may compel the City of Charlotte to enforce a performance bond that had originally been obtained by the prior developer to guarantee the construction of certain infrastructure improvements. Brookline Residential, LLC and Residences at Brookline, LLC (collectively "Brookline") appeal from an order granting summary judgment in favor of the City of Charlotte (the "City") and International Fidelity Insurance Company

("IFIC") (collectively "Defendants") and denying Brookline's cross-motion. After careful review, we affirm the trial court's order for the reasons set forth below.

Factual and Procedural Background

In 2007, Clarion-Reames, LLC ("Clarion-Reames"), a developer, sought to construct a residential housing development called Brookline Phase 1 on a parcel of land (the "Property") in Charlotte, North Carolina. In early 2008, Clarion-Reames received final approval from the City to record plats for a section of the development known as "Phase 1, Map 1." In order to receive this approval, Clarion-Reames agreed to complete certain road improvements (the "Original Road Improvements") to nearby Lakeview Road and Reames Road estimated to cost $683,500, and on 26 February 2008 Clarion-Reames obtained a surety bond (the "Bond") from IFIC to guarantee construction of the improvements.

The Bond listed Clarion-Reames as the principal, IFIC as the obligor, and the City as the obligee. The Bond stated that if Clarion-Reames was "in default under its obligation to install improvements" pursuant to the Subdivision Final Plat Approval Form it had submitted in connection with final approval of Phase I, Map I, IFIC "will (a) within fifteen (15) days of determination of such default, take over and assume completion of said improvements, or (b) pay the City of Charlotte in cash the reasonable cost of completion."

Although Clarion-Reames obtained the Bond as a precondition to final plat approval of Phase I, Map I — which was to consist of 10 single-family homes — the bonded improvements covered all of the required public road improvements for the entire Brookline Phase 1 development, which was to consist of 184 single-family homes.

By 2010, Clarion-Reames had constructed only nine of the planned 184 homes in the Brookline development and had completed some, but not all, of the bonded road improvements. In early 2010, Clarion-Reames ceased work on the development because it was unable to raise sufficient capital for the project.

In July 2011, Clarion-Reames's lender foreclosed on the Property, which was purchased by Brookline in May 2012. Before making the purchase, Brookline had made inquiries to the City about the status of the Bond. In an email to Neil Kapadia, one of Brookline's two principals, the Customer Service and Permitting Manager for the City, Nan Peterson, stated that "the City does have a bond for the . . . improvements on Lakeview and Reames Road."

In February 2013, Brookline recorded several new plats in order to combine a number of lots on the Property that had been depicted as individual lots in the original Brookline Phase I plan. Brookline then filed a rezoning petition with the City in early 2013 in order to receive approval for its plans to build multi-family housing on the Property. On 30 April 2013, while that rezoning petition was pending, Brookline made another inquiry to the City regarding the status of the Bond. Tom Ferguson, the Engineering Program Manager for the City, provided the following response in an email to Kapadia:

> 1) **What does the bond cover?** The bond covers the required improvements to Lakeview and Reames Roads as specified on the subdivision plans approved by the City on September 6, 2007.
>
> 2) **When will the City call the bond and complete the remaining improvements?** The prior developer/owner has completed sufficient improvements to safely serve the limited development which has occurred to date (only 9 homes built so far). The unfinished improvements include widening for turn lanes, curb & gutter, and sidewalk along Reames Road and a segment of sidewalk on Lakeview Road east of Cushing Street. Until there is additional development activity within the site to warrant construction of the turn lanes on Reames Road, we do not plan to call the bond and complete the remaining improvements.
>
> You previously contacted our office in February 2012 regarding the status of the referenced bond. At that time, we confirmed that the bond was still in place and that the original developer (or the surety) remained responsible for completing the improvements to Reames Road and Lakeview Road. Since that time, you have filed a rezoning petition for the site. The site plan associated with your rezoning petition (2013-047) proposes to relocate the street connections to Reames Road approximately 200 feet north of the connection point shown on the currently approved subdivision plans. Please be advised that the currently held performance bond guarantees construction of improvements as specified on the subdivision plans approved in September 6, 2007. *If you make changes to the approved plans upon which the current performance bond was based, you will likely become fully*

> *responsible for all roadway improvements specified on the revised plans.*

(Emphasis added.)

After receiving this email, Brookline went forward with its rezoning plans, and in July 2013 the City approved Brookline's rezoning petition to allow for multi-family apartment units on the Property. In November 2014, the City approved Brookline's subdivision plan, which provided for certain road improvements (the "Altered Road Improvements") that included several new improvements along with most of the Original Road Improvements. As part of the approval process, Brookline committed to making the Altered Road Improvements.

In the spring and summer of 2014, Brookline tried unsuccessfully to convince the City to call the Bond and force IFIC to pay for the portions of the Original Road Improvements that had not yet been completed and were included within the Altered Road Improvements. After failing to persuade the City to enforce the Bond, Brookline filed the present action against Defendants in Mecklenburg County Superior Court on 17 November 2014. Defendants each filed motions to dismiss, which the trial court denied on 28 May 2015.

Brookline filed an amended complaint on 3 June 2015 in which it requested various forms of declaratory relief relating to the Bond, including a declaration that "the City [was] obligated either to call the Bond and provide those funds to Plaintiffs to use to construct the portion of the Original Road Improvements that remain part of the Altered Road Improvements, or tender as damages to Plaintiffs the cost to construct the portions of the Original Road Improvements that remain of [sic] part of the Altered Road Improvements." Brookline sought accompanying injunctive relief requesting that the trial court direct (1) the City to call the Bond and fund the construction of the Original Road Improvements; (2) IFIC to pay the City the funds necessary to complete the portions of the Original Road Improvements that remained part of the Altered Road Improvements; and (3) the City to advance to Plaintiffs all funds received from IFIC pursuant to the Bond for Brookline's use in completing the Altered Road Improvements. Brookline also asserted a claim, in the alternative, for the recovery of damages for the expenses it would incur if it was required to construct the portions of the Original Road Improvements contained within the Altered Road Improvements.

The parties filed cross-motions for summary judgment, and a hearing was held on 3 August 2015 before the Honorable Hugh B. Lewis. On 24 August 2015, the trial court entered an order granting Defendants'

motions for summary judgment and denying Brookline's cross-motion. Brookline filed a timely notice of appeal.

Analysis

"On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014) (internal citations and quotation marks omitted). "The moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that "[a]n issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *In re Alessandrini*, __ N.C. App. __, __, 769 S.E.2d 214, 216 (2015) (citation omitted).

Brookline's argument that the trial court erred in granting summary judgment in favor of Defendants essentially rests on two main contentions: (1) that the City had an obligation to seek enforcement of the Bond upon Clarion-Reames's default and Brookline is entitled to compel the City's performance of that duty;[1] and (2) that the City's obligation remains ongoing because the Bond was neither invalidated nor extinguished despite the changes in zoning and road improvement plans that occurred after Brookline purchased the property. Because our analysis of the first issue is dispositive of this appeal, we need not address the second issue.

Brookline argues that "a municipality's statutory authority to obtain a performance bond to secure improvements required in connection with the approval and recordation of a subdivision plat, carries an implicit obligation on the municipality to enforce that bond when the primary obligor defaults and loses the development to foreclosure." In order to determine the validity of this contention on the present facts, we must analyze the relevant statutes enacted by the General Assembly

1. Brookline does not argue that it possesses the authority itself to call the Bond. Rather, it contends that the City has a legal duty to call the Bond and that Brookline has the right to compel the City to exercise this power through the present action.

and the applicable ordinance passed by the City pertaining to the use of performance bonds in regulating subdivision development.

The General Assembly has provided that "[a] city may by ordinance regulate the subdivision of land within its territorial jurisdiction." N.C. Gen. Stat. § 160A-371 (2015). Such municipal ordinances

> may provide for the more orderly development of subdivisions by requiring the construction of community service facilities in accordance with municipal plans, policies, and standards. To assure compliance with these and other ordinance requirements, the ordinance may provide for performance guarantees to assure successful completion of required improvements. If a performance guarantee is required, the city shall provide a range of options of types of performance guarantees, including, but not limited to, surety bonds or letters of credit, from which the developer may choose. . . .

N.C. Gen. Stat. § 160A-372(c) (2013).[2]

The City's subdivision ordinance during the time period relevant to this action stated, in pertinent part, as follows:

> Unless specifically noted, before any final plat of a subdivision is eligible for final approval, and before any street is accepted for maintenance by the city or the state department of transportation, minimum improvements, including drainage and soil erosion, must have been completed by the developer and approved by the city or county engineer in accordance with the standards and specifications of the Charlotte Land Development Standards manual or bonded in accordance with section 20-58(c).

Charlotte, N.C., Code § 20-51. Section 20-58(c) of the ordinance, in turn, provided in relevant part the following:

> Where the improvements required by this chapter have not been completed prior to the submission of the final subdivision plat for approval, the approval of the plat will be subject to the owner filing a surety bond or an

2. There were a number of changes made to N.C. Gen. Stat. § 160A-372 in 2015 that became effective after 1 October 2015. *See* 2015 Sess. Laws 486, 486-90, ch. 187, §§ 1-3. We apply the prior version of the statute that was in effect during the time period relevant to this action.

> irrevocable letter of credit with the engineering department . . . with sureties satisfactory to the city guaranteeing the installation of the required improvements . . . . Upon completion of the improvements and the submission of as-built drawings, as required by this chapter, written notice thereof must be given by the subdivider to the appropriate engineering department. The engineering department will arrange for an inspection of the improvements and, if found satisfactory, will, within 30 days of the date of the notice, authorize in writing the release of the security given, subject to the warranty requirement.

Charlotte, N.C., Code § 20-58(c).

We must interpret the above-quoted statutes and ordinance according to well-established principles of statutory construction. *See Woodlief v. Mecklenburg Cty.*, 176 N.C. App. 205, 209, 625 S.E.2d 904, 907 ("The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." (citation and quotation marks omitted)), *disc. review denied*, 360 N.C. 492, 632 S.E.2d 775 (2006).

> The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature. If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms. Thus, in effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.

Lunsford v. Mills, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (internal citations and quotation marks omitted).

Based upon our careful reading of the above-quoted provisions, we are unable to conclude that Brookline is entitled to an order compelling the City to call the Bond. Neither the statutes nor the ordinance contain language either specifying the circumstances under which the City must enforce a performance guarantee or authorizing a developer to compel the City to take such action. This Court is not at liberty to read into the statutes and ordinance words that simply do not exist therein. *See id.* (holding that in construing statutes courts must not "insert words not used"); *In re Duckett*, 271 N.C. 430, 436, 156 S.E.2d 838, 844 (1967) ("It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.").

In an attempt to show that the City had a duty to call the Bond, Brookline points to the language in N.C. Gen. Stat. § 160A-372(c) providing that "[t]o assure compliance with . . . ordinance requirements, the ordinance may provide for performance guarantees to assure successful completion of required improvements." N.C. Gen. Stat. § 160A-372(c). Brookline then asserts that the City's ordinance implementing this statute provides for only one set of circumstances under which a bond may be released — that is, when the City, upon inspection, certifies that the bonded improvements have been completed. *See* Charlotte, N.C., Code § 20-58(c) ("Upon completion of the improvements and the submission of as-built drawings, as required by this chapter, written notice thereof must be given by the subdivider to the appropriate engineering department. The engineering department will arrange for an inspection of the improvements and, if found satisfactory, will, within 30 days of the date of the notice, authorize in writing the release of the security given . . . .").

However, while this language explains how a bond may be satisfied and released after agreed-upon improvements have been made, it does not speak to when — and under what circumstances — the City *must* seek enforcement of a bond. Thus, no duty on the City's part to enforce such bonds is expressly contained in the statutes or the ordinance. And Brookline has failed to persuade us that such a duty is implied therein.

Moreover, even assuming *arguendo* that there are, in fact, some conceivable circumstances under which the City could be compelled to enforce a performance bond by an appropriate party, Brookline is not such a party. Here, Brookline was not a party to the Bond, was not assigned rights under the Bond, and was not a third-party beneficiary of the Bond.[3] Furthermore, Brookline (1) was expressly warned by the City before rezoning the Property and altering the road improvement plans that "[i]f you make changes to the approved plans upon which the current performance bond was based, you will likely become fully responsible for all roadway improvements specified on the revised plans"; and (2) made a commitment to the City — in connection with the City's approval of Brookline's development plans — to construct the required road improvements itself.

While our ruling in this case is based entirely on North Carolina law, we note that our decision is consistent with two recent decisions from

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3. A "public performance bond is a contract, governed by the law of contracts." *Town of Pineville v. Atkinson/Dyer/Watson Architects, P.A.*, 114 N.C. App. 497, 499, 442 S.E.2d 73, 74 (1994).

other jurisdictions that have addressed similar issues.[4] In *Ponderosa Fire District v. Coconino County*, 235 Ariz. 597, 334 P.3d 1256 (Ct. App. 2014), the original developer obtained several bonds to guarantee infrastructure improvements tied to plat approval by Coconino County of a portion — referred to as Unit 3 — of a larger housing development. Units 1 and 2 had already been finished and their improvements installed. The original developer went bankrupt before it could build any homes on — or complete the infrastructure improvements for — Unit 3. *Id.* at 599, 334 P.3d at 1258.

After several trustee sales, a successor developer, Bellemont 276, L.L.C. ("Bellemont"), purchased Unit 3 in order to build homes on it and then sell them to the public. Bellemont attempted to persuade Coconino County to call the bonds that had been obtained by the original developer and covered the required improvements to Unit 3. After failing to convince the county to enforce these bonds, Bellemont brought suit against the county. In its complaint, Bellemont "alleg[ed] that it had acquired Unit 3 with the expectation the bonds would be called to pay for the remaining improvements and infrastructure" and "requested declaratory relief, a writ of mandamus compelling the County to call the bonds, and monetary damages." *Id.* at 600, 334 P.3d at 1259.

On appeal, the Arizona Court of Appeals examined the relevant Arizona statute, which stated in pertinent part that subdivision regulations adopted by a county "shall require the posting of performance bonds, assurances or such other security as may be appropriate and necessary to ensure the installation of required street, sewer, electric and water utilities, drainage, flood control and improvements meeting established minimum standards of design and construction." *Id.* at 602, 334 P.3d at 1261.

The court held that the statute "plainly require[s] the County to 'ensure' that the amount of the bond posted by a developer is sufficient to cover the cost of necessary subdivision improvements. The statute

4. Although decisions from other jurisdictions are not binding on this Court on an issue arising under North Carolina law, we may consider such decisions as persuasive authority. *See Carolina Power & Light Co. v. Employment Sec. Comm'n of N.C.*, 363 N.C. 562, 569, 681 S.E.2d 776, 780 (2009) (noting that while not binding, a decision from another jurisdiction was nonetheless "instructive"); *State v. Williams*, 232 N.C. App. 152, 157, 754 S.E.2d 418, 422 ("While we recognize that decisions from other jurisdictions are, of course, not binding on the courts of this State, we are free to review such decisions for guidance." (citation and quotation marks omitted)), *appeal dismissed and disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014); *Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005) ("Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina's law."), *aff'd*, 361 N.C. 114, 638 S.E.2d 203 (2006).

does not, however, specify when a county is required to call a bond." *Id.* at 603, 334 P.3d at 1262. The court then stated as follows:

> We conclude the County's decision not to call the bonds at this time was a proper exercise of its necessary and implied power under [the statute]. The legislative purpose of the statute is to require developers such as Bellemont to pay for the cost of subdivision improvements. Here, the County determined that calling the bonds did not serve this interest; rather, the County decided, in its discretion, to forego calling the bonds and require Bellemont to pay for the cost of the Unit 3 improvements.
>
> In support of this conclusion, we note that Bellemont's construction of [the statute] would lead to absurd results. Under Bellemont's interpretation of the statute, whenever a developer abandons a subdivision, a county has a mandatory duty to call the bond, regardless of the circumstances. This leaves counties with an open-ended obligation to finish all abandoned subdivision improvements, with no discretion to consider *any* factors that may arise after the final plat is approved. For example, counties would be required to call a bond and finish improvements for a subdivision that may lay vacant for many years. . . .
>
> We therefore conclude the County exercised its discretion under the statute by seeking to have Bellemont install the required subdivision improvements rather than calling the bonds.

Id. at 603-04, 334 P.3d at 1262-63 (internal citations omitted).

The court then examined the relevant Coconino County ordinance, which provided as follows:

> The Final Plat will be submitted to the Board for approval if the construction and improvements have been accepted or if a cash deposit or other financial arrangement acceptable to the County have been made between the subdivider and the Board. In the event the subdivider fails to perform within the time allotted by the Board, then after reasonable notice to the subdivider of the default, the County may do or have done all work and charge subdivider's deposit with all costs and expenses incurred.

Id. at 604, 334 P.3d at 1263 (emphasis omitted).

The court concluded that the language of this ordinance — like the language of the statute — did not limit the county's discretion as to when to call the bonds. Accordingly, the court determined that Bellemont was not entitled to an order compelling the county to enforce the bonds covering Unit 3. *Id.* at 605, 334 P.3d at 1264.

Similarly, in *LDS Development, LLC v. City of Eugene*, 280 Or. App. 611, 382 P.3d 576 (2016), the original developer represented to the City of Eugene, Oregon that it would install certain infrastructure improvements in connection with the city's approval of a development project and obtained a bond guaranteeing its performance. That developer then withdrew from the project before completing the bonded improvements. A successor developer purchased the property and subsequently sued the city, alleging that the city was required to either finish the improvements itself or call the performance bond. *Id.* at 616, 382 P.3d at 579.

On appeal, the Oregon Court of Appeals held that the applicable

> statutes and city code provisions do not require that the city actually exercise its right to call in a bond or complete the improvements itself in the event that a developer fails to do so. Certainly the city may exercise its discretion to complete planned improvements or to enforce a bond provided by a subdivider who failed to fulfill its obligations, but, under the operative statutes, the city is not required to do so.

Id. at 620, 382 P.3d at 582. Thus, the reasoning in *Ponderosa* and *LDS* is fully consistent with our ruling on this issue.

In light of our holding that Brookline lacks authority to compel the City to call the Bond and has no legal rights with respect to the Bond, we likewise reject the notion that it is entitled to any of the other forms of declaratory or injunctive relief requested in its amended complaint. *See Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 824, 611 S.E.2d 191, 194 (2005) ("Absent an enforceable contract right, an action for declaratory relief to construe or apply a contract will not lie."); *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 600, 544 S.E.2d 797, 799 (2001) (concluding that "because plaintiff was a stranger to [the] insurance contract . . . , plaintiff lacked standing to seek a declaratory judgment construing the policy provisions"). Nor do we discern any legal basis upon which Brookline would be entitled to recover monetary damages stemming from the City's exercise of its discretion in not enforcing the Bond.

For these reasons, we hold that the trial court properly granted Defendants' motions for summary judgment and denied Brookline's cross-motion. However, we note that while the precise basis for the trial court's ruling is not entirely clear from its 24 August 2015 order, it appears that the trial court's decision was based primarily on the notions that (1) Brookline's rezoning of the property from single-family homes to multi-family apartments "drastically changed" the 2008 preliminary subdivision plans approved by the City; and (2) the road improvements constructed by Clarion-Reames before the foreclosure were adequate to support the nine existing single-family homes in the development. We need not address either of these issues given our holding that Brookline is not entitled to any of the relief sought in its pleadings because it lacks a legal basis to compel the City to call the Bond or any other legal rights relating to the Bond.

Accordingly, we affirm the ultimate result reached by the trial court albeit for different reasons. *See State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) ("A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." (citation omitted)), *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987); *Cape Fear Pub. Util. Auth. v. Costa*, 205 N.C. App. 589, 598, 697 S.E.2d 338, 343 (2010) (affirming trial court's order granting summary judgment for reasons different from those articulated by trial court).

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges ELMORE and DIETZ concur.

EDWARDS v. EDWARDS

[251 N.C. App. 549 (2017)]

ALLEN G. EDWARDS, PLAINTIFF
v.
CHRISTINE L. EDWARDS, DEFENDANT
v.
BRANDON EDWARDS, THIRD-PARTY DEFENDANT

No. COA16-346

Filed 17 January 2017

1. Divorce—equitable distribution—property valuation—tax report

Where the trial court in an equitable distribution proceeding valued a parcel of real property at $193,195 based on county tax records submitted by the wife, there was no error. The husband did not object to the wife's introduction of the ad valorem tax value of the property, and that tax report supported the trial court's finding regarding the fair market value of the property.

2. Divorce—equitable distribution—rental property valuation—proper calculation

On appeal from the trial court's equitable distribution order, the Court of Appeals reversed and remanded the trial court's valuation of certain rental properties. On one rental property, trial court should have subtracted the husband's expenses for upkeep from the rent received, and on the other rental property, where the husband and wife's adult son had been living, the trial court should have determined how much rent the husband actually received and then subtracted his expenses for upkeep.

Appeal by Plaintiff from order entered 10 December 2015 by Judge Melinda H. Crouch in New Hanover County District Court. Heard in the Court of Appeals 5 October 2016.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III, for the Plaintiff-Appellant.

J. Albert Clyburn for the Defendant-Appellee.

DILLON, Judge.

Allen Edwards ("Husband") appeals from an equitable distribution order. For the following reasons, we affirm in part and reverse and remand in part.

I. Background

Husband and Christine Edwards ("Wife") were married in 1989, separated in 2012, and were divorced in 2013. Mr. and Ms. Edwards had one child during their marriage, Brandon Edwards.[1]

This appeal concerns the equitable distribution of (1) two parcels of real property (one located on St. Mary Church Road and the other on Pointer Lane) and (2) the rental value of both properties during the period of separation.

In its equitable distribution order and judgment, the trial court assigned a net fair market value of $193,195 to the property on St. Mary Church Road and a net fair market value of $109,439 to the property on Pointer Lane. Further, the trial court found that Husband exclusively possessed these properties during the period of separation (approximately 36 months) and that the total fair market rental value of the properties during this period was $72,000 for the entire period ($2,000/month). The trial court distributed this fair market rental value to Husband as divisible property.

Following entry of the trial court's equitable distribution order, Husband timely appealed.

II. Standard of Review

In an equitable distribution proceeding, "the trial court is to determine the net fair market value of [a] property based on the evidence offered by the parties." *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 419, 588 S.E.2d 517, 521 (2003). "A trial court's findings of fact in an equitable distribution case are conclusive if supported by any competent evidence." *Id.* "The mere existence of conflicting evidence or discrepancies in evidence will not justify reversal." *Mrozek v. Mrozek*, 129 N.C. App. 43, 48, 496 S.E.2d 836, 840 (1998).

III. Analysis

A. Fair Market Value of St. Mary Church Road Property

[1] Husband first argues that the trial court's use of the tax value in calculating the fair market value of the St. Mary Church Road property constituted an abuse of discretion. We disagree. Based on well-established

1. Brandon Edwards was added to this action as a third-party Defendant because he held title to certain property that could have been classified as marital property. He is not a party to this appeal and has not submitted any documents to this Court.

Supreme Court precedent, although a real property's tax value is generally not competent to establish the value of the real property, it may be considered by the fact-finder if its introduction is not properly objected to.

Marital property is valued as of the date of separation, *Davis v. Davis*, 360 N.C. 518, 526-27, 631 S.E.2d 114, 120 (2006), which, in this case, was in 2012.

At trial, Husband presented the expert opinion of a real estate appraiser that the value of the St. Mary Church Road property was $61,000 *as of the time of trial* in 2015. Wife presented Wilson County tax records showing that the tax value of the property was determined to be $193,195 *as of January 1, 2008*. After considering this evidence, the trial court found that the fair market value of the St. Mary Church Road property on the date of separation was $193,195, the same amount as the tax value assigned to the property.

Our Supreme Court has held that ad valorem tax records are not competent to establish the market value of real property. *Star Mfg. Co. v. Atlantic Coast Line R.R.*, 222 N.C. 330, 332-33, 23 S.E.2d 32, 36 (1942); *Bunn v. Harris*, 216 N.C. 366, 373, 5 S.E.2d 149, 153 (1939); *Hamilton v. Seaboard*, 150 N.C. 193, 194, 63 S.E. 730, 730 (1909); *Cardwell v. Mebane*, 68 N.C. 485, 487 (1873) ("The 'tax lists' [are] not competent evidence to show the value of the land[.]");[2] *see also Craven County v. Hall*, 87 N.C. App. 256, 258, 360 S.E.2d 479, 480 (1987). This is so because "in the valuation of [] land, for taxation, the owner is not consulted. . . . It is well understood that it is the custom of the assessors to fix a uniform, rather than an actual, valuation." *Bunn*, 216 N.C. at 373, 5 S.E.2d at 153. Further, "the assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the [fact-finder]." *Cardwell*, 68 N.C. at 487. *See also Suffolk & C. R. Co. v. West End Land & Imp. Co.*, 137 N.C. 330, 332-33, 49 S.E. 350, 351 (1904).[3]

However, Husband did not object at trial to Wife's introduction of the ad valorem tax value of the St. Mary Church Road property. And our Supreme Court has long held that "it is a well established rule

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2. Authored by Richmond Mumford Pearson, who served as North Carolina's Chief Justice from 1858-1878. Justice Pearson was our first popularly elected Chief Justice, first elected in 1868.

3. We note that our Court has previously stated that "the *ad valorem* tax value assessed by a county is [] allowed as evidence of the value of real property." *Clay v. Monroe*, 189 N.C. App. 482, 487, 658 S.E.2d 532, 536 (2008) (emphasis added); *see also Brock v. Stone*, 203 N.C. App. 135, 136, 691 S.E.2d 37, 39 (2010). However, we are compelled to follow precedent from our Supreme Court on this issue.

that evidence admitted without objection, though it should have been excluded had proper objection been made, is entitled to be considered for whatever probative value it may have." *Quick v. United Ben. Life Ins. Co.*, 287 N.C. 47, 59, 213 S.E.2d 563, 570 (1975). In a fuller explanation of this rule, our Supreme Court has stated:

> It is generally recognized in this jurisdiction that evidence admitted without objection is properly considered by the court in determining the sufficiency of the evidence and by the jury in determining the issue, even though the evidence is incompetent and should have been excluded had objection been made. . . . The objection to the admission of this evidence must be made at the time of its introduction, and where testimony sufficient to establish a fact at issue has been received in evidence without objection, a nonsuit cannot be sustained even if the only evidence tending to establish the disputed fact is incompetent.

Reeves v. Hill, 272 N.C. 352, 362, 158 S.E.2d 529, 537 (1968) (internal marks and citations omitted); *see also Jackson v. N.C. Dept. of Commerce*, ___ N.C. App. ___, ___, 775 S.E.2d 687, 689 (2015).

Here, the trial court's finding regarding the fair market value of the St. Mary Church Road property was supported by the property tax report submitted by Wife with no objection from Husband. Therefore, we affirm the trial court's valuation of the property. *See Mrozek*, 129 N.C. App. at 48, 496 S.E.2d at 840.

B. Fair Market Rental Value

[2] Husband's second argument relates to the trial court's calculation of the fair market rental value of the properties during the 36-month period of separation. Wife concedes that Husband is correct in his argument.

For the St. Mary Church Road property, the trial court imputed and distributed a fair market rental value of $43,200 to Husband based on a fair rental value of $1,200 per month *times* 36 months. Husband argues that the trial court's findings concerning the fair market value is not supported by competent evidence, and Wife makes no argument to the contrary. Rather, the parties agree that the proper calculation should be the actual amount of rent received by Husband during this period *minus* the expenses paid by Husband for the upkeep of the property during this period. The parties concede that competent evidence in the record shows that Husband received gross rental income of $15,200 during the period of separation and that the matter should be remanded in

order to allow the trial court to determine what reduction in this value, if any, Husband is entitled to for the $6,833 he claims he expended for the upkeep of the property during the period of separation. Accordingly, we reverse and remand the trial court's valuation of this divisible property as set forth in the Conclusion. *See* N.C. R. App. P., Rule 28.

For the Pointer Lane property, the trial court imputed and distributed a fair market rental value of $28,800 ($800/month) to Husband. Husband testified that in his opinion, a fair market rental value for the Pointer Lane property would be approximately $800 per month. Husband further testified that the parties' son was occupying Pointer Lane and was not paying rent. Wife testified that their son was paying approximately $300 per month. On appeal, Husband argues that the trial court abused its discretion in valuing this divisible property at $28,800. Wife makes no argument to support the trial court's valuation, but rather concedes that their adult son lived at Pointer Lane during the relevant time period and that the imputed rental value should only be the amount Husband actually received. We note that the trial court made no findings to show its reasoning in using a fair rental value number when the parties' son was living in the property. We further note that there is conflicting evidence in the record as to how much rent, if any, Husband actually received. Accordingly, we reverse and remand this valuation, as set forth in the Conclusion. *See* N.C. R. App. P., Rule 28.

IV. Conclusion

The trial court's valuation of the St. Mary Church Road property based on the tax value evidence is affirmed. Though tax value evidence is generally not competent to prove value, the evidence offered by Wife was not objected to and could therefore be considered by the trial court in its valuation of the St. Mary Church Road property.

The trial court's valuation of certain divisible property – namely, the rental value of the St. Mary Church Road and Pointer Lane properties during the period of separation – is reversed and remanded. On remand, the trial court shall determine the rental value of the St. Mary Church Road property at the rent actually received by Husband (which the parties concede to be $15,200.00) *minus* Husband's expenses as allowed by the trial court. The trial court shall determine the rental value of the Pointer Lane property based on the rent actually received by Husband minus any expenses paid by Husband as allowed by the trial court. In doing so, the trial court shall make findings concerning Husband's expenses for both properties and may, in its discretion, receive additional evidence if necessary. Finally, after the trial court has re-valued

this divisible property, the trial court may redistribute any marital and divisible property to achieve an equitable distribution.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges ELMORE and HUNTER, JR., concur.

BAKER A MITCHELL, JR, AND THE ROGER BACON ACADEMY, INC, PLAINTIFFS
v.
EDWARD H PRUDEN, IN HIS INDIVIDUAL CAPACITY, DEFENDANT

No. COA16-428

Filed 17 January 2017

1. Appeal and Error—interlocutory orders and appeals—substantial right—governmental immunity—public official immunity—judicial/quasi-judicial immunity

Although defendant's appeal from a denial of a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) was from an interlocutory order, the affirmative defenses of governmental immunity, public official immunity, and judicial/quasi-judicial immunity entitled defendant to immediate appellate review.

2. Immunity—public official immunity—superintendent—approval of new charter school

The trial court erred by denying defendant's motion to dismiss plaintiffs' second amended complaint alleging claims of libel *per se*, libel *per quod*, unfair and deceptive trade practices, and punitive damages. Defendant was entitled to public official immunity. Defendant's actions were consistent with the duties and authority of a superintendent and constituted permissible opinions regarding his concerns for the approval of a new charter school.

Appeal by defendant from order entered 20 January 2016 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 20 October 2016.

Nexsen Pruet, PLLC, by G. Eugene Boyce, R. Daniel Boyce, and Alex R. Williams, for plaintiff-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Edwin Love West, III, Julia C. Ambrose, and Eric M. David, for defendant-appellant.

McCULLOUGH, Judge.

Edward H. Pruden ("defendant") appeals from an order denying his motion to dismiss Baker A. Mitchell, Jr. ("Mitchell") and The Roger Bacon Academy, Inc.'s ("RBA") (collectively "plaintiffs") second amended complaint. For the reasons stated herein, we reverse the order of the trial court.

I. Background

On 6 January 2015, plaintiffs filed a complaint against defendant. On 13 January 2015, plaintiffs filed an amended complaint.

On 15 July 2015, plaintiffs filed a second amended complaint alleging claims of libel *per se*, libel *per quod*, unfair and deceptive trade practices ("UDTP"), and punitive damages. The second amended complaint alleged as follows: Mitchell is the owner and manager of RBA, founded in 1999. RBA is a corporation, engaged in the organization, support, and operation of four public charter schools in southeast North Carolina: Charter Day School ("CDS"), Columbus Charter Schools, Douglass Academy, and South Brunswick Charter School. Defendant was Superintendent of Brunswick County Schools ("BCS") from 1 July 2010 until 30 November 2014. Defendant, acting outside of the scope of his employment as Superintendent, falsely stated to third parties that the public charter schools were "dismantling" North Carolina's public education system and that they have "morphed into an entrepreneurial opportunity." On 4 December 2013, a video entitled "Dr. Pruden Superintendent of the Year Video" was published on YouTube. In that video, defendant falsely stated that BCS was superior to the "competition" because BCS "does not operate schools for a profit." Plaintiffs alleged that defendant's reference to "competition" was "clearly a reference" to the public charter schools for children of Brunswick County.

The second amended complaint further alleged as follows: In 2013, RBA submitted an application to the Office of Charter Schools for a new public charter school named "South Brunswick Charter School" ("SBCS"). Defendant began an "obsessive public campaign to derail approval" of the new school, "viciously defaming the character and reputation" of Mitchell. First, defendant submitted a "Local Education Agency Impact Statement" to the Office of Charter Schools on 9 April 2013

and a revised impact statement ("impact statement") on 14 May 2013. At some time after 20 May 2013, defendant's impact statement was posted to a website maintained by the North Carolina Department of Public Instruction. Plaintiffs alleged that the impact statement contained statements that "maligns" plaintiffs and "casts aspersions on Mitchell's honesty, character and moral standing in the community[.]" Defendant also privately petitioned at least one member of the Charter School Advisory Council ("CSAC") to manipulate the approval process such that approval of the charter would be denied. The vice-chair of the CSAC, Tim Markley ("Markley"), "issued repeated challenges" to the SBCS. On 16 July 2013, a motion was made to approve the SBCS conditioned upon a change in the CDS Board. Markley met with defendant in the hall after the meeting and Markley was overheard expressing his regrets and apologizing for not being able to prevent approval of the SBCS charter.

Plaintiffs alleged that defendant, acting in his individual capacity, began submission of "a parade of documents" to the North Carolina State Board of Education ("SBE"), including copies of defamatory letters written to Mr. Bill Cobey, chairman of the SBE, expressing false allegations and his concerns about what defendant claimed were conflicts of interest between Mitchell, RBA, and public charter schools. In a letter dated 7 August 2013 to Mr. Cobey and the SBE, defendant urged that the SBE consider information regarding conflicts of interest before taking action on the application for SBCS. Plaintiffs alleged that this letter contained statements which were "false, libelous and intended to impugn the ethical reputation and character of Mitchell" by stating as follows:

> As evidenced by the nature of the CSAC's final vote, which required two attempts to obtain a majority, there are many "red flags" surrounding [SBCS's] application and the apparent and multiple conflicts of interest surrounding the Roger Bacon Academy and Charter Day School's board of directors.

Plaintiffs further alleged that in a letter dated 3 September 2013 to Mr. Cobey and the SBE, defendant, outside of the scope of his duties, formally requested a "delay granting preliminary approval to [SBCS] due to violations of North Carolina's Public Records Law and heightened conflict of interest concerns[.]" In a letter dated 4 November 2013 to Mr. Cobey and the SBE, defendant sought a response from the SBE regarding its investigation into the conflict of interest allegations raised by defendant. On 20 December 2013, Mr. Cobey responded to these letters informing defendant that "after careful review for actual and potential conflicts of interest, the [State Ethics] Commission has determined that

Mr. Mitchell is eligible to serve on the CSAB [Charter School Advisory Board] and has not identified any actual conflicts of interest[.]" Plaintiffs alleged that in a 7 January 2014 letter, defendant "accosted" the SBE, encouraging the SBE to continue investigation of Mitchell, RBA, and CDS. Regarding all the letters, plaintiffs alleged that defendant had no information to support the false and defamatory statements, that his actions were outside the scope of his duties as Superintendent, and that they were only meant to further his personal campaign to maliciously defame plaintiffs.

Plaintiffs alleged that although defendant knew the falsity of his statements, on 7 January 2014, defendant published the 7 August 2013, 3 September 2013, 4 November 2014, and 7 January 2014 letters to media outlets across southeast North Carolina. After the publication of defendant's false and defamatory statements, CDS and Douglass Academy saw a profound reduction in enrollment and RBA received a reduction in management fees. Plaintiffs alleged that defendant acted with actual malice, in his individual capacity, and outside the scope of his duties as Superintendent. Thus, they alleged that sovereign immunity did not apply or alternatively, that it was waived.

On 6 November 2015, defendant filed a motion to dismiss plaintiffs' second amended complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendant argued that his statements were made in his official capacity, on behalf of the Brunswick County Board of Education. Defendant claimed plaintiffs failed to plead wavier of sovereign/governmental immunity with the required specificity. Furthermore, defendant argued that plaintiffs' claims were barred by the doctrine of sovereign/governmental immunity, public official immunity, and judicial or quasi-judicial immunity. As to the claims of libel *per se* and libel *per quod*, defendant argued that the claims failed because the statements at issue were not "of and concerning" plaintiffs, not defamatory as a matter of law, and not false. Defendant also argued that plaintiffs' claims were barred by the applicable statute of limitations, N.C. Gen. Stat. § 1-54, as all but one of the statements at issue was published more than a year before the complaint was filed. Defendant contended that the UDTP claim failed because the underlying claims for libel failed to state a claim for relief and that Chapter 75 of the North Carolina General Statutes does not create a cause of action against an agency or subdivision of the State. Defendant argued that he was entitled to reasonable attorneys' fees because plaintiffs knew, or should have known, this action was frivolous and malicious. Lastly, defendant contended that plaintiffs' claims were barred by the protections of the

First Amendment to the United States Constitution and Article I, Section 14 of the North Carolina Constitution.

Following a hearing held on 17 November 2015, the trial court entered an order on 20 January 2016, denying defendant's Rule 12(b)(6) motion and defendant's oral Rule 12(b)(1) motion to dismiss. Defendant appeals from this order.

II. Discussion

The sole issue on appeal is whether the trial court erred by denying defendant's motion to dismiss plaintiffs' second amended complaint. Defendant argues that he is entitled to quasi-judicial immunity, public official immunity, and governmental immunity.

[1] Defendant's appeal from a denial of a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) is interlocutory. *See Bolton Corp. v. T.A. Loving Co.*, 317 N.C. 623, 629, 347 S.E.2d 369, 373 (1986). However, "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Hines v. Yates*, 171 N.C. App. 150, 156, 614 S.E.2d 385, 389 (2005). Also, rulings "denying dispositive motions based on [a] public official's immunity affect a substantial right and are immediately appealable." *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001). Because defendant's motion to dismiss and arguments assert the affirmative defenses of governmental immunity, public official immunity, and judicial/quasi-judicial immunity, we hold that this appeal is properly before our Court.

> On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim.

Green v. Kearney, 203 N.C. App. 260, 266-67, 690 S.E.2d 755, 761 (2010) (citation omitted). "Although well-pleaded factual allegations of the complaint are treated as true for purposes of a 12(b)(6) motion, conclusions of law or unwarranted deductions of facts are not admitted." *Dalenko v. Wake County Dep't of Human Servs.*, 157 N.C. App. 49, 56, 578 S.E.2d 599, 604 (2003) (internal quotation marks and citation omitted).

> A complaint is not sufficient to withstand a motion to dismiss if an insurmountable bar to recovery appears on the face of the complaint. Such an insurmountable bar may consist of an absence of law to support a claim, an absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily defeats the claim.

Al-Hourani v. Ashley, 126 N.C. App. 519, 521, 485 S.E.2d 887, 889 (1997) (internal citations omitted).

[2] First, we consider whether the trial court erred by denying defendant's motion to dismiss under the doctrine of public official immunity.

"A public official is one who exercises some portion of sovereign power and discretion, whereas public employees perform ministerial duties." *Dalenko*, 157 N.C. App. at 55, 578 S.E.2d at 603 (citation omitted). "Clearly, the superintendent of a school system must perform discretionary acts requiring personal deliberation, decision and judgment." *Gunter v. Anders*, 114 N.C. App. 61, 67, 441 S.E.2d 167, 171 (1994). Therefore, defendant, as the superintendent of BCS from 1 July 2010 until 30 November 2014, was a public officer for purposes of immunity.

> The defense of public official immunity is a "derivative form" of governmental immunity. Public official immunity precludes suits against public officials in their individual capacities and protects them from liability "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]"

Fullwood v. Barnes, __ N.C. App. __, __, 792 S.E.2d 545, __ (2016) (internal citations omitted). "Thus, a public official is immune from suit unless the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 288, 730 S.E.2d 226, 230 (2012). "Actions that are malicious, corrupt, or outside of the scope of official duties will pierce the cloak of official immunity[.]" *Fullwood*, __ N.C. App. at __, 792 S.E.2d at __.

"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." *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984).

> It is well settled that absent evidence to the contrary, it will always be presumed that public officials will discharge

> their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places a heavy burden on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence.

Strickland v. Hedrick, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008) (citation omitted). "Any evidence presented to rebut this presumption must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise." *Fullwood*, __ N.C. App. at __, 792 S.E.2d at __ (citation and internal quotation marks omitted).

In the present case, plaintiffs' second amended complaint included allegations that defendant was "acting beyond the scope of his employment as Superintendent[]" and that defendant's actions were "outside the scope of his duties as Superintendent and only meant to further his personal campaign to maliciously defame Mitchell and RBA."

We note that although the second amended complaint alleges that defendant's actions were beyond the scope of his duties, "we are not required to treat this allegation of a legal conclusion as true." *Dalenko*, 157 N.C. App. at 56, 578 S.E.2d at 604.

The factual allegations in the second amended complaint, considered as true, tend to show, in pertinent part, that: on 4 December 2013, a video entitled "Dr. Pruden Superintendent of the Year Video" was published on the YouTube website where defendant references the "competition," that BCS does not operate schools for a profit, and tells the competition "game on"; defendant submitted the impact statement, approved by the Brunswick County Board of Education, to the Office of Charter Schools in compliance with N.C. Gen. Stat. § 115C-238.29D(d)(3) (2012)[1]; the impact statement noted that "Brunswick County opposes the approval of the South Brunswick Charter School application[]"; the impact statement was then posted on a website maintained by the North Carolina Department of Public Instruction, Office of Charter Schools; in a letter dated 7 August 2013, addressed to Mr. Cobey and all members of the SBE, and signed by defendant as Superintendent of BCS, defendant expressed concerns regarding possible conflicts of interest surrounding

1. The statute in place at that time stated that the "board of education of the local school administrative unit in which the charter school is located" would have "an opportunity to be heard by the State Board of Education on any adverse impact the proposed growth would have on the unit's ability to provide a sound basic education to its students[.]" N.C. Gen. Stat. § 115C-238.29D(d)(3) (2012).

the RBA and CDS's board of directors and stated that the letter was endorsed unanimously by four members of the Brunswick County Board of Education; in a letter dated 3 September 2013, addressed to Mr. Cobey and all members of the SBE, and signed by defendant as Superintendent of BCS, defendant requested that the SBE delay voting on whether or not to grant preliminary approval for the fourth charter school to be managed by the RBA and to seek additional information from the Office of Charter Schools regarding conflicts of interest; in a letter dated 4 November 2013, addressed to Mr. Cobey and all members of the SBE, and signed by defendant as Superintendent of BCS, defendant sought an update and response from the SBE regarding its investigation into the potential conflicts of interest; on 20 December 2013, defendant received a letter from Mr. Cobey that informed him that the State Ethics Commission had determined that Mitchell was eligible to serve on the Charter School Advisory Board; in a letter dated 7 January 2014, addressed to Mr. Cobey and all members of the SBE, and signed by defendant as Superintendent of BCS, defendant acknowledges receiving the 20 December 2013 letter but addresses "additional concerns to which [the 20 December 2013] letter did not respond[]" and asks the SBE to pursue a "real, substantive investigation of these issues before committing over one million dollars ($1,000,000) of additional taxpayer dollars next year[]"; and on 7 January 2014, defendant instructed the Executive Director of Quality Assurance and Community Engagement with BCS to republish the 7 August 2013, 3 September 2013, 4 November 2013, and 7 January 2014 letters to media outlets across southeast North Carolina.

After considering the foregoing, we hold that the second amended complaint does not allege facts which would support a legal conclusion that any of defendant's alleged conduct was outside the scope of his duties as Superintendent of BCS. Defendant's actions were consistent with the duties and authority of a superintendent and constituted permissible opinions regarding his concerns for the approval of a new charter school.

As to the allegations of malice, the second amended complaint merely stated that defendant's actions were "only meant to further his personal campaign to maliciously defame Mitchell and RBA[.]" It is well established that "a conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion." *Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 890 (1997). Here, plaintiffs state bare, conclusory allegations that

defendant acted with malice. Because we presume that defendant discharged his duties in good faith and exercised his power in accordance with the spirit and purpose of the law and plaintiffs have not shown any evidence to the contrary, we hold that the second amended complaint failed to allege facts which would support a legal conclusion that defendant acted with malice.

In conclusion, we hold that the allegations of plaintiff's second amended complaint are legally insufficient to overcome defendant's public official immunity. Accordingly, we hold that the trial court erred by denying defendant's motion to dismiss plaintiffs' second amended complaint under the doctrine of public official immunity, and reverse the order of the trial court. Because we hold that defendant is entitled to public official immunity, we do not reach defendant's remaining arguments.

III. Conclusion

The 20 January 2016 order of the trial court is reversed.

REVERSED.

Judges STROUD and ZACHARY concur.

RME MANAGEMENT, LLC, PLAINTIFF
v.
CHAPEL H.O.M. ASSOCIATES, LLC AND CHAPEL HILL MOTEL ENTERPRISES, INC., DEFENDANTS

No. COA16-596

Filed 17 January 2017

Landlord and Tenant—lease—timeliness of tax payment—implicit grace period

The trial court did not err by denying plaintiff lessor's motion for summary judgment and granting summary judgment in favor of defendant lessees. The pertinent taxes were paid during the implicit grace period which the lease afforded, given the ordinary meaning of the terms used, and in light of the course of dealing.

Appeal by plaintiff from order entered 7 March 2016 by Judge Lunsford Long in Orange County District Court. Heard in the Court of Appeals 3 November 2016.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and James R. Baker, for plaintiff-appellant.

Troutman Sanders LLP, by Ashley H. Story and D. Kyle Deak, for defendants-appellees.

ZACHARY, Judge.

Plaintiff RME Management, LLC (RME) appeals an order granting summary judgment in favor of Defendants Chapel H.O.M. Associates, LLC (HOM) and Chapel Hill Motel Enterprises, Inc. (CHME). For the reasons that follow, we affirm.

I. Background

RME and HOM are the assignees of the lessor and the lessee, respectively, of real property located at 1301 Fordham Boulevard in Chapel Hill, North Carolina (the property). The lease was executed on 17 March 1966, and shortly thereafter, the original lessee built a hotel on the property, which is still in operation today. In January 1967, CHME entered into a sublease to operate the hotel. The lease and sublease were assigned to HOM in August 1988. RME became the owner and current lessor of the property in October 2012.

The lease's initial term commenced on 1 January 1966 and was scheduled to terminate on 31 December 2015. However, the lease contained a renewal option that allowed HOM to extend the lease for an additional forty-nine years. HOM exercised the renewal option in September 2014, and the additional forty-nine-year lease term was set to commence on 1 January 2016.

Central to this case, the lease contained two provisions that required HOM, as lessee, to pay taxes assessed against the property. Paragraph 17 of the lease provides, in pertinent part:

> As a further rental hereunder, the Lessee shall pay all ad valorem and personal property taxes which may be assessed against the demised premises and the improvements thereon and personal property located therein, or any part thereof, for each year of the term of this lease. . . .

Paragraph 19 further provides that:

> The Lessee expressly agrees to pay all installments of taxes and assessments required to be paid by it hereunder *when due*, subject to the right of said Lessee to contest

> such tax or assessment, in good faith, provided the title of the Lessors shall not be placed in jeopardy by forfeiture, foreclosure, sale under tax warrant, or otherwise.

(Emphasis added). Although HOM's obligation to pay property taxes is clear, the lease does not define the term "when due" as it relates to the date by which the taxes must be paid. The lease also contains a default provision:

> If any default of the Lessee hereunder shall continue uncorrected for thirty (30) days after notice thereof from the Lessors, the Lessors may, by giving written notice to the Lessee, at any time thereafter during the continuance of such default either (a) terminate the lease, or (b) re-enter the demised premises by summary process or otherwise, and expel the Lessee and remove all personal property therefrom and re-let the premises at the best rent obtainable. . . .

Property tax notifications and bills were mailed to CHME (which was obligated to pay property taxes, in full, under the sublease), and HOM appears to have relied on CHME to make all necessary payments. While the subject of considerable dispute on appeal, it appears that RME, HOM, and their predecessors never gave much, if any, attention to when the property taxes were being paid before 2013.

On 23 October 2013, however, RME's attorney, Jonathan Ganz, sent a letter to defendants alleging that they had breached the lease by failing to pay property taxes on or before September 1st in each of the preceding four years. The letter stated that RME had just recently become aware of these circumstances, and further asserted that "[i]n Orange County, real property tax bills for a calendar year are due on September 1 of that year." HOM responded, through its attorney, by sending a letter to RME, asserting that the lease did not require the tenant to pay taxes by September 1st of any fiscal year. Despite the parties' contrary positions on the issue of exactly when property tax payments were to be made, RME took no further action at that time, as Mr. Ganz's letter failed to comply with the technical requirements of the lease's notice and default provisions.

There was no dispute in 2014 as to when the property taxes had to be paid, as CHME appealed the property's valuation, thereby tolling the date on which the taxes were "due" under the lease. However, the 2015 tax bill for the property was issued in July 2015 and defendants did not pay the taxes by 1 September 2015. As a result, on 21 September 2015,

RME sent HOM a notice of default "for failure to pay all taxes as required pursuant to the lease." HOM responded as follows in a letter dated 16 October 2016:

> This letter is sent in response to your letter dated September 21, 2015 which wrongfully alleges a default under the Lease. We specifically deny that a default exists for failure to pay all taxes as required under the Lease.
>
> Pursuant to N.C.G.S. § 105-360, 2015 real property taxes are payable without interest through January 5, 2016. Real property taxes are not delinquent, and interest does not begin to accrue until January 6, 2016. As such, there exists no delinquency in the payment of real property taxes and no default under the terms of the Lease.

For whatever reason, defendants chose not to pay the property tax bill immediately, an action that would have cured the alleged default. Consequently, RME sent HOM a written notice that the lease had been terminated and instructed HOM and CHME to vacate the premises.

The notice of termination was dated 27 October 2015, the same day that RME filed a summary ejectment action against defendants in the Small Claims Division of Orange County District Court. RME paid the taxes on the morning of 3 November 2015. Later that same day, Federal Express delivered a tax payment from CHME to the Orange County Tax Administrator's Revenue Division. Thereafter, HOM tried to tender the amount of the 2015 tax payment to RME on two occasions, but RME refused to accept reimbursement.

The complaint seeking summary ejectment was dismissed by an Orange County Magistrate on 10 November 2015. RME noted an appeal to Orange County District Court on 18 November 2015, and also filed a motion for summary judgment. After conducting a hearing on the matter, the trial court denied RME's motion for summary judgment and granted summary judgment in favor of defendants. The trial court's order held:

> Here, the course of dealing clearly shows that the parties historically did not construe the lease to require that the taxes be paid by midnight on September 1 each year; they understood the terms "pay" and "pay when due" to have been used in their ordinary sense, rather than within the technical, literal definitional requirements of N.C. Gen. Stat. § 105-360.

> The ordinary meaning of "pay" and "pay when due" customarily includes an implicit grace period during which payment can be made without being overdue; few obligations, and certainly not property taxes, are expected to be paid on the very first day they become due.
>
> The taxes were paid during the implicit grace period which the lease afforded, given the ordinary meaning of the terms used, and in light of the course of dealing.
>
> Accordingly, there is no genuine issue as to any material fact, Defendants are entitled to judgment as a matter of law, Plaintiff's motion for summary should be denied, and summary judgment should be entered for Defendants[.]

RME appeals.

II. Analysis

RME's principal arguments on appeal are that the trial court erred in denying its summary judgment motion and in granting summary judgment in favor of defendants. We disagree.

A. Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986) (citation omitted). "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." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (citation and internal quotation marks omitted). "A trial court may enter summary judgment in a contract dispute if the provision at issue is not ambiguous and there are no issues of material fact." *Malone v. Barnette*, __ N.C. App. __, __, 772 S.E.2d 256, 259 (2015) (citing *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 633, 684 S.E.2d 709, 719 (2009) ("[W]hen the language of a contract is not ambiguous, no factual issue appears and only a question of law which

is appropriate for summary judgment is presented to the court."), and other citation omitted). Furthermore, if a grant of "summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

B. "When Due"

RME argues that the trial court improperly denied its motion for summary judgment on the summary ejectment claim and that that the court erred in granting summary judgment in favor of defendants. More specifically, RME contends that Paragraph 19 of the lease, which states that taxes must be paid "when due," required defendants to pay the taxes immediately on 1 September 2015. RME's argument, as we understand it, is that because tax payments became "due" under N.C. Gen. Stat. § 105-360 on September 1st, any payment made after that date was late, or "past due," such that RME was entitled to send a notice of default and terminate the lease. In contrast, defendants argue that because the taxes first became due on September 1st and were not delinquent until January 6th, the taxes were "due," i.e., payable, at any time from September 1st to January 5th (of the following year). We agree with defendants.

"A lease is a contract which contains both property rights and contractual rights." *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 570, 500 S.E.2d 752, 756 (citation omitted), *disc. review denied*, 349 N.C. 240, 514 S.E.2d 274 (1998). The provisions of a lease are, therefore, interpreted according to general principles of contract law. *Martin v. Ray Lackey Enters., Inc.*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990).

"Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution." *State v. Philip Morris USA, Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (citing *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973)). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citation omitted). "When the language of a contract is plain and unambiguous then construction of the agreement is a matter of law for the court." *Whirlpool Corp. v. Dailey Constr., Inc.*, 110 N.C. App. 468, 471, 429 S.E.2d 748, 751 (1993). In such a case, " 'the court may not ignore or delete any of [the contract's] provisions, nor insert words into it, but must construe the contract as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms.' " *Hemric v. Groce*, 169 N.C. App. 69, 76, 609 S.E.2d 276, 282 (quoting *Martin v. Martin*, 26 N.C. App. 506, 508, 216 S.E.2d 456, 457-58 (1975)), *cert. denied*, 359 N.C. 631, 616 S.E.2d 234 (2005).

If the contract's terms are ambiguous, however, "then resort to extrinsic evidence is necessary and the question is one for the jury." *Whirlpool Corp.*, 110 N.C. App. at 471, 429 S.E.2d at 751 (citation omitted). Even so, "ambiguity . . . is not established by the mere fact that [one party] makes a claim based upon a construction of its language which the [other party] asserts is not its meaning." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). Instead, "[a]n ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Holshouser v. Shaner Hotel Grp. Props. One Ltd. P'ship*, 134 N.C. App. 391, 397, 518 S.E.2d 17, 23 (1999), *aff'd per curiam*, 351 N.C. 330, 524 S.E.2d 568 (2000) (citations and internal quotation marks omitted).

An additional principle of contract construction is that "parties are generally presumed to take into account all existing laws when entering into a contract." *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 406, 584 S.E.2d 731, 739 (2003) (citation omitted). "When the language of a statute is clear and without ambiguity, 'there is no room for judicial construction,' and the statute must be given effect in accordance with its plain and definite meaning." *AVCO Fin. Servs. v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (citation omitted). Mindful that our central task is to interpret the parties' intent "at the moment of [the lease's] execution," *Philip Morris USA, Inc.*, 359 N.C. at 773, 618 S.E.2d at 225, we first note that the relevant statute—in terms of intent—is the one that was in effect in 1966, N.C. Gen. Stat. § 105-345 (1965).[1] However, there is no material difference between the 1965-version of section 105-345 and its successor, N.C. Gen. Stat. § 105-360(a) (2015), which provides:

> Taxes levied under this Subchapter by a taxing unit are *due and payable* on September 1 of the fiscal year for which the taxes are levied. Taxes are payable at par or face amount if paid before January 6 following the due date. Taxes paid on or after January 6 following the due date are subject to interest charges. Interest accrues on taxes paid on or after January 6 as follows. . . .

1. Section 105-345 provided that all property taxes were "due and payable on the first Monday of October in which they [were] . . . assessed or levied." It also provided that if tax payments were made in cash "[a]fter the first day of November and on or before the first day of February next after due and payable, the tax shall be paid at par or face value." N.C. Gen. Stat. § 105-345(2) (1965).

(emphasis added). Therefore, we base our analysis, as have the parties, on the language contained in section 105-360. Here, we must interpret the phrase "when due" in relation to defendants' obligation to pay property taxes under Paragraph 19 of the lease and section 105-360. More precisely, the issue presented is whether a lessee fails to perform its obligation when property taxes are not paid at the moment they become due when a lease requires the lessee to pay taxes "when due." No appellate decisions in North Carolina have addressed this exact question, but the Court of Appeals of Michigan has confronted the issue.

In *Roseborough v. Empire of America*, the plaintiffs claimed that the defendant bank had failed to pay the real estate taxes in a timely manner, as required by the parties' mortgage agreement. 168 Mich. App. 92, 93, 423 N.W.2d 578, 579 (1987) (per curiam). The plaintiffs contended that the bank's agreement to pay the taxes "when due" required payment of the 1984 taxes on 1 December 1984, the date on which property tax collection commenced and the amounts assessed became a lien on the property. *Id.* at 95, 423 N.W.2d at 579. As a result, the *Roseborough* Court had to interpret the mortgage contract language "when due" in relation to the obligation to pay property taxes under the law. *Id.* The Court held that "when due" meant when payable, which under Michigan law was a period commencing December 1st and ending at the point that the tax bill became delinquent on the following February 15th. *Id.* at 95-96, 423 N.W.2d at 579. Accordingly, the taxes were "due," in the sense of being payable, at any time between December 1st and February 15th, not just on December 1st.

Although clearly not controlling, we find the reasoning in *Roseborough* compelling, and we apply it to the circumstances of this case. The effect of the interpretation that RME urges us to adopt is as follows: the lease required defendant to pay the taxes at the moment they first became "due." Under this interpretation, defendants could only meet their obligation by paying the property taxes on, and only on, September 1st. In other words, any payment before September 1st would be "early," any payment on September 1st would be "when due," and any payment after September 1st would be late, or past the point "when" the payments were "due." This is a nonsensical, hyper-technical construction of the lease and North Carolina property tax law.

Indeed, after noting that the first sentence of section 105-360 provides that property taxes are "due and payable on September 1," and that the second sentence provides that property taxes are "payable" without interest "if paid before January 6 following the due date," RME

argues that "[d]efendants' statement that taxes are 'due and payable through January 5' inserts the phrase 'and payable' into the second sentence of the statute." But there is no meaningful distinction between the terms due and payable. As recognized by one of America's leading legal lexicographers, "[b]ecause a debt cannot be *due* without also being *payable*, the doublet *due* and *payable* is unnecessary in place of *due*." Bryan A. Gardner, *A Dictionary of Modern Legal Usage* 299 (2d ed. 1995). Just because taxes first become due on September 1st does not mean that they become past due on the following day. Instead, property taxes in North Carolina are "due" (i.e., payable) over a period of time (September 1st through the following January 5th) and not on any single date. The use of the phrase "when due," without qualifying language, must be given its plain meaning, and its plain meaning is, when applied to section 105-360, the period of time between the first and last dates for timely payment of those taxes (September 1st and January 5th, respectively). As noted in *Roseborough*, "Plaintiffs' argument would have more force if the . . . agreement contained qualifying language such as 'when first become due' or 'at the moment taxes become due.' " 168 Mich. App. at 95-96, 423 N.W.2d at 579. Such qualifying language is absent from the lease in the instant case. Accordingly, we reject RME's interpretation of the phrase "when due" as it relates to HOM's obligation to pay property taxes under the lease.

Application of section 105-360 to the lease's terms reveals that taxes on the property first become due on September 1st, but they do not become past due or delinquent until the following January 6th. Because the plain meaning of "when due" refers to the period running from September 1st to January 5th, we conclude that Paragraph 19 of the lease is not ambiguous. When RME sent notice of termination in October 2015 and paid the property taxes in November 2015, RME deprived HOM of the opportunity to meet its obligation to pay (or direct CHME to pay) the taxes on or before 5 January 2016. The trial court, therefore, properly concluded that no genuine issue of material fact remained, that RME's motion for summary judgment should be denied, and that summary judgment should be entered in favor of defendants. As our decision results solely from our interpretation of Paragraph 19's plain language, we need not address whether the trial court properly considered evidence of the parties' prior course of dealing. *See Shore*, 324 N.C. at 428, 378 S.E.2d at 779 ("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.").

III. Conclusion

For the reasons stated above, we affirm the trial court's order denying RME's motion for summary judgment and granting summary judgment in favor of defendants.

AFFIRMED.

Judges STROUD and McCULLOUGH concur.

SOUTHERN SHORES REALTY SERVICES, INC., PLAINTIFF
v.
WILLIAM G. MILLER, THE MILLER FAMILY LIMITED PARTNERSHIP II, THE MILLER FAMILY LIMITED PARTNERSHIP III, OLD GLORY II, LLC, OLD GLORY III, LLC, OLD GLORY IV, LLC, OLD GLORY V, LLC, OLD GLORY VI, LLC, OLD GLORY VII, LLC, OLD GLORY IX, LLC, OLD GLORY XI, LLC, OLD GLORY XII, LLC, AND OLD GLORY XIII, LLC, DEFENDANTS

No. COA16-557

Filed 17 January 2017

Corporations—breach of contract—piercing the corporate veil—directed verdict—judgment notwithstanding verdict

The trial court did not err by denying defendants' motions for directed verdict or judgment notwithstanding the verdict on plaintiff's claims for breach of contract against all defendants, and on plaintiff's claim for piercing the corporate veil brought against William G. Miller. Plaintiff presented more than a scintilla of evidence to support each element of these claims.

Appeal by defendants from orders entered on 1 October 2015 and 15 December 2015, and judgment entered 18 November 2015 by Judge Cy A. Grant, Sr. in Dare County Superior Court. Heard in the Court of Appeals 3 November 2016.

Vandeventer Black LLP, by David P. Ferrell and Kevin A. Rust, for plaintiff-appellee.

Gregory E. Wills, P.C., by Gregory E. Wills, for defendants-appellants.

ZACHARY, Judge.

William G. Miller; The Miller Family Limited Partnership II; The Miller Family Limited Partnership III; Old Glory II, LLC; Old Glory III, LLC; Old Glory IV, LLC; Old Glory V, LLC; Old Glory VI, LLC; Old Glory VII, LLC; Old Glory IX, LLC; Old Glory XI, LLC; Old Glory XII, LLC; and Old Glory XIII, LLC (collectively, defendants), appeal from judgment entered against them following a trial on claims asserted by Southern Shores Realty Services, Inc. (plaintiff), and from the trial court's denial of defendants' motions for a directed verdict and for entry of Judgment Notwithstanding the Verdict ("JNOV") or in the alternative for a new trial. On appeal, defendants argue that they were entitled to entry of a directed verdict or JNOV on plaintiff's claims for breach of contract against all defendants, and on plaintiff's claim for piercing the corporate veil brought against William G. Miller ("Mr. Miller"). We have carefully reviewed defendants' arguments in light of the record on appeal and the applicable law, and conclude that the trial court did not err and that defendants are not entitled to relief.

I. Background

This appeal arises out of a dispute concerning thirteen contracts for management of properties available for short-term vacation rental of houses on the North Carolina coast. Plaintiff is a North Carolina real estate company that provides rental management services to the owners of vacation rental properties on the Outer Banks. Plaintiff generally contracts with the owners of properties that are available for short-term rental of less than thirty days. Plaintiff advertises and rents the properties, and provides housekeeping, maintenance, and record-keeping services for the properties' owners. In return, plaintiff earns a commission of 13% of the total rental price for a vacation rental. In order to reserve a house for a short-term vacation rental, prospective tenants are required to deposit half of the total rental amount with plaintiff in advance. When plaintiff receives the deposit, it disburses the deposit to the owner of the property. When the tenant departs the rental property, plaintiff transfers the remainder of the rental payment to the property's owner.

Defendant William Miller is "the patriarch and speaker for the family business" at issue in the present case, which consists of the construction, rental, and sale of coastal properties. The other defendants are limited liability companies (LLCs) established in North Carolina pursuant to the North Carolina Limited Liability Company Act, N.C. Gen. Stat. § 57D-1-01 *et. seq.* Each LLC was established to manage the construction, rental, and sale of a single coastal property. Mr. Miller is a managing member of each LLC, as are Mr. Miller's wife and their sons.

In 2009, plaintiff signed thirteen contracts with the LLC defendants in the instant case, under the terms of which plaintiff agreed to provide rental management services for the 2010 vacation rental season. The contracts and the correspondence between plaintiff and defendants refer to defendants as "Owner" and to plaintiff as "SSRS" or "Agent." Each of these contracts provided, in relevant part that:

> SSRS will remit rental proceeds collected, less any deductions authorized hereunder . . . to Owner on the following basis: SSRS will disburse up to 50% of the rental rate when the advance payment is made and the balance is disbursed after the tenant's departure provided: (1) this shall not constitute a guarantee by Agent for rental payments that Agent is unable to collect in the exercise of reasonable diligence; (2) payments hereunder are subject to limitations imposed by the VRA regarding advance disbursement of rent; and (3) if, pursuant to this Agreement or required by the VRA, Agent either has refunded or will refund in whole or in part any rental payments made by a tenant and previously remitted to Owner, Owner agrees to return same to Agent promptly upon Agent's demand. Two exceptions to this policy are:
>
> . . .
>
> 2. "Foreclosure" - Owner will report foreclosure on the rental property to Agent and rental proceeds already disbursed to Owner will be returned to SSRS. Any remaining proceeds paid by Tenant will be held by SSRS to ensure the availability of funds for Tenant's rental or refund. If Agent receives information regarding Owner's financial difficulties of any kind, Agent will hold remaining rental income for the protection of Tenant's rental or refund. Foreclosure is a material fact; therefore, Agent is required to disclose knowledge of foreclosure to Tenant.

Plaintiff subscribed to a listing service that included a list of properties that were in foreclosure. In January of 2010, one of defendants' properties that plaintiff had rented to vacation tenants for the summer of 2010 appeared on the foreclosure list. Defendants had not informed plaintiff of this occurrence. David Watson, plaintiff's sales manager and general manager, arranged a meeting with Mr. Miller, at which Mr. Miller agreed to return the rental deposit that plaintiff had disbursed to defendant LLCs for rental of the property. Sharon Bell, who had been plaintiff's

accounting supervisor for approximately twenty years, attended the meeting and heard Mr. Miller agree to return the rental deposits that had been disbursed to his businesses for properties that were in foreclosure. However, those funds were never returned to plaintiff, and on 28 January 2010, plaintiff received a letter from an attorney associated with the law firm representing defendants, admitting that five of the properties subject to contracts between plaintiff and defendants were then in foreclosure. The letter stated in relevant part, the following:

> As Mr. Miller has informed you, Stubbs & Perdue is representing Mr. Miller and Old Glory in his negotiations with various creditors that hold liens on his properties and that you are the rental agency for. I am writing to assure you that we are diligently working on this project and are hopeful that some sort of resolution will be reached.
>
> What we are unsure of is whether this will be inside or outside of bankruptcy. If we are only left with the alternative of filing for bankruptcy, our plan is to file under chapter 11 of the Bankruptcy Code. This will allow Mr. Miller to remain in control of the properties and continu[e] to operate as normal while a plan of reorganization is formulated. Mr. Miller has stressed his intentions to continue utilizing Southern Shores as his rental agency.
>
> Right now the there are two primary factors that would push Mr. Miller into filing for bankruptcy. First would be the inability to reach a compromise with the creditors where a sale of a property would occur. A close second is this notice letter from your agency that might deter renters from selecting Old Glory properties for their vacation.
>
> Mr. Miller and I understand your concern regarding protecting your renters, so let me assure you that we will keep you in the loop as far as our negotiations with creditors. We would appreciate prior notice of your sending out these notice letters. As I have been informed, if we are unsuccessful in dismissing a foreclosure hearing, your intent is to send out the letters two weeks prior to the scheduled sale. Right now, the first scheduled hearing is February 5 and the sale is February 26. We will be attending the hearing and attempt to have the foreclosure dismissed. I will let you know how this goes.

> Further, we have advised Mr. Miller to retain the deposits as these are needed to maintain and ready the properties for being rented. . . . Accordingly, it is imperative that Mr. Miller continue to receive deposits from Southern Shores as is specified in the agreement between you and Mr. Miller.
>
> Just in case you are not aware, here is a current list of hearing and sale dates:
>
> [Chart of foreclosure sale dates scheduled for dates between 28 February 2010 and 18 March 2010].

On 3 February 2010, plaintiff received a letter from Mr. Miller individually, in which Mr. Miller stated that:

> From: William G. Miller
>
> Subject: Rental Management Agreement - Foreclosures.
>
> I am very disappointed with [plaintiff]. [Plaintiff] is in violation of the 2009 and 2010 Rental Management Agreement, Pars. 7.
>
> As stated - Foreclosure is a material fact.
>
> Property on the disclosure list is not "Foreclosure." The hearing is only to determine if the property is indeed a possible "foreclosure." Even after the hearing, the property is not in "Foreclosure." The hearing determines the appropriate players involved and the real negotiations can start. As a last resort, a Chapter 11 would be filed the day before any announced sale. At that point the players could be forced to accept changes requested.
>
> Holding Rental Income - [Plaintiff] has not received any information of the owners' financial difficulties. . . . [T]his is a "STRATEGIC DEFAULT" [which is] defined throughout the United States as "NOT A FINANCIAL DIFFICULTY" but as a process to force an action.
>
> . . . [Plaintiff] has withheld money from ten other properties. Each property is a Limited Liability Company (LLC). . . . This appears to be a willful action to harm my business.
>
> . . .

> These are my initial thoughts. I have not run it through my lawyers. Consider this and talk to me within the next two days, so I can plan accordingly.

(Use of capital letters and underlining in original).

One of defendants' properties was sold in foreclosure on 18 March 2010. At that point, defendants had not returned the funds that plaintiff had disbursed to them. On 26 March 2010, plaintiff terminated its contractual relationship with defendants. Plaintiff informed the tenants who had reserved rentals for the summer of 2010 about the foreclosure proceedings and used plaintiff's own funds to recompense the tenants for the rental deposits they had made and that plaintiff had disbursed to defendants. Ultimately, eleven of the thirteen properties that were the subject of contracts between plaintiff and defendants were sold in foreclosure.

On 19 January 2011, plaintiff filed a complaint against defendants, seeking to recover the sum of $74,221.79 that plaintiff had spent from its own funds to recompense the tenants for the tenants' deposits made prior to the initiation of foreclosure proceedings on defendants' properties. Plaintiff asserted claims for breach of contract and unfair or deceptive trade practices against all defendants, and a claim against Mr. Miller individually, seeking to hold him personally liable for plaintiff's damages by application of the equitable remedy known as "piercing the corporate veil." On 1 April 2011, defendants filed an answer denying the material allegations of plaintiff's complaint, raising various defenses, and asserting counterclaims against plaintiff for breach of contract, breach of fiduciary duty, tortious interference with contract, and unfair or deceptive trade practices. In its reply, plaintiff denied defendants' allegations and moved for dismissal of defendants' counterclaims. On 20 March 2013, Judge Walter H. Godwin, Jr. entered an order granting plaintiff's motion for summary judgment on defendants' counterclaims for breach of fiduciary duty, tortious interference with contract, and unfair or deceptive trade practices, denying plaintiff's motion for summary judgment on defendants' claim for breach of contract, and denying defendants' motion for summary judgment on plaintiff's claims for breach of contract and unfair or deceptive trade practices.

The parties' claims were tried before the trial court and a jury at the 28 September 2015 civil session of Dare County Superior Court. During trial, Mr. Miller testified that he had been employed full-time as a real estate owner and manager since 1987, and that plaintiff and defendants had signed contracts for plaintiff to manage thirteen rental properties

for the 2010 summer vacation season. Mr. Miller admitted that in the fall of 2009 defendants stopped making mortgage payments on the properties that were the subject of their contracts with plaintiff. At that point, Mr. Miller prepared proposed modification agreements for submission to one or more lending institutions and investigated the possibility of declaring bankruptcy. Mr. Miller testified that the plan for each property was to "stop the payments on it and then if we get a foreclosure sale and before the upset period is up, you know, we will file Chapter 11 and we will retain control of that entity through a Chapter 11."

Mr. Miller conceded that the contracts between plaintiff and defendants required defendants to notify plaintiff if a property was in foreclosure and to return rental deposits that had been disbursed to defendants, and that after some of defendants' properties went into foreclosure, defendants did not return the rental deposits that plaintiff had disbursed to defendants. He also admitted that the eleven properties on which he stopped making mortgage payments were sold "on the courthouse steps[.]" In addition, Mr. Miller acknowledged that the contracts further provided that if plaintiff "receives information regarding owner's financial difficulties of any kind" that plaintiff would then "hold remaining rental income for protection of tenants, rental or refund" and that the contracts specified that foreclosure was a material fact that would be disclosed to tenants.

At the close of plaintiff's evidence and again at the close of all the evidence, defendants moved for a directed verdict in their favor. At the close of all the evidence, the trial court granted defendants' motion for directed verdict against plaintiff as to plaintiff's claims for unfair or deceptive trade practices, but allowed plaintiff's claims for breach of contract and piercing the corporate veil to be submitted to the jury. At the close of all the evidence, plaintiff moved for directed verdict on defendants' claim for breach of contract; the trial court denied plaintiff's motion and defendants' claim for breach of contract was also submitted to the jury.

On 2 October 2015, the jury returned verdicts finding that defendants had breached their contracts with plaintiff; that plaintiff was entitled to recover the sum of $74,221.79 (the amount of rental deposits disbursed to defendants) from defendants; and that Mr. Miller had controlled defendants with respect to the acts or omissions that damaged plaintiff. The jury did not find that plaintiff had breached the contracts with defendants. On 18 November 2015, the trial court entered judgment in accordance with the jury's verdicts. On 24 November 2015, defendants filed a motion asking the trial court to set aside the verdicts of the jury

pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(b)(1), and to enter judgment in Mr. Miller's favor with respect to plaintiff's claim to pierce the corporate veil, or in the alternative, to award defendants a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. Following a hearing on defendants' motions, the trial court entered an order on 15 December 2015, denying defendants' motions. Defendants noted a timely appeal to this Court from the denial of defendants' motion for directed verdict, JNOV, or a new trial, and the judgment entered in this case.

II. Standard of Review

On appeal, defendants argue that the trial court erred by denying their motions for directed verdict and JNOV. "When considering the denial of a directed verdict or JNOV, the standard of review is the same. 'The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury.' " *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991)). "A motion for JNOV 'should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim.' 'A scintilla of evidence is defined as very slight evidence.' " *Hayes v. Waltz*, __ N.C. App. __, __, 784 S.E.2d 607, 613 (2016) (quoting *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009), and *Pope v. Bridge Broom, Inc.*, __ N.C. App. __, __ 770 S.E.2d 702, *disc. review denied*, 368 N.C. 284, 775 S.E.2d 861 (2015)). "The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987).

Defendants also argue that the trial court erred in its instructions to the jury. "When a challenge to the trial court's instructions to the jury raises a legal question, it is subject to review *de novo*. However, . . . '[t]he form and phraseology of issues is in the court's discretion, and there is no abuse of discretion if the issues are sufficiently comprehensive to resolve all factual controversies.' " *Geoscience Grp., Inc. v. Waters Constr. Co., Inc.*, 234 N.C. App. 680, 686, 759 S.E.2d 696, 700 (2014) (citing *Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc.*, 159 N.C. App. 43, 53, 582 S.E.2d 701, 706-07 (2003), and quoting *Barbecue Inn, Inc. v. CP & L*, 88 N.C. App. 355, 361, 363 S.E.2d 362, 366 (1988)).

III. Breach of Contract

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor*

v. Hill, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (citation omitted). In this case, the parties stipulated to the existence of valid contracts between defendants and plaintiff. As discussed above, each of the parties' contracts stated, in relevant part, that:

> . . . SSRS will disburse up to 50% of the rental rate when the advance payment is made and the balance is disbursed after the tenant's departure provided . . . if, pursuant to this Agreement or required by the VRA, Agent either has refunded or will refund in whole or in part any rental payments made by a tenant and previously remitted to Owner, Owner agrees to return same to Agent promptly upon Agent's demand. . . .
>
> . . . Owner will report foreclosure on the rental property to Agent and rental proceeds already disbursed to Owner will be returned to SSRS. Any remaining proceeds paid by Tenant will be held by SSRS to ensure the availability of funds for Tenant's rental or refund. If Agent receives information regarding Owner's financial difficulties of any kind, Agent will hold remaining rental income for the protection of Tenant's rental or refund. Foreclosure is a material fact; therefore, Agent is required to disclose knowledge of foreclosure to Tenant.

We hold that the terms of each of the contracts plainly required that if a rental property was subject to foreclosure, defendants would (1) notify plaintiff of the foreclosure proceeding, and (2) return to plaintiff any rental income that plaintiff had previously disbursed to defendants for the property that was in foreclosure. Plaintiff presented ample evidence establishing that defendants failed to perform either of these contractual obligations, and defendants do not dispute that they did not return the rental deposits that plaintiff had disbursed prior to learning that some of defendants' properties were in foreclosure. We conclude that plaintiff presented evidence to support each element of its claims for breach of contract and that the trial court did not err by denying defendants' motions for directed verdict and JNOV with respect to these claims.

In reaching this conclusion, we have carefully evaluated defendants' arguments urging us to reach a different result. Defendants' primary argument is that the result in this case should be dictated, not by the express terms of the parties' contracts, but by the statutory provisions of the North Carolina Vacation Rental Act ("VRA"), N.C. Gen. Stat. § 42A-1 *et. seq.* Defendants direct our attention to references in the

contracts in which the parties acknowledge their obligation to adhere to all applicable law, including the VRA. For example, each of the contracts states that:

> . . . Owner hereby contracts with Agent, and Agent hereby contracts with Owner, to lease and manage the propert . . . in accordance with all applicable laws and regulations, including but not limited to the North Carolina Vacation Rental Act (NCGS 42A-1 *et. seq.*) . . . upon the terms and conditions contained herein.

Defendants argue that their appeal raises a "matter of first impression" regarding the proper interpretation of N.C. Gen. Stat. § 42A-19(a) (2015), which states in relevant part that:

> The grantee of residential property voluntarily transferred by a landlord who has entered into a vacation rental agreement for the use of the property shall take title to the property subject to the vacation rental agreement if the vacation rental is to end not later than 180 days after the grantee's interest in the property is recorded in the office of the register of deeds.

N.C. Gen. Stat. § 42A-19(a) requires the buyer of property acquired in a *voluntary* transfer from the owner to honor previously executed vacation rental agreements that are scheduled within six months of the voluntary transfer. efendants contend that this provision also applies to property that is *involuntarily* transferred in a foreclosure proceeding. Defendants apparently assume that a tenant who has contracted for a short-term vacation rental of one or two weeks might choose to litigate the tenant's right to insist on the rental of a property that had been sold in foreclosure. As a practical matter, this seems unlikely; however, we conclude that on the facts of this case we are not required to resolve any issues pertaining to the VRA or to determine the correct interpretation of its provisions.

Assuming, *arguendo*, that defendants have correctly interpreted the scope of N.C. Gen. Stat. § 42A-19, this does not change the outcome of this case. The plain language of the parties' contracts required defendants to notify plaintiff if a rental property was in foreclosure, and to refund any previously disbursed rental payments associated with the property. "When competent parties contract at arm's length upon a lawful subject, as to them the contract is the law of their case." *Suits v. Insurance Co.*, 249 N.C. 383, 386, 106 S.E.2d 579, 582 (1959). "[T]o

ascertain the intent of the parties at the moment of execution . . . the court looks to the language used[.] . . . Presumably the words which the parties select were deliberately chosen and are to be given their ordinary significance." *Briggs v. Mills, Inc.*, 251 N.C. 642, 644, 111 S.E.2d 841, 844 (1960) (citations omitted).

Defendants suggest that because their contracts recite that the parties will follow the applicable provisions of the VRA - which would be required whether or not the contracts included the reference to the VRA - the terms of the contracts are thereby *replaced* by the VRA, which defendants contend "control[s] the relationship between all the parties[.]" Defendants have not cited any authority for the proposition that a contract's reference to relevant statutory provisions nullifies the contract's express terms, and we know of no authority for this position. We conclude that defendants have failed to show that the VRA conflicts with or replaces the terms of the parties' contracts, and that the interpretation of the VRA is not germane to the issue of defendants' entitlement to a directed verdict on plaintiff's claims for breach of contract.

Defendants also argue that, although the parties' contracts state that defendants "will report foreclosure on the rental property to Agent" and that "rental proceeds already disbursed to Owner will be returned to SSRS," these obligations do not arise until the entire foreclosure proceeding is completed and the deed to the property is transferred to a new owner. Defendants contend that the fact that "the VRA defines 'Transfer' as 'recording at the registrar of deeds' " requires the conclusion that "the term 'Foreclosure,' in this context, must mean the point at which a deed vesting title in the lender is recorded at the registrar of deeds[.]" However, "foreclosure" is defined as "[a] legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property." Black's Law Dictionary 719 (9th ed. 2009). It is long established that "[i]n construing contracts ordinary words are given their ordinary meaning unless it is apparent that the words were used in a special sense. 'The terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense.' " *Harris v. Latta*, 298 N.C. 555, 558, 259 S.E.2d 239, 241 (1979) (internal quotation omitted). We conclude that the term "foreclosure" in the parties' contracts should be interpreted in its ordinary meaning as being a legal proceeding by a mortgagee brought against a mortgagor who has defaulted on payments due under the terms of a mortgage contract. Therefore, defendants' contractual obligation to notify plaintiff of foreclosure proceedings arose when these proceedings were initiated.

Defendants also argue that the trial court erred in its instructions to the jury on the effect of a sale in foreclosure upon a vacation rental tenant's legal right to enforce a short-term lease entered into prior to the foreclosure. Neither the trial court's instructions to the jury nor the verdict sheets submitted to the jury asked the jury to render a verdict on the effect of a foreclosure upon a tenant's legal right to force the purchaser of a property to honor a short-term vacation rental lease. At one point during its deliberations, the jury asked for instructions on the definition of the term "foreclosure" and on whether a bank that purchased a property in foreclosure would be required to honor a vacation rental agreement. The trial court instructed the jury on the definition of foreclosure taken from Black's Law Dictionary, 9th ed., as quoted above, and we conclude that the trial court did not err in giving this definition. The trial court further instructed the jury that our appellate jurisprudence had not established whether a bank would be obligated to honor a vacation rental lease after buying a property in foreclosure but that, as a general rule, "the sale under a mortgage or deed of trust cuts out and extinguishes all liens, encumbrances and junior mortgages executed subsequent to the mortgage containing the power."

Defendants contend that the trial court's instruction failed to account for an exception to the general rule established by the provisions of the VRA. However, as discussed above, the parties' contracts imposed certain duties upon defendants in the event of a foreclosure on a property that was subject to a short-term rental. These contractual obligations were not dependent upon or associated with the issue of the rights of a short-term vacation rental tenant upon foreclosure of a property subject to a short-term vacation lease, and the jury was not required to resolve any factual issues regarding the effect of foreclosure upon a tenant's rights in its determination of the merits of the parties' respective claims. Defendants have failed to articulate any way in which the trial court's instructions on this issue, even if erroneous, would have confused the jury as to any of the substantive issues it was required to resolve or would have affected the jury's verdict on plaintiff's claims for breach of contract. We conclude that this argument is without merit.

For the reasons discussed above, we conclude that plaintiff presented more than a scintilla of evidence to support each element of its claims for breach of contract. Therefore, the trial court did not err by denying defendants' motions for directed verdict, for entry of a JNOV, or for a new trial on these claims.

IV. Piercing Corporate Veil

Mr. Miller argues that the trial court erred by denying his motion for directed verdict, entry of JNOV, or award of a new trial on plaintiff's claim seeking to hold him personally liable for plaintiff's damages by applying the equitable doctrine of piercing the corporate veil. For the reasons that follow, we disagree.

A. Introduction: Legal Principles

The determination of whether an individual may be held personally liable for the debts of a business entity with which the individual is associated depends in part upon the nature of the entity. "The general rule is that in the ordinary course of business, a corporation is treated as distinct from its shareholders." *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 438, 666 S.E.2d 107, 112 (2008) (citation omitted). However:

> [E]xceptions to the general rule of corporate insularity may be made when applying the corporate fiction would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim. Those who are responsible for the existence of the corporation are, in those situations, prevented from using its separate existence to accomplish an unconscionable result.

Ridgeway, 362 N.C. at 439, 666 S.E.2d at 112-113 (internal quotation omitted). Thus, "courts will disregard the corporate form or 'pierce the corporate veil,' and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity." *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985) (citation omitted). A court's decision to pierce the corporate veil, thereby "proceeding beyond the corporate form[,] is a strong step: Like lightning, it is rare [and] severe [.]" *Ridgeway* at 439, 666 S.E.2d at 112 (internal quotation omitted).

The limitation upon circumstances in which a corporate officer or shareholder may be personally liable for debts incurred by the corporation is an important distinction between the law governing corporations and that of partnerships. "Shareholders in a corporation are insulated from personal liability for acts of the corporation, . . . but partners in a partnership are not insulated from liability[.] . . . Stated differently, no corporate veil exists between a general partnership and its partners." *Ron Medlin Constr. v. Harris*, 364 N.C. 577, 583, 704 S.E.2d 486, 490 (2010).

In the present case, the defendants, with the exception of Mr. Miller, are limited liability companies, or LLCs. "An LLC is a statutory form of business organization . . . that combines characteristics of business corporations and partnerships." *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 636, 652 S.E.2d 231, 235 (2007) (internal quotation omitted). "[T]he North Carolina Limited Liability Company Act provides for the formation of a business entity combining the limited liability of a corporation and the more simplified taxation model of a partnership. . . allowing for great flexibility in its organization." *Id.* "[A]s its name implies, limited liability of the entity's owners, often referred to as 'members,' is a crucial characteristic of the LLC form, giving members the same limited liability as corporate shareholders. . . . As a corporation acts through its officers and directors, so an LLC acts through its member-managers[.]" *Id.* In addition, N.C. Gen. Stat. § 57D-3-30 (2015) provides that a "person who is an interest owner, manager, or other company official is not liable for the obligations of the LLC solely by reason of being an interest owner, manager, or other company official."

However, our appellate courts have generally upheld the imposition of personal liability upon an individual manager of an LLC under the same circumstances that support piercing the corporate veil. "[A] judgment in this area requires a peculiarly individualized and delicate balancing of competing equities. Nevertheless, for the purpose of achieving uniformity and predictability in this critical area of jurisprudence, this Court has previously adopted the 'instrumentality rule.' " *Ridgeway* at 440, 666 S.E.2d at 113 (quoting *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985)). In *Glenn*, our Supreme Court "enumerated three elements which support an attack on [a] separate corporate entity under the instrumentality rule[.]" *Glenn*, 313 N.C. at 454, 329 S.E.2d at 330. The Court described these elements as follows:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 455, 329 S.E.2d at 330 (internal quotation omitted). The Court also set out circumstances that have proven useful in determining whether it is appropriate to pierce the corporate veil in a specific case:

> Factors which heretofore have been expressly or impliedly considered in piercing the corporate veil include:
>
> 1. Inadequate capitalization[.] . . .
>
> 2. Non-compliance with corporate formalities. . . .
>
> 3. Complete domination and control of the corporation so that it has no independent identity. . . .
>
> 4. Excessive fragmentation of a single enterprise into separate corporations. . . .

Glenn at 455, 329 S.E.2d at 330-31 (citations omitted). These factors may be weighed differently in a case in which the business entity in question is an LLC rather than a corporation. For example, N.C. Gen. Stat. § 57D-3-20 (2015) provides in relevant part that "(a) The management of an LLC and its business is vested in the managers[,]" and that "(d) All members by virtue of their status as members are managers of the LLC[.]" Given that all members of an LLC are statutorily deemed to be managers, the fact that an individual has a management role in an LLC cannot, standing alone, justify imposing personal liability upon the manager on the grounds that he or she exercised "control" over the LLC.

B. Discussion

Preliminarily, we address the scope of defendants' appellate arguments. Plaintiff argues that our review should be limited to the arguments that defendants made on the issue of piercing the corporate veil at the trial level, in their motions for entry of a directed verdict. However, defendants have also appealed from the denial of their motion for entry of JNOV or the award of a new trial. We will therefore address arguments that defendants raised at either hearing.

As discussed above, to hold Mr. Miller personally liable for the judgment entered against defendants:

> [Plaintiff] must present evidence of three elements:
>
> "(1) Control . . . complete domination, not only of finances, but of policy and business practice in respect to the

> transaction attacked[;] . . . and (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a . . . positive legal duty . . . in contravention of [a] plaintiff's legal rights; and (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of."

Green v. Freeman, 233 N.C. App. 109, 111, 756 S.E.2d 368, 371-72 (2014) (quoting *Green*, 367 N.C. at 146, 749 S.E.2d at 270 (internal citations and quotations omitted)).

We next determine whether plaintiff offered "more than a scintilla" of evidence as to these elements. In making this determination, we will also consider the evidence of the factors discussed above, including inadequate capitalization, excessive fragmentation of a single enterprise into separate LLCs, and whether Mr. Miller exercised complete domination and control over the LLCs. We conclude that the non-compliance with corporate formalities, which is another factor identified in *Glenn*, is of less relevance in the context of an LLC, which is subject to far fewer formal statutory requirements than is a corporation. We also recognize that the mere fact that Mr. Miller had a management role in the LLCs cannot be the basis for imposing personal liability upon him.

It is undisputed that eleven of the thirteen properties that were the subject of the contracts between the parties were sold in foreclosure, and that during the course of the foreclosure proceedings Mr. Miller informed plaintiff that defendants might be forced to declare bankruptcy. The LLCs did not have sufficient capital to pay creditors and conduct business. We conclude that this is evidence tending to show that the LLCs were inadequately capitalized. In addition, the fact that a separate LLC was formed for the management of each individual rental property constitutes evidence from which a reasonable fact-finder might find that defendants' business enterprise was excessively fragmented. We note that at trial, Mr. Miller testified that the reason that defendants formed 30 or 40 LLCs for the business was to limit the liability of the LLCs.

We also conclude that plaintiff offered sufficient evidence to support a finding that Mr. Miller personally controlled the finances, policies, and business practices of the LLCs. In this respect, we note that at trial Mr. Miller acknowledged that he was in charge of managing the family business:

> MR. MILLER: Well we're all managing members and we all have the capability of signing papers and that sort of

> thing. It's been agreed at this point in time that we have an agreement within ourselves that, you know, I'm the present managing member but that James there is going to take over and he will have control.

Two of plaintiff's witnesses at trial, Mr. Watson and Ms. Bell, testified that their business dealings were always with Mr. Miller, whom they understood to be the "decision maker" for the LLCs. In fact, *defendants'* counsel asked Mr. Watson to acknowledge on cross-examination that "Mr. Miller [had] told [him] . . . that if there was any kind of bankruptcy done *he* would remain in charge[.]" (emphasis added). In addition, the attorney who wrote to plaintiff stated that the law firm with which he was associated represented "Mr. Miller and [the LLCs]" but did not indicate that the firm represented any other members of the LLCs individually. The content of the letter unmistakably characterized Mr. Miller as the "alter ego" of the family business. For example, the letter stated that a plan was being formulated that "will *allow Mr. Miller to remain in control* of the properties[,]" proclaimed that "Mr. Miller has stressed his intentions to continue utilizing [plaintiff] Southern Shores as *his* rental agency[,]" noted the existence of "two primary factors that would *push Mr. Miller into filing for bankruptcy*[,]" and warned plaintiff that "it is imperative that Mr. Miller continue to receive deposits from [plaintiff] Southern Shores as is specified in the *agreement between you and Mr. Miller*." Moreover, Mr. Miller wrote to plaintiff individually to express his opinions on matters in contention between the parties. Finally, we note that in their appellate brief, *defendants* describe Mr. Miller as "the patriarch and speaker for the family business."

As discussed above, in order to survive a motion for directed verdict or JNOV, the non-movant need only present "more than a scintilla of evidence" on each element of its claim. *Stark v. Ford Motor Co.*, 365 N.C. 468, 480, 723 S.E.2d 753, 761 (2012) (citation omitted). It is well established that in ruling on a motion for directed verdict or JNOV, "the trial court is to consider all evidence in the light most favorable to the party opposing the motion; the nonmovant is to be given the benefit of every reasonable inference that legitimately may be drawn from the evidence; and contradictions must be resolved in the nonmovant's favor." *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986). In this case, we conclude that plaintiff presented more than a scintilla of evidence from which the jury could find that Mr. Miller exercised complete control over the LLCs. We also conclude that plaintiff offered sufficient evidence that Mr. Miller used his control over the LLCs to disregard the contractual obligation to return the rental deposits to plaintiff and that Mr. Miller's

actions were the proximate cause of the damages suffered by plaintiff. As a result, we conclude that the trial court did not err by denying defendants' motions for directed verdict or JNOV.

In their appellate brief, defendants direct our attention to the facts that the LLCs were properly formed under North Carolina law and that Mr. Miller did not own a majority share of the businesses. We have held, however, that plaintiff offered evidence of Mr. Miller's complete domination of the LLCs sufficient to allow the jury to determine whether he should be held personally liable for the judgment against defendants. Defendants also concede that an individual may be "held personally liable" when an individual's exercise of control is used to violate a duty owed to a plaintiff. In this case, there was evidence indicating that (1) defendants owed a duty to return to plaintiff the rental deposits previously disbursed when the properties went into foreclosure; (2) Mr. Miller made the substantive decisions for the LLCs and was known as the "decision maker"; (3) Mr. Miller refused to comply with this contractual obligation, even writing a letter to plaintiff as an individual (the letter in no way suggested that he was writing on behalf of other LLC members) expressing his personal "disappointment" with plaintiff; and (4) the damages suffered by plaintiff were directly and proximately caused by Mr. Miller's refusal to return the rental deposits. We conclude that defendants' argument regarding the insufficiency of plaintiff's evidence is without merit.

Defendants also argue, in a somewhat dramatic fashion, that unless the trial court is reversed "the concept of limited liability [will be] eliminated entirely from the law of contracts in North Carolina," with the result that any member of an LLC with "whom the opposing party actually deals with on a day-to-day basis, would be subject to personal liability for breach of the LLC's contract." Defendants contend that if we uphold the jury's verdict "then there is no point in having a 'limited liability' company in this State." We disagree with defendants' implication that the instant case is in some way extending or changing the established law concerning the imposition of personal liability on an individual based upon his or her actions in relation to a business entity. For example, it seems clear that on the facts of this case there would be no basis upon which to hold any of the other member-managers of the LLCs personally liable. Nor is Mr. Miller's liability premised simply upon his exercise of ordinary daily management of the LLCs. Instead, it appears that he made the decision to intentionally breach the parties' contracts without input from the other LLC members, and attempted to use the LLCs to achieve an unjust result. We also note that, to the extent

that defendants are urging that as a matter of public policy the law governing individual liability in the context of an LLC should be changed, "[t]he General Assembly is the policy-making agency because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). We conclude that "plaintiff has carried his minimal burden of presenting more than a scintilla of evidence supporting his . . . claim." *Morris v. Scenera Research, LLC*, 368 N.C. 857, 862, 788 S.E.2d 154, 158 (2016).

For the reasons discussed above, we conclude that the trial court did not err by denying defendants' motions for directed verdict or JNOV and that its orders should be

AFFIRMED.

Judges ELMORE and STROUD concur.

WALTER CALVERT SMITH, PLAINTIFF
v.
STEWART POLSKY, M.D., CAROLINA UROLOGY PARTNERS, PLLC, AND LAKE NORMAN UROLOGY, PLLC, DEFENDANTS

No. COA16-605

Filed 17 January 2017

Appeal and Error—interlocutory orders and appeals—denial of pretrial motion in limine—no substantial right

Defendants' appeal of the trial court's denial of certain portions of their pretrial motion in limine was from an interlocutory order Defendants failed to establish that their appeal affected a substantial right that would be lost or inadequately addressed absent immediate review.

Appeal by defendants from order entered 8 March 2016 by Judge Julia Lynn Gullett in Iredell County Superior Court. Heard in the Court of Appeals 15 November 2016.

Homesley, Gaines, Dudley & Clodfelter, LLP, by Edmund L. Gaines and Christina Clodfelter, for plaintiff-appellee.

Parker Poe Adams & Bernstein LLP, by Chip Holmes and Bradley K. Overcash, for defendants-appellants.

ZACHARY, Judge.

Stewart Polsky, M.D., Carolina Urology Partners, PLLC, and Lake Norman Urology, PLLC (defendants) appeal an order denying certain portions of their pretrial motion *in limine*. For the reasons that follow, we dismiss defendants' appeal as interlocutory.

I. Background

Plaintiff Walter Smith (Smith) became a paraplegic in 1975 when he suffered a spinal cord injury in a motor vehicle accident. In 1995, Smith underwent the implantation of an inflatable penile prosthesis, which malfunctioned and ceased operating in 2008. Dr. Polsky became Smith's urologist in 2005. On 25 August 2009, Dr. Polsky performed penile prosthesis revision surgery on Smith, a procedure that involved removing the original inflatable penile prosthetic device and replacing it with a new one.

Following the procedure, Smith experienced pain and swelling at the surgical site, and he was eventually hospitalized on 19 September 2009. Dr. Polsky examined Smith at the hospital, diagnosed him with a "possible scrotal infection," and prescribed three antibiotics. The antibiotics Gentamicin, Vancomycin, and Ceftriaxone were administered intravenously. After being discharged from the hospital on 23 September 2009, Smith was instructed to continue taking the three antibiotics intravenously, and Advanced Home Care, Inc. (Advanced Home Care) provided and administered the medications. Smith received his last dose of Gentamicin—which is known to cause bilateral vestibulopathy, a condition caused by damage to one's inner ears that results in imbalance and impaired vision—on 9 October 2009. Shortly thereafter, Smith was diagnosed with bilateral vestibulopathy. Smith had the infected, replacement penile prosthesis surgically removed approximately three years later.

In February 2011, Smith filed for Chapter 7 Bankruptcy. On 21 August 2012, the trustee of Smith's bankruptcy estate filed a complaint in Iredell County Superior Court against Dr. Polsky, his medical practice, and Advanced Home Care. The complaint alleged numerous theories of medical negligence arising out of the surgical care as well as the prescription and monitoring of the post-surgery antibiotic therapy that Smith received from August through October of 2009. Pertinent to this appeal, the complaint alleged that once Smith was diagnosed with

a scrotal (or superficial wound) infection on 19 September 2009, Dr. Polsky was negligent in choosing to prescribe antibiotic therapy instead of surgically removing the infected penile prosthesis. All claims against Advanced Home Care were eventually settled and dismissed, and a portion of the settlement proceeds were used to satisfy the claims of Smith's bankruptcy estate. As a result, Smith was substituted as plaintiff against Dr. Polsky and his practice, the remaining defendants in the medical negligence action.

In May 2014, defendants filed a Motion for Summary Judgment, or in the alternative, Motion for Partial Summary Judgment. However, before the trial court ruled on defendants' motion, the parties entered into a Voluntary Dismissal with Prejudice and Stipulation (the Dismissal). Pursuant to the Dismissal, Smith dismissed with prejudice the claims contained in Paragraph 41, subparagraphs (d) through (k) of his complaint, which alleged the following theories of negligence:

> (d) Having decided to initiate antibiotic therapy on September 19, 2009, Defendant Dr. Polsky breached the standard of care by choosing the antibiotic gentamicin as opposed to choosing other more efficacious and less risky agents.
>
> (e) Having decided to administer gentamicin, Dr. Polsky failed to communicate to the hospital pharmacists the severity of the infection, and whether he was employing gentamicin as a primary or synergistic agent.
>
> (f) Having decided to administer gentamicin, Dr. Polsky failed to adequately inform himself of what parameters would be applied by the hospital pharmacists in calculating "gentamicin daily dosing per pharmacy."
>
> (g) Having decided to administer gentamicin, Dr. Polsky failed to select a proper dose of gentamicin for the target infection assuming that it required treatment for more than 3-5 days.
>
> (h) Having decided to administer gentamicin, Dr. Polsky failed to prudently balance the probability of success with antibiotic treatment against the extremely high likelihood that bilateral vestibulopathy would result from the prolonged administration of 7 mg/kg/day of gentamicin.
>
> (i) Having decided to administer gentamicin, Dr. Polsky failed to order renal function testing with sufficient

> frequency to detect rapidly deteriorating renal function. This violation continued throughout the period of gentamicin administration as changes in renal function were noted. Defendant Dr. Polsky breached the standard of care when he failed to discontinue gentamicin immediately on October 1, 2009, when excessive gentamicin and vancomycin trough levels were obtained in conjunction with an increased serum creatinine.
>
> (j) Defendant Dr. Polsky breached the standard of care when he failed to discontinue gentamicin immediately on October 6, 2009, when excessive gentamicin and vancomycin trough levels were obtained in conjunction with an increased serum creatinine.
>
> (k) His care was also deficient in other respects as may be discovered in the prosecution of this action.

The Dismissal also required Smith to file an amended complaint, and he did so on 3 September 2014. Smith further stipulated that the "only remaining theories of negligence alleged against [d]efendants . . . [were] enumerated in Paragraph 32, subparagraphs (a) through (c)" of his amended complaint, which read:

> (a) Defendant Dr. Polsky breached the standard of care by failing to utilize a multiple wound irrigation technique at the time of the AMS 700 reimplantation on August 25, 2009.
>
> (b) On or about September 19, 2009, Defendant Dr. Polsky breached the standard of care by failing to remove the previously placed reservoir and attached tubing, along with the AMS 700 device which was implanted on August 25, 2009.
>
> (c) Defendant Dr. Polsky breached the standard of care by initiating antibiotic treatment for the infected prosthetic device on September 19, 2009. The risk of Dr. Polsky's prescribed long term therapy greatly outweighed the extremely unlikely potential reward of salvaging the device.

In exchange for Smith's promises to dismiss the above-mentioned theories of negligence and file an amended complaint, defendants agreed and stipulated that material issues of fact remained concerning Smith's surviving negligence claims.

Smith and defendants both filed pretrial motions between November and December of 2015. Defendants' motion *in limine* No. 1 requested that the trial court exclude

> [a]ny evidence and/or argument related to any theories of liability that Dr. Polsky was negligent in any manner for the selection and/or use of the antibiotic Gentamicin, including but not limited to: (1) the decision not to choose any alternative antibiotic; (2) testimony or evidence relating to the individual toxicity characteristics of Gentamicin; (3) that the "prolonged" use of Gentamicin was negligent; and (4) evidence related to the "synergistic" effect of the antibiotics as those claims have been Dismissed, with Prejudice, by the Plaintiff.

The trial court held a hearing on the parties' pretrial motions on 21 December 2015. At the hearing, defendants argued that while Smith could present evidence that "any antibiotic treatment would not have helped [him] because the only [prudent] decision [was] the surgical removal," he could not contend that Dr. Polsky was negligent in choosing, administering, dosing, or monitoring the antibiotic Gentamicin.

In contrast, Smith argued that not allowing him to explain the risks of the Gentamicin treatment "would be to hamstring . . . , prevent us from being able to give the jury the rest of the story." Smith's position was that the term "initiating antibiotic therapy" in Paragraph 32, subparagraph (c) of his amended complaint included and preserved claims that Dr. Polsky was negligent in prescribing the long-term use of Gentamicin.

Defendants responded by asserting that all negligence claims concerning the specific, prolonged use of Gentamicin to treat Smith's infection had been dismissed with prejudice. According to defendants, the Dismissal acted as a prior adjudication on the merits as to those claims, and all subparts of defendants' motion *in limine* should have been granted pursuant to the doctrine of res judicata.

In an order entered 8 March 2016, the trial court denied defendant's motion *in limine* No. 1, subparts (1) through (3), and granted defendants' motion as to subpart (4). Defendants appeal.

II. Standard of Review

It is well established that

> [a] motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at

> trial, and is recognized in both civil and criminal trials. The trial court has wide discretion in making this advance ruling . . . . Moreover, the court's ruling is not a final ruling on the admissibility of the evidence in question, but only interlocutory or preliminary in nature. Therefore, the court's ruling on a motion *in limine* is subject to modification during the course of the trial.

Heatherly v. Indus. Health Council, 130 N.C. App. 616, 619, 504 S.E.2d 102, 105 (1998) (internal citations and quotation marks omitted). When this Court reviews a decision to grant or deny a motion *in limine*, the determination will not be reversed absent a showing that the trial court abused its discretion. *Id.*

In the instant case, because the trial court's order denying portions of defendants' motion *in limine* No. 1 is interlocutory, we must first determine whether this appeal is properly before us. Both Smith and defendants contend that the trial court's ruling is subject to immediate review, but "acquiescence of the parties does not confer subject matter jurisdiction on a court." *McCutchen v. McCutchen*, 360 N.C. 280, 282, 624 S.E.2d 620, 623 (2006).

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 354, 362, 57 S.E.2d 377, 381 (1950). In most cases, a party has "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). This general rule prevents "fragmentary and premature appeals that unnecessarily delay the administration of justice[.]" *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980).

There are "at least two instances[,]" however, in which a party may immediately appeal from an interlocutory order or judgment. *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 579 (1999). The first occasion arises when the trial court certifies its order for immediate review under Rule 54(b) of the North Carolina Rules of Civil Procedure. *McConnell v. McConnell*, 151 N.C. App. 622, 624, 566 S.E.2d 801, 803 (2002). In the second instance, immediate review is available where the order affects a substantial right. *Blackwelder v. Dept. of Human Res.*, 60 N.C. App. 331, 333, 299 S.E.2d 777, 779 (1983).

Our Supreme Court has defined a "substantial right" as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person]

is entitled to have preserved and protected by law: a material right." *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (quotation marks and citation omitted) (alteration in original). "The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001). Put differently, an appellant must demonstrate that the challenged "order deprives the appellant of a substantial right that 'will clearly be lost or irremediably adversely affected if the order is not review[ed] before final judgment.' " *Edmondson v. Macclesfield L-P Gas Co.*, 182 N.C. App. 381, 391, 642 S.E.2d 265, 272 (2007) (quoting *Blackwelder*, 60 N.C. App. at 335, 299 S.E.2d at 780). In making this determination, our appellate courts take a "restricted view of the 'substantial right' exception to the general rule prohibiting immediate appeals from interlocutory orders." *Blackwelder*, 60 N.C. App. at 334, 299 S.E.2d at 780.

III. Analysis

According to defendants, "[a]llowing [Smith] to resurrect his Gentamicin-specific claims that were previously dismissed undermines the doctrine of *res judicata* and violates [d]efendants' substantial right to avoid inconsistent verdicts on the same claims." Defendants further argue that if the trial court's preliminary ruling on their motion *in limine* is not addressed, they will be forced "to re-litigate the previously-adjudicated Gentamicin claims." Defendants' res judicata defense rests on their contention that the Dismissal operated as a final judgment on the merits releasing them from any further exposure to Gentamicin claims at trial. In sum, while acknowledging the interlocutory nature of their appeal, defendants insist that the denial of their motion *in limine* No. 1, subparts (1) through (3), affects a substantial right. We disagree.

The longstanding rule in North Carolina is that a voluntary dismissal with prejudice is, by operation of law, a final judgment on the merits implicating the doctrine of res judicata. *Riviere v. Riviere*, 134 N.C. App. 302, 306, 517 S.E.2d 673, 676 (1999); *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 712, 306 S.E.2d 513, 515 (1983); *Barnes v. McGee*, 21 N.C. App. 287, 290, 204 S.E.2d 203, 205 (1974). "Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citations omitted). By its very operation, the doctrine precludes the relitigation of "all matters . . . that were or should have been adjudicated in the prior action." *Id.* (citation omitted).

This Court has previously held that "when a trial court enters an order rejecting the affirmative defense[] of res judicata . . ., the order *can* affect a substantial right and *may* be immediately appealed." *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 459, 646 S.E.2d 418, 422 (2007) (emphasis added; citation and internal quotation marks omitted). Even so, it is clear that invocation of res judicata "does not . . . automatically entitle a party to an interlocutory appeal of an order rejecting" that defense. *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 534, *disc. review denied*, 361 N.C. 567, 650 S.E.2d 602 (2007). For example, the "denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal only where a possibility of inconsistent verdicts exists if the case proceeds to trial." *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 167, 519 S.E.2d 540, 546 (1999) (citation and quotation marks omitted), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000). Thus, motions based upon res judicata serve to "prevent[] the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993).

According to defendants, "[p]roceeding with the present case under the trial court's ruling will force [them] to re-litigate the previously-adjudicated Gentamicin claims" and to "confront the likelihood of inconsistent verdicts[.]" In making this argument, defendants equate the Dismissal with a prior decision on the merits in a court of law.

Previous decisions, however, have specifically restricted interlocutory appeals based on the doctrine of res judicata.

> Interlocutory appeals [are limited] to the situation when the rejection of . . . defenses [based upon res judicata or collateral estoppel] g[i]ve rise to a risk of two actual trials resulting in two different verdicts. *See, e.g., Country Club of Johnston County, Inc.* . . . , 135 N.C. App. . . . [at] 167, 519 S.E.2d . . . [at] 546 . . . (holding that an order denying a motion based on the defense of res judicata gives rise to a "substantial right" only when allowing the case to go forward without an appeal would present the possibility of inconsistent jury verdicts) . . . ; *Northwestern Fin. Group, Inc. v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692 (holding that the defense of res judicata gives rise to a "substantial right" only when there is a risk of two actual trials resulting in two different verdicts),

> *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). One panel, however, has held that a "substantial right" was affected when defendants raised defenses of res judicata and collateral estoppel based on a prior federal summary judgment decision rendered on the merits. *See Williams v. City of Jacksonsville Police Dep't*, 165 N.C. App. 587, 589-90, 599 S.E.2d 422, 426 (2004).

Foster, 181 N.C. App. at 162-63, 638 S.E.2d at 534.

The *Foster* Court dismissed the defendants' appeal and had no need to reconcile *Country Club*, *Northwestern*, and *Williams*, because in *Foster*, as here, there was no possibility of a result inconsistent with a prior jury verdict or a prior decision on the merits by a judge. *Id.* at 163, 638 S.E.2d at 534. Indeed, defendants' res judicata defense in the instant case rests solely on the Dismissal with the accompanying stipulations. A review of the pertinent case law reveals that, in the context of interlocutory appeals involving the defense of res judicata, this Court has drawn a distinction between claims of a substantial right based on prior voluntary dismissals with prejudice and claims based on prior adjudications by a judge or jury. *Id.*; *Robinson v. Gardner*, 167 N.C. App. 763, 769, 606 S.E.2d 449, 453, *disc. review denied*, 359 N.C. 322, 611 S.E.2d 417 (2005); *Allen v. Stone*, 161 N.C. App. 519, 522, 588 S.E.2d 495, 497 (2003); *see also Anderson v. Atl. Cas. Ins. Co.*, 134 N.C. App. 724, 727, 518 S.E.2d 786, 789 (1999) (holding that the defendant was not entitled to immediate appeal based on argument that action was barred by a release because "[a]voidance of trial is not a substantial right").

In *Allen*, the plaintiff had dismissed her claims pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure on two previous occasions. 161 N.C. App. at 519-20, 588 S.E.2d at 496. After the plaintiff filed a third action, the defendant filed a motion to dismiss based on the ground that Rule 41(a)(1)'s two-dismissal rule[1] barred the action. The trial court denied the motion to dismiss, and the defendant appealed, arguing that the denial of his motion based on the prior dismissals affected a substantial right. *Id.* at 521, 588 S.E.2d at 496. However, this Court rejected the defendant's argument and explained "that avoidance of a trial, no matter how *tedious or unnecessary*, is not a substantial right entitling an appellant to immediate review." *Id.* at 522, 588 S.E.2d at 497 (emphasis added).

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1. Rule 41(a)(1) of the North Carolina Rules of Civil Procedure provides "that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same claim."

The procedural facts in *Robinson* were virtually identical to those in *Allen*. However, the defendants in *Robinson* claimed that their appeal affected a substantial right because the plaintiff's prior dismissal with prejudice gave rise to the defense of res judicata. 167 N.C. App. at 768, 606 S.E.2d at 452-53. After holding that it was bound by *Allen*, the *Robinson* Court explained that the defendants' assertion of a res judicata defense had no talismanic effect on the substantial right inquiry:

> The present appeal does not involve possible inconsistent jury verdicts or even an inconsistent decision on the merits since, as in *Allen*, there was only a voluntary dismissal that would—if not set aside—result in an adjudication on the merits only by operation of law. There has been no decision by any court or jury that could prove to be inconsistent with a future decision. Defendants do not seek to avoid inconsistent decisions; they seek to avoid any litigation at all.

Id. at 769, 606 S.E.2d at 453.

In *Foster*, the defendants appealed the denial of their motion for judgment on the pleadings. The defendants' claim of a substantial right was based on their contention that a prior settlement and voluntary dismissal with prejudice afforded them the defenses of collateral estoppel and res judicata. 181 N.C. App. at 162, 638 S.E.2d at 533. This Court disagreed, held that it was bound by the decisions in *Allen* and *Robinson*, and dismissed the defendants' appeal as interlocutory. *Id.* at 163, 638 S.E.2d at 534. The *Foster* Court reasoned as follows: "Like the defendants in *Robinson* and *Allen*, defendants in this case base their claim of res judicata on a prior voluntary dismissal with prejudice that does not reflect a ruling on the merits by any jury or judge." *Id.* at 163-64, 638 S.E.2d at 534.

As in *Foster*, defendants in the present case base their claim of a substantial right exclusively on Smith's dismissal with prejudice and the parties' accompanying stipulations. In making this claim, defendants ignore the fact that no judge or jury has ruled on the merits of the claims affected by the Dismissal. Instead, the Dismissal represents "an adjudication on the merits only by operation of law." *Robinson*, 167 N.C. App. at 769, 606 S.E.2d at 453. This appeal does not involve possible inconsistent jury verdicts, much less an inconsistent decision on the merits. *See Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (while the possibility of two trials on the same issue can give rise to a substantial right justifying an interlocutory appeal, the appellant must

show that a judgment or order creates "the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue"); *Country Club of Johnston County, Inc.*, 135 N.C. App. at 167, 519 S.E.2d at 546 (dismissing appeal based on res judicata because prior decisions involved summary judgment orders and not verdicts, and, therefore, the case "present[ed] no possibility of inconsistent verdicts").

In addition, despite defendants' assertion that res judicata "controls" our substantial right analysis, it is not insignificant that this appeal arises from the partial denial of a motion *in limine*. A preliminary ruling "on a motion *in limine* is subject to change during the course of trial, depending upon the actual evidence offered at trial." *Xiong v. Marks*, 193 N.C. App. 644, 647, 668 S.E.2d 594, 597 (2008) (citation and quotation marks omitted). Consequently, the trial court may, in its discretion, modify its ruling on the Gentamicin claims before or during trial of this matter.

For the reasons stated above, defendants have failed to establish that their appeal affects a substantial right that will be lost or inadequately addressed absent immediate review. As such, the trial court's order on the motion *in limine* is not subject to immediate appeal.

IV. Conclusion

Because defendants have not demonstrated the existence of a substantial right, their appeal from the trial court's denial of a portion of their motion *in limine* is not eligible for immediate review. Accordingly, defendants' appeal is dismissed as interlocutory.

DISMISSED.

Judges CALABRIA and INMAN concur.

STATE OF NORTH CAROLINA
v.
KENDRICK TARRELL BURTON

No. COA16-343

Filed 17 January 2017

1. Appeal and Error—preservation of issues—failure to object at trial

Although defendant contended that the trial court erred by allowing the State to introduce into evidence the cocaine found in the vehicle and admitting his statement to an officer that the cocaine in the vehicle belonged to him, defendant did not object to this evidence at trial and thus failed to preserve it for review.

2. Constitutional Law—effective assistance of counsel—failure to object—failure to show prejudice

Defendant did not receive ineffective assistance of counsel based on his counsel's failure to object at trial to the admission of either the cocaine obtained from defendant's car or his incriminating statement admitting that the cocaine belonged to him rather than another person. Defendant failed to show any prejudice arising from his trial counsel's actions.

Appeal by defendant from judgment entered 10 November 2015 by Judge Marvin P. Pope Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 7 September 2016.

Roy Cooper, Attorney General, by Katy Dickinson-Schultz, Assistant Attorney General, for the State.

Meghan Adelle Jones for defendant-appellant.

DAVIS, Judge.

This case presents the issues of whether (1) the State must affirmatively prove that a vehicle was "readily mobile" in order for the "automobile exception" to permit a warrantless search under the Fourth Amendment; and (2) *Miranda* warnings are required before a law enforcement officer may read aloud the charges against two arrestees in each other's presence. Kendrick Tarrell Burton ("Defendant") appeals from his conviction of felony possession of cocaine. On appeal, he

contends that the trial court erred in admitting both the cocaine discovered as the result of a search of his vehicle and the incriminating statement he made while in custody. Alternatively, he contends that he was denied his right to effective assistance of counsel. After careful review, we conclude that Defendant received a fair trial free from error.

Factual and Procedural Background

The State presented evidence at trial tending to establish the following facts: On 18 February 2014, Officer Joshua Kingry of the Asheville Police Department was patrolling an area in downtown Asheville, North Carolina. At approximately 9:10 p.m., Officer Kingry was driving on Water Street when he smelled a strong odor of marijuana. He got out of his car to investigate the source of the odor. He determined that the odor was coming from a silver Honda Civic — which was later determined to be registered to Defendant — parked on the side of the street. As Officer Kingry walked up to the vehicle, he noticed a man — later determined to be Cortez Duff — sitting in the passenger seat with a "tray in his lap . . . [with] marijuana . . . on the tray[.]"

Officer Kingry told Duff to exit the vehicle, searched him, and found a set of digital scales in Duff's pocket. While Officer Kingry was talking to Duff, Defendant came out of the house adjacent to the area where the vehicle was parked. Defendant asked why Officer Kingry was searching Duff, and Officer Kingry responded that he had smelled marijuana and found Duff in possession of marijuana in the car. Defendant told Officer Kingry that he "couldn't search based on the odor of marijuana" and that Defendant needed to get his wallet out of the vehicle.

Officer Kingry directed both Defendant and Duff to sit on the hood of the car while he searched the vehicle. During his search, he found Defendant's wallet as well as a Mason jar containing marijuana. In addition, Officer Kingry located a black sock with two plastic bags inside of it, each containing a substance he recognized to be crack cocaine.

Officer Kingry placed Defendant and Duff under arrest and took them to the Buncombe County Detention Center. After arrest warrants had been issued, Officer Kingry read both warrants aloud to Defendant and Duff in each other's presence. As Officer Kingry finished reading the charges, Defendant told Officer Kingry that Duff "shouldn't be charged with the cocaine because it was [Defendant's]." Defendant was subsequently indicted for possession with intent to sell or deliver cocaine.

A jury trial was scheduled to begin in Buncombe County Superior Court on 10 November 2015. That same day, Defendant's counsel filed a

motion to suppress the evidence that had been obtained from his car.[1] The motion stated, in pertinent part, as follows:

> According to the State's Discovery, my client was detained on 2/14/2014 on or about 26 Water Street, Asheville, N.C. He was detained because Asheville Police Officer Kingry said that he stopped and when he smelled the odor of marijuana coming from a parked car, owned by my client and occupied by Corteze [sic] Lamont Duff. Officer Kingry reported seeing Marijuana in the lap of Mr. Duff who he detained. He also detained my client when he came out to his car to try and retrieve his wallet. The defendant objects to being detained, arrested, searched, and having his car searched. He denies voluntarily consenting to any searches.

A hearing on Defendant's motion was held before the Honorable Marvin P. Pope, Jr. Defendant's attorney stated the following to the trial court regarding the motion: "Your Honor, frankly I'm not sure my client has standing to object to the beginning of the detention, but I think he might. He wanted me to object to it, but I don't think it's a strong argument."

The trial court denied Defendant's motion to suppress, and Defendant's trial began. The jury ultimately found Defendant guilty of felony possession of cocaine. Defendant was sentenced to 5 to 15 months imprisonment. His sentence was suspended, and he was placed on supervised probation for 18 months. Defendant gave oral notice of appeal in open court.

Analysis

I. Preservation of Issues for Appeal

[1] Defendant argues that the trial court erred in allowing the State to introduce into evidence the cocaine found in the vehicle because, he contends, the search of his car violated his rights under the Fourth Amendment. He also challenges the admission of his statement to Officer Kingry that the cocaine in the vehicle belonged to him on the theory that the introduction of this evidence violated his rights under the Fifth Amendment. However, Defendant concedes in his brief that his trial counsel did not object to any of this evidence at trial.

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1. We note that the record does not indicate that Defendant ever made a motion to suppress the statement he made at the detention center to Officer Kingry.

Our Supreme Court has held that

> [t]o preserve an issue for appeal, the defendant must make an objection at the point during the trial when the State attempts to introduce the evidence. A defendant cannot rely on his pretrial motion to suppress to preserve an issue for appeal. His objection must be renewed at trial. [Defendant's] failure to object at trial waived his right to have this issue reviewed on appeal. This assignment of error is overruled.

State v. Golphin, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (citations omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Thus, Defendant has failed to preserve these issues for appellate review. *See id.* at 465, 533 S.E.2d at 234 ("As [defendant] did not object, he has failed to preserve these assignments of error for appellate review.").

Nor is Defendant entitled to review of these issues for plain error. It is well established that this Court will conduct plain error review only where the defendant specifically makes a plain error argument in his appellate brief. *See State v. Dennison*, 359 N.C. 312, 312-13, 608 S.E.2d 756, 757 (2005) (where "defendant did not 'specifically and distinctly' allege plain error as required by North Carolina Rule of Appellate Procedure 10(c)(4), defendant [was] not entitled to plain error review" (citation omitted)). Here, Defendant has failed to "specifically and distinctly" argue plain error in his brief, and — for this reason — he is not entitled to plain error review. *See Golphin*, 352 N.C. at 465, 533 S.E.2d at 234 (because defendant "did not 'specifically and distinctly' argue plain error . . . these assignments of error are overruled" (internal citation omitted)).

II. Ineffective Assistance of Counsel

[2] Defendant contends, alternatively, that he was denied effective assistance of counsel. In order to prevail on an ineffective assistance of counsel claim, "a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Phillips*, 365 N.C. 103, 118, 711 S.E.2d 122, 135 (2011) (citation and quotation marks omitted), *cert. denied*, __ U.S. __, 182 L. Ed. 2d 176 (2012).

> Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result

> of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (internal citations and quotation marks omitted), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006).

> In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendants to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Turner, 237 N.C. App. 388, 395, 765 S.E.2d 77, 83 (2014) (internal citations, quotation marks, and brackets omitted), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 563 (2015). However, "[i]n considering ineffective assistance of counsel claims, 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." *Id.* at 396, 765 S.E.2d at 84 (citation and brackets omitted).

Defendant argues that his trial counsel's representation was ineffective because he failed to object at trial to the admission of either (1) the cocaine obtained from Defendant's car; or (2) his incriminating statement admitting that the cocaine belonged to him rather than to Duff. We address each of these issues in turn.

A. Discovery of Cocaine Inside Defendant's Vehicle

Defendant contends that his trial counsel should have objected on Fourth Amendment grounds to the admission of the cocaine obtained during Officer Kingry's warrantless search of his vehicle. Defendant asserts that because the State did not prove that Defendant's car was

"readily mobile," a warrantless search of the vehicle was not permitted under the Fourth Amendment. We disagree.

It is well established that "[p]ursuant to the so-called 'automobile exception' to the warrant requirement, a search warrant is not a prerequisite to the carrying out of a search of a motor vehicle as long as the officer has probable cause to search." *State v. Corpening*, 109 N.C. App. 586, 589, 427 S.E.2d 892, 894 (1993). The United States Supreme Court has explained that the automobile exception to the Fourth Amendment's protection against warrantless searches and seizures "has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation." *California v. Carney*, 471 U.S. 386, 394, 85 L. Ed. 2d 406, 415 (1985).

While appearing to concede that the automobile exception would normally apply to the facts of this case, Defendant argues that the exception is inapplicable here because the State failed to prove that Defendant's vehicle was "readily mobile." In making this argument, Defendant cites our Supreme Court's decision in *State v. Isleib*, 319 N.C. 634, 356 S.E.2d 573 (1987).

In *Isleib*, an officer observed the defendant driving a vehicle, and based on an informant's tip, the officer conducted a warrantless search of the vehicle without the defendant's consent. *Id.* at 638, 356 S.E.2d at 576-77. The officer did not see any contraband in plain view, but upon searching a pocketbook in the vehicle, he found a bag of marijuana. The defendant filed a motion to suppress the evidence, arguing that her Fourth Amendment rights were violated as a result of the warrantless search. The trial court granted her motion, and we affirmed. *Id.* at 636, 356 S.E.2d at 575.

The Supreme Court reversed our decision, holding that the search of the vehicle fell within the automobile exception to the warrant requirement. *Id.* at 637, 356 S.E.2d at 575. The court held that

> [t]he so-called "automobile exception" to the warrant requirement . . . is founded upon two separate but related reasons: the inherent mobility of motor vehicles which makes it impracticable, if not impossible, for a law enforcement officer to obtain a warrant for the search of an automobile while the automobile remains within the officer's jurisdiction and the decreased expectation of privacy

> which citizens have in motor vehicles, which results from the physical characteristics of automobiles and their use.

Id. at 637, 356 S.E.2d at 575-76 (internal citations omitted).

Defendant attempts to characterize *Isleib* as standing for the proposition that where an officer does not actually see a vehicle being driven, the vehicle cannot be deemed "readily mobile" for purposes of the automobile exception. However, no such proposition was stated by our Supreme Court in *Isleib*. Nor has Defendant cited to any other case expressly holding that the State must prove a vehicle was actually capable of movement at the time an officer conducted a warrantless search of it where the vehicle's appearance gave no indication it was incapable of being driven.[2]

In the present case, the record establishes that Officer Kingry observed Defendant's car parked on the street next to his residence. No evidence was presented at trial suggesting that the vehicle was actually incapable of movement at the time it was searched by Officer Kingry.[3]

Therefore, Defendant has failed to offer any persuasive argument that an objection by his trial counsel on this ground would have been successful. Accordingly, he has failed to show prejudice for purposes of his ineffective assistance of counsel claim. *See State v. Roache*, 358 N.C. 243, 326, 595 S.E.2d 381, 433 (2004) (rejecting ineffective assistance of counsel claim where defendant failed to show prejudice).

B. Incriminating Statement

Defendant next argues that his trial counsel provided ineffective assistance by failing to object to the admission of his statement to Officer Kingry that the cocaine belonged to him rather than Duff. He contends that this statement was obtained in violation of his Fifth Amendment rights because Officer Kingry failed to advise him of his *Miranda*[4] rights before reading the two warrants to him and Duff in each other's presence.

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2. Defendant cites a number of decisions applying the automobile exception in which the court mentions as part of the factual summary of the case that the vehicle was observed by an officer while it was being driven. However, we reject Defendant's attempt to extrapolate from these cases a rule that an officer *must* actually see the vehicle being driven before the automobile exception can apply.

3. While there was testimony that Defendant's car was towed following his arrest, there was no explanation given for the towing, and we lack any basis for concluding that the vehicle was towed because it was inoperable.

4. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

The warnings required by *Miranda* "appl[y] only in the situation where a defendant is subject to custodial interrogation." *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002) (citation omitted), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Here, the State does not dispute that Defendant was in custody at the time the warrants were read to him and Duff. Thus, the remaining question is whether Defendant's statement was made during interrogation.

> Both the United States Supreme Court and this Court have held that during a custodial interrogation, if the accused invokes his right to counsel, the interrogation must cease and cannot be resumed without an attorney being present . . . . The term 'interrogation' is not limited to express questioning by law enforcement officers, but also includes any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Golphin, 352 N.C. at 406, 533 S.E.2d at 199 (internal citations and quotation marks omitted).

This Court has held that "[f]actors that are relevant to the determination of whether police should have known their conduct was likely to elicit an incriminating response include: (1) the intent of the police; (2) whether the practice is designed to elicit an incriminating response from the accused; and (3) any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion[.]" *State v. Fisher*, 158 N.C. App. 133, 142-43, 580 S.E.2d 405, 413 (2003) (citation and quotation marks omitted), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004).

The State contends that Defendant's statement was spontaneous rather than the result of interrogation. It is well established that "[s]pontaneous statements made by an individual while in custody are admissible despite the absence of *Miranda* warnings." *State v. Lipford*, 81 N.C. App. 464, 468, 344 S.E.2d 307, 310 (1986). North Carolina courts have applied this principle on a number of occasions.

For example, in *State v. Mack*, 81 N.C. App. 578, 345 S.E.2d 223 (1986), the defendant was found asleep in a car that had driven off the road and come to a stop on top of a fence. When a police officer approached the car, he smelled a strong odor of alcohol and saw a bottle of whisky on the front passenger side floorboard. After the officer transported the defendant to the police station, the officer asked him

"questions with reference to a social security number." *Id.* at 579, 345 S.E.2d at 224 (quotation marks omitted). The defendant responded, "All I did was . . . I fell asleep and ran over there to the fence." *Id.*

The defendant moved to suppress this statement, and the trial court denied the motion. *Id.* at 579-80, 345 S.E.2d at 224. On appeal, this Court determined that because the officer could not "have reasonably anticipated a self-incriminatory answer" in response to questions regarding the defendant's social security information, "we construe defendant's inopportune response to the officer's routine booking questions as a 'spontaneous utterance.' " *Id.* at 582, 345 S.E.2d at 225.

Similarly, in *State v. Frazier*, 142 N.C. App. 361, 542 S.E.2d 682 (2001), a police officer found drugs in the defendant's hotel room. At trial, the officer was asked by the prosecutor whether the defendant made any statements while in the hotel room. The officer testified that the defendant had stated that "there were no other drugs in the room." *Id.* at 364, 542 S.E.2d at 685. The defendant's counsel moved to suppress the officer's testimony regarding the defendant's statement, arguing that it was obtained in violation of his *Miranda* rights. The trial court denied the motion. *Id.* at 364, 542 S.E.2d at 685.

This Court affirmed the trial court's denial of the motion to suppress the defendant's statement. We held that "[s]pontaneous statements made by an individual while in custody are admissible despite the absence of Miranda warnings." *Id.* at 369, 542 S.E.2d at 688 (citation and quotation marks omitted). Because there was "no evidence from the record Defendant's statement was made in response to any question posed by the officers[,]" we concluded that the utterance was a "spontaneous statement, not made in response to the officers' prompting, and thus . . . admissible despite the absence of *Miranda* warnings." *Id.* at 370, 542 S.E.2d at 689; *see also State v. Sellers*, 58 N.C. App. 43, 48, 293 S.E.2d 226, 229 (where defendant told officer "I'm drunk. I would maybe blow a thirty [on a breathalyzer test,]" the statement was spontaneous such that no *Miranda* warning was required), *disc. review denied*, 306 N.C. 749, 295 S.E.2d 485 (1982).

We are likewise satisfied in the present case that Defendant's admission to Officer Kingry is properly classified as a spontaneous statement. N.C. Gen. Stat. § 15A-501 provides, in pertinent part, that "[u]pon the arrest of a person, with or without a warrant . . . a law-enforcement officer: (1) Must inform the person arrested of the charge against him or the cause for his arrest." N.C. Gen. Stat. § 15A-501 (2015); *see also* N.C. Gen. Stat. § 15A-401(c)(2) (2015).

Here, the State argues that Officer Kingry's act of reading Defendant's and Duff's charges to both of them at the same time was consistent with his statutory obligation to inform them of the charges against them. While Defendant argues that it is not a common practice for an officer to inform multiple arrestees of the charges against them in the presence of one another, he has failed to cite any legal authority condemning this practice as unlawful. Moreover, Defendant has also failed to show (1) any awareness by Officer Kingry of a personal relationship between Defendant and Duff so as to have led him to believe that upon hearing the charges against Duff, Defendant was likely to make an inculpatory statement; or (2) that his reading of the charges in this manner was a practice designed to improperly elicit incriminating statements from defendants. Therefore, no *Miranda* warning was required under these circumstances.

Accordingly, Defendant has once again failed to show any prejudice arising from his trial counsel's actions. Therefore, we are unable to conclude that Defendant received ineffective assistance of counsel. *See State v. Givens*, __ N.C. App. __, __, 783 S.E.2d 42, 49 (2016) ("Accordingly, defendant's argument that he received ineffective assistance of counsel and is entitled to a new trial is overruled.").

Conclusion

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

NO ERROR.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
GEORGE REYNOLD EVANS, DEFENDANT

No. COA16-629

Filed 17 January 2017

1. Constitutional Law—right to speedy trial—Barker factors—failure to challenge sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the drugs and weapons charges against him based on an alleged violation of his constitutional right to a speedy trial. The trial court properly considered the factors articulated in *Barker*. Further, defendant did not challenge the evidentiary support for any of the trial court's findings, or argue that the court's findings did not support its conclusion of law.

2. Search and Seizure—traffic stop—motion to suppress evidence—reasonable suspicion

The trial court did not err in a drugs and weapons case by denying defendant's motion to suppress the evidence seized at the time of his arrest. The officer had the requisite reasonable suspicion to justify a traffic stop of defendant's car, and the trial court's findings of fact also supported this conclusion. Further, defendant failed to offer any appellate argument challenging the evidentiary basis for a conclusion that reasonable suspicion existed.

Appeal by defendant from judgment entered 8 January 2016 by Judge Jay D. Hockenbury in Onslow County Superior Court. Heard in the Court of Appeals 29 November 2016.

Attorney General Roy Cooper, by Associate Attorney General Cara Byrne, for the State.

Sharon L. Smith for defendant-appellant.

ZACHARY, Judge.

George Evans (defendant) appeals from the judgment entered upon his convictions for possession of drug paraphernalia and carrying a concealed weapon. On appeal, defendant argues that the trial court erred by denying his motions to dismiss the charges against him for violation

of his constitutional right to a speedy trial, and to suppress evidence seized at the time of defendant's arrest. After careful consideration of defendant's arguments, in light of the record and the applicable law, we conclude that the trial court did not err and that defendant is not entitled to relief on the basis of these arguments.

I. Factual and Procedural Background

At approximately 4:00 a.m. on 9 March 2013, Jacksonville Police Officer Jason Griess was patrolling the area of U.S. 17 and Moosehart Avenue, an area that Officer Griess characterized as a "known drug corridor." As Officer Griess drove north on U.S. 17, he observed that a vehicle traveling south had come to a complete stop in the right-hand lane of travel. The vehicle "was stopped in the middle of the southbound travel lane in the outside travel lane," and was not at a stop sign or intersection. Defendant was later determined to be the driver of the car. Officer Griess then saw an unidentified pedestrian approach the passenger side of the car and lean in the window. Based on Officer Griess's observations that the vehicle had stopped in the roadway at 4:00 a.m., that a man then approached and leaned into the car and that these events occurred in an area known for drug activity, Officer Griess decided to conduct an investigatory traffic stop. When Officer Griess turned his patrol vehicle around and approached the car from behind, the vehicle started moving south again, and pulled into a parking lot. Officer Griess followed the car into the parking lot and alerted other officers as to his location.

In the parking lot, Officer Griess got out of his patrol vehicle and approached defendant's car. As Officer Griess approached the car, he saw defendant open the door, duck his head down, and then straighten up. Defendant came around the side of the car, raised his arms, and told Officer Griess that he had gotten out of the car in order to pick up his cell phone from the floor of the car. Officer Griess ordered defendant to get back in the car. Several other law enforcement officers soon arrived, including Sergeant Chris Funke, who noticed that a glass pipe was lying directly behind the driver's side front tire. Officer Griess testified at trial that:

> It was a clear glass cylindrical pipe . . . [with] dark residue on it and what I -- I believe to be crack cocaine inside of it that was dark as well like it had been used recently. I also noted at the time it was unbroken. The location of it was directly behind the front driver's side.

Based upon his training and experience, Officer Griess believed the pipe to be of the type used to smoke crack cocaine. The pipe was three

or four inches directly behind the front tire and in a location where, if the pipe had been present in the parking lot before defendant entered, it would have been crushed when defendant's car drove over it. Sergeant Funke took possession of the pipe, and Officer Griess placed defendant under arrest for possession of drug paraphernalia and possession of cocaine. When Officer Griess searched defendant's car incident to this arrest, he discovered a pellet gun.

On 9 March 2013, defendant was arrested and charged with possession of cocaine, possession of drug paraphernalia, and carrying a concealed weapon. Defendant was released on an unsecured bond the same day. In April, 2014, defendant was arrested and charged with felony assault. Defendant was unable to make bond and remained in jail awaiting trial on the charges associated with this serious assault and was still incarcerated on those charges when defendant was tried for the offenses at issue in this case. On 16 April 2014, the unsecured bond that had been set for the present charges was changed to a $2,500 secured bond. On 6 March 2015, defendant filed a motion for a speedy trial, and on 15 May 2015, the trial court modified the bond in this case to unsecured; however, defendant remained in jail on the assault charges. Defendant was indicted for the charges in the instant case on 15 April 2015.

The charges against defendant came on for trial at the 5 January 2016 criminal session of Onslow County Superior Court. Prior to trial, the trial court conducted a hearing on defendant's motions to dismiss the charges against him for violation of his constitutional right to a speedy trial and to suppress items seized at the time of his arrest. The court denied both of these motions. On 8 January 2016, the jury returned verdicts finding defendant guilty of possession of drug paraphernalia and carrying a concealed weapon, but finding him not guilty of possession of cocaine. The trial court sentenced defendant to consecutive terms of imprisonment of 45 days each for the two offenses of which he was convicted. Because defendant was given credit for the 341 days that he was in jail prior to trial, he did not serve any additional time as a result of these convictions. Defendant gave notice of appeal in open court.

II. Standard of Review

Defendant has appealed from the trial court's orders on two pretrial motions that were heard by the court without a jury. "On appeal, the standard of review when the trial court sits without a jury 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.' " *Barker v. Barker*, 228 N.C. App. 362, 364, 745 S.E.2d 910, 912 (2013)

(quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). "The well-established rule is that findings of fact made by the 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 them, although the evidence might have supported findings to the contrary." *Henderson County v. Osteen*, 297 N.C. 113, 120, 254 S.E.2d 160, 165 (1979) (citation omitted). "A trial court's unchallenged findings of fact are 'presumed to be supported by competent evidence and [are] binding on appeal.' " *Hoover v. Hoover*, __ N.C. App. __, __, 788 S.E.2d 615, 616 (2016) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

In this case, defendant argues that the trial court erred by denying his motions to dismiss the charges against him for deprivation of his constitutional right to a speedy trial and to suppress the evidence seized at the time of his arrest on the grounds that the evidence was seized in violation of his rights under the Fourth Amendment to the United States Constitution. Thus, both of defendant's appellate arguments are based upon an assertion that his constitutional rights were violated. "An appellate court reviews conclusions of law pertaining to a constitutional matter *de novo*." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citation omitted). " '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) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

III. Speedy Trial Motion

A. Introduction

[1] The Sixth Amendment to the United States Constitution states, in relevant part, that "in all criminal prosecutions the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. "This provision is made applicable to the states by the Fourteenth Amendment." *State v. Washington*, 192 N.C. App. 277, 282, 665 S.E.2d 799, 803 (2008) (citing *Klopfer v. North Carolina*, 386 U.S. 213, 222, 18 L. Ed. 2d 1, 8 (1967)). The leading case on a criminal defendant's constitutional right to a speedy trial is *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), in which the United States Supreme Court set out a framework for analyzing a defendant's assertion of a violation of the right to a speedy trial:

> A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should

> assess in determining whether a particular defendant has been deprived of his right. . . . [W]e identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

Barker, 407 U.S. at 530, 33 L. Ed. 2d at 116-117. "North Carolina courts have adopted these standards in analyzing alleged speedy trial violations." *Washington*, 192 N.C. App. at 282, 665 S.E.2d at 803 (citing *State v. Bare*, 77 N.C. App. 516, 519, 335 S.E.2d 748, 750 (1985)). *Barker* also held that no single factor is determinative:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Barker at 533, 33 L. Ed. 2d at 118. We next consider the factors identified in *Barker* in the context of the facts of this case.

B. *Barker* Factors

1. Length of Delay

In analyzing a defendant's claim of deprivation of the right to a speedy trial, "[w]e must first determine the relevant period of delay. 'A defendant's right to a speedy trial attaches upon being formally accused of criminal activity, by arrest or indictment.' The period relevant to speedy trial analysis ends upon trial." *State v. Friend*, 219 N.C. App. 338, 343, 724 S.E.2d 85, 90 (2012) (quoting *State v. Hammonds*, 141 N.C. App. 152, 159, 541 S.E.2d 166, 172 (2000)). In this case, defendant was arrested on 9 March 2013 and tried beginning on 5 January 2016, a period of delay of two years and ten months.

"[S]ome delay is inherent and must be tolerated in any criminal trial[;] for example, the state is entitled to an adequate period in which to prepare its case for trial[.]" *State v. Pippin*, 72 N.C. App. 387, 391-92, 324 S.E.2d 900, 904 (1985) (citations omitted). "Consequently, 'the length of a delay is not determinative of whether a violation has occurred.' " *Hammonds*, 141 N.C. App. at 159, 541 S.E.2d at 172 (quoting *Bare*, 77 N.C. App. at 519, 335 S.E.2d at 750). Thus:

> "[T]he length of the delay is to some extent a triggering mechanism. Until there is some delay which is

> presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." . . . Because the length of delay is viewed as a triggering mechanism for the speedy trial issue, "its significance in the balance is not great."

Id. (quoting *Barker* at 530-31, 33 L. Ed. 2d at 117, and *State v. Hill*, 287 N.C. 207, 211, 214 S.E.2d 67, 71 (1975)).

In this case, defendant asserts that the delay of almost three years between his arrest and the trial on the present charges was long enough to trigger our examination of the other three factors set out in *Barker*. The State argues that the delay was not unreasonable but concedes that the length of the delay may be "a triggering mechanism[.]" We conclude that the length of delay in this case was extensive enough to trigger our consideration of the other *Barker* factors.

2. Reason for Delay

Preliminarily, we address the proper burden of proof regarding the production of evidence as to the reason for the delay of a defendant's trial. In *State v. Spivey*, 357 N.C. 114, 579 S.E.2d 251 (2003), the defendant argued that the four and a half year delay between his arrest and trial violated his right to a speedy trial. Our Supreme Court agreed that "the length of delay was approximately four and one-half years, which is clearly enough to trigger examination of the other factors." *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255. The Court then addressed the defendant's duty to produce evidence as to the cause of the delay:

> [The] defendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution. Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the *neglect or willfulness* of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence. This Court has stated:
>
> > "The constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. . . . Neither a defendant nor the State can be protected from prejudice which is an incident of ordinary or reasonably necessary delay. The proscription is against

> purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort."

Spivey at 119, 579 S.E.2d at 255 (emphasis in original) (quoting *State v. Johnso*n, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969) (other citations omitted)). We conclude that upon a defendant's production of evidence that his trial was delayed for a length of time sufficient to trigger review of the other *Barker* factors, the defendant then has the burden of producing evidence establishing a *prima facie* case that the delay resulted from the neglect or willfulness of the State. At that point, the burden shifts to the State to rebut the defendant's evidence.

On appeal, defendant proposes a different burden of proof, and argues that the trial court "erred in applying the *Barker* analysis, because it failed to hold the prosecution to its burden of justifying the delay once [the defendant] made a *prima facie* showing of unreasonable delay." Defendant contends that when a defendant shows that the length of delay is sufficient to trigger review of the other *Barker* factors, the burden of proof then shifts to the State to explain the cause of the delay, *without* requiring the defendant to make an initial proffer of evidence indicating that the delay was caused by the willful acts or negligence of the State. We disagree.

Defendant's position is supported solely by his reference to an excerpt from a sentence in *Pippin*, in which this Court stated that on the facts of that case, the Court "agree[d] with the implicit finding of the trial court that a delay of fourteen months in bringing defendant to trial was *prima facie* unreasonable and required the district attorney to fully justify the delay." *Pippin*, 72 N.C. App. at 392, 324 S.E.2d at 904. Defendant appears to contend that the use of the phrase "*prima facie* unreasonable" in this excerpt has the effect of placing the burden upon the State to "fully justify" any pretrial delay that is lengthy enough to warrant review of the factors discussed in *Barker*. However, review of the entire *Pippin* opinion makes it clear that defendant's interpretation of that case is not correct. In *Pippin*, this Court stated that:

> Defendant has the initial burden of showing, *prima facie*, that the delay was caused by the willful acts or neglect of the prosecuting authority, and, if this burden is met, the State must "offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* showing or risk dismissal."

Pippin, 72 N.C. App. at 391, 324 S.E.2d at 904 (emphasis added) (quoting *State v. McKoy*, 294 N.C. 134, 143, 240 S.E. 2d 383, 390 (1978)). Upon

review of the facts of the case and the factors identified in *Barker*, we held that:

> In balancing the four *Barker* factors, we find that defendant had presented a *prima facie* case that the district attorney's delay in bringing him to trial for approximately fourteen months was caused, in significant part, by the negligence of the district attorney in securing an indictment under which defendant could be properly tried. . . . Once the defendant presented a *prima facie* case that substantial delay was the result of the district attorney's negligence, the burden of proof shifted to the state to fully explain and justify the reasons for the delay.

Pippin at 398, 324 S.E.2d at 907-908 (emphasis added). We conclude that *Pippin* does not support defendant's position on the burden of proof in a case raising a speedy trial claim.

In the present case, defendant does not argue that he presented evidence that the delay of his trial was the result of the willful actions or negligence of the State. Defendant instead relies upon his contention, which we have rejected, that the State had the initial burden of producing evidence to justify the delay. We also observe that the uncontradicted record evidence established that (1) between the time of defendant's arrest and his trial, he was represented by five different attorneys, each of whom needed time to become familiar with the case, and that (2) although the prosecutor submitted the glass pipe to the State Crime Lab within a few days of defendant's arrest, the lab did not return the pipe and test results to the State until 22 July 2015. We conclude that defendant has failed to make a persuasive argument regarding the reason for the delay.

3. Defendant's Assertion of Right

In *Barker*, the United States Supreme Court held that although a defendant's failure to assert his right to a speedy trial would not constitute a waiver, "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker* at 532, 33 L. Ed. 2d at 118. In this case, defendant asserted his right to a speedy trial in a timely *pro se* motion, which was later adopted by his counsel.

4. Prejudice

Regarding the prejudice arising from a violation of a defendant's right to a speedy trial, *Barker* held that:

> Prejudice . . . should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (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. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532, 33 L. Ed. 2d at 118.

At the hearing on defendant's speedy trial motion, the trial court asked defendant's counsel to articulate the prejudice that defendant had suffered as a result of the delay in his trial. After consulting with defendant, his counsel stated that defendant was prejudiced by being jailed for almost a year on relatively minor charges and that the delay "allowed the State through its witnesses to formulate a concerted plan on how to respond to these allegations. . . . In other words, they were -- it gave them time to get their stories all together so they would be consistent." In addition, defendant testified at the hearing that he was prejudiced by the delay in his trial because, in his opinion, the delay allowed the State's witnesses to coordinate and to fabricate their testimony. The following excerpt is representative of defendant's testimony on this issue:

> DEFENDANT: [i]f we had went to trial when we was supposed to have went to trial, none of this would have come about with them giving them adequate time to make changes and lie about the story concerning the crack pipe and the other charge because I was stopped twice within one week. And that gave them ample time to coordinate, because it was the same officer who stopped me the first time. Seven days later, they stopped me again. And every time that they stopped me, it was always a lie that they used as an excuse to obtain searching my vehicle.

Neither defendant's testimony nor the statement of his counsel was supported by other evidence. On appeal, defendant concedes that the trial court did not find his testimony credible, but argues that the trial court failed to give adequate consideration to the prejudice that is inherent in pretrial incarceration. Defendant fails to acknowledge that, during the time that he was incarcerated on the present charges, he was also incarcerated on unrelated felony charges. "Although a convict in the penitentiary is entitled to the constitutional protection of a speedy trial,

in determining the effect of the length of delay in trial, it must be noted that such a person is not deprived of the freedom an acquittal would bring to a person being held in jail only for the purpose of awaiting trial." *State v. Wright*, 28 N.C. App. 426, 430, 221 S.E.2d 751, 754, *aff'd*, 290 N.C. 45, 224 S.E.2d 624 (1976). In this case, defendant remained in jail on unrelated charges even after his bond was reduced to unsecured, and he does not allege that he suffered anxiety or prejudice specifically related to these charges. We conclude that the only prejudice that defendant has identified is the prejudice that is an essential attribute of any period of incarceration.

C. Discussion

As discussed above, the "four interrelated factors [identified in *Barker*] must be considered and balanced in deciding whether a defendant's Sixth Amendment right to a speedy trial has been violated." *State v. Pickens*, 346 N.C. 628, 649, 488 S.E.2d 162, 174 (1997). In the present case, the trial court made the following findings of fact in its order denying defendant's motion to dismiss the charges against him for violation of his right to a speedy trial:

> 1. The Defendant was arrested on March 9, 2013 by the Jacksonville Police Department and charged with the offenses listed in the indictment in the above file number.
>
> 2. It has been approximately 2 years and 9 months from the date of the Defendant's arrest until the current term of Court in which the Defendant's case was called for trial.
>
> 3. The controlled substances seized from the Defendant at the time of his arrest were submitted to the State Crime Laboratory for analysis on or about March 15, 2013.
>
> 4. The reports and conclusions of the Crime Lab and their analysis were not completed until about July 22, 2015.
>
> 5. The Defendant has had five lawyers appointed to represent him during the pendency of this action; some lawyers withdrew because of conflicts, others at the request of the defendant.
>
> 6. The Defendant asserted his right to speedy trial by filing a motion to that effect on or about March 9, 2015. . . .
>
> 7. It has been approximately 10 months from the time the defendant asserted his right to a speedy trial until the case was called for trial[.] . . .

> 8. On March 29, 2014, the defendant was arrested and charged with an unrelated felony assault and attempted murder in Onslow County file numbers 14 CRS 52041; 52042; 52052; 52011; 1110 and has remained in pretrial incarceration for those offenses pending resolution of those offenses.
>
> 9. The Defendant has pending offenses in Columbus County for offenses related to the assault and attempted murder.
>
> 10. According to the court file and records maintained by the Clerk of Court, the Defendant has approximately 341 days pretrial credit to be applied to this case number.
>
> 11. The Defendant's original bond was set at $2,500 which was not an unreasonable bond for these offenses.
>
> 12. There has been no evidence presented to the Court of any purposeful impermissible or intentional delay which the prosecution could have avoided by reasonable effort. The defendant has failed to present any evidence that the delay was caused by the State's negligence or willfulness, and there is no indication that the Court's resources were either negligently or purposefully underutilized.
>
> 13. There is no credible evidence other than the defendant's personal opinion that the delay allowed officers of the Jacksonville Police Department to collude with each other as to the events of the night in question pertaining to the defendant's arrest for these offenses.
>
> 14. There is no credible evidence presented to the Court that the delay prejudiced the defendant or that the defendant's defense was impaired in any way by the delay.

On the basis of its findings, the trial court concluded that:

> Based upon the above findings of fact, the Court concludes as a matter of law that none of the defendant's rights to a speedy trial under the North Carolina General Statutes, North Carolina Constitution or the United States Constitution have been violated.

We conclude that the trial court's order reflects an appropriate consideration of the factors articulated in *Barker*. On appeal, defendant

does not challenge the evidentiary support for any of the trial court's findings, or argue that the court's findings do not support its conclusion of law. "It is not the role of the appellate courts . . . to create an appeal for an appellant," as doing so would leave "an appellee . . . without notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (*per curiam*) (citation omitted). We conclude that defendant has failed to demonstrate that the trial court erred by denying his motion to dismiss the charges against him for violation of his right to a speedy trial, and that accordingly the trial court's order should be affirmed.

IV. Suppression Motion

[2] Defendant argues next that the trial court erred by denying his motion to suppress the evidence seized at the time of his arrest, on the grounds that "the trial court applied the incorrect probable cause standard, rather than reasonable suspicion, to analyze the evidence," and that the trial court's findings of fact were insufficient to show that the decision to stop defendant was based upon reasonable suspicion. We conclude that this argument lacks merit.

"Both the United States and North Carolina Constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Although potentially brief and limited in scope, a traffic stop is considered a 'seizure' within the meaning of these provisions." *State v. Otto*, 366 N.C. 134, 136-37, 726 S.E.2d 824, 827 (2012) (citation omitted). "Traffic stops have been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, . . . 20 L. Ed. 2d 889 (1968)." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (internal quotation omitted). "Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a 'reasonable, articulable suspicion that criminal activity is afoot.' " *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000)).

"An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). When determining whether an investigatory stop was based upon reasonable suspicion of criminal activity:

> A court must consider "the totality of the circumstances --the whole picture" in determining whether a reasonable suspicion to make an investigatory stop exists. The stop

> must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an "unparticularized suspicion or hunch."

Watkins, 337 N.C. at 441-42, 446 S.E.2d at 70 (quoting *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981), and *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989) (other citation omitted)).

An appellate court's review of an order ruling on a defendant's motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

In the present case, the uncontradicted evidence showed that Officer Griess was patrolling an area that he described as a "known drug corridor" at 4:00 a.m., when he observed defendant's car stop in the lane of traffic, whereupon an unidentified pedestrian approached defendant's car and leaned in the window. Officer Griess testified that "all [of] these actions are indicative to me of a drug transaction" and that, based upon this set of circumstances he decided to "pull up behind the vehicle and conduct a traffic stop." Officer Griess testified that his "primary concern was the drug activity because of the possible hand-to-hand transaction [he had] observed." We conclude that Officer Griess's observations, coupled with reasonable inferences from those observations, gave Officer Griess the requisite reasonable suspicion of criminal activity required for him to conduct a brief investigatory traffic stop, based on the facts that (1) defendant stopped his vehicle in a lane of traffic on the roadway; (2) after he stopped his car, an unknown pedestrian approached the car and leaned in the window; and (3) this incident occurred at 4:00 a.m. in an area known to Officer Griess to be a location where drug sales frequently took place.

In its order denying defendant's suppression motion, the trial court's findings of fact included the following;

. . .

> 2: The Court is in a position to adjudge the credibility of the witnesses.
>
> 3: On March the 9th, 2013, at approximately 4:12 a.m., Jacksonville Police Officer Jason Griess on routine patrol was traveling north on US Highway 17 [and observed] . . . a vehicle coming toward the officer who was going 45 miles per hour, and this was in the vicinity of Moosehart Avenue and Route 17 in Jacksonville, which is a large business corridor and, also, a noted drug corridor in the city. The officer noticed that the vehicle, who was traveling in the opposite direction, came to a stop on the outside lane, which is the lane closest to the businesses of Route 17 at this location. This is a five-lane highway, two lanes in each direction with a turn lane in the middle. There were other vehicles going south in the same direction of the noted vehicle and traffic was light. . . .
>
> 4: The officer noticed that the vehicle came to a complete stop on the outside lane and an individual, a male, approached the vehicle on the passenger's side and was leaning into the vehicle. The officer, who was alone in his patrol car, performed a U-turn and turned on his blue light[.] . . .
>
> 5: The officer did the U-turn and was making the stop because of a violation done in his presence of either a state or city statute. The state statute is [N.C. Gen. Stat. §] 20-141(h) which states no person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic. . . .
>
> 6: The officer observed the traffic violations before he turned his blue light on. The officer also observed suspicious activity in the drug corridor by the car stopping on the road and a male approaching and leaning into the car.
>
> 7: After the blue light was on, the vehicle quickly made two right turns [into a] . . . parking lot[.] . . . The officer pulled up behind the vehicle at a 90-degree angle[.] . . .

8: The officer called in his location, and got out of the car. As he was approaching the vehicle, the officer noticed the top front door began to open[.] . . . A male head popped out and an individual identified as the defendant walked to the officer, who told the defendant to get back in the car. The defendant made a statement, "I was just getting out to pick up my cell phone from the floor." At that time, the officer called for additional backup[,] . . . [and] stayed next to the car . . . watching the defendant until the backup arrived.

9: In approximately one minute the backup arrived; Officer Colvell, Officer Ehrler and Officer Funke. . . .

10: Officer Griess brought the other officers up to date on what happened before their arrival, and Officer Funke found a glass pipe that is typically used for smoking cocaine three to four inches behind the front driver's tire in a position [where it] was highly unlikely that the pipe would not have been crushed if it was in that position before the Defendant parked his car.

11: The pipe on the ground was picked up and put into an evidence bag. Officer Griess searched the vehicle and he found a pellet gun wrapped in a ski mask in a pocket on the back of [the] driver's passenger seat readily accessible to the defendant.

12: The glass smoking pipe on the ground is similar to pipes used to smoke cocaine. The Defendant was placed under arrest for possession [of] drug paraphernalia, possession of cocaine, and carrying a concealed weapon. The pipe, ski mask and pellet gun were seized and taken to the evidence room of the Jacksonville Police Department. . . . The defendant was not given a citation for violating the North Carolina State Statute 20-141(h) or the Jacksonville City Statute 0125-1113, because the emphasis of the police investigation was on the drug charges.

. . .

Based upon its findings of fact, the trial court concluded that:

1: If an officer has probable cause to believe that an individual has committed even a very minor criminal offense

in his presence, he may without violating the Fourth Amendment arrest the offender.

2: An officer has probable cause for arrest when the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person or one of reasonable caution in believing in the circumstances shown that the suspect has committed an offense.

3: Observing a traffic violation provides sufficient justification for a police officer to detain the offender vehicle for as long as it takes to perform the judicial incidence of a routine traffic stop.

4: Officer Griess had probable cause to believe that a traffic violation occurred in his presence and was justified in stopping the Defendant's vehicle.

5: The officers were justified in searching in the area of the vehicle, and after finding the crack pipe, had lawful grounds to search the vehicle even without the defendant's consent.

6: The traffic stop, arrest of the defendant, and search of the [defendant's] vehicle satisfied the constitutional requirements set forth in the U.S. Constitution, the North Carolina Constitution and the North Carolina General Statutes.

In the heading to defendant's appellate argument regarding the denial of his suppression motion, defendant asserts that "there was no reasonable suspicion sufficient to justify stopping [defendant]." However, defendant does not set forth any legal argument or citation to authority to support this contention, which is therefore deemed abandoned. *See* N.C. R. App. P. Rule 28(a) (2015) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Defendant's appellate brief instead focuses upon the fact that the trial court applied a probable cause standard, rather than reasonable suspicion, to the question of whether the brief investigative seizure of defendant violated his rights under the Fourth Amendment. Defendant correctly asserts that the proper standard for determining the constitutionality of a traffic stop is reasonable suspicion. However, defendant fails to acknowledge that probable cause is a more stringent standard than reasonable suspicion and that, as a result, the trial court's error tended to benefit defendant.

Moreover, "there is sound authority to the effect that where the court below has reached the correct result, the judgment may be affirmed even though the theory on which the result is bottomed is erroneous." *Dobias v. White*, 240 N.C. 680, 688, 83 S.E.2d 785, 790 (1954). "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." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (citations omitted).

We conclude that the undisputed facts and circumstances known to Officer Griess support the conclusion that the law enforcement officer had the requisite reasonable suspicion to justify a traffic stop of defendant's car, and that the trial court's findings of fact support this conclusion as well. As discussed above, defendant has not offered any appellate argument challenging the evidentiary basis for a conclusion that reasonable suspicion existed. Defendant asserts that the court's findings of fact are insufficient to establish reasonable suspicion, and cites *State v. Murray*, 192 N.C. App. 684, 666 S.E.2d 205 (2008). In *Murray*, however, the law enforcement officer who stopped the defendant admitted that he had not observed the defendant violate any traffic laws, and that the officer had "no reason to believe" that the defendant was engaged in any illegal activity. *Murray*, 192 N.C. App. at 688, 666 S.E.2d at 208. In the present case, Officer Griess observed defendant stop his vehicle in a lane of travel of a busy highway, which is both a violation of traffic regulations and a safety hazard. The officer also saw a pedestrian approach defendant's car and lean in the window and, as previously discussed, these events occurred at 4:00 a.m. in an area known for illegal drug sales. We conclude that *Murray* is factually distinguishable from the present case and does not require reversal of the trial court's denial of defendant's suppression motion.

For the reasons discussed above, we conclude that the trial court did not err by denying defendant's motion to dismiss the charges against him for violation of his right to a speedy trial, or by denying his motion to suppress the evidence seized at the time of his arrest. Given that defendant has raised no other challenges to his convictions, we conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges CALABRIA and INMAN concur.

STATE v. GREENE

[251 N.C. App. 627 (2017)]

STATE OF NORTH CAROLINA
v.
KRYSTEN S. GREENE, DEFENDANT

No. COA15-1060

Filed 17 January 2017

1. Larceny—from the person—sleeping victims—not touching purses

Where defendant stole several items from the victims' purses while they slept in a hospital waiting room, the trial court erred by failing to dismiss the charge against defendant for larceny from the person. The victims' purses—although close to the victims—were not actually touching the victims, so there was insufficient evidence that the property was taken from the victims' person or within the victims' protection and presence.

2. Conspiracy—to possess stolen property—sufficiency of evidence

Where defendant stole several items from the victims' purses while they slept in a hospital waiting room, the trial court did not err by declining to dismiss the charges of conspiracy to possess stolen goods. The evidence showed that defendant made a phone call from jail to a Mr. Spencer, and thereafter Mr. Spencer showed up at the residence where the stolen pistol was located and admitted to "working with" defendant.

3. Evidence—hearsay—same evidence admitted without objection

The Court of Appeals declined to consider defendant's argument that the trial court erroneously admitted hearsay from a police detective in defendant's trial for theft-related charges, because the same evidence was admitted on several other occasions without objection, including by another detective.

4. Evidence—plain error review—no probable impact on jury's verdict

Where defendant argued that the trial court committed plain error in allowing a police detective to testify that a Mr. Spencer was linked to several other crimes with defendant and that he had admitted to working with defendant, even assuming error, considering the other evidence regarding a conspiracy with Mr. Spencer there was no probable impact on the jury's verdict.

5. Constitutional Law—effective assistance of counsel—alleged error on cross-examination of police officer

Where defendant was convicted for several theft-related offenses, defendant did not receive ineffective assistance of counsel. Even assuming defendant's attorney committed an error in his cross-examination of a police detective, defendant failed to show that but for counsel's unprofessional errors the result of the proceeding would have been different.

6. Appeal and Error—argument not considered—conviction at issue already vacated

The Court of Appeals did not address whether the trial court committed plain error in reinstructing the jury on larceny from the person, because earlier in the same opinion the Court of Appeals vacated and remanded defendant's conviction for larceny of the person.

7. Larceny—two separate victims—not one continuous transaction

Where defendant stole property from two separate victims, the Court of Appeals rejected defendant's argument that the takings were part of one continuous transaction and that judgment should be arrested on one of the larceny convictions.

Appeal by defendant from judgments entered on 4, 6 and 13 May 2015 by Judge John E. Nobles, Jr. in Superior Court, Onslow County. Heard in the Court of Appeals 22 February 2016.

Attorney General Josh Stein, by Special Deputy Attorney General I. Faison Hicks, for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

STROUD, Judge.

Defendant appeals from several convictions for theft-related offenses. We vacate defendant's convictions for larceny from the person because the evidence does not establish the necessary elements to sustain a conviction of larceny from the person and remand for judgment to be entered on the lesser-included offense of misdemeanor larceny and any resentencing if necessary due to two of defendant's multiple convictions being vacated. We find no error as to defendant's remaining convictions.

I. Background

The State's evidence tended to show in November 2012, Ms. Ramona Tongdee was at the hospital with her grandmother because her grandfather was hospitalized for a stroke. Ms. Tongdee and her grandmother were in a waiting room furnished with couches, recliners, and chairs. Ms. Tongdee fell asleep on a couch and when she awoke her "purse was on the floor. Rather than kind of tucked away, it was on the floor with things spilled out of it[.]" Ms. Tongdee's grandmother's purse "was on the couch, in the same manner." Ms. Tongdee was missing her pink .40 caliber semiautomatic pistol and her grandmother was missing $75.00.

The hospital had security video cameras in this area and the security footage showed a man "going through Ms. Tongdee's purse, as well as other family members' property, while they were asleep in the room. Altogether, the time frame spanned about 11 minutes, while the male was going through the their [(sic)] property while they slept." Later, in a field near a residence, officers discovered a pink pistol. Mr. Julian Spencer later arrived at the residence and told the officers he was there to get a dog from inside the residence, but he did not have a key. Mr. Spencer then admitted that he was working with defendant.

In April of 2013, Ms. Marcia Humphrey returned to her home and discovered that thousands of dollars of cash and old coins, including an 1857 quarter, were missing from her home. Defendant's fingerprint was found in Ms. Humphrey's home, although Ms. Humphrey did not know him or give him permission to be in her home. Thereafter, defendant's girlfriend pawned Ms. Humphrey's 1857 quarter.

In April of 2014, defendant was indicted for several crimes. Ultimately, the jury convicted him of felonious breaking and/or entering, felonious larceny after breaking and/or entering, felonious possession of stolen goods/property, larceny of a firearm, possession of a stolen firearm, two counts of larceny from the person, felonious possession of stolen goods/property, feloniously conspiring to possess stolen goods/property, and possession of a firearm by felon. In February of 2015, defendant "admitted habitual felon status." (Original in all caps.) The trial court entered judgments, and defendant appeals.

II. Motion to Dismiss

Defendant contends that two of his motions to dismiss should have been allowed.

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

A. Larceny from the Person

[1] Defendant first contends that the trial court erred in failing to dismiss the charge of larceny from the person from Ms. Tongdee and her grandmother due to insufficiency of the evidence.

> The essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with intent to permanently deprive the owner of the property. It is larceny from the person if the property is taken *from the victim's person or within the victim's protection and presence at the time of the taking.*

State v. Hull, 236 N.C. App. 415, 418, 762 S.E.2d 915, 918 (2014) (emphasis added) (citations and quotation marks omitted). Our Supreme Court has explained that the definition of a taking "from the person" was established by the common law:

> This Court recently addressed the crime of larceny from the person in *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991). We noted that because the North Carolina General Statutes do not define the phrase "from the person" as it relates to larceny, the common law definition controls. We quoted with approval from the common law description of "from the person":
>
> > Property is stolen "from the person," if it was under the protection of the person at the time. Property attached to the person is under the protection of the person even while he is asleep. And

> the word "attached" is not to be given a narrow construction in this regard. It will include property which is being held in the hand, or an earring affixed to the ear, or a chain around the neck, or anything in the pockets of clothing actually on the person's body at the moment. Moreover, property may be under the protection of the person although not actually "attached" to him. Thus if a man carrying a heavy suitcase sets it down for a moment to rest, and remains right there to guard it, the suitcase remains under the protection of his person. And if a jeweler removes several diamonds and places them on the counter for the inspection of a customer, under the jeweler's eye, the diamonds are under the protection of the person. On the other hand, one who is asleep is not actually protecting property merely because it is in his presence. Taking property belonging to a sleeping person, and in his presence at the time, is not larceny from the person unless the thing was attached to him, in the pocket of clothing being worn by him, or controlled by him at the time in some equivalent manner.
>
> The crime of larceny from the person is regularly understood to include the taking of property "from one's presence and control." Thus, for larceny to be "from the person," the property stolen must be in the immediate presence of and under the protection or control of the victim at the time the property is taken.

State v. Barnes, 345 N.C. 146, 148–49, 478 S.E.2d 188, 190 (1996) (citations omitted).

State v. Buckom clarifies,

> At common law, Larciny [sic] from the person is either by privately stealing; or by open and violent assault, which is usually called robbery. Open and violent larciny [sic] from the person, or robbery is the felonious and forcible taking from the person of another, of goods or money to any value by violence or putting him in fear. The difference between the two forms of larceny referred to by Blackstone is that robbery, even in its least aggravated

> form, is an open and violent larciny [sic] from the person, or the felonious taking, from the person [of,] or in the presence of[,] another, of goods or money against his will by violence or by putting him in fear, whereas stealing from the person is a concealed, clandestine activity. At common law, larceny from the person differs from robbery in that larceny from the person lacks the requirement that the victim be put in fear. Larceny from the person forms a middle ground in the common law between the private stealing most commonly associated with larceny, and the taking by force and violence commonly associated with robbery.

328 N.C. 313, 317, 401 S.E.2d 362, 364–65 (1991) (citations, quotation marks, and ellipses omitted).

Defendant argues that our Supreme Court clarified in *State v. Barnes* that "[t]aking property belonging to a sleeping person, and in his presence at the time, is not larceny from the person unless the thing was attached to him, in the pocket of clothing being worn by him, or controlled by him at the time in some equivalent manner." 345 N.C. 146, 149, 478 S.E.2d 188, 190 (1996). Defendant argues that because Ms. Tongdee's purse and her grandmother's purse were not attached to them as they slept, there was insufficient evidence of larceny from the person.

The State's argument essentially concedes that the purses were not attached to or touching the victims and takes a creative technological approach to defendant's contentions. The State argues that even if the purses were not attached to their owners, the purses were still under their protection thanks to their vicarious "eye" of the video cameras in the hospital[1]:

> Property is under the protection of a person, such that it can be the subject of a larceny from the person, so long as, among other things, it is under the person's eye. *E.g.*, *State of North Carolina v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991) ("If a jeweler removes several diamonds and places them on the counter for the inspection of a customer, under the jeweler's eye, the diamonds are under the protection of the person.")

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1. The videotape of the incident is not in our record, so our statement of the facts and analysis is based upon the testimony at trial, some of which describes what is happening in the video.

> Here, the evidence showed that Ms. Tongdee and [her grandmother] placed their purses essentially right next to their bodies as they lay down to sleep. And the evidence also showed that they went to sleep in a room that was equipped with a video surveillance camera that created a motion picture photo-recording of every human action that occurred during every second while Ms. Tongdee and [her grandmother] slept in the ICU waiting room. This video surveillance camera acted as the functional equivalent to the jeweler's eye in *Buckom*.

(Quotation marks and brackets omitted). The State's argument takes the meaning of "under the jeweler's eye," far out of context and beyond its meaning as used in case law. *Buckom*, 328 N.C. at 318, 401 S.E.2d at 365; *see State v. Boston*, 165 N.C. App. 890, 893, 600 S.E.2d 863, 865 (2004).

In *State v. Boston*, this Court noted that cases addressing the situations where property was taken from the person emphasize the importance of "the awareness of the victim of the theft at the time of the taking[.]" 165 N.C. App. at 893, 600 S.E.2d at 865. In *Boston*, the defendant testified that he was having a conversation with the victim in the victim's home and "noticed a wallet on a little table near where defendant was standing. Defendant then took the wallet and walked out the door." *Id.* at 891, 600 S.E.2d at 864. The victim had turned away and did not see the defendant take the wallet. *Id.* at 893, 600 S.E.2d at 865. This Court determined that the trial court erred by failing to instruct the jury on misdemeanor larceny because the "defendant presented evidence that the wallet was not under the eye of, or the protection or control of, Mr. Skinner at the time the wallet was taken." *Id.* The court in *Boston* noted that its

> holding is consistent with the North Carolina Supreme Court's decision in *State v. Buckom*, 328 N.C. 313, 401 S.E.2d 362 (1991). In *Buckom*, the Court held that the "from the person" element of larceny from the person was supported by evidence that the defendant took money from the open drawer of a cash register at the same time the cashier was reaching in the drawer to make change. What distinguishes *Buckom* from Lee[2] and *Barnes* is not

2. In *State v. Lee*, this Court determined that the taking of a handbag from a grocery cart when the owner was "four or five steps away" looking at the grocery shelves was not larceny from the person. 88 N.C. App. 478, 478–79, 363 S.E.2d 656, 656 (1988) (quotation marks omitted).

> only the distance involved, which is relevant to immediate presence, but also the awareness of the victim of the theft at the time of the taking, which is relevant to protection and control. This distinction is further supported by dicta in *Buckom* and *Barnes*. Both cases cited the example of diamonds placed on the counter and "under the jeweler's eye" as remaining under the protection of the jeweler. *Buckom*, 328 N.C. at 318, 401 S.E.2d at 365; *Barnes*, 345 N.C. at 148, 478 S.E.2d at 190.

Id.

Video surveillance systems may make a photographic record of a taking, but they are no substitute for "the awareness of the victim of the theft at the time of the taking[.]" *Id.* Many stores, office buildings, and even city streets now have video camera surveillance. Furthermore, it is increasingly common for individuals to have video security systems in their yards and homes, and some systems will allow individuals to view the video from their home system on their phone or computer when away from the residence. The State's theory of video surveillance as the "functional equivalent" of the human eye would convert any larceny committed in areas monitored by video to larceny of the person. Sometimes technological changes may lead quite reasonably to changes in the law, but the essence of larceny from the person is still that it is *from the person*, which requires the person's awareness at the time of the taking unless the item was attached to the person. *See id.*

Nor does the evidence here show that the purses were attached, in the owners' pocket, or controlled in a like manner. *See Barnes*, 345 N.C. at 149, 478 S.E.2d at 190. Ms. Tongdee testified that her purse was between her and her daughter "touching the couch" and that her grandmother's "purse was between her [grandmother] and the recliner and the couch[.]" Even though the purses were close to their owners, the evidence does not show that the purses were actually even touching them. Because Ms. Tongdee and her grandmother were sleeping at the time of the larceny, without their purses "attached to [them], in the pocket of clothing being worn by [them], or controlled by [them] at the time in some equivalent manner[,]" *id.*, we conclude that there was insufficient evidence that "the property [was] taken from the victim[s'] person or within the victim[s'] protection and presence at the time of the taking." *Hull*, 236 N.C. App. at 418, 762 S.E.2d at 918. Therefore, we vacate and remand for entry of judgment on misdemeanor larceny. *See generally Lee*, 88 N.C. App. at 479–80, 363 S.E.2d at 657 ("In vacating the larceny from the person conviction, however, we note that the evidence and

verdict support a conviction of the lesser included offense of misdemeanor larceny, and remand the matter to the trial court so defendant can be sentenced for that offense in compliance with G.S. 14-3(a)." (citation omitted)).

B. Conspiracy to Possess Stolen Property

[2] Defendant next contends that the trial court erred in failing to dismiss the charges of conspiracy to possess stolen goods, *i.e.*, the gun. Defendant concedes he was in possession of stolen property but argues the evidence was insufficient as to any conspiracy. "A criminal conspiracy is an agreement between two or more persons to do an unlawful act. A conspiracy may be shown by express agreement or an implied understanding. A conspiracy may be shown by circumstantial evidence[.]" *State v. Choppy*, 141 N.C. App. 32, 39, 539 S.E.2d 44, 49 (2000) (citations, quotation marks, and brackets omitted).

The evidence showed that defendant made a phone call from jail to Mr. Spencer. Thereafter, Mr. Spencer showed up at the residence where the pistol was and admitted to "working with" defendant. The jury could reasonably infer from the evidence that Mr. Spencer conspired with defendant to possess the pistol. *See id.* We conclude that there was sufficient evidence of a conspiracy to possess stolen property, *see id.*, and thus the trial court properly denied defendant's motion to dismiss. This argument is overruled.

III. Hearsay Testimony

Defendant next raises several hearsay issues.

A. Hearsay with Same Evidence Admitted

[3] Defendant contends that the trial court erred in overruling his objection to hearsay as to Detective Lincoln's testimony regarding what a witness told him about a vehicle description, the owner of that vehicle, and the relationship between defendant and the vehicle owner, defendant's girlfriend. We need not review these arguments because even if Detective Lincoln's testimony was inadmissible hearsay, the same evidence was admitted on several other occasions without objection, including by another detective. *See State v. Perry*, 159 N.C. App. 30, 37, 582 S.E.2d 708, 713 (2003) ("By failing to object to the later admission of the same evidence, defendant has waived any benefit of the original objection and failed to preserve the issue for appeal."). These arguments are overruled.

B. Plain Error

[4] Defendant also contends that although he failed to object, the trial court committed plain error in allowing Detective Lincoln to testify that Mr. Spencer was linked to several other crimes with defendant, and he had admitted to working with defendant.

> [T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted). Considering the other evidence regarding a conspiracy with Mr. Spencer, including that defendant called him from jail, and thereafter Mr. Spencer showed up at the location where the stolen pistol was hidden, even if there was hearsay testimony as to the relationship between the two, we do not believe this "error had a probable impact on the jury's finding that the defendant was guilty." *Id.*

IV. Ineffective Assistance of Counsel

[5] Defendant next argues that he received ineffective assistance of counsel because his attorney elicited the hearsay testimony regarding the relationship between himself and Mr. Spencer.

> To obtain relief for ineffective assistance of counsel, the defendant must demonstrate initially that his counsel's conduct fell below an objective standard of reasonableness. The defendant's burden of proof requires the following:
>
> > First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Quick, 152 N.C. App. 220, 222, 566 S.E.2d 735, 737 (2002) (citations and quotation marks omitted). Even generously presuming arguendo that defendant's attorney committed an error in his cross-examination of Detective Lincoln, defendant has not shown that, "but for counsel's unprofessional errors, the result of the proceeding would have been different" given the telephone call between the two from jail coupled with Mr. Spencer thereafter showing up where the gun was hidden. *Id.* We conclude that defendant did not receive ineffective assistance of counsel. This argument is overruled.

V. Jury Instructions

[6] Defendant next contends that the trial court committed plain error in reinstructing the jury on larceny from the person as the instructions "amounted to a directed verdict of guilty since the court did not explain that the person would not physically possess the property or not be within the person's protection if the person was asleep at the time of the taking." (Original in all caps.) As we have already vacated and remanded for defendant's conviction of larceny of the person and as defendant does not challenge the instruction regarding the elements of misdemeanor larceny, we need not address this issue.

VI. Arrest Judgment

[7] Lastly, defendant contends that the trial "court should arrest judgment on one of the two larceny of the persons in 13 CRS 53006 since the thefts occurred during a continuous transaction and is thus one larceny for the purposes of conviction and sentencing." (Original in all caps.) Defendant contends that his theft of the gun from Ms. Tongdee and the cash from her grandmother were part of one continuous transaction. Defendant cites to *State v. Froneberger*, where the defendant was convicted after pawning items of silver from the same larceny victim on

four separate occasions, and this Court set aside three of the convictions because there was no evidence that the larceny was not actually one transaction, but then defendant pawned the items over time. *See Froneberger*, 81 N.C. App. 398, 344 S.E.2d 344 (1986). The Court noted the general rule, "A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place." *Id.* at 401, 344 S.E.2d at 347. Thus, because in *Froneberger*, all of the items stolen belonged to the same owner and were taken from the same place without any evidence that the items were taken at different times, this Court set aside three of the convictions. *Id.* at 401-02, 344 S.E.2d at 347. Evidence indicating property was taken from the same person led to only one conviction of larceny for the defendant. *See id.*

But here, the takings were from two separate victims. In an analogous situation, regarding robbery, this Court has determined that when the "defendants threatened the use of force on separate victims and took property from each of them. . . . [E]ach separate victim was deprived of property. The armed robbery of each person is a separate and distinct offense, for which defendants may be prosecuted and punished." *State v. Johnson*, 23 N.C. App. 52, 56, 208 S.E.2d 206, 209 (1974). Here, defendant took property from both Ms. Tongdee and her grandmother. In fact, the jury saw the video surveillance recording which showed that defendant walked up to the couch where Ms. Tongdee was sleeping, took a purse, went through it, took the gun, began to walk away, and then turned around, walked back to the waiting area, and grabbed a purse from a chair where Ms. Tongdee's grandmother was asleep. Defendant walked away after taking Ms. Tongdee's gun and appeared to be leaving, but then he returned to take her grandmother's purse.

The elements of larceny are: "(1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with intent to permanently deprive the owner of the property." *Hull*, 236 N.C. App. at 418, 762 S.E.2d at 918. Here defendant took and carried away property belonging to two separate victims, without either owner's consent, and with the intent to permanently deprive each of them of their personal property, and thus the jury was properly allowed to consider both charges and the trial court properly sentenced defendant upon them. *See generally Johnson*, 23 N.C. App. at 56, 208 S.E.2d at 209. This argument is overruled.

VII. Conclusion

For the foregoing reasons, we vacate defendant's convictions for larceny from the person and remand for entry of judgments for misdemeanor larceny and any necessary resentencing on defendant's multiple convictions. As to all other issues raised on appeal, we find no error.

VACATED and REMANDED in part; NO ERROR in part.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
BOBBY JOHNSON

No. COA16-491

Filed 17 January 2017

1. Confessions and Incriminating Statements—coercive police interview—failure to Mirandize

The trial court erred by denying defendant's motion to suppress inculpatory statements he made during a police interview in which he was shown a DNA analysis indicating that his DNA was recovered from under a murder victim's fingernails—at which time he should have been *Mirandized*—and then was questioned for hours in a coercive manner. In light of the overwhelming evidence of defendant's guilt, however, the error was harmless beyond a reasonable doubt.

2. Homicide—evidence excluded—overwhelming evidence of guilt

The trial court did not err in defendant's murder trial by excluding evidence of bullet fragments recovered from a parking lot adjoining the crime scene that might have indicated the presence of a second gun. Even assuming for the sake of argument that there was a second gun involved in the crime, the State did not need to prove that defendant was the person who shot the victim in order to convict him of first-degree murder, and the presence of an additional gun would not have weakened the evidence of defendant's involvement.

STATE v. JOHNSON

[251 N.C. App. 639 (2017)]

Appeal by Defendant from judgment entered 6 October 2015 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. Heard in the Court of Appeals 19 September 2016.

Attorney General Josh Stein, by Assistant Attorney General Alvin W. Keller, Jr., for the State.

Marilyn G. Ozer for Defendant.

McGEE, Chief Judge.

Anita Rychlik ("Anita") and her husband, David Rychlik ("David"), were employees of the Thrift Motel in Charlotte ("the motel") when Anita was shot and killed in the early morning hours of 2 May 2007. David was outside in the parking lot in front of the motel talking to Brandy Davis ("Brandy"), when three men ("the men"), all dressed in black, approached from the left side of the motel as one faced the front of the building. At that time, Anita managed the motel and David acted as the security guard. Anita was asleep inside the motel. One of the men was holding a gun, and the man forcibly searched David and Brandy, taking some personal items from both of them, and a set of keys to the motel from David.

Brandy testified the men were African-American, that two of them were approximately five feet, six inches tall or five feet, seven inches tall and weighed about 150 pounds, while the third man was approximately six feet or six feet, one inch tall and weighed between 180 and 200 pounds. According to Brandy, the larger man was holding a small black gun. The men asked David where the safe was and they demanded keys. All three of the men were talking and demanding things. David was hit in the head with the gun during the altercation. Brandy described the man holding the gun as "the older gentleman," and "the tall one," and testified that he told one of the "younger guys" to stay with her and David, and to "shoot" them if they moved. Brandy could see the younger men's faces, and estimated them to be eighteen or nineteen years old. Brandy also testified that the man holding the gun had a "mask all the way down his face" which made it difficult to tell how old he was. One of the smaller, younger men remained with David and Brandy, while the other two men entered the motel. Brandy did not know if the younger man who remained with them had a gun. The two men then entered Anita's bedroom in the motel and there was a struggle. Brandy heard Anita give "a very panic-attack scream," and Anita was shot once in the back of her neck and killed. The men then fled from the scene.

James Rhymes ("Rhymes"), who lived at the motel, testified that on the night in question he left his room upon hearing a strange noise. As Rhymes turned to head toward Anita's office, which was a very short distance from Rhymes' room, he was confronted by a man wearing a mask and holding a gun. Rhymes pushed the gun away from him and turned and ran away up a nearby hill. As he was running away, he heard two gunshots, but was not hit.

The three men escaped, and no one was charged with Anita's murder until 24 October 2011. However, during the course of the investigation Bobby Johnson ("Defendant") was identified as a suspect and, in 2007, he was placed in custody, read his *Miranda* rights, which he waived, and he voluntarily gave investigators an interview and a buccal swab for the purposes of collecting his DNA. DNA was also recovered from under Anita's fingernails, and these DNA samples were sent for testing and comparison. Results from the DNA analysis were returned to investigators in 2009. Although the DNA analysis indicated that only one in 16,600,000 African-Americans could have been the contributor of the DNA recovered from under Anita's fingernails, and that Defendant was one of those African-Americans who could have contributed that DNA, the Charlotte-Mecklenburg Police Department did not attempt to locate Defendant until late 2011.

A police detective "called [Defendant] and spoke to him a number of times and made arrangements for him to come down to the station." Detective William Earl Ward, Jr. ("Detective Ward") testified that they "wanted to talk to him about the DNA evidence." Defendant voluntarily went to the police station on the morning of 24 October 2011, arriving at approximately 9:40 a.m. Defendant was escorted to an interview room on the second floor, just outside the homicide office. The interview room was behind doors that remain locked. Detective Ward and Detective Brian Whitworth ("Detective Whitworth"), together ("the detectives") began to interview Defendant. Approximately four hours after entering the interview room, Defendant was placed under arrest for murder, and approximately ten minutes later, after additional conversation, he was read his *Miranda* rights and signed a waiver of those rights. Approximately twenty-five minutes after that, Defendant began to discuss his involvement in the crime. Defendant named brothers Antonio Chaney ("Tony") and Joshua Chaney ("Josh") as the two other men involved, and stated that it was Tony who shot and killed Anita.

Because the voluntariness of Defendant's confession is an issue on appeal, we examine in great detail Defendant's interrogation on 24 October 2011 – from the initiation of the questioning until Defendant

admitted participating in Anita's murder. According to the video recording of Defendant's interview, the questioning began in a police interrogation room at approximately 9:50 a.m. Defendant told the detectives that he had been "saved" recently, and Defendant was reminded that Detective Ward had interviewed him back in 2007. At approximately 10:11 a.m., the detectives showed Defendant a forensic report stating DNA had been recovered from under Anita's fingernails,[1] and that there was only a one in 16,600,000 chance that the DNA would match any particular African-American, but that the DNA recovered from under Anita's fingernails matched Defendant's DNA.

Detective Ward told Defendant that the 2007 interview had locked Defendant into a statement and that, with the DNA report, they now had the "meat and potatoes," and that Defendant's 2007 statement was coming back and "kicking you in the ass." Defendant was told that the crime was committed by three people, and that one of those three people was Defendant. Defendant was told: "The fact is your DNA is under [Anita's] fingernails in her living quarters which you denied even being there." Defendant was told that he needed "to do the right thing by God," and was told the DNA analysis "puts you there[,]" that "[y]ou were there that night, you know what happened." Defendant was told he had not been at home like he had been telling the detectives. Defendant was told, "you were there [at the motel], you were involved in this crime, it's as simple as that, I can't put it more plainly, you can't make this stuff up. It's a scientific fact." "You were there. This puts you there. You understand what this holds? This could be a capital murder case. This is a death penalty case." "If you want to wear it on your own, that's your decision. If you want to do the right thing and bring other people that were involved, that's your decision." The detectives continued:

> Your body parts, your cells, your DNA, are on her body. How can that happen if you never touched her? There's no way. There's no way your DNA can be spit in the wind and land somewhere. It has to be her grabbing your hair or grabbing your neck. That's how it happens. It's forever, Bobby.[2] Bobby, so you understand, where we're coming

1. The DNA recovered was identified as having come from three separate individuals, one of whom was Anita. Defendant was identified as the likely (one in over sixteen million chance) contributor of the second profile. The third profile was never matched to anyone.

2. Throughout the interview, the detectives referred to Defendant as "Bobby." At times, Defendant referred to himself as "Bobby."

> from is not "hey, we wanted to talk to you about this murder case . . . ." Where we stand now as a law enforcement agency . . . is that there's no question anymore. That's the meat and potatoes right there for the case [pointing at the DNA analysis]. That's enough to charge you with murder right now. Right now. My suggestion to you is this. Stop with the "I wasn't there," because this proves you were there.

The detectives told Defendant that if the shooting was an accident, if Anita backed into the gun and "pow, holy sh*t, you didn't mean for that to happen, now's the time to talk about it. If you stay silent about it, Bobby, you're going to wear it." The detectives told Defendant that they knew what happened to Anita in her room, but that Defendant was going to have to explain it. Defendant was then told again that that the odds were one in 16,600,000 that any African-American person other than Defendant could have contributed the DNA recovered from under Anita's fingernails.

Referring to an earlier comment Defendant had made, Detective Ward stated: "When you said [Anita] was shot in the back of the neck, only you, me, the victim, and the coroner knew that. That was not publicized." Detective Ward told Defendant: "I have locked you in so hard to this story here, you can't get out with a blow torch." As Defendant continued to deny being involved, the detectives stopped him from talking and told him they knew he was lying. The detectives told Defendant:

> You're in a box right now. This is the . . . lock to the door [Detective Ward was holding the DNA report in his hand]. If you want to wear capital murder on your own and let them other two dipsticks go run free, that's on you man. I can't help you with that. But if you want to be a hero, be a real man, be a God saved man, then do the right thing.

The detectives told Defendant they could not promise him anything and people had to pay for their crimes, but that Defendant was facing a capital murder charge and he needed to do what was best for himself. They told Defendant the district attorney would look at the people involved and work with those that they and the detectives believed were being "honest and true." Defendant was told he should cooperate and get the truth "off his chest." Defendant was told that "[p]eople need . . . something to grab ahold of in a case when they're . . . boxed in, and you're boxed in. You're boxed in by the best evidence that is out there for any case today – DNA." Defendant was told that because of the DNA

evidence, "I know you're either my shooter, or you're someone who was with my shooter. We want the shooter."

Defendant was asked, in light of the DNA evidence, what he thought the jury was going to think. Defendant answered that they would think he took part in the crime. Defendant was told that DNA analysts do not make mistakes, and he needed to "do the right thing." Defendant was told that the DNA evidence was "pretty damning, that puts you there." Defendant responded "That put me there, man. That right there just took my life. That right there just took my life." Detective Ward responded:

> Yes, so, and I want you to understand that. That's what I'm trying to explain to you, that it's over. This game is over. This is the meat and potatoes of the case [touching the DNA analysis], that's what we need to lock folks up. We thought well, we can go get a warrant, let's not do that. . . . But this isn't going away, this is a done deal. It's a done deal.

Defendant responded: "I mean, I'm going to jail, so . . . ." Detective Ward interjected: "Well, we're not there yet, but it's pretty close, ok? And if that will make you understand. If that will make you a believer that's, that's a possibility. We'll do what we need to do." Defendant replied, "I want to be on your team. I don't want to be in prison the rest of my damn life." Detective Ward said: "I tell you that the DA works with people . . . ." Defendant interjected that the issue was "not going away," and told the detectives he would try and help them out in the hope that the case against him would be resolved in the best way possible. The detectives told Defendant: "We're going to need everybody that was involved, and what part they played, to help you. That's the only thing that's gonna help you. Saying what you're saying right now, that's not gonna help Bobby a damn bit."

Shortly after making this statement, at approximately 10:36 a.m., the detectives asked Defendant if they could pat him down for weapons. Defendant complied, and was frisked and asked to take off his hat. After the pat-down, Defendant sat back in his chair and the interrogation continued. Defendant was asked to talk about his experience of being "saved," and was told that it was more important to help others than to help himself. The detectives told Defendant that there were three people involved, and that he was one of them. They told Defendant he should help himself, that if he wanted to "wear this" by himself, then "God bless you," but that that would be crazy since there were two others involved. Detective Ward said: "Sh*t, I wouldn't go down by myself."

Defendant was then asked again if he had shot Anita, or been with the person who had, and Defendant again replied, "no." Defendant was told that the detectives did not believe him, and Defendant replied: "I know you don't." Defendant was told: "So what you're telling us, and what you're telling the DA, is that you're not willing to help out." Defendant was again reminded that it was a capital murder case with DNA evidence implicating him. Detective Ward told Defendant they locked him into a story in 2007, a story that was a lie, then they took the buccal swab to test his DNA, and that if "Bobby doesn't choose to help himself, then Bobby can wear it himself. All I can do is say that the smartest thing, based on my experience, is to cooperate. . . . You and two other folks, two other people, have gotten away with murder since 2007. That sucks."

Detective Ward told Defendant they had shown the "meat and potatoes" to him, but he was still not willing to help himself. Defendant was told: "We rely on facts. We don't rely on B.S. This right here [touching DNA report] is fact." Defendant was then told: "Bobby doesn't know what we've done. He doesn't know that we haven't already talked to the *other defendants*. You don't know what other evidence we have, or what other folks have said about what you did." (Emphasis added).

Defendant was told: "We've done our homework. The ball's in your court. The time to get on the bus and get the best seat is now. I didn't have this [the DNA evidence]" in 2007. The detectives told Defendant that he was allowed to tell his lies in 2007, but now they were showing him the truth. "It's black and white." The detectives offered to go and get an assistant district attorney to see what offer Defendant might get for cooperating, but Defendant declined. Defendant was told that it was up to him to "save your own tail," and that if he needed to throw others "under the bus" he should do that. The detectives talked some more about Defendant needing to get the best seat on the bus, and Defendant told them that he was trying to. Defendant then started crying.

The detectives said that "accidents happen," and that Defendant should act in a godly way. Defendant said that he felt "set up." When Defendant again denied having been at the murder scene, the detectives told him he could not keep denying involvement. Defendant said: "I don't have a life." The detectives responded: "You don't," and told Defendant he was lying, they knew the truth, that Defendant could not deny what was in his heart, and that the only way to "take care of those tears" was to get it all out in the open and "clean his heart, clean Bobby's soul."

The detectives then told Defendant his tears didn't "mean sh*t," that Defendant was just crying because he was "trapped," and that Defendant did what he did and made his own choices. The detectives told Defendant they were giving him the option to cut his losses, and that was all they could do. A few minutes later, Defendant stated: "I want to help you bad" and started to cry again. Defendant then hit himself in the head and began sobbing for over a minute. As Defendant whimpered with his head on the table, he was told to wipe his face, and asked if he had any regrets. Defendant was asked if the tears were for Anita or himself.

At approximately 11:09 a.m., Defendant told the detectives he was sick to his stomach, and he was provided with a trash can and told that the only way to feel better would be to start talking to them. Defendant was told that the best thing for him, and what the jury would like to see, would be to show remorse. Defendant began sobbing again and denied having killed Anita. Defendant continued sobbing for a couple of minutes and, at one point, his head fell to the table. Talking through sobs, Defendant said he was "a free man right now," then spit into a cup and said, "I'm about to lose my life."

The detectives kept telling Defendant he was making it hard on himself, and to think about God. Defendant told the detectives he was trying to help, and that he came voluntarily to talk. Defendant was then told that most people do not run, they talk, and that "we didn't call you and say hey Bobby I need to talk to you about this murder case, you're a suspect. Would you have come down? Probably not." Defendant was told the only way to "make it right" with God and with Defendant's children was to tell the detectives "how it went down." Defendant was then asked: "What you blubbering for?" "Bad news for you, Bobby, cause it's your DNA hooked to hers. Boom!" Defendant responded, crying, "I'm tore apart. I'm destroyed right now."

Defendant was told: "There's only one thing to do in this room," and Defendant responded: "I know there's only one thing to do in this room." The detectives told Defendant that either he "goes down" or he "gives up the other two folks." Defendant continued crying with his head on the table and was told: "For us, this is the best interview in the world. We got you. You know we got you." The detectives then told Defendant how making a plea agreement worked, that not all cases went to trial, and that if Defendant wanted, they would go and get an assistant district attorney at that moment. After a couple of minutes, Defendant stated that if he admitted to committing the crime, he would go to prison for

life or get the death penalty. After some more back and forth, Defendant was told, "you're trying to find another lie to tell me. You're stuttering."

Several minutes later, Defendant was told: "You know it's over," and he responded: "I know it's over." The detectives then asked, "who else was with you that night?" After another long pause, Defendant again denied involvement, cried some more, and said, "that's all I got." After several minutes, the detectives told Defendant: "You are almost there." "We know what happened." "We're trying to be there for you." Detective Whitworth told Defendant: "I could have just come and locked you up but I don't do that to people because I'm an honorable man." Defendant said he could not keep repeating the same thing, and was told, "then don't, repeat the right thing." Defendant began crying again and indicated he felt suicidal.

A couple of minutes later, Defendant was told it was not unusual for people to come in "and lie like you." Defendant cried some more and the detectives told him that his continued lying made the "best case for DA – you lie to us once on tape, lied again on tape – got your DNA." Defendant then said: "I know I'm dead," and the detectives told him he had the choice to cooperate or not, and asked him, "are you willing to wear this yourself?"

Detective Ward asked Defendant if he thought he was going to be able to go home "today." When Defendant answered that he did not, he was told: "Then you're under arrest for murder." Detective Whitworth told him: "If you don't believe you can get up and walk out of here, then I have no choice. You just told me you believe you're going to jail." Detective Ward then asked Defendant: "Did you just say that, yes or no?" Defendant responded: "Yes, sir." Detective Ward responded: "Then I'm going to have to place you under arrest and then I've got some stuff to do before I continue." "Because to be voluntary you've got to believe you can walk out of here." Defendant said he believed he could go home but that he wanted to help because he believed he was the "star player." Detective Ward told Defendant that if he felt like he could leave, "we're good," but if he did not, "then we'll have to do something different." Defendant was then asked if he thought he could get up and walk out at any time, and Defendant responded, "not at any time, only after you free me to go." A visibly exasperated Detective Whitworth responded: "That's different, Bobby." He then asked Defendant again if he thought he could walk out at that moment, and Defendant responded in the affirmative. Defendant was then told: "Because if not, then we're going to have to go to the next level." Defendant later said he had "faith" that he

could walk out, but also knew he could not provide what the detectives wanted and that he was confused.

Defendant said, speaking about himself: "Right now it looks like Bobby did this because Bobby has DNA under the victim['s] . . . nails." Several minutes later, the detectives told Defendant: "You did what you did." "You're full of sh*t." And: "You're done." The detectives again told Defendant they were certain they were talking to the right person, that Defendant was "choosing not to help" himself, and that he was lying. The detectives told Defendant: "All you can do is make it a little easier on you." They asked him: "Do you think it will go easier on you if you don't talk?" Defendant replied: "No[,]" and the detectives thanked him and said: "So you're listening to us." The detectives reiterated they were certain they were "talking to the right person" and that Defendant was not going to change their minds. The detectives told Defendant to "cut your losses. Help yourself."

At approximately 12:20 p.m., the detectives told Defendant there would be no other interviews with him after that one, that someone would have to pay for the crime, and the nature of the punishment would depend on the individual. Defendant was told: "You told us things in these interviews that only the killer knows. It's that simple." "So is Bobby willing to help Bobby?" Defendant was again told to "cut his losses" and "get the best seat on the bus." Several minutes later, Defendant was told he had gotten away with murder for four years, was asked if he wanted to share the blame, and was told that the "DA wants to know who didn't cooperate; who did cooperate."

The detectives told Defendant they did not "think" he was lying to them, they "knew" it. Defendant was told the "ball" was in his court and, after a long pause, Defendant was again asked if he wanted an assistant district attorney to come and tell him what was in his best interest. Defendant was told that coming clean would give him peace and closure, and that showing remorse would help "cleanse" his soul, and put him at "a higher level." At approximately 12:45 p.m., Defendant was told the district attorney would look at who had cooperated; if only one of the three involved had cooperated, the district attorney would go after the other two; if two of the three had cooperated, the district attorney would go after the uncooperative one. Several minutes later, the detectives asked: "Do you trust them that much?"

Defendant then put his head on the table and went silent for a very long pause. One of the detectives touched Defendant, and Defendant

said: "God," which was followed by minutes more of silence. At approximately 1:05 p.m. Defendant stated: "I'm dead." The detectives told him he would have to pay, but the question was how much; that it would be a question of cooperation versus non-cooperation. Defendant was again told it would be better for him if he cooperated. He was asked if he wanted the detectives to get an assistant district attorney, and was told by Detective Ward that, if he gave a truthful statement, "I'll work for you."

The detectives told Defendant his record was not that bad, other than his prior murder conviction, and that the district attorney would consider that. Defendant was again told the detectives knew they were talking to the right person, and that Defendant knew he was the right person, too.

The detectives left Defendant alone in the interrogation room at 1:15 p.m. and Defendant began to pray out loud. A few minutes later Defendant got up and asked if he could use the restroom, which he did, then returned to an empty interrogation room where he sat alone until 1:57 p.m., when Detective Ward returned alone and resumed talking to Defendant. Detective Ward showed Defendant two post-mortem photographs of Anita at approximately 2:01 p.m.

At approximately 2:03 p.m., Detective Ward told Defendant he was placing him under arrest for Anita's murder, and Detective Ward had Defendant shackle himself to chains set in the interrogation room floor. Although Detective Ward had not yet given Defendant his *Miranda* warnings, he continued to talk to Defendant and listen to him for approximately eleven more minutes. Defendant told Detective Ward he could give him some answers if Detective Ward would allow him to call someone. Detective Ward told Defendant that he was not going to listen to lies. Defendant was told that he was not going to get to go home because murder suspects are generally held without bail.

At approximately 2:14 p.m., Detective Ward began to read Defendant his *Miranda* rights, and Defendant signed a waiver of those rights at approximately 2:17 p.m. Detective Ward continued to question Defendant and told him he was trying to work with Defendant, and that cooperating would be the smartest thing. At approximately 2:22 p.m., Detective Ward told Defendant: "I felt like I had to make you a believer, you weren't believing us." "I felt in my heart like the only thing that's going to make you understand that this isn't going to go away is to charge you with murder. So I charged you with murder."

Several minutes later, Detective Ward assured Defendant he did not "have a problem taking the stand on the behalf of a defendant." Detective Ward told Defendant that he could face either second-degree, first-degree, or capital murder and "that's why I'm . . . beating my head against the wall trying to explain to you, help yourself. Put it into a better category for you." Detective Ward told Defendant he could not promise anything, but the district attorney would go easier on Defendant if Defendant was truthful. Defendant was told to "cut his losses," that if he was honest about what he had done, it would help him. Defendant was told not to "wear" the charge all by himself.

At approximately 2:38 p.m., Defendant began crying again and told Detective Ward, "you have to get me a witness protection plan, though," then began sobbing. Defendant asked: "I'm already dead, should I just kill myself all the way?" At approximately 2:40 p.m., Defendant told Detective Ward, while sobbing, "I wasn't the gunman." Defendant then told Detective Ward that Tony and Josh were the other two men involved, asked Detective Ward for a hug, and sobbed on Detective Ward's shoulder. As indicated above, Defendant told the detectives that he had not killed Anita, and that he assumed Tony had been the one who shot her.

Acting on information obtained from Defendant, the detectives located Tony and Josh and questioned them at the police station. Tony and Josh gave different accounts from each other when questioned by the police, and then gave different accounts when testifying at trial. When initially questioned, Josh told police he had handled a gun that night, and that the gun belonged to him. Josh testified that he first told the detectives that he shot Anita, but that this statement was not recorded. Josh then told police Tony had killed Anita; that Tony had told him "he [Tony] shot her[, but Tony] didn't know if he killed her or not." However, at trial, Josh testified he never touched a gun, that Defendant brought the gun, and that he did not know who shot Anita. Tony testified at trial that Defendant and Josh planned the robbery. Tony also testified that Josh never had a gun, but admitted he had previously told police that Josh "probably did have a gun[.]"

When Josh testified at trial, he said that he, Tony, and Defendant walked to the motel and when they were beside the motel, Defendant pulled out a gun and said they should rob a man and a woman who were standing in the parking lot. Josh and Tony wore stocking caps, and Defendant wore a ski mask that covered his face. They all approached the man and woman in the parking lot and Defendant threatened them with his gun and told them to get on the ground; then Josh went through

their pockets. Josh put the items he recovered into his own pockets, except a set of keys, which he gave to Defendant. Defendant told Josh to remain with the victims, and he and Tony went to the motel. Josh heard both a man and a woman screaming, and some gunfire. Defendant and Tony returned a few minutes later and the three men left together. Josh testified that Defendant attempted to rob another man who was approaching the motel, but the man ran away and Defendant fired his gun at the man, but missed. Defendant hid the gun under a brick beside an abandoned building. Josh testified he never had a gun that night, and that he never saw Tony with a gun.

Tony's testimony was that he, Josh, and Defendant left a friend's house and headed toward the motel with the intention of committing a robbery. According to Tony's testimony, Defendant and Josh had come up with the plan. However, Tony then testified they all came up with the plan once they were at the motel. Tony testified Defendant hit the man in the head with his gun, then saw Josh doing something to the man and woman who were on the ground. Tony took the keys and attempted to unlock to door to the motel, and finally managed to find the correct key. He and Defendant went inside, and encountered a woman sleeping. Defendant went to the woman, and when she woke up "she was trying to get him off[,] and "she was screaming." Tony said he left the room to rejoin Josh, then they heard a gunshot and saw Defendant "coming out of the room running." The three men then ran away from the motel, but when they saw a man coming towards them, Defendant shot at the man twice. They went behind a building where Defendant hid the gun under a brick.

Defendant filed a motion to suppress on 11 December 2014, arguing his statements to police should be suppressed because they were not voluntarily made. Defendant's motion specifically argued that Defendant was subjected to custodial interrogation before he was given his *Miranda* rights, and that Defendant's inculpatory statements were made pursuant to improper use of both threat and promise.

Defendant's motion was heard 28 September 2015, and was denied by order entered 3 November 2015, *nunc pro tunc*, 29 September 2015. The trial court ruled that Defendant "was not in custody until the time that he was advised that he was under arrest and Mirandized at 2:14 p.m." The trial court further ruled that Defendant's inculpatory statements were made voluntarily, and not "obtained as a result of hope or fear instilled by the detectives." Defendant was tried and found guilty of first-degree murder on 6 October 2015. Defendant appeals.

[1] In Defendant's first argument, he contends the trial court erred in denying his motion to suppress. We agree, but hold the error was harmless.

Our Supreme Court has stated the proper standard of review for denial of a motion to suppress as follows:

> The applicable standard in reviewing a trial court's determination on a motion to suppress is that the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." Any conclusions of law reached by the trial court in determining whether defendant was in custody "must be legally correct, reflecting a correct application of applicable legal principles to the facts found."

State v. Barden, 356 N.C. 316, 332, 572 S.E.2d 108, 120–21 (2002) (citations omitted). This Court has held:

> We review *de novo* a trial court's conclusions as to the voluntariness of a defendant's waiver of *Miranda* rights and statements. "The State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary." Where, as here, "a defendant's waiver of *Miranda* rights arises under the same circumstances as the making of his statement, the voluntariness issues may be evaluated as a single matter. Whether a waiver and statements were voluntarily made "must be found from a consideration of the entire record[.]" "[T]he reviewing court applies a totality-of-circumstances test."

State v. Ingram, __ N.C. App. __, __, 774 S.E.2d 433, 442 (2015) (citations omitted).

> There are a number of . . . relevant factors [in determining the voluntariness of a statement]:
>
> > whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

> . . . . Furthermore, for a waiver of *Miranda* rights to be valid, it "must be . . . given voluntarily 'in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception[.] "[W]here it appears that an incriminating statement was given under any circumstances indicating coercion or involuntary action, that statement will be inadmissible." "[T]he question of whether Defendant's incriminating statements were made voluntarily turns on an analysis of the circumstances Defendant was subjected to before making his incriminating statements and the impact those circumstances had upon him."

Id. at __, 774 S.E.2d at 442–43 (citations omitted).

In the present case, the trial court made the following relevant findings of fact:

> 3. Det. Ward and another CMPD detective, Brian Whitworth ("Det. Whitworth") sought to make contact with the Defendant on October 19, 2011.
>
> 4. The Defendant came to the police department headquarters on his own, without police escort, on October 24, 2011.
>
> 5. The Defendant was not told he was under arrest.
>
> 6. The Defendant was not shackled or handcuffed.
>
> 7. At times, during the interview with Det. Ward and Det. Whitworth, both detectives left the interview room.
>
> 8. There was not a guard or police officer stationed at the door to the interview room.
>
> 9. The Defendant was in possession of his personal cell phone while inside the interview room.
>
> 10. The Defendant was offered, and accepted, food and drink.
>
> 11. The Defendant was not hesitant to engage with, or otherwise speak to, the detectives.
>
> 12. At no point was the Defendant made any specific promises.

. . . .

18. At no time did the Defendant ask detectives to obtain for him, or to give him the opportunity to speak with, a defense lawyer.

19. The Defendant was emotional at times.

20. The Defendant cried at times.

21. The Defendant expressed concern with his ability to "keep food down."

22. The Defendant was 37 years old at the time of the interview.

23. The Defendant is high-school-educated through the 11th grade and obtained his GED.

24. The Defendant is articulate, intelligent, literate, and knowledgeable about the criminal justice system and its processes.

25. Det. Ward had previously interviewed the Defendant, in 1993, about a murder unrelated to the above-captioned case.

26. While there were no specific promises or threats made by law enforcement, the detectives conducting the interview did represent to the Defendant that the District Attorney "might look favorably" at the Defendant if he made a confession.

27. At one point, the Defendant was patted down, as a matter of course, for safety purposes.

28. Det. Ward had previously interviewed the Defendant, in 2007, about the above captioned case.

29. During his 2007 interview, the Defendant did not admit any involvement in the above-captioned case.

30. The Defendant had self-interest in staying and engaging with police in 2011.

31. The Defendant offered to help, offered to wear a wire, and offered to do whatever else he could to assist the detectives.

Defendant argues the trial court's findings of fact "seem to intentionally downplay the influence of hope and fear." Defendant specifically contends that findings of fact five, nineteen, twenty, twenty-one, and twenty-six are incorrect or incomplete.

Defendant argues that finding five: "Defendant was not told he was under arrest," "is at best an incomplete finding as [Defendant] was told he would be arrested if he did not state that he was there voluntarily. [Defendant] was also told that he was guilty of murder and would 'pay the price. In order to evaluate Defendant's arguments, we have reviewed the relevant parts of the video recordings of Defendant's interview on 24 October 2011, which are set forth above. We note that Defendant was told that he was under arrest at approximately 2:03 p.m. Concerning the time prior to formal arrest, when Defendant was being interrogated, we agree with Defendant that whether or not he was specifically told he was under arrest, the detectives' statements to Defendant, along with the attendant circumstances, made Defendant's position akin to a formal arrest at a point early in the interview.

Findings of fact nineteen, twenty, and twenty-one are all supported by competent evidence, though we agree with Defendant that finding Defendant "was emotional at times," and "cried at times" tends to understate Defendant's emotional state during much of the interview. Concerning Defendant's ability to keep food down, our review of the video interrogation demonstrates that Defendant did tell the detectives he felt sick to his stomach, and that he rejected an offer of food at one point, stating that he worried he would not be able to "keep it down." Defendant also on occasion spit into a cup in a manner indicating stomach upset. Finally, though we may agree with the wording of finding of fact twenty-six that "there were no specific promises or threats made by" the detectives (emphasis added), we agree with Defendant that viewing the totality of the circumstances, Defendant was induced by both fear and hope to make inculpatory statements to the detectives.

Defendant was asked to "voluntarily" show up at the police department for an interview. What Defendant did not know at that time was that the police had received DNA evidence suggesting the overwhelming likelihood that Defendant's DNA had been recovered from underneath Anita's fingernails. Defendant did not know this at the time he was asked to "voluntarily" submit to an interview at the police station, so at the time Defendant arrived at the police station, a reasonable person in Defendant's situation would not have "believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Barden*, 356 N.C. at 337, 572 S.E.2d at 123 (citation omitted).

What is clear to this Court, however, is that Defendant was not going to leave the police station that day without being placed under arrest for Anita's murder.

As the State acknowledges:

> Both the United States Supreme Court and this Court have held that *Miranda* applies only in the situation where a defendant is subject to custodial interrogation. *Miranda v. Arizona*, 384 U.S. at 444, 16 L.Ed.2d at 706; *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404 (1997). The proper inquiry for determining whether a person is "in custody" for purposes of *Miranda* is "based on the totality of the circumstances, whether there was a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. In this case, we must examine "whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest."

Id. (citations omitted); *see also J.D.B. v. North Carolina*, 564 U.S. 261, 269–71, 180 L. Ed. 2d 310, 321-22 (2011).

Approximately twenty minutes into the interview, Defendant was shown the DNA analysis indicating that his DNA had been recovered from under Anita's fingernails. This evidence, if true, placed Defendant not only at the scene of the murder, but in close physical proximity to the victim. We hold that at that time, "a reasonable person in [D]efendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Barden*, 356 N.C. at 337, 572 S.E.2d at 123. A reasonable person, who had previously denied ever having had contact with a murder victim, when confronted with DNA evidence recovered from underneath that murder victim's fingernails, would not believe he was free to exit a police interrogation room and go home. At that point in time, Defendant should have been informed that he was under arrest and should have been provided his rights under *Miranda*. *Id.*

We note that the detectives continued to reinforce the position that Defendant was not free to leave through their subsequent and continuing interrogation. At approximately 10:12 a.m., Detective Ward told Defendant that the DNA evidence locked Defendant in on charges of armed robbery and murder. The detectives told Defendant at

approximately 10:16 a.m. that this case would be a capital murder case, and, unless Defendant wanted "to wear" the whole charge, Defendant needed to tell them who else was involved. In the next few minutes, the detectives told Defendant that his DNA under Anita's fingernails provided enough probable cause to charge Defendant for murder, and showed that Anita had grabbed Defendant's arm or his hair before she was murdered. Approximately thirty-one minutes into the interview, the detectives told Defendant that he should stop denying his participation, because he was so locked into the charges that he could not "get out with a blow torch." Detective Ward again told Defendant that this case would be a capital case, but Defendant could help himself by cooperating, and that district attorneys "will work with people who are honest and true." Defendant was challenged in this manner for over four hours, as thoroughly set out above, until he was finally told he was under arrest. Though we do not apply a subjective test, we note that Defendant was eventually placed under arrest and *Mirandized*, even though he had continued to deny involvement in Anita's murder from the time his interrogation began until he was placed under arrest.

Defendant argues that *Missouri v. Seibert*, 542 U.S. 600, 159 L. Ed. 2d 643 (2004), renders his inculpatory statements involuntary. In *Seibert*, the United States Supreme Court stated that the "technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*." *Id.* at 609, 159 L. Ed. 2d at 653. In *Seibert*, detectives first questioned the defendant without *Miranda* warnings until he confessed, then detectives got the *Mirandized* defendant to repeat his confession. This technique was

> a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of *Miranda*, the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time.

Id. at 604, 159 L. Ed. 2d at 650 (citation omitted). The Supreme Court held:

> By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. After

> all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

Id. at 613–14, 159 L. Ed. 2d at 655-56 (citations omitted).

We agree that the detectives in the present case used the same objectionable technique considered in *Seibert*. However, unlike in *Seibert*, Defendant in the present case did not confess until after he was given his *Miranda* warnings. For this reason, our analysis is whether the entirety of the interrogation, from when Defendant first should have been *Mirandized*, up until his inculpatory statements, rendered Defendant's inculpatory statements involuntary, even without Defendant having confessed prior to having been *Mirandized*.

We hold that resolution of the present case is determined by precedent, which is partially analyzed in *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975). In *Pruitt*, there was

> plenary evidence that the procedural safeguards required by the *Miranda* decision were recited by the officers and that defendant signed a waiver stating that he understood his constitutional rights, including his right to counsel. Even so, the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly made.

Id. at 454, 212 S.E.2d at 100 (citation omitted). Our Supreme Court in *Pruitt* reasoned:

> Another case factually similar to the case now before us is State v. Stevenson, 212 N.C. 648, 194 S.E. 81. There the evidence tended to show that the defendant had started to make a statement while in jail and was told by an officer that he need not lie because the officer already had more than enough evidence for his conviction. The defendant thereupon confessed. This Court awarded a new trial on the ground that the confession was not a free and voluntary confession but was instead a product of unlawful inducement on the part of the law enforcement officer.
>
> In *State v. Drake*, 113 N.C. 625, 18 S.E. 166, the facts showed that while the defendant was being carried from the place of his arrest to a Justice of the Peace, a law enforcement officer said to him, 'If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you.' At that time the defendant denied his guilt, but after the Justice of the Peace had committed him to jail, he confessed. The Court again held the confession to be involuntary and, in part, stated:
>
> > ". . . The assertion of his innocence, in reply to the proposition that he should confess and thus make it easier for him, does not at all prove that the offer of benefit from the officer who had him in charge did not find a lodgment in his mind. If so, what could be more reasonable than that when he found himself on the way to prison in charge of the author of this hope that a confession would alleviate his condition, he should be tempted to act then upon a suggestion that he had rejected when the prospect did not seem to him so dark, and make a confession. It *may* have proceeded from this cause, from this hope so held out to him. If it

> *may* have proceeded from that cause, there is no guaranty of its truth, and it must be rejected."

In *State v. Livingston*, 202 N.C. 809, 164 S.E. 337, the defendants were arrested, and after measuring their shoes and tracks at the scene of the crime, the officers told defendants that "it would be lighter on them to confess" and that "it looks like you had about as well tell it." The defendants forthwith confessed to the crime charged. There the Court . . . held that the confessions were involuntary and inadmissible in evidence. *Accord: State v. Fox*, *Supra* (Officer told defendant that it would be better for him in court if he told the truth and that he might be charged with a lesser offense of accessory to the homicide charge rather than its principal.); *State v. Fuqua*, 269 N.C. 223, 152 S.E.2d 68 (A police officer told the incarcerated defendants that he [the officer] would be able to testify that they cooperated if they aided the State in its case.); *State v. Woodruff*, 259 N.C. 333, 130 S.E.2d 641 (Officer obtained favors and concessions on the part of State officials to induce defendant to aid in solving the homicide and promised that if the evidence obtained involved defendant, he would try to help defendant.); *State v. Davis*, 125 N.C. 612, 34 S.E. 198 (Officer told defendant that he had "worked up the case, and he had as well tell all about it.").

The rule set forth in *Roberts* has been consistently followed by this Court. The Court has, however, made it clear that custodial admonitions to an accused by police officers to tell the truth, standing alone, do not render a confession inadmissible. Furthermore, this Court has made it equally clear that any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage.

In instant case the interrogation of defendant by three police officers took place in a police-dominated atmosphere. Against this background the officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was "lying" and that they did not want to "fool around." Under these circumstances one can infer that the language used by the officers tended to provoke fright. This language was then tempered by statements that the officers considered

> defendant the type of person "that such a thing would prey heavily upon" and that he would be "relieved to get it off his chest." This somewhat flattering language was capped by the statement that "it would simply be harder on him if he didn't go ahead and cooperate." Certainly the latter statement would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess.
>
> We are satisfied that both the oral and written confessions obtained from defendant were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody. We hold that both the oral and the written confessions obtained in the Sheriff's Department on 9 October 1973 were involuntary and that it was prejudicial error to admit them into evidence.

Id. at 456–58, 212 S.E.2d at 101–03 (citations omitted). We hold that the circumstances in the present case were at least as coercive as those in *Pruitt*. In the present case, Defendant was questioned for hours after he should have been *Mirandized* and, throughout this questioning, the detectives repeatedly told Defendant they knew he was lying; that they had DNA proof of Defendant's guilt; that only a guilty person would have known Anita was shot in the back of the neck; that this could be a capital case, and that Defendant's treatment would depend on his cooperation; that the district attorney's office would usually work with those who cooperated; that Detective Ward would consider testifying on Defendant's behalf;[3] that Defendant would feel better if he confessed and did right by God and his children; and that Defendant should get the "best seat on the bus" by giving statements against the two other men involved. It is also clear that the detectives decided to arrest Defendant at the time they did in order to shake him up and, in Detective Ward's words: "I felt in my heart like the only thing that's going to make you understand that this isn't going to go away is to charge you with murder. So I charged you with murder."[4]

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3. *See State v. Flood*, 237 N.C. App. 287, 297, 765 S.E.2d 65, 73 (2014), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 854 (2015) (citing *State v. Fuqua*, 269 N.C. 223, 228, 152 S.E.2d 68, 72 (1967) "(statements inadmissible where an officer offered to testify on the suspect's behalf if he cooperated)."

4. *See Pruitt*, 286 N.C. at 457, 212 S.E.2d at 102 (citation and quotation marks omitted) ("The assertion of his innocence, in reply to the proposition that he should confess and thus make it easier for him, does not at all prove that the offer of benefit from the officer who had him in charge did not find a lodgment in his mind. If so, what could be

The facts before us are in contrast to those in cases where a defendant's statements were found to have been voluntary:

> Unlike the situations in *Pruitt* and *Stevenson*, the detective did not accuse defendant of lying, but rather informed defendant of the crime with which he might be charged and urged him to tell the truth and think about what would be better for him. Further, at the time Howard made the statements defendant contends were coercive, Howard had already identified for defendant, and defendant had acknowledged, the others with him the night of the murder. Earlier in the interview Howard had stated:
>
> > What I want to talk with you about is when you and Chuck and Brian and Bootsy and another guy from Clayton by the name of Brian Barbour come to Raleigh and ya'll robbed an old man and hit him with a bat. That's the incident I'm talking about, okay?
>
> Shortly thereafter, Howard asked defendant, "So who was together? Who was with ya'll that night?" Defendant responded, "Everybody that you named." Defendant knew at that point that the State had at least one witness.
>
> . . . .
>
> Under the totality of the circumstances test, the isolated statements by Howard do not support defendant's contention that his statements were made involuntarily out of fear or hope on the part of defendant. We conclude, therefore, that the trial court did not err in determining that the statements were freely and voluntarily given and in denying defendant's motion to suppress.

State v. McCullers, 341 N.C. 19, 28, 460 S.E.2d 163, 168 (1995); *see also State v. Thomas*, 310 N.C. 369, 379, 312 S.E.2d 458, 464 (1984) ("In *Pruitt*, unlike the case before us, the police repeatedly told defendant that they knew that he had committed the crime and that his story had

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more reasonable than that when he found himself on the way to prison in charge of the author of this hope that a confession would alleviate his condition, he should be tempted to act then upon a suggestion that he had rejected when the prospect did not seem to him so dark, and make a confession. It *may* have proceeded from this cause, from this hope so held out to him. If it *may* have proceeded from that cause, there is no guaranty of its truth, and it must be rejected.").

too many holes in it; that he was 'lying' and that they did not want to 'fool around.' In addition, the officers told defendant in that case that 'it would simply be harder on him if he didn't go ahead and cooperate.' ") (citations and quotation marks omitted); *Flood*, 237 N.C. App. at 296–99, 765 S.E.2d at 72–74 (lengthy analysis of *Pruitt* and other relevant opinions); *State v. Patterson*, 146 N.C. App. 113, 124, 552 S.E.2d 246, 255 (2001) ("In *Pruitt*, the investigating officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around.' They also told him that they considered [him] the type of person 'that such a thing would prey heavily upon' and that he would be 'relieved to get it off his chest.' The Court found that under these circumstances the defendant's confessions were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody.") (citations and quotation marks omitted).

The fact that the detectives at times managed to get Defendant to state that he thought he could leave does not change our analysis. *J.D.B.*, 564 U.S. at 271, 180 L. Ed. 2d at 322 ("[T]he 'subjective views harbored by either the interrogating officers or the person being questioned' are irrelevant. The test, in other words, involves no consideration of the 'actual mindset' of the particular suspect subjected to police questioning."). Based upon *Pruitt* and other cited cases, we hold that Defendant's inculpatory statements "were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody." *Pruitt*, 286 N.C. at 458, 212 S.E.2d at 103. Defendant's motion to suppress his confession should have been granted.

Because we have held that Defendant's constitutional rights were violated by the failure to suppress his inculpatory statements, it is the State's burden to prove this error was harmless beyond a reasonable doubt. " 'A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.' N.C.G.S. § 15A–1443(b) (2011)." *State v. Ortiz-Zape*, 367 N.C. 1, 13, 743 S.E.2d 156, 164 (2013). In its brief, the State incorrectly attempts to place this burden on Defendant. However, we hold that the overwhelming evidence of Defendant's guilt of first-degree murder, based upon the evidence that Anita was murdered in the course of a robbery in which Defendant played an essential part, renders this error harmless beyond a reasonable doubt.

Both Josh and Tony, whose testimony Defendant did not move to suppress, identified Defendant as the third man involved in the robbery and shooting, and both stated Defendant was wearing a mask that covered his face. They both testified that Defendant and Tony entered the motel while Josh remained outside, and both claimed Defendant was carrying a gun. Brandy testified that there were two younger men without their faces covered, and an older, larger man whose face was covered by a mask. Brandy testified it was the older, larger man who held the gun, and who entered the motel with one of the younger men. Most importantly, Defendant's DNA[5] was recovered from under Anita's fingernails. Although Defendant's admission of participation in the crime, which we have held was involuntary, clearly prejudiced Defendant, in light of the overwhelming evidence presented pointing to Defendant as one of the three men involved in the robbery and murder, we hold the prejudice to Defendant was harmless beyond a reasonable doubt. We reach this holding on these particular facts, and because the jury was instructed on acting in concert and felony murder based upon killing in the course of a robbery. The State did not have to prove that Defendant shot Anita, only that he was one of the three men involved in the robberies and murder. The evidence that Defendant was one of the three men involved was overwhelming, and the State has shown beyond a reasonable doubt that Defendant would have been convicted even had his motion to suppress his inculpatory statements been granted.

[2] In Defendant's second argument, he contends the trial court erred in excluding evidence of bullet fragments recovered from the parking lot that might have indicated the presence of a second gun at the crime scene. We disagree.

Defendant argues he could have used this evidence to impeach the testimonies of Josh and Tony. Even assuming *arguendo* that there was a second gun involved in the crime, the State did not need to prove that Defendant was the person who shot Anita in order to obtain a conviction against him for first-degree murder, nor would the presence of an additional gun have weakened the plenary evidence of Defendant's involvement. This argument is without merit.

The trial court erred in denying Defendant's motion to suppress his inculpatory statements, but we hold this error was harmless in light of the plenary additional evidence of Defendant's guilt. For the same reason, we hold that, even assuming *arguendo* the trial court erred in

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5. To a stated certainty of 1 in 16,600,000 African-Americans, and all evidence presented demonstrated that all three of the men involved were African-American.

excluding evidence of bullet fragments recovered from the parking lot, any such error was harmless.

NO PREJUDICIAL ERROR.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
JOHNNY DARNELL MOBLEY, DEFENDANT

No. COA16-545

Filed 17 January 2017

Mental Illness—competency to stand trial—serious health problems—drowsiness during trial

Where defendant was on trial for drug charges and there was evidence before the trial court that defendant had a serious heart condition, for which he had been hospitalized for months; he had been diagnosed with bipolar schizophrenia, a major mental illness; he took 25 different pharmaceutical medications twice daily; his medications had psychoactive side effects; and he was unable to remain awake in the courtroom, even when kicked or prodded by counsel, the trial court erred by failing to appoint an expert to investigate defendant's competence to stand trial.

Appeal by defendant from judgment entered 12 February 2016 by Judge Carla Archie in Gaston County Superior Court. Heard in the Court of Appeals 15 November 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General David W. Boone, for the State.

Lisa Miles for defendant-appellant.

ZACHARY, Judge.

Johnny Darnell Mobley (defendant) appeals from a judgment entered upon his convictions for trafficking in marijuana by possession and transportation, and for having attained the status of an habitual

felon. On appeal defendant argues that the trial court erred by failing to appoint an expert to conduct an investigation into defendant's competence to proceed to trial, and by denying defendant's motion to dismiss the charges against him. After careful consideration of defendant's arguments in light of the record and the applicable law, we conclude that, on the facts of this case, the trial court erred by failing to appoint an expert to investigate defendant's competence to stand trial. Accordingly, we reverse and remand without reaching the issue of the sufficiency of the evidence to support defendant's convictions.

I. Factual and Procedural Background

On 29 January 2015, defendant was arrested on charges of trafficking in more than ten but fewer than 50 pounds of marijuana by possession and by transportation, in violation of N.C. Gen. Stat. § 90-95(h)(1) (2015). Counsel was appointed to represent defendant on 30 January 2015. Defendant was indicted for these offenses on 2 March 2015, and was indicted on 5 October 2015 for having attained the status of an habitual felon. The charges against defendant came on for trial at the 10 February 2016 criminal session of Gaston County Superior Court. Prior to the start of trial, defendant's counsel expressed concern about defendant's having fallen asleep in the courtroom. The trial court conducted a discussion with defendant and counsel, which is described in detail below, and then ruled that defendant was competent to proceed to trial.

The evidence presented by the State at trial tended to show the following: On 28 January 2015, Postal Inspector Justin Crooks inspected a package at the U.S. Post Office in Mount Holly, North Carolina. The package gave off an odor of marijuana; accordingly, he obtained assistance from a Charlotte-Mecklenburg Police Detective who worked with a dog that is trained to identify narcotics. After the dog indicated that the suspicious package contained narcotics, Inspector Crooks obtained a federal search warrant to inspect the contents of the package. Inside the package were two bundles of green vegetable matter weighing over 23 pounds. The contents appeared to be marijuana. This was later confirmed by forensic testing and the parties do not dispute that the package in fact contained marijuana.

After Inspector Crooks examined the contents of the package, he contacted Officer E. Kyle Yancey of the Gaston County Police Department, who arranged for a controlled delivery of the package. The controlled delivery took place on 29 January 2015. Postal Inspector Mark Heath drove a postal service vehicle and wore a mail carrier's uniform. When Inspector Heath arrived at the location to which the package was

addressed, he parked at the curb and got out of the postal service vehicle with the package. As Inspector Heath walked toward the house, he was met by defendant, who accepted the package and signed a postal form acknowledging delivery of the package. Upon Inspector Heath's return to the postal service vehicle, he saw defendant "placing the package into the cargo area of the Ford Explorer that was parked there in the driveway." Inspector Heath radioed law enforcement officers who were in the area and informed them that defendant had accepted the package before placing it a vehicle and driving away. A few minutes later the officers stopped defendant's vehicle. Defendant was arrested and charged with trafficking in marijuana by possession and transportation.

On 11 February 2016, the jury returned verdicts finding defendant guilty of trafficking in marijuana by possession and by transportation. Defendant entered a plea of guilty to having the status of an habitual felon. The trial court consolidated the offenses for purposes of sentencing, and sentenced defendant to 60 to 84 months' imprisonment. Defendant gave notice of appeal in open court.

II. Competency to Proceed

N.C. Gen. Stat. § 15A-1001(a) (2015) provides that:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

"[This] statute provides three separate tests in the disjunctive. If a defendant is deficient under any of these tests he or she does not have the capacity to proceed." *State v. Shytle*, 323 N.C. 684, 688, 374 S.E.2d 573, 575 (1989) (citations omitted). "The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed." *State v. Cooper*, 286 N.C. 549, 565, 213 S.E.2d 305, 316 (1975) (citations omitted). In determining whether a defendant has the capacity to proceed, the fact that a defendant has been diagnosed with a mental illness does not, standing alone, require a finding that the defendant is incompetent to stand trial. In *Cooper*, our Supreme Court held that:

> In this instance, there was ample expert medical testimony to support the trial court's finding that the defendant was competent to plead to the charges against him and to stand trial. The fact that the defendant had to be given medication periodically during the trial, in order to prevent exacerbation of his mental illness by the tensions of the courtroom, does not require a finding that he was not competent to stand trial when, as here, the undisputed medical testimony is that the medication did not have the effect of dulling his mind and that the specified dosage was adequate to keep his mental illness in remission.

Cooper, 286 N.C. at 566, 213 S.E.2d at 317.

"[A] trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency even absent a request." *State v. Staten*, 172 N.C. App. 673, 678, 616 S.E.2d 650, 654-55, *disc. review denied*, 360 N.C. 180, 626 S.E.2d 838 (2005). "A trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2007) (internal quotation marks and citations omitted).

III. Defendant's Inability to Remain Awake During Trial

In the present case, defendant's trial began on the morning of Wednesday, 10 February 2016. Prior to the introduction of evidence, the trial court conducted pretrial proceedings lasting approximately three hours, including jury selection and a hearing on defendant's motion to suppress evidence. Before the trial court took a lunch recess, defendant's trial counsel asked to bring a matter to the trial court's attention. Following a brief unrecorded bench conference, the trial court asked defendant to stand, and conducted a colloquy with defendant:

> THE COURT: Your lawyer has raised some concerns with the Court about your attention this morning. Are you able to hear and understand me?
>
> THE DEFENDANT: Not really.
>
> THE COURT: Is it because you are having difficulty hearing, you have a hearing problem, or are your thoughts somewhere else?
>
> THE DEFENDANT: Really I don't even know. I think my thoughts are somewhere else.

THE COURT: All right. Are you under the influence of anything, alcohol or drugs?

THE DEFENDANT: My medication. That's it.

THE COURT: All right. What sort of medication do you take?

THE DEFENDANT: A bag full.

THE COURT: What sort of conditions do the medications treat?

THE DEFENDANT: My heart and my mental illness.

THE COURT: Your heart, and you have a mental illness?

THE DEFENDANT: Yes.

THE COURT: And how long have you had your heart condition?

THE DEFENDANT: Probably since 2007.

THE COURT: And have you been diagnosed with some sort of mental illness?

THE DEFENDANT: Yes.

THE COURT: What is that?

THE DEFENDANT: Bipolar schizophrenic.

THE COURT: How long ago were you diagnosed?

THE DEFENDANT: Probably about four years.

THE COURT: And do you take medication for both of those conditions, your heart and your mental illness?

THE DEFENDANT: Yes, ma'am.

THE COURT: How long have you been taking your current medications?

THE DEFENDANT: Since then; about four years.

THE COURT: And how do those medications affect you? Are there any side effects?

THE DEFENDANT: Yeah. I sleep less, and like memory loss. Stuff like that.

> THE COURT: How long have you experienced those side effects?
>
> THE DEFENDANT: Probably since that time.
>
> THE COURT: And how have you managed those side effects for the last four years?
>
> THE DEFENDANT: Just go with the flow, I guess. Just whatever happens.

Defendant told the trial court that despite having a full night's sleep the night before, he was having difficulty following the proceedings in court. The trial court conducted an additional inquiry into defendant's comprehension of the legal proceedings. Defendant's behavior was respectful and appropriate, and his answers to the court's questions were not irrational or delusional. Defendant demonstrated a general, if limited, understanding of the charges against him and of the prior history of the case. For example, he knew that he was charged with trafficking in marijuana and being an habitual felon, and that the significance of the habitual felon charge was that it exposed him to a longer prison sentence. The trial court asked defendant about the medications he took, and defendant agreed to allow the court to inspect a bag defendant had brought to court that contained his medications. After reviewing the contents of the bag, the trial court discussed the medications with defendant:

> THE COURT: All right. Mr. Mobley, I have not reached into the bag but I just counted the bottles. And there appear to be twenty-five plus bottles of medication in there. Do you take all of those every day?
>
> THE DEFENDANT: Yes; twice a day. I have a list of them right here.
>
> THE COURT: And have you shared that list of medications with your lawyer before today?
>
> THE DEFENDANT: No.
>
> THE COURT: And when is the last time you have seen a doctor for your heart condition?
>
> THE DEFENDANT: I go Friday. They gonna put another pacemaker in and another stint.

THE COURT: You go a day after tomorrow?

THE DEFENDANT: Yes, ma'am.

Defendant also told the court that he was scheduled to meet with a doctor regarding his mental illness in about six weeks. The trial court then asked defendant's counsel for further input. Defendant's trial counsel stated that she was appointed to represent defendant shortly after his arrest. Defense counsel met with defendant several times to discuss the case, and described defendant as having been "coherent and able to discuss his case" with counsel. Defendant's attorney expressed concern, however, about defendant's inability to remain awake during the pretrial proceedings:

> DEFENSE COUNSEL: It was only then during the jury selection that he was -- I noticed him snoring, or heard him snoring, looked over and he was asleep on more than one occasion. I attempted to explain the severity of his case and the importance of the jury and what they may think of him, simply his demeanor. And to no avail. It continued to keep happening, which of course is alarming to me and certainly to the State, and obviously to this Court. . . .
>
> THE COURT: So is it my understanding -- do I hear you saying that you have seen some noticeable deterioration in his ability to communicate and participate in his defense today that you have not seen before today?
>
> DEFENSE COUNSEL: I have -- well, first of all, I will say this. I have not been seated beside Mr. Mobley for three hours straight. So that being said, I'm not sure I would say it's a deterioration, I will say that I have never seen him be this lethargic. And I'm not -- I can't speak to what's causing it, but again, I've never been in his -- sitting beside of him for three hours.
>
> THE COURT: Have you noticed some deterioration today in the three-hour window that you have been -- has it been consistent all day or have you seen his attention span decline today?
>
> DEFENSE COUNSEL: No, I think his attention span has been waning. He did appear a little more engaged -- well, that's kind of hard for me to say too, because during the testimony I was more focused on the officers instead of

> him. And he did have some things to say to me after the motion. I guess that's hard for me to say. Because what really drew my attention to it was the snoring.
>
> THE COURT: All right.
>
> DEFENSE COUNSEL: And then I noticed it repeatedly. And I noticed the jurors, several of them appeared to be noticing it as well. When I spoke to him first thing this morning, no, I did not at all get the impression that he was in any way impaired by anything. It's just the sleeping that has me concerned.

At that point, the trial judge told the parties that she would consider the matter during the lunch recess. Following the break for lunch, the trial court addressed counsel and defendant:

> THE COURT: Okay. . . . [B]efore we broke for lunch, defense counsel raised some concerns about the defendant, Mr. Mobley. And, Mr. Mobley, we were having a discussion right before lunch about what you understood to be the charges against you and your physical condition and so forth. Do you remember that?
>
> THE DEFENDANT: Yeah; a little bit.

Thereafter, the trial court reviewed with defendant the charges against him and the possible sentences he might receive if convicted. Defendant indicated that he understood these circumstances, although he had little memory of meeting with counsel prior to trial. The court then returned to the subject of defendant's sleeping in court:

> THE COURT: Now, Mr. Mobley, your lawyer brought to my attention that you appeared to be sleeping, she heard you snoring, I believe.
>
> THE DEFENDANT: I'm tired right now. I was going to ask can I sit back down.

In response, the trial court explained to defendant that he was charged with serious offenses for which he might receive a significant prison sentence and that the jury would be assessing his demeanor:

> THE COURT: . . . But whether or not you testify the jury can see you. They can see whether or not you are asleep. And so it would be in your best interest to stay awake

and give the jury the very best impression. Do you understand that?

THE DEFENDANT: Yes. But right now I'm just tired and beat. This medicine, I just won't take it tomorrow, or whatever.

THE COURT: I'm sorry. Say that again.

THE DEFENDANT: My medicine, I just won't take it tomorrow, or something.

THE COURT: Well, what has your doctor told you about taking your medicine, and whether you should ---

THE DEFENDANT: Take it every day.

THE COURT: Are you able to reach your doctor on the telephone?

THE DEFENDANT: I don't know. I guess.

THE COURT: How many doctors do you have?

THE DEFENDANT: Seven.

THE COURT: Seven doctors? And what have they told you would happen if you stopped taking your medication?

THE DEFENDANT: Possibility of like dying.

THE COURT: And so do you think it is wise to stop taking your medication?

THE DEFENDANT: No.

THE COURT: Do you work normally, Mr. Mobley?

THE DEFENDANT: No, ma'am.

THE COURT: Are you on disability?

THE DEFENDANT: No. I just applied for it. I had a aortic valve dissection, electronic.

THE COURT: And how long were you in the hospital?

THE DEFENDANT: About seven months.

THE COURT: How long have you been out of the hospital?

THE DEFENDANT: Now probably about eight months.

. . .

> THE COURT: And what do you do during the day?
>
> THE DEFENDANT: Just stay at home.
>
> THE COURT: Do you sleep most of the day?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: All right. Based upon the Court's inquiry, the Court does not have any concerns about Mr. Mobley's competency to proceed. He appears to understand the charges against him and the maximum possible penalties of those charges if he is convicted of the same. He also appears to understand the importance of his appearance to the jury. So the Court is prepared to proceed.

At this point, several witnesses testified for the State. Before the trial court recessed court for an afternoon break, defendant's counsel informed the court that defendant had continued to sleep during trial:

> THE COURT: Counsel, anything before we break?
>
> PROSECUTOR: I just would ask that. . . [the witnesses] be released off their subpoenas, Your Honor.
>
> THE COURT: Any objection?
>
> DEFENSE COUNSEL: No, Your Honor. And I would just state for the record that I have kicked and I have hit Mr. Mobley three times during the course of this afternoon, and to no avail.
>
> THE COURT: So noted.

After the jury found defendant guilty of two counts of trafficking in marijuana, defendant agreed to plead guilty to having the status of an habitual felon. During the trial court's colloquy with defendant regarding his plea of guilty, the subject of defendant's mental condition was raised again:

> THE COURT: Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other substance?
>
> THE DEFENDANT: Just medicine.
>
> THE COURT: That we talked about earlier at the outset?
>
> THE DEFENDANT: Yes, ma'am.

> THE COURT: Does that affect your ability to understand what's going on today?
>
> THE DEFENDANT: Sometimes. I'm just ready to get this over with.
>
> THE COURT: Are you thinking clearly today?
>
> THE DEFENDANT: I hope so. Let's -- I'm just ready to get it over with.
>
> THE COURT: All right. Sir, I understand that you're ready to get it over with, but are you understanding what is going on today?
>
> THE DEFENDANT: Yes.

IV. Discussion

As discussed above, a "trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *Badgett*, 361 N.C. at 259, 644 S.E.2d at 221. A criminal defendant is incompetent to proceed to trial if he is "unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." N.C. Gen. Stat. § 15A-1001(a). "[A] defendant's competency to stand trial is not necessarily static, but can change over even brief periods of time." *State v. Whitted*, 209 N.C. App. 522, 528-29, 705 S.E.2d 787, 792 (2011) (citing *State v. McRae*, 139 N.C. App. 387, 533 S.E.2d 557 (2000)). For this reason, a defendant's competency is assessed "at the time of trial." *Cooper*, 286 N.C. at 565, 213 S.E. 2d at 316.

"Where a defendant demonstrates or where matters before the trial court indicate that there is a significant possibility that a defendant is incompetent to proceed with trial, the trial court must appoint an expert or experts to inquire into the defendant's mental health[.]" *State v. Grooms*, 353 N.C. 50, 78, 540 S.E.2d 713, 730 (2000). In the present case, we conclude that the evidence indicated that defendant was able to "understand the nature and object of the proceedings against him, [and] to comprehend his own situation in reference to the proceedings[.]" § 15A-1001(a). We conclude, however, that "matters before the trial court" indicated more than a "significant possibility" that defendant, who suffered from serious physical and mental conditions, was unable to remain awake and therefore was unable to consult with his attorney

or participate in his defense. This evidence raised a "significant possibility" that at the time of trial defendant was incompetent.

We have reached this conclusion based on the specific facts and circumstances of this case, in which there was evidence before the trial court suggesting that:

> 1. Defendant had a serious heart condition, for which he had been hospitalized for several months.
>
> 2. Defendant had been diagnosed with bipolar schizophrenia, a major mental illness.
>
> 3. Defendant took 25 different medications twice daily.
>
> 4. Defendant's medications had psychoactive side-effects.
>
> 5. Defendant was unable to remain awake in the courtroom, even when kicked or prodded by counsel.

We hold that these circumstances required the trial court to appoint an expert in order to ascertain whether defendant was competent to proceed to trial. We also note that no evidence or arguments were presented in court to discredit defendant's contentions about his physical and mental condition, and that the trial court did not make any findings indicating that the court had doubts about defendant's credibility.

"[A] defendant does not have to be at the highest stage of mental alertness to be competent to be tried. So long as a defendant can confer with his or her attorney . . . the defendant is able to assist his or her defense in a rational manner." *Shytle*, 323 N.C. at 689, 374 S.E.2d at 575. However, as the United States Supreme Court held more than forty years ago:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to . . . consult with counsel, and to assist in preparing his defense may not be subjected to a trial. . . . Some have viewed the common-law prohibition as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.

Drope v. Missouri, 420 U.S. 162, 171, 43 L. Ed. 2d 103, 113 (1975) (internal quotation and citations omitted). It is clear that a defendant who is incapable of remaining awake is, by definition, unable to "consult with counsel, and to assist in preparing his defense."

We emphasize that our conclusion is based upon the application of long-standing legal principles to the unusual facts of this case, and should not be interpreted as articulating a new rule or standard. We do not hold that a trial court is required to order a competency evaluation in every case in which a criminal defendant is drowsy or suffers from a mental or physical illness. However, the facts of the present case raise significant questions about defendant's competence, and these questions cannot be answered by reference to the record evidence. Defendant represented that he suffered from serious physical and mental conditions, but defendant's medical records were not in evidence. It is possible that defendant's overwhelming drowsiness simply required an adjustment in medication dosage or treatment protocol. Defendant's condition may have been transient, and may have been either more or less serious than he represented. As a result, our holding is not based on any opinion or speculation as to the likely result of an investigation into defendant's competence or any other factual issue in this case. Nonetheless, when the trial court was faced with a defendant who ostensibly suffered from serious mental and physical conditions and could not stay awake during his trial on serious felony charges, the trial court was constitutionally required to appoint an expert to investigate the issue of defendant's capacity to proceed.

For the reasons discussed above, we conclude that the trial court erred by failing to determine whether, at the time of trial, defendant was competent to stand trial and that defendant is entitled to a new trial.

REVERSED.

Judges CALABRIA and INMAN concur.

STATE OF NORTH CAROLINA
v.
FILEMON OLDMEDO SILVA

No. COA16-278

Filed 17 January 2017

Motor Vehicles—driving while impaired offenses—statutory formal arraignment

On appeal from a judgment entered upon defendant's convictions for habitual impaired driving and driving while license revoked for an impaired driving revocation, the Court of Appeals held that the trial court's failure to strictly follow the formal arraignment requirements of N.C.G.S. § 15A-928(c) was not reversible error.

Appeal by defendant from judgment entered 22 September 2015 by Judge Stanley L. Allen in Forsyth County Superior Court. Heard in the Court of Appeals 8 September 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Ashleigh P. Dunston for the State.

Paul F. Herzog for defendant-appellant.

McCULLOUGH, Judge.

Filemon Oldmedo Silva ("defendant") appeals from a judgment entered upon his convictions for habitual impaired driving and driving while license revoked (DWLR) for an impaired driving revocation. For the following reasons, we find no error.

I. Background

During the early morning hours of 22 February 2015, defendant was arrested for driving while impaired (DWI) and DWLR for an impaired driving revocation after a Winston Salem Police Department officer noticed defendant slumped over asleep in the driver's seat of a running automobile. On 20 April 2015, a Forsyth County Grand Jury indicted defendant on one count of habitual impaired driving and one count of DWLR for an impaired driving revocation. The charges came on for trial in Forsyth County Superior Court on 21 September 2015 before the Honorable Stanley L. Allen. At the conclusion of the trial, the jury returned verdicts finding defendant guilty of both habitual impaired

driving and DWLR for an impaired driving revocation. The offenses were consolidate for entry of judgment and judgment was entered on 22 September 2015 sentencing defendant to a term of 15 to 27 months imprisonment. Defendant appeals.

II. Discussion

On appeal, defendant contends the trial court erred by failing to personally address and arraign him regarding the prior DWI convictions serving as the basis of the habitual impaired driving charge and the prior impaired driving revocation serving as the basis of the DWLR for an impaired driving revocation charge. Defendant contends the alleged errors were in violation of N.C. Gen. Stat. §§ 15A-928, -941, and -1022, and the Fourteenth Amendment to the United States Constitution.

N.C. Gen. Stat. § 15A-941 provides that, generally, "[a] defendant will be arraigned . . . only if the defendant files a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment." N.C. Gen. Stat. § 15A-941(d) (2015). That statute further provides that "[a]rraignment consists of bringing a defendant in open court . . . before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead." N.C. Gen. Stat. § 15A-941(a). This Court has long recognized that "the purpose of an arraignment is to advise the defendant of the crime with which he is charged[,]" *State v. Carter*, 30 N.C. App. 59, 61, 226 S.E.2d 179, 180 (1976), but "[t]he failure to conduct a formal arraignment itself is not reversible error . . . and the failure to do so is not prejudicial error unless defendant objects and states that he is not properly informed of the charges[,]" *State v. Brunson*, 120 N.C. App. 571, 578, 463 S.E.2d 417, 421 (1995).

Yet, the statute primarily at issue in this case, N.C. Gen. Stat. § 15A-928, provides special rules for the indictment and arraignment of a defendant "[w]hen the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter[.]" N.C. Gen. Stat. § 15A-928(a) (2015). Pertinent to this case, that statute, entitled "allegation and proof of previous convictions in superior court[,]" provides as follows:

> (c) After commencement of the trial and before the close of the State's case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent.

> Depending upon the defendant's response, the trial of the case must then proceed as follows:
>
> (1) If the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof.
>
> (2) If the defendant denies the previous conviction or remains silent, the State may prove that element of the offense charged before the jury as a part of its case. This section applies only to proof of a prior conviction when it is an element of the crime charged, and does not prohibit the State from introducing proof of prior convictions when otherwise permitted under the rules of evidence.

N.C. Gen. Stat. § 15A-928(c). This Court has explained that

> [t]he purpose of [section 15A-928], which is for the benefit of defendants charged with prior convictions, is not to require that the procedures referred to therein be accomplished at a certain time and no other, which would be pointless. Its purpose is to insure that defendants are informed of the prior convictions they are charged with and are given a fair opportunity to either admit or deny them before the State's evidence is concluded; because, as the statute makes plain, if the convictions are denied, the State can then present proof of that element of the offense to the jury, but cannot do so if the prior convictions are admitted.

State v. Ford, 71 N.C. App. 452, 454, 322 S.E.2d 431, 432 (1984).

As detailed above, in this case, defendant was indicted on one count of habitual impaired driving in file number 15 CRS 51679. That specialized indictment charged DWI in count one and charged three prior DWI convictions within ten years of the current DWI offense in count two,

in accordance with the requirements of N.C. Gen. Stat. § 15A-928(a) and (b). *See State v. Lobohe*, 143 N.C. App. 555, 558, 547 S.E.2d 107, 109 (2001) (explaining that an indictment that charged DWI in one count and alleged previous DWI convictions in count two followed precisely the format required in N.C. Gen. Stat. § 15A-928). In a separate indictment in file number 15 CRS 2755, defendant was indicted on one count of DWLR for an impaired driving revocation.

After defendant's case was called for trial, but before the jury was impaneled, the Assistant District Attorney (ADA) prosecuting the case raised the issue of whether defendant would be stipulating to any prior convictions, explaining that "[defense counsel] made the comment . . . that he was going to be stipulating to some items." Therefore, the ADA asked "the Court to do a colloquy with the defendant showing that he has agreed that his . . . attorney can admit these -- whatever items may be." At that point, defense counsel indicated that he had discussed with the prosecutor stipulating that defendant's license was revoked for an impaired driving revocation for purposes of the DWLR for an impaired driving revocation charge if the jury finds that defendant did "drive" for purposes of the DWLR charge. The ADA then indicated that she was under the impression that if defendant stipulated to prior DWI convictions for habitual impaired driving, the State would not be able to present any evidence of the prior convictions. The ADA, however, explained that she believed she was not required to accept a stipulation that defendant's license was revoked for an impaired driving revocation and indicated the State would put on evidence of all the elements of DWLR for an impaired driving revocation, unless defendant pleaded guilty to the charge. During the ADA's comments to the court, defense counsel indicated that the ADA was correct that defendant would not stipulate to the prior DWI convictions needed to prove habitual impaired driving. To be exact, when the prior DWI convictions were brought up, defense counsel unequivocally stated, "No. We're not stipulating to the three prior convictions." The case then proceeded to jury selection with both parties in agreement that there were no stipulations as to the prior DWI convictions or that defendant's license was revoked for an impaired driving revocation.

Now on appeal, defendant relies repeatedly on *State v. Jackson*, 306 N.C. 642, 295 S.E.2d 383 (1982), for the assertions that the offense of habitual impaired driving is the type of offense governed by N.C. Gen. Stat. § 15A-928 and that the statute must be strictly followed. Although defendant acknowledges that defense counsel refused to stipulate to defendant's prior DWI convictions, defendant argues the trial court

failed to strictly follow the arraignment requirement of N.C. Gen. Stat. § 15A-928(c) for the habitual impaired driving charge because the trial court did not personally address defendant to obtain a plea. Defendant contends both N.C. Gen. Stat. §§ 15A-928(c) and -941(a) require the court to personally address a defendant and that an admission of prior convictions is the "functional equivalent" of a guilty plea and, therefore, N.C. Gen. Stat. § 15A-1022(a) and the Fourteenth Amendment to the United States Constitution, concerning guilty pleas, require that a defendant be addressed directly. Defendant relies on cases in which defense counsel admitted the defendants' guilt.

In a footnote, defendant further contends the legal principles argued concerning habitual impaired driving apply equally to the related misdemeanor charge of DWLR for an impaired driving revocation.

At the outset, we hold that defendant is correct that habitual impaired driving is precisely the type of offense to which N.C. Gen. Stat. § 15A-928 applies. *See* N.C. Gen. Stat. § 20-138.5(a) (2015) ("A person commits the offense of habitual impaired driving if he drives while impaired as defined in [N.C. Gen. Stat. §] 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in [N.C. Gen. Stat. §] 20-4.01(24a) within 10 years of the date of this offense."). However, we note that defendant's reliance on *Jackson* is misplaced because the footnote repeatedly quoted by defendant is dicta. In *Jackson*, the Court held that N.C. Gen. Stat. § 15A-928 was not applicable because the defendant's prior conviction of armed robbery did not raise the offense for which the defendant was charged to one of a higher grade. *Jackson*, 306 N.C. at 652, 295 S.E.2d at 389. In a footnote, the Court merely provided an example of when N.C. Gen. Stat. § 15A-928 applied and cautioned the bench and bar about the application of the statute "in order to apprise [a] defendant of the offense for which he is charged and to enable him to prepare an effective defense." *Id.*, n.2.

Reaching the merits of defendant's arguments, we are not persuaded that the trial court's failure to strictly follow N.C. Gen. Stat. § 15A-928(c) is reversible error in the present case. We find *State v. Jernigan*, 118 N.C. App. 240, 455 S.E.2d 163 (1995), controlling.

In *Jernigan*, a defendant appealed his conviction for habitual impaired driving on the basis that "the trial court did not formally arraign [him] upon the charge alleging the previous convictions and did not advise [him] that he could admit the previous convictions, deny them, or remain silent, as required by [N.C. Gen. Stat. §] 15A–928(c)." *Id.* at 243, 455 S.E.2d at 165. The defendant contended the trial court's

failure to conduct a formal arraignment constituted reversible error and this Court disagreed. In *Jernigan*, this Court explained as follows:

> The purpose of [N.C. Gen. Stat. §] 15A-928 is to insure that the defendant is informed of the previous convictions the State intends to use and is given a fair opportunity to either admit or deny them or remain silent. This purpose is analogous to that of [N.C. Gen. Stat.] § 15A-941, the general arraignment statute. Under that statute, the defendant must be brought before a judge and must have the charges read or summarized to him and must be directed to plead. If the defendant does not plead, he must be tried as if he pled not guilty. The failure to arraign the defendant under [N.C. Gen. Stat. §] 15A-941 is not always reversible error. Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding.

Id. at 244, 455 S.E.2d at 166 (internal citations and quotation marks omitted). This Court then held that "there [was] no doubt that [the] defendant was fully aware of the charges against him and was in no way prejudiced by the omission of the arraignment required by [N.C. Gen. Stat. §] 15A-928(c)" where "[the] defendant's attorney informed the court that he had discussed the case with [the] defendant and that [the] defendant would stipulate to the previous convictions[]" and "[the d]efendant [made] no contention on appeal that he was not aware of the charges against him, that he did not understand his rights, or that he did not understand the effect of the stipulation." *Id.*

Additionally, in response to the defendant's argument "that the stipulation was ineffective because it was made by his attorney without defendant's having been advised by the court of his rights regarding the stipulation[,]" *id.* at 245, 455 S.E.2d at 166, this Court explained that

> it is clear that a defendant's attorney may stipulate to an element of the charged crime on behalf of the defendant . . . . Moreover, there is no requirement that the record show that the defendant personally stipulated to the element or that the defendant knowingly, voluntarily, and understandingly consented to the stipulation. . . . It is well-established that stipulations are acceptable and desirable substitutes for proving a particular act. Statements of

> an attorney are admissible against his client provided that they have been within the scope of his authority and that the relationship of attorney and client existed at the time. In conducting an individual's defense an attorney is presumed to have the authority to act on behalf of his client. The burden is upon the client to prove lack of authority to the satisfaction of the court.

Id. at 245, 455 S.E.2d at 166-67. Yet, in *Jernigan*, the defendant did not show, nor contend, that his attorney was acting contrary to his wishes. *Id.* at 245, 455 S.E.2d at 166. Thus, this Court held the trial court did not commit reversible error in *Jernigan* by failing to formally arraign the defendant as provided in N.C. Gen. Stat. § 15A-928(c).

The present case is distinguishable from *Jernigan* only by the facts that defense counsel refused to stipulate to the prior convictions, requiring the State to put on evidence of all the elements of the charged offenses, and that defendant was primarily Spanish speaking. However, those distinctions do not sway us to reach a different result in the present case. Defendant does not assert that defense counsel was acting contrary to his wishes when he refused to stipulate to the prior convictions, but instead contends it is not clear that defendant understood the law because of a limited ability to understand English. We are not persuaded because there is no indication that defendant was confused about the charges or that defense counsel was acting contrary to defendant's wishes. Additionally, interpreters were present throughout the proceedings to translate for defendant. Lastly, despite defendant's assertions to the contrary, the State presented overwhelming evidence of defendant's guilt through testimony of the arresting officer. As a result, we hold the trial court did not commit reversible error.

In a footnote at the conclusion of defendant's argument on appeal, defendant raises an issue as to the general competence of his trial counsel based on trial counsel's alleged fundamental misunderstanding of the methods the State may use to prove prior DWI convictions in habitual driving while impaired cases. Defendant asserts that "[i]t seems likely that his [trial counsel's] misunderstanding of basic traffic law could have led to a trial strategy that was fatal to his client's case" and requests that, in the event defendant is not awarded a new trial, this Court remand the matter for a hearing concerning his trial counsel's effectiveness. It appears that defendant is raising an ineffective assistance of counsel argument on appeal, but seeking review of the issue in superior court.

> It is well established that ineffective assistance of counsel claims "brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Thompson, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004) (citations omitted) (quoting *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 80 (2005). It is evident that defendant's ineffective assistance of counsel claim before this Court is premature. Thus, we dismiss any claim asserted in the footnote without prejudice and leave the matter for the trial court to consider upon a proper motion for appropriate relief by defendant.

III. Conclusion

For the reasons discussed above, the trial court did not commit reversible error when it failed to formally arraign defendant pursuant to N.C. Gen. Stat. § 15A-928(c).

NO ERROR.

Judges HUNTER, Jr., and DIETZ concur.

TATER PATCH ESTATES HOME OWNER'S ASSOCIATION,
A NORTH CAROLINA CORPORATION, PLAINTIFF
v.
TAMMY SUTTON, DEFENDANT

No. COA16-787

Filed 17 January 2017

1. Associations—homeowners'—assessments—combining lots—question for jury

In a case involving a dispute over homeowners' association assessments, the trial court did not err by denying plaintiff association's motion for a directed verdict on the issue of defendant's obligation to pay assessments. Defendant argued that, by combining Lots 20, 25, and 28, she reduced her obligation to one lot under the Declaration, while plaintiff argued that defendant owed assessments for four lots rather than two. There was sufficient evidence to present a question for the jury.

2. Associations—homeowners'—damage to property from work approved by association—question for jury

In a case involving a dispute over homeowners' association assessments, the trial court did not err by denying plaintiff association's motion for a directed verdict on defendant's counterclaim for damage allegedly done to her property by work approved by the association. There was sufficient evidence to create a question of fact as to whether the association was aware or approved of the grading of the road and the alteration it caused to defendant's lot.

3. Associations—homeowners'—evidence from auction and sales contract—no prejudice

In a case involving a dispute over homeowners' association assessments, where plaintiff association argued that the trial court erred by allowing testimony regarding statements made at auction and by admitting a land sales contract, the Court of Appeals held that, assuming arguendo that the evidence was improperly admitted, plaintiff failed to show a likelihood that the jury would have reached a different result without the evidence.

4. Associations—homeowners'—assessments—roads—pro rata share

In a case involving a dispute over homeowners' association assessments, the Court of Appeals rejected defendant's argument

that the trial court erred by instructing the jury that the law does not require defendant's lot to be adjacent to a subdivision road for her to be liable for road maintenance assessments by the association on that lot. The Declaration clearly indicated the intent to require all lot owners to pay a pro rata share of the road maintenance.

5. Associations—homeowners'—assessments—proportion of common expenses

In a case involving a dispute over homeowners' association assessments, the Court of Appeals rejected defendant's argument that the trial court erred by instructing the jury that lot purchasers have a right to presume that they would pay a certain proportion of the common expenses as shown by the plat, and to presume the owners of every other lot on the plat would pay an equal sum pursuant to the plan of road maintenance contained in the covenants. Defendant failed to show any prejudice on the instruction.

Appeal by plaintiff and defendant from judgment entered 3 February 2016 by Judge Donna Forga in Haywood County District Court. Heard in the Court of Appeals 1 December 2016.

Cannon Law, P.C., by William E. Cannon, Jr., Christopher Castro-Rappl and Martha S. Bradley, for plaintiff-appellant, cross-appellee.

Fred H. Moody, Jr. for defendant-appellee, cross-appellant.

TYSON, Judge.

Tater Patch Estates Home Owner's Association ("Plaintiff" or "the HOA") and Tammy Sutton ("Defendant") both appeal from judgment entered, following a jury trial and verdict, in favor of Plaintiff and against Defendant in the amount of $8,040.00, and in favor of Defendant on her counterclaim and against Plaintiff in the amount of $8,040.00. We find no error.

I. Background

Defendant purchased Lots 20, 25, and 28 within the Tater Patch Estates subdivision at an auction in November of 2000. All three lots were conveyed to Defendant within a single deed. Defendant additionally purchased Lot 2 within the Tater Patch Estates subdivision in August of 2001. Deeds for both of these purchases were recorded with the Haywood County Register of Deeds.

Each deed conveying title to Defendant states the property is "subject to restrictions recorded in Deed Book 471 at Page 136, Haywood County Registry." The referenced restrictions are contained within the recorded Declaration of Covenants, Conditions and Restrictions ("Declaration"), which was executed by the developers of Tater Patch Estates. The Declaration requires lot owners to pay "a pro rata share of the maintenance of the subdivision roads based on the number of lots." The Declaration further provides for the formation of a homeowner's association after the developers have conveyed seventy-five percent of the lots located in the subdivision.

The Declaration was recorded in 1999, prior to Defendant's purchases. Subsequent to the recording of the Declaration, but prior to Defendant's purchases, the developers recorded a plat, which divided the subdivision into individually numbered lots, including the lots referred to within Defendant's deeds.

In June 2002, Defendant filed a Notice of Intent to Combine Parcels with the Haywood County Register of Deeds. This notice proposed to re-combine Lots 20, 25, and 28 into a single parcel.

By 2007, the developers had conveyed seventy-five percent of the lots within Tater Patch Estates, which allowed for the formation of a homeowner's association pursuant to the terms of the Declaration. In April 2007, an entity claiming to be the Tater Patch Home Owner's Association sent 2007 billing statements to the lot owners for yearly fees and road maintenance assessments. The invoices were to be paid "ASAP or by June 15, 2007." Defendant was billed the yearly fee for each of her four lots, as well as separate road assessments for each of the lots, for a total of $3,200.00. At that time, no articles of incorporation were filed. No organizational meeting or election of officers and directors of the association had occurred, and Defendant's attorney asserted by letter to the purported HOA, that no one was "legally constituted to levy, collect or expend these funds." As a result, Defendant refused to pay the assessments for which she was billed at that time.

Articles of Incorporation for Plaintiff, Tater Patch Estates Home Owner's Association, were filed with the North Carolina Secretary of State on 31 May 2007. The organizational meeting was held on 2 November 2007. Plaintiff thereafter maintained the roads within the subdivision and the gated entrance. In 2009, Plaintiff changed the lock on the entrance gate, and failed to provide Defendant with a key to open the locked gate until 2014.

On 5 December 2012, Plaintiff sent to Defendant an invoice for assessments and yearly fees. This invoice billed the combined Lots 20, 25, and 28 as one lot. Defendant was billed for two assessments each year, from 2007 through 2012. One assessment was for the three combined lots, and another was for Lot 2. The invoice claimed Defendant owed $5,444.60. Defendant received another HOA invoice dated 6 February 2013, which showed she owed $5,924.60.

Defendant did not pay any of the money invoiced for the assessments or fees. On 31 January 2013, Plaintiff filed suit in district court, and claimed Defendant owed $5,684.60. Plaintiff later amended the complaint to claim Defendant owed $10,889.20.

In August 2013, after litigation had commenced, Plaintiff sent Defendant a letter, which stated Plaintiff had erroneously charged Defendant for two lots instead of four. The letter further stated Defendant's act of combining three of her lots, 20, 25, and 28, had no effect upon the amount she owed to the HOA for fees and assessments on all four lots. A corrected HOA invoice was enclosed, which asserted Defendant owed $15,209.20 for assessments on all four lots from 2007 through 2013.

On 13 May 2014, Defendant filed a counterclaim. She alleged the grading and significant lowering of the elevation of Viewpoint Road by an adjoining lot owner with the approval of the HOA had "ruined access" to combined Lots 20, 25, and 28, and rendered access to that lot "practically impossible." Defendant alleged damages in excess of $10,000.00 for the de-valuation of those combined lots.

Plaintiff's and Defendant's claims were submitted, adjudicated, and determined by a jury after a three day trial. Plaintiff moved for a directed verdict on its claim and Defendant's counterclaim, and renewed those motions at the close of all evidence. The jury awarded the sum of $8,040.00 in favor of Plaintiff, against Defendant, for the unpaid assessments and late fees. The verdict sheet specifically states the awarded assessments and late fees pertain to two lots. The jury also awarded an identical amount, $8,040.00, in favor of Defendant, against Plaintiff, for damages arising out of Defendant's counterclaim concerning the road and access. The trial court entered judgment in accordance with the jury's verdicts and awards. Both parties appeal.

II. Jurisdiction

The parties' appeals from the district court's final judgment are properly before this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2015).

III. Issues

Plaintiff argues the trial court erred by: (1) denying Plaintiff's motion for a directed verdict on its claim for assessments; (2) denying Plaintiff's motion for a directed verdict on Defendant's counterclaim; (3) admitting into evidence a copy of the sales contract between Defendant and the developers of Tater Patch Estates, and (4) allowing Defendant and two others to testify concerning the announcements at auction and what information they were told at the time Defendant purchased the three lots.

On cross-appeal, Defendant argues the trial court erred by instructing the jury: (1) the law does not require Lot 2 to be adjacent to a subdivision road for Defendant to be liable for road maintenance assessments by the HOA on that lot; and (2) lot purchasers have a right to presume they would pay a certain proportion of the common expenses as shown by the plat, and to presume the owners of every other lot on the plat will pay an equal sum pursuant to the plan of road maintenance contained in the covenants.

IV. Plaintiff's Motions for Directed Verdict

A. Standard of Review

Our Supreme Court has set forth the standard we review the trial court's rulings on motions for a directed verdict and judgment notwithstanding the verdict.

> The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury. When determining the correctness of the denial for directed verdict or judgment notwithstanding the verdict, the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury. Where the motion for judgment notwithstanding the verdict is a motion that judgment be entered in accordance with the movant's earlier motion for directed verdict, this Court has required the use of the same standard of sufficiency of evidence in reviewing both motions.

Davis v. Dennis Lilly Co., 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991) (internal citations omitted).

B. Motion for Directed Verdict on Plaintiff's Claim for Assessments

[1] Plaintiff argues the trial court erred by denying Plaintiff's motion for directed verdict on the issue of Defendant's obligation to pay assessments. We disagree.

Plaintiff asserts the covenants contained in the Declaration attached to all four of Defendant's lots, and argues Defendant's act of combining three of the four lots did not reduce her per lot assessment obligations. Plaintiff moved for directed verdict on its claim for assessments from 2008 through 2014. Plaintiff withdrew its claim for assessments for the year 2007, and stipulated the issue of late fees was appropriate for the jury to determine. The jury specifically determined Plaintiff is entitled to recover assessments from Defendant for two lots only, from January 2008 through January 2016, and awarded Plaintiff a total of $5,400.00. The balance of the jury's $8,040.00 award to the HOA was for late fees.

The parties do not contest Plaintiff's right to assess lot owners under the Declaration. Defendant argues that, by re-combing Lots 20, 25, and 28, she reduced her obligation to one lot under the Declaration. Plaintiff claims Defendant owes assessments for four lots, instead of two. Plaintiff asserts its motion for directed verdict on its claim for assessments was limited to the principal amount of Defendant's debt. As Defendant admittedly never paid any assessments, Plaintiff asserts the only issue for the court to determine on the motion for directed verdict was the proper amount for Plaintiff to have assessed Defendant for the years 2008 through 2016.

Regardless of Defendant's obligation to pay assessments on all four lots, sufficient evidence was introduced to present a question for the jury and to sustain the jury's verdict on this issue. *Id.* Plaintiff had the burden of proving the amount of its claims for assessments and any late charges due against Defendant. "A directed verdict in favor of the party upon whom rests the burden of proof is proper when there is *no conflict* in the evidence and *all* the evidence tends to support his right to relief, or when all material facts are admitted by the adverse party." *Hodge v. First Atlantic Corp.*, 10 N.C. App. 632, 636, 179 S.E.2d 855, 857 (citing *Chisholm v. Hall*, 255 N.C. 374, 121 S.E. 2d 726 (1961), *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E. 2d 451 (1970)) (emphasis supplied).

Plaintiff's amended complaint claimed Defendant owed the sum of $10,889.20, as of 11 January 2013. In August of 2013, Defendant was invoiced the amount of $15,209.20. At the time of trial in January 2016, Plaintiff claimed Defendant owed the HOA a total of $20,729.20. It was

appropriate for the jury to determine the total amount of Defendant's indebtedness from the evidence presented. The trial court did not err by denying Plaintiff's motion for directed verdict.

C. Motion for Directed Verdict on Defendant's Counterclaim

[2] Plaintiff also argues the trial court erred by denying Plaintiff's motion for a directed verdict on Defendant's counterclaim. We disagree.

Defendant filed a counterclaim against Plaintiff for damage allegedly done to her property by the grading and lowering of Viewpoint Road. Defendant's counterclaim alleged the owner of Lot 1, located across Viewpoint Road from Defendant's combined Lots 20, 25, and 28, graded and lowered the elevation of Viewpoint Road approximately fifteen feet in conjunction with construction performed on Lot 1. Defendant alleged Plaintiff was responsible for damage done to her property, where the lowering and grading of the road was done with the "consent and approval of Plaintiff."

The Declaration requires plans for construction to be approved in writing by the developers. Plaintiff asserts the Declaration is silent on whether Plaintiff became vested with the right to approve construction plans when the developers relinquished control. At trial, Defendant offered into evidence the minutes of the 6 August 2011 HOA meeting, wherein Plaintiff continued to require a site plan to review prior to the commencement of construction of any house. No evidence of a site plan showing the proposed grading and finished elevation of Viewpoint Road was presented at trial.

Defendant testified that the lowering of Viewpoint Road "left [her lots] high up on the bank," about fifteen to twenty feet. She testified the road construction left her without a "way to build an easy driveway in there now." Prior to the construction, Plaintiff was able to drive directly onto her lots from Viewpoint Road. She was unable to do so after the lowering of the road due to the significant embankment and new road elevation. She testified Plaintiff never contacted her about the road construction.

Defendant argues "[f]rom this evidence, a jury could find [Plaintiff] owed a duty to [Defendant] to maintain the subdivision roads and prevent damage to them and that [Plaintiff] breached that duty by failing to protect Viewpoint Road." Plaintiff argues Defendant failed to present any evidence to show who altered the road or Defendant's property, and that Plaintiff has no affirmative duty to Defendant to ensure property owners do not cause damage to roadways within the subdivision.

Under the specific facts of this case, the trial court did not err by submitting Defendant's counterclaim to the jury. Defendant presented photographs of the steep and obvious embankment created by the lowering of the elevation of the road. A question of fact was presented of whether Plaintiff was aware or approved of the grading of the road and the obvious alteration it caused to Defendant's lots.

Furthermore, evidence was also presented to show the HOA had changed the lock on the entrance gate in 2009, and did not provide Defendant with a key until 2014, because she had failed to pay her assessments. *See* N.C. Gen. Stat. § 47F-3-102(11) (2015) (stating a HOA is prohibited from denying a lot owner access to their property for failure to pay assessments). Evidence was presented to allow the jury to determine Defendant was prevented access to her property, and unaware of the construction and lowering of the elevation of the road, to the detriment of her property. This argument is overruled.

V. Evidentiary Issues

[3] Plaintiff argues the trial court erred by allowing Defendant and two of Defendant's witnesses to testify they were told at auction, upon purchase of the three lots, that the lots could be re-combined and Defendant would only be liable for one assessment. Plaintiff argues statements made by the auctioneer are irrelevant, because all prior contracts and negotiations were merged into the deed conveying the lots to Defendant, and the testimony is inadmissible hearsay. *See Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, 66-67, 344 S.E.2d 68, 75 (1986).

Plaintiff also argues the trial court erred by allowing into evidence a land sales contract between Defendant and the seller of Lots 20, 25, and 28, which stated the property was "Sold subject to announcements made from auction stand and all existing rights-of-way and easements." Plaintiff argues the contract was irrelevant, because the land contract was merged into the deed once the deed was executed, making its terms unenforceable and meaningless.

"The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987).

Our Court has held:

> Verdicts and judgments are not to be set aside for mere error and no more. To accomplish this result it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, and

> that a different result likely would have ensued, with the burden being on the appellant to show this. . . . Presuming error, [the appellant] has not shown prejudice and we will not speculate whether such error was prejudicial.

Boykin v. Morrison, 148 N.C. App. 98, 102, 557 S.E.2d 583, 585 (2001) (citation and quotation marks omitted).

Under the specific facts presented in this case, Plaintiff has failed to show the likelihood a different result would have been reached, but for the admission of this evidence. *Id.* The jury's verdict sheet shows Defendant owed assessments specifically for two lots for January 2008 through January 2016, but it does not state which of Defendant's specific lots. The Declaration was offered into evidence, which specifically states lots can be re-combined. Plaintiff also publicly filed documentation to re-combine her lots. Also, for seven years Plaintiff invoiced Defendant for assessments for only two lots, and did not invoice her for four lots until after litigation had commenced. Furthermore, the land sales contract clearly states the purchaser "is not relying on any information provided by J.L. Todd Auction Company in regard to said property." Presuming, *arguendo*, evidence of the statements made at auction and the land sales contract were improperly admitted into evidence, Plaintiff has failed to show a likelihood the jury would have reached a different result without this evidence to establish prejudice.

VI. Jury Instructions

Defendant argues the trial court erred by instructing the jury contrary to law. We disagree.

A. Standard of Review

> On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.] The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dungan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (internal citations and quotation marks omitted).

B. Obligation to Pay Assessments on Lot Not Adjacent to Subdivision Roads

[4] Defendant argues the trial court erred by instructing the jury "the law does not require that the Defendant's property be adjacent to a subdivision road in order for the defendant to be liable for assessments for road maintenance or other common expenses." We disagree.

The uncontroverted evidence shows Defendant's Lot 2 is part of the subdivision, but does not have access to a road located within the subdivision and maintained by the HOA. Defendant argues she should not be required to pay for road maintenance for Lot 2, because this lot is accessed by a public road located outside of the subdivision.

"The essential requirements for a real covenant are: '(1) the intent of the parties as can be determined from the instruments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and, (3) there must be privity of estate between the parties to the covenant.' " *Four Seasons Homeowners Assoc. v. Sellers*, 62 N.C. App. 205, 210, 302 S.E.2d 848, 852 (1983) (quoting *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 669, 248 S.E. 2d 904, 908 (1978)).

In *Sellers*, this Court rejected the property owners' argument that a covenant allowing the collection of assessments to finance the community recreational facilities did not run with the land, because the lot owners' property was located several blocks away from the recreational facilities. *Id.* The Court held the covenant "runs with each lot in the entire subdivision of which defendants' lots are but a small part." *Id.*

Defendant's reliance upon N.C. Gen. Stat. § 47F-3-115(c)(1) (2015) is misplaced. That statute provides:

> (c) To the extent required by the declaration:
>
> (1) Any common expense associated with the maintenance, repair, or replacement of a limited common element shall be assessed against the lots to which that limited common element is assigned, equally, or in any other proportion that the declaration provides.

Id. A "limited common element" is defined as "a portion of the common elements *allocated by the declaration or by operation of law* for the exclusive use of one or more but fewer than all of the lots." N.C. Gen. Stat. § 47F-1-103(18) (2015) (emphasis supplied).

The Declaration unambiguously states, "[e]ach lot owner shall pay a pro rata share of the maintenance of the subdivision roads based on the number of lots." The Declaration does not allocate the roads, fronting on some lots but not others, for exclusive use by a subset of lots. The maintenance of the subdivision roads is the responsibility of all subdivision lot owners, and the right to use and maintain them is not limited to a particular group or specific lots. The Declaration clearly indicates the intent of the developers to require all lot owners to pay a pro rata share of the road maintenance. The subdivision roads are not limited common areas, and the trial court's instruction was proper. Defendant's assertion is without merit and is overruled.

C. Instruction Regarding Assumption of Lot Purchasers

[5] Defendant also argues the trial court erred by instructing the jury that "purchasers of lots from plats as filed have a right to assume they would pay a certain proportion of the common expenses as shown by the plat and to assume that the owners of each and every other . . . lot on the plat will pay an equal sum pursuant to the plan of road maintenance as contained on the restricted covenants."

Defendant has failed to show any prejudice by this instruction. As noted, Defendant was obligated to pay assessments for Lot 2. Presuming, *arguendo*, the act of combining Lots 20, 25, and 28 caused her to owe only one other lot assessment, she remained obligated for assessments on two lots. The jury specifically found Defendant owed assessments on two lots. Defendant has failed to show prejudice. This argument is overruled.

VII. Conclusion

The trial court properly denied Plaintiff's motions for directed verdict on Plaintiff's claim for assessments and Defendant's counterclaim. Plaintiff failed to show prejudice by the trial court's admission into evidence of a copy of the sales contract between Defendant and the developers of Tater Patch Estates, or by allowing Defendant and two others to testify concerning the announcements at auction and what they were told at the time Defendant bought Lots 20, 25, and 28.

Defendant failed to show error or prejudice in the trial court's instruction to the jury. Both parties received a fair trial, free from errors and prejudice they preserved and argued. *It is so ordered.*

NO ERROR.

Judges McCULLOUGH and DILLON concur.

DARRELL THOMPSON, EMPLOYEE, PLAINTIFF
v.
INTERNATIONAL PAPER CO., EMPLOYER, SELF-INSURED
(SEDGWICK CMS, THIRD-PARTY ADMINISTRATOR), DEFENDANT

No. COA15-1383

Filed 17 January 2017

Workers' Compensation—severe burns—attendant care services—ordered by physician

Where plaintiff suffered severe burns at work and the Industrial Commission awarded him attendant care services until 31 December 2012 but denied reimbursement to his wife after that date, the Court of Appeals held that the Commission erred in its findings and conclusions regarding the need to compensate plaintiff's wife for her continuing services. While there was evidence supporting the reduction of compensation to two hours per day after 1 June 2012, there was no evidence that plaintiff's need for attendant care, as ordered by his physician, was over as of 31 December 2012.

Appeal by plaintiff from opinion and award entered 11 September 2015 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 May 2016.

Copeley Johnson & Groninger, PLLC, by Valerie A. Johnson and Narendra K. Ghosh, for plaintiff-appellant.

Scudder Law PLLC, by Sharon Scudder, for defendant-appellee.

STROUD, Judge.

Plaintiff Darrell Thompson appeals from the Commission's opinion and award awarding attendant care services until 31 December 2012 and denying reimbursement to his wife after this date. On appeal, plaintiff argues that the Commission erred in concluding that he did not require attendant care services for his severe burn injuries after 31 December 2012. We agree, since the Commission's findings do not support its conclusion of law denying payment for attendant care services after 31 December 2012. Accordingly, we reverse and remand for entry of an opinion and award consistent with this opinion.

Facts

The Full Commission's opinion and award sets forth the following uncontested facts. Defendant operates a paper plant in Riegelwood, North Carolina, which plaintiff began working at in 2005. Plaintiff's job involved helping respond to calls of the operator and helping oversee the process of wood chips being cooked into paper. On 23 February 2012, while at work, plaintiff and a co-worker were assigned to inspect a malfunctioning knotter, which is "a vessel in which [a chemical mixture referred to as] black liquor, along with steam, breaks down the wood chips." While checking on the knotter, plaintiff heard a loud noise and instinctively turned to his right and ran away. Plaintiff was then sprayed on the left side of his face, back of his head, his back, and his arms with "a black liquor and pulp mixture spewing from the knotter." Although plaintiff's co-workers immediately grabbed him and put him under an emergency eye washer, he still suffered severe burns that covered more than 23 percent of his body, most severely on his left shoulder and arm.

Plaintiff was initially taken to the New Hanover Regional Medical Center, but was then transferred and admitted to the UNC Burn Center in Chapel Hill, North Carolina, where he stayed from 23 February 2012 until 2 April 2012. While at the Burn Center, plaintiff underwent three major skin graft surgeries and was treated by several providers, including Dr. Cairns, the Director of the Burn Center.

The Burn Center encourages family to engage in the care of their injured family members, so plaintiff's wife, Marcee Swindell-Thompson ("Ms. Thompson"), took leave from her job as a social worker and stayed with plaintiff at the Burn Center during the months he was there to assist him with basic and specialized care, including walking, bathing, and caring for his wounds. Defendant paid for Ms. Thompson's room and board so that she could be close to plaintiff while he recovered at the Burn Center, but she was not compensated for any of the care and services she provided plaintiff during his recovery. Plaintiff received psychological counseling while at the Burn Center and was diagnosed with depression and post-traumatic stress disorder as a result of the event on 23 February 2012. Plaintiff also participated in physical therapy during his time at the Burn Center.

Plaintiff was discharged on 2 April 2012, though he was worried about "placing the burden on his wife to care for him at home." A social worker with the Burn Center, Monika Atanesian, wrote a letter to Ms. Thompson's employer asking that her FMLA leave be extended an additional two months, until 1 June 2012, because she "served as plaintiff's

primary caregiver and would need to provide him with attendant and wound care for the next two to three months." From 2 April 2012 until 1 June 2012, Ms. Thompson testified that she spent almost all of her time on a daily basis on plaintiff's care.

Plaintiff slowly regained his independence following his discharge from the Burn Center. Ms. Thompson would change his wraps twice a day, a process which took 45 minutes to an hour each time, and applied creams to his burns, which initially took 30 minutes but was down to just 10 minutes a day at the time of the hearing before the Deputy Commissioner. Plaintiff also participated in physical therapy after his discharge, and Ms. Thompson helped him get into the car and went with him to his sessions. Defendant provided plaintiff and Ms. Thompson with transportation to the physical therapy sessions until 29 June 2012, when they began to drive themselves because the Burn Center believed doing so would be therapeutic.

As plaintiff's recovery progressed, the amount of care provided by Ms. Thompson decreased. Ms. Thompson returned to work on 1 June 2012 but arranged an alternate work schedule so that she could continue to provide care to her husband. She continued to help plaintiff get ready for physical therapy and drove him there and back each morning. She would then go to work at 10:00 a.m. and return home midday to make lunch for plaintiff. In the evenings, Ms. Thompson would remove and reapply plaintiff's wraps after returning home from work.

Plaintiff underwent 12 sessions of laser treatments at UNC with a plastic surgeon, Dr. Hultman, from November 2012 through July 2014, "to reduce the impact of the hypertrophic scarring." Dr. Hultman testified that some level of attendant care would be necessary for plaintiff for life. He also noted that he had never written a prescription for attendant care for plaintiff and that typically a burn patient's general needs are addressed by the Burn Center.

Defendant filed a Form 60 Employer's Admission of Employee's Right to Compensation on or about 12 April 2012, accepting plaintiff's burn and skin graft injuries to his neck, back, shoulders, bilateral arms, and legs as compensable, but denied that his torn left rotator cuff was a result of the workplace accident and that Ms. Thompson was entitled to reimbursement for attendant care services she provided to plaintiff. On or about 10 February 2015, Deputy Commissioner Robert J. Harris issued an opinion and award finding that the attendant care Ms. Thompson had provided to plaintiff since 23 February 2012 was necessary and that further attended care is also "reasonably required to effect

a cure, provide relief and/or lessen the period of Plaintiff's disability." The Deputy Commissioner thus concluded that all of the attendant care provided by Ms. Thompson was medically necessary and compensable, as is the ongoing attendant care to be provided.

Defendant appealed to the Full Commission, and on 11 September 2015, the Commission issued its opinion and award, which affirmed much of the Deputy Commissioner's decision but found that plaintiff did not require attendant care services after 31 December 2012 and denied reimbursement to Ms. Thompson after that date. Specifically, the Full Commission found that "the attendant care services Ms. Thompson provided plaintiff following his hospital discharge, from April 2, 2012 through December 31, 2012, were reasonably required to effect a cure, provide relief, or lessen the period of plaintiff's disability." The Commission concluded that Ms. Thompson should be compensated for her services from 2 April 2012 until 1 June 2012 at a rate of $9.24 per hour, for six hours a day, and at the same rate from 2 June 2012 through 31 December 2012 for two hours per day.

The Commission then found, "based upon a preponderance of the evidence in view of the entire record, that plaintiff regained sufficient independence in his post-discharge recovery such that he no longer needed attendant care services subsequent to December 31, 2012." The Commission concluded that "attendant care became medically necessary as a result of plaintiff's compensable burn injuries at the time of plaintiff's discharge from the Burn Center on April 2, 2012 and continued through December 31, 2012. The Commission concludes that attendant care was no longer medically necessary thereafter." Plaintiff timely appealed to this Court.

Discussion

I. Standard of Review

This Court's review of an opinion and award filed by the Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "The findings of fact by the Industrial Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). The determination of whether a plaintiff is entitled to receive benefits for attendant care "is a conclusion of law which must be supported by findings of fact." *Ruiz v. Belk Masonry Co.*, 148 N.C. App. 675, 679, 559 S.E.2d 249, 252 (2002).

> On an appeal from an opinion and award from the Commission regarding attendant care benefits, the standard of review for this Court is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law.
>
> The Commission's conclusions of law are reviewed *de novo*. If the conclusions of the Commission are based upon a misapprehension of the law, the case should be remanded so that the evidence may be considered in its true legal light.

Shackleton v. S. Flooring & Acoustical Co., 211 N.C. App. 233, 244-45, 712 S.E.2d 289, 297 (2011) (citations, quotation marks, brackets, and ellipses omitted).

II. Attendant Care Services

On appeal, plaintiff argues that no competent evidence supports the Commission's finding that plaintiff has not required attendant care services since 1 January 2013.

Defendant, by contrast, argues that the Commission did not err in refusing to extend attendant care beyond 31 December 2012 because a written prescription is required in order to receive compensation for attendant care services, and plaintiff did not have one for care beyond 31 December 2012. Defendant contends that

> [t]he note from Ms. Atanesian that is the "prescriptive instrument" clearly states the time frame permitted. . . . There is no evidence, in the almost 1000 pages of medical records, that any additional prescription, letter or order was ever written to extend or renew this time, or that any specific, additional dates during which attendant care would be medically necessary have been enlarged beyond that date by the testimony or notes of any medical provider.

N.C. Gen. Stat. § 97-2(19) (2011), defines "Medical Compensation" as follows:

> (19) Medical Compensation. -- The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited

> to, *attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission*, vocational rehabilitation, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

(Emphasis added).

In *Shackleton*, this Court reversed and remanded a portion of the Commission's opinion and award requiring a physician's prescription as "a prerequisite to attendant care compensation," finding that such requirement "constitutes a misapprehension of law[.]" 211 N.C. App. at 251, 712 S.E.2d at 301. The *Shackleton* Court found that "the liberal construction of the Workers' Compensation Act suggests, and the prior decisions by our appellate courts require, that the test for attendant care be less restrictive than that imposed by the Full Commission in this case." *Id.* at 250, 712 S.E.2d at 300. Ultimately, this Court concluded:

> The law of this State does not support an approach in which a physician's prescription is the sole evidence upon which the question of attendant care compensation hinges. Instead, we explicitly adopt what we believe has already been the practice in North Carolina -- a flexible case-by-case approach in which the Commission may determine the reasonableness and medical necessity of particular attendant care services by reviewing a variety of evidence, including but not limited to the following: a prescription or report of a healthcare provider; the testimony or a statement of a physician, nurse, or life care planner; the testimony of the claimant or the claimant's family member; or the very nature of the injury.

Id. at 250-51, 712 S.E.2d at 300-01.

Yet *Shackleton* was published on 19 April 2011, just a few weeks before an amendment to N.C. Gen. Stat. § 97-2(19) added the language: "including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer[.]" *See* N.C. Sess. Law

2011-287 § 2 (eff. 24 June 2011). We have been unable to find any decisions by this Court addressing this issue since the amendment took effect. But the amendment does reject *Shackleton's* "flexible case-by-case approach" to determining the "reasonableness and medical necessity of particular attendant care services[,]" 211 N.C. App. at 250, 712 S.E.2d at 301, by requiring that these services be "prescribed by a health care provider authorized by the employer[.]" N.C. Gen. Stat. § 97-2(19).

The Commission addressed the need for attendant care in its "Findings of Fact" as follows:

> 65. Based upon a preponderance of the evidence in view of the entire record, the Commission finds plaintiff's need for attendant care services declined as his recovery progressed and his wife returned to full-time work on June 1, 2012. Accordingly, the Commission finds plaintiff needed attendant care services from Ms. Thompson for two hours per day from June 2, 2012 through December 31, 2012. The Commission finds reasonable compensation for such services to be $9.24 per hour.
>
> 66. The Commission finds, based upon a preponderance of the evidence in view of the entire record, that plaintiff regained sufficient independence in his post-discharge recovery such that he no longer needed attendant care services subsequent to December 31, 2012.

Plaintiff argues that he is challenging the Commission's "finding" that he is not entitled to attendant care benefits past 31 December 2012. He does not challenge any of the other findings of fact, nor has defendant cross-appealed or challenged any other findings. Although the Commission has labelled its determination of entitlement to attendant care benefits as a finding of fact, it is actually a conclusion of law which we review *de novo*. *Shackleton*, 211 N.C. App. at 244-45, 712 S.E.2d at 297. See also *Barnette v. Lowe's Home Centers, Inc.*, __ N.C. App. __, __, 785 S.E.2d 161, 165 (2016) ("Regardless of how they may be labeled, we treat findings of fact as findings of fact and conclusions of law as conclusions of law for purposes of our review."). The Commission also addressed the basis for its determination in its conclusions of law, as noted below. We therefore must determine as a matter of law whether the Commission's findings of fact support its legal conclusion that plaintiff's entitlement to attendant care ended as of 31 December 2012.

In reviewing the order on appeal in light of N.C. Gen. Stat. § 97-2(19), we have been unable to determine, based upon the evidence and findings

of fact, why the Commission chose 31 December 2012 as the ending date for plaintiff's attendant care. While to some extent it appears that the Commission may have interpreted the phrase "prescribed by a health care provider" to require a written prescription, as defendant contends would be proper, the Commission addressed this issue in its conclusions of law and determined quite correctly that a written prescription was not required. The Commission concluded as follows:

> 8. Section 97-2(19) of the Workers' Compensation Act does not require that a *written* prescription be issued by a medical provider in order for attendant care services to be payable by the employer. The statute merely requires that attendant care services be "prescribed" by the medical provider. "[S]tatutory interpretation properly commences with an examination of the plain words of a statute." *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997). "An analysis utilizing the plain language of the statute and the canons of construction must be done in a manner which harmonizes with the underlying reason and purpose of the statute." *Electric Supply Co. v. Swaim Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). "[W]hen language used in a statute is clear and unambiguous, [the Court] must refrain from judicial construction and accord words undefined in the statute their plain and definite meaning." *Heib v. Lowery*, 244 N.C. 403, 409, 474 S.E.2d 323, 327 (1996) (quoting *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995)). *See also Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 376, 553 S.E.2d 89, 93 (2001).
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> 9. The Workers' Compensation Act does not define "prescribed" as used within N.C. Gen. Stat. § 97-2(19). Merriam-Webster's Online Dictionary, which includes the main A-Z listing of *Merriam-Webster's Collegiate Dictionary, Eleventh Edition*, defines "prescribed" as "to officially tell someone to use (a medicine, therapy, diet, etc.) as a remedy or treatment" or "to make (something) an official rule." As an intransitive verb, it means "to lay down a rule" or "to write or give medical prescriptions." As a transitive verb, it means "to lay down as a guide, direction, or rule of action," "to specify with authority," or "to designate or order the use of as a remedy." *Merriam-Webster*, An Encyclopaedia Britannica Company, available

at http://www.merriam-webster.com/dictionary/prescribe. Similarly, *The American Heritage Dictionary of the English Language* defines prescribed as "To set down as a rule, law, or direction," "To order the use of (a medicine or other treatment)." *The American Heritage Dictionary of the English Language*, *Fifth Edition*, available online at https://ahdictionary.com/word/search.html?q=prescribed.

10. Dr. Cairns testified that, while plaintiff required specialized wound care post-discharge from the Burn Center, he leaves it to Ms. Atanesian, the hospital social worker, to determine whether admission to a long-term care facility is needed or if the patient's family is able to provide the necessary wound care. Only if someone directly approaches Dr. Cairns about the issue does he make a personal decision about such matters. In this case, Ms. Atanesian determined that plaintiff's wife, Ms. Thompson, was able to provide wound care for plaintiff at home. On April 3, 2012, one day after plaintiff's hospital discharge, Ms. Atanesian wrote a letter to Ms. Thompson's employer advising that Ms. Thompson would serve as plaintiff's "primary caregiver" for purposes of providing "attendant and wound care." Ms. Atanesian provided this written directive in her capacity as Case Manager for Adult and Pediatric Burn Surgery at UNC Hospitals, under the supervision and direction of Dr. Cairns. Accordingly, the Commission concludes that a preponderance of the evidence in view of the entire record shows Dr. Cairns prescribed at-home attendant care for plaintiff and, in the absence of a written prescription by Dr. Cairns, the April 3, 2012 letter written by Ms. Atanesian qualifies as a prescriptive instruction issued in accordance with the medical directives of Dr. Cairns.

11. Additionally, the North Carolina appellate courts have recognized certain instances in which common sense dictates that a particular result be reached when the facts of a case infer a logical conclusion. For instance, the state Supreme Court has held that, in some instances, the cause of a claimant's injuries will be evident to the "layman of average intelligence and experience" such that expert medical testimony is unnecessary to determine

> causation. *Click*, 300 N.C. at 167, 265 S.E.2d at 391. The state appellate court has also held that "[t]he ordinary person knows, without having to consult a medical expert, when it is necessary to lie down and rest because his or her own body is tired, exhausted, or in pain. . . ." *Perkins v. Broughton Hosp.*, 71 N.C. App. 275, 279, 321 S.E.2d 495, 497 (1984) (cited by *Britt v. Gator Woo Inc.*, 185 N.C. App. 677, 682, 648 S.E.2d 917, 921 (2007)). Given the extent of plaintiff's burn injuries, which necessitated approximately two months of in-patient care at the Burn Center, it logically follows that plaintiff continued to require specialized wound care for a period of time following his discharge therefrom and that he did, in fact, receive wound care from his wife who obtained training in how to provide such care from medical professionals at the Burn Center. Based upon a preponderance of the evidence in view of the entire record, and reasonable inferences drawn therefrom, the Commission concludes that Dr. Cairns prescribed attendant care for plaintiff by directing the Burn Center's social worker, Ms. Atanesian, to evaluate Ms. Thompson's ability to provide such care in lieu of transferring plaintiff to a long-term care facility. The Commission concludes that Dr. Cairns "prescribed" at-home attendant care for plaintiff by providing this medical directive to Ms. Atanesian, who, in turn, approved Ms. Thompson to provide the at-home attendant care. N.C. Gen. Stat. § 97-2(19).

We agree with the Commission's determination that a *written* prescription is not necessary. As the order noted, one of the most basic rules of statutory interpretation is that courts may not delete or add words to clear statutory language.

> The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature. If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms. Thus, in effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.

Lunsford v. Mills, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citations and quotation marks omitted).

Yet since all of plaintiff's physicians said that plaintiff required and would continue to require attendant care for his burn injuries, it appears that the Commission relied upon the social worker's letter, at least to some extent, precisely because it was the only *written* directive regarding attendant care. But as we have already noted, the Commission also recognized that N.C. Gen. Stat. § 97-2(19) does not require a written prescription for attendant care. *Id.* The statute simply requires that attendant care be prescribed by an authorized "health care provider," and this term is defined in the next subsection:

> (20) Health care provider. -- The term "health care provider" means physician, hospital, pharmacy, chiropractor, nurse, dentist, podiatrist, physical therapist, rehabilitation specialist, psychologist, and any other person providing medical care pursuant to this Article.

N.C. Gen. Stat. Ann. § 97-2 (20).

Dr. Cairns was plaintiff's "health care provider authorized by the employer[,]" and he ordered that plaintiff receive care initially under the supervision of the Burn Center and then with attendant care continuing at home. N.C. Gen. Stat. § 97-2(19). Chapter 97, which contains the Worker's Compensation Act in full, does not provide a definition for a "prescription" or "prescribe." Elsewhere in state and federal law, certain controlled substances do specifically require a *written* prescription from an authorized medical provider. *See*, *e.g.*, N.C. Gen. Stat. § 90-106(a) (2015) ("Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance included in Schedule II of this Article may be dispensed without the written prescription of a practitioner."); N.C. Gen. Stat. § 90-87(23) (2015) (defining "prescription" under the Controlled Substances Act as "[a] written order or other order which is promptly reduced to writing for a controlled substance as defined in this Article[.]"). The most general definition of "prescription order" we can find in the North Carolina General Statutes is found in the North Carolina Pharmacy Practice Act:

> "Prescription order" means a written or verbal order for a prescription drug, prescription device, or pharmaceutical service from a person authorized by law to prescribe such drug, device, or service. A prescription order includes an order entered in a chart or other medical record of a patient.

N.C. Gen. Stat. § 90-85.3(t) (2015).

Although the Commission did not, according to its findings and conclusions, interpret the phrase "prescribed by a health care provider" to require a written prescription, its conclusions still seem to rely upon the FMLA letter from the social worker, Ms. Atanesian, as a written expression of the physician's orders. Of course, the social worker could not write a prescription, since she was not a "health care provider[,]" but she could and did convey the instructions of the treating physician, as an employee of the Burn Center. The Commission found that Ms. Atanesian's letter "qualifies as a prescriptive instruction issued in accordance with the medical directives of Dr. Cairns." Use of the adjective "prescriptive" does not make the social worker's letter a "prescription," and as we have explained, there was no need for a written prescription. Dr. Cairns directed that plaintiff continue to receive attendant care, and the Burn Center oversaw the care and assisted plaintiff as needed.

We recognize that attendant care services are quite different from a bottle of pills, and they are certainly not dispensed at pharmacies. But we believe it is instructive that a prescription, except in certain limited situations set forth in various statutes, can be *either* a "written or verbal order." *Id.* There was no need for the Commission to try to turn the FMLA letter into a written "prescription" when the statute merely requires that the attendant care be "prescribed by a health care provider authorized by the employer[.]" N.C. Gen. Stat. § 97-2(19). Dr. Cairns was plaintiff's authorized "health care provider" and he obviously "prescribed" that plaintiff needed attendant care, both just after his release from the hospital and ongoing care for the future. In fact, he noted that if Ms. Thompson could not continue to provide this care, another medical intervention would be necessary.

In addition, we recognize that the amendment to N.C. Gen. Stat. § 97-2(19) may have been intended to limit the scope of attendant care allowed under *Shackleton*, and there is no need to insert the words "in writing" into the statute to accomplish this intent. The statute, as written, allows attendant care services only where such services have been determined medically necessary by a health care provider authorized by the employer, N.C. Gen. Stat. § 97-2(19), and thus cannot be based only upon "a variety of evidence" including "testimony of the claimant or the claimant's family member; or the very nature of the injury." *Shackleton*, 211 N.C. App. at 250, 251, 712 S.E.2d at 301.

Yet the Commission's order extends the care to 31 December 2012, after the period of time set forth in the FMLA letter, so we must also consider the basis for this time period. It seems that Conclusion of Law No. 11 addresses this and that the Commission extended attendant care

past 1 June 2012 based upon the reduction in time needed for care each day and because "common sense dictates that a particular result be reached when the facts of a case infer a logical conclusion." But to the extent that the Commission relied upon "common sense" to set an ending date, its conclusion cannot comport with N.C. Gen. Stat. § 97-2(19), which requires that attendant care be "prescribed by a health care provider authorized by the employer[.]" Based upon the findings of fact, it is apparent that the Commission determined that plaintiff's attendant care services were medically necessary beyond 1 June 2012. But, in light of the actual medical evidence in this case, it is not apparent from its findings of fact why the Commission ultimately concluded that "attendant care was no longer medically necessary" after 31 December 2012.

Defendant argues that

> [e]ven if the legal requirement for a prescription is ignored or diluted, there is still competent evidence in the record to support the Commission's findings that attendant care was simply not medically necessary after 31 December 2012. Competent evidence showed that Plaintiff returned to normal life activities during 2012, including social activities, serving on a church committee, having a normal intimate life with his spouse, and playing golf, and he was simply not a candidate for attendant care services at that time.

We first note that although there was evidence about plaintiff's activities, the Commission did not make any finding that plaintiff had returned to "normal life activities" as defendant contends as of the date of the hearing, although he was moving in that direction. Instead, the Commission found as follows:

> 53. As of the date of hearing before Deputy Commissioner Harris, plaintiff was not yet back to playing a full golf game at a course. Plaintiff testified that he was able to chip the ball around in his yard. He was also doing some recreational shooting, holding the handgun in his right hand and using his left hand for support and balance under his right triceps.
>
> 54. Also, as of the date of hearing before the Deputy Commissioner, plaintiff was able to drive himself short distances, but his medications prevented him from driving long distances. Plaintiff testified that he continued to have sharp pains in and about his left shoulder throughout each day, and he was unable to lift with that shoulder,

> although he had not received any medical restrictions against use of the left upper extremity.
>
> 55. Plaintiff testified that he continued to avoid going outside in the sun because it is too painful for him.
>
> 56. As of the date of hearing before the Deputy Commissioner, plaintiff had not returned to work. Defendant did not contend that plaintiff is no longer disabled, either before the Deputy Commissioner or at the Full Commission hearing.

These findings are not challenged by either party. Thus, defendant's argument implicitly recognizes that the Commission relied upon the letter up to 1 June 2012, but awarded attendant care until 31 December 2012 upon its determination that some care was medically necessary after 1 June, but in a reduced amount as the time needed to care for plaintiff decreased.

Essentially, it appears that the Commission used a hybrid approach, basing its award upon a written "prescriptive instruction" up to 1 June 2012 and "common sense" until 31 December 2012. But the statute now sets forth a clear basis for an award of attendant care: the care must be "prescribed by a health care provider authorized by the employer[.]" Based upon the record, all of the attendant care in this case was directed by plaintiff's authorized physicians, from immediately after his injury and continuing through the date of the hearing. The evidence shows that the time needed for care was reduced, but does not show that it disappeared entirely. There was no evidence, medical or otherwise, that set 31 December 2012 as the time plaintiff's need for attendant care ended. The evidence and findings all indicate that plaintiff will need some care for life, and the evidence is essentially uncontroverted. Ms. Thompson testified that for the period of time after 2012, it took her about 30 minutes a day to assist plaintiff with his compression garments and to apply lotion, sunscreen, and Cetaphil to his skin. Plaintiff similarly testified that it took about 10 minutes per day for Ms. Thompson to apply creams and 15 to 30 minutes per day to attend to his wounds.

Regarding attendant care for the time period the Commission approved or beyond, Dr. Hultman stated in a deposition that he "would be happy to order that[,]" but that it would be hard to put a specific number on the amount of care per day that a patient would need and that he would go with whatever Dr. Cairns said. Plaintiff's physicians, Dr. Cairns and Dr. Hultman, agreed in separate depositions that Ms. Thompson's

attendant care has all been medically necessary. Dr. Cairns explained that "[i]f we didn't have his wife participating in his care, we would have had to come up with another plan, which would have meant that . . . another medical intervention would have been required[.]"

Dr. Hultman explained plaintiff's ongoing medical need, noting that "attendant care is going to be a necessary part of [plaintiff's] lifelong needs" and that "as a burn surgeon . . . I would say with confidence that he is going to require some type of attendant care." He noted that plaintiff's scars would "need to be massaged and have a moisturizing agent put on every day, indefinitely." Additionally, he stated that "given [plaintiff's] limited mobility with his shoulder, it makes it harder for him to care for himself." Dr. Hultman estimated that massaging and moisturizing plaintiff's scars and assisting with his compression garments could take between 90 to 120 minutes. Thus, while the amount of time needed for attendant care may change over the years, all of his treating physicians agreed he will continue to need *some* amount of care. The Commission's reduction of compensation to two hours per day after 1 June 2012 is supported by the evidence, but there is no evidence that plaintiff's need for attendant care, as ordered by his physicians, was over as of 31 December 2012. We therefore conclude that the Commission erred in its findings and conclusions of law regarding Ms. Thompson's attendant care services provided to plaintiff after 31 December 2012 and the need to compensate her for those continuing services. Attendant care must be "prescribed by a health care provider" and all of plaintiff's physicians agreed that he would continue to need attendant care. The extent of his needs will certainly change over time, but based upon all of the evidence in this case and the Commission's findings of fact, we cannot determine why it set 31 December 2012 as the ending date for attendant care.

Conclusion

Accordingly, we reverse the Full Commission's opinion and award and remand for entry of an amended opinion and award with additional findings of fact and conclusions of law on the issue of Ms. Thompson's attendant care services to plaintiff consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and DIETZ concur.

WILLIAMS v. ADVANCE AUTO PARTS, INC.

[251 N.C. App. 712 (2017)]

HARRY WILLIAMS, PLAINTIFF
v.
ADVANCE AUTO PARTS, INC., AND ADVANCE STORES COMPANY, INCORPORATED D/B/A ADVANCE AUTO PARTS, DEFENDANTS

No. COA16-625

Filed 17 January 2017

1. Civil Procedure—amendment to complaint—addition of party—after expiration of statute of limitations

Where plaintiff tripped and fell in an Advance Auto Parts store, filed a complaint that named the defendant as "Advance Auto Parts, Inc.," and—after the expiration of the statute of limitations—filed a notice of amendment to complaint adding "Advance Stores Company, Incorporated" as a named defendant, the trial court properly concluded that plaintiff's amendment was not the correction of a mere misnomer but an impermissible attempt to add a new defendant after the statute of limitations had expired.

2. Estoppel—named wrong entity as defendant—no evidence of intent to deceive—no showing of due diligence

Where the trial court concluded that plaintiff's amendment to his complaint was an impermissible attempt to add a new defendant after the statute of limitations had expired, the Court of Appeals concluded that plaintiff could not invoke equitable estoppel. Plaintiff submitted a letter from the third-party claims administrator for "Advance Auto" or "Advance Auto Parts" but brought no evidence to suggest that the letter was intended confuse plaintiff. Plaintiff also could not show that he exercised due diligence in discovering the legal owner of the retail store where he was injured.

3. Appeal and Error—swapping horses on appeal

Where the trial court concluded that plaintiff's amendment to his complaint was an impermissible attempt to add a new defendant after the statute of limitations had expired, the Court of Appeals declined to consider plaintiff's argument that he was entitled to relief because the one entity failed to file a certificate of assumed name and because it was merely the other entity's alter ego. Plaintiff failed to bring either theory before the trial court and could not swap horses on appeal.

Appeal by Plaintiff from orders entered 3 and 7 March 2016 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 30 November 2016.

Riddle & Brantley, LLP, by Donald J. Dunn and Jonathan M. Smith for Plaintiff-Appellant.

Millberg Gordon Stewart PLLC, by B. Tyler Brooks and John C. Millberg for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Harry Williams ("Plaintiff") appeals two orders from the Cumberland County Superior Court granting summary judgment to both Advance Stores Company, Inc. ("Stores") and Advance Auto Parts, Inc. ("Parts"). Plaintiff contends his failure to name the correct plaintiff in his complaint was a mere misnomer which the trial court should have granted him permission to amend and relate back to the original complaint. We disagree.

I. Facts and Background

On 30 October 2012, Plaintiff tripped and fell, injuring himself inside an Advance Auto Parts retail store in Fayetteville, North Carolina. After the incident, Plaintiff submitted a claim for his injuries to a third party administrator, Sedgwick CMS ("Sedgwick"), who administered the liability policy for the store. In a 25 November 2012 letter ("Sedgwick letter"), Sedgwick named the insured as "Advance Auto." Sedgwick subsequently advised Plaintiff it was "the Third Party claims Administrator (TPA) for Advance Auto Parts" and denied Plaintiff's claim for failure to "find negligence on the part of Advance Auto Parts for this loss."

On 26 October 2015, Plaintiff filed a complaint in Cumberland County Superior Court naming the defendant as "Advance Auto Parts, Inc." Plaintiff directed a civil summons to Parts the same day. On 21 December 2015, Plaintiff filed a notice of amendment to complaint, adding "Advance Stores Company, Incorporated" as a named defendant. Plaintiff also directed a civil summons to both Parts and Stores and filed his amended complaint on 21 December 2015.

On 30 December 2015, Parts filed its answer to the original complaint, seeking dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim. In the alternative, Parts asked for summary judgment pursuant to Rule 56 on the grounds it

did not "own, lease, operate, control, or maintain the premises identified in the plaintiff's complaint." The same day, Parts filed a separate motion for summary judgment, arguing it had no duty to Plaintiff because it did not own the store in question. Parts further argued the statute of limitations had expired on Plaintiff's claim, and any amendment could not be held to relate back to the original complaint under Rule 15(c) of the North Carolina Rules of Civil Procedure.

Parts attached as an exhibit the affidavit of Pamela R. Webster ("Ms. Webster") the senior claims manager for Parts. Ms. Webster stated Parts is a holding company organized under Delaware law with a principle place of business in Virginia. Stores is a wholly owned subsidiary of Parts, organized under Virginia law and with a principal place of business in Virginia. Ms. Webster stated Stores, not Parts, is the owner and operator of the Advance Auto Parts store where Plaintiff was injured.

On 3 February 2016, Parts filed its answer to the amended complaint, seeking dismissal for failure to state a claim and requesting summary judgment in its favor in the alternative, arguing it did not own the premises identified in Plaintiff's complaint. Parts attached no affidavits or exhibits to its answer.

On 3 February 2016, Stores filed its answer to the amended complaint and moved to dismiss, arguing Stores and Parts were separate legal entities, the statute of limitations had expired, and Plaintiff sought to "impermissibly add a new defendant to the case after the expiration of the statute of limitations." Stores attached no affidavits or exhibits to its answer.

On 24 February 2016, Plaintiff filed a memorandum of law in opposition to Parts' motion for summary judgment. Along with its memorandum, Plaintiff submitted an affidavit from Plaintiff's counsel and two exhibits to the affidavit. The affidavit described counsel's attempts to locate the correct defendant, noting counsel's paralegal used the Sedgwick letter as a basis for searching the North Carolina Secretary of State's corporate registry for the name "Advance Auto." The paralegal confirmed the choice of Advance Auto Parts Inc. as the proper defendant by searching Google for "Advance Auto" and inspecting Advance Auto Parts' website. The Sedgwick letter and a printout showing "Advance Auto Parts, Inc." as one of the results for a search for "Advance Auto" on the Secretary of State's website were appended as exhibits to the affidavit.

Stores filed its memorandum of law in support of its motion to dismiss the amended complaint on 26 February 2016. Stores included several exhibits with its memorandum, including Ms. Webster's affidavit

and a deed from the Cumberland County Register of Deeds for the store where Plaintiff was allegedly injured, showing the store was owned by Stores. Stores also presented the court with Parts' application for a North Carolina certificate of authority showing Parts is a Delaware corporation.

On 26 February 2016, Parts submitted its memorandum of law supporting its motion for summary judgment on the original complaint. Parts appended Ms. Webster's affidavit, the copy of the store's deed, and its application for certificate of authority as exhibits.

On 3 March 2016, the trial court issued an order granting summary judgment to Stores on the amended complaint. Based on the deed from the Cumberland County Register of Deeds, the court found Stores, not Parts, "is the corporate entity that operates and controls the Advance Auto Parts retail store where the plaintiff's alleged fall occurred." The court further found the statute of limitations on plaintiff's claim expired on 30 October 2015.

As to the amendment, the court found Plaintiff amended his complaint after the statute of limitations expired, seeking to "add Advance Stores Company, Inc. as a defendant." The court found Rule 15(c) did not allow relation back to add a party to an existing claim, except as to correct a "misnomer or mistake in the party's name." It further held:

> The evidence in this case establishes that the plaintiff filed his original complaint against Advance Auto Parts, Inc. The statute of limitations for plaintiff's claim expired on 30 October 2015. Approximately seven weeks after the expiration of the statute of limitations, plaintiff amended the complaint to name a different corporate entity, Advance Stores Company, Inc. The amendment to add Advance Stores Company, Inc., sought to bring in a new defendant to the case and was not the mere correction of a misnomer or a mistake in the name of the originally named defendant. Accordingly, because the plaintiff's amended complaint was filed after the expiration of the statute of limitations and the amendment sought to add a new defendant, it cannot relate back as a matter of law to the original date of filing under Rule 15.

The court also found Plaintiff failed to prove equitable estoppel, holding the Sedgwick letter was not evidence Sedgwick "misled or misrepresented to the plaintiff that [its] insured was the corporation Advance Auto Parts, Inc." As a result, the trial court held there was "no genuine

issue of material fact that plaintiff amended his complaint to name a new defendant after the statute of limitations expired," and granted summary judgment to Stores.

On 7 March 2016, the trial court issued an order granting summary judgment to Parts on the original complaint. The court found Stores was a subsidiary of Parts and that Stores was the legal owner of the store where Plaintiff fell. It further found Plaintiff provided no evidence to support "any contention that Advance Auto Parts Inc., exercises the degree of control over Advance Stores Company, Inc." necessary to pierce the corporate veil. As such, the court held Parts was "improperly named . . . as a defendant in this case." Because Parts owed no legal duty with regard to a premises it did not own, the trial court held there was no genuine issue of material fact to justify disregarding the corporate form and granted summary judgment to Parts.

Plaintiff entered notice of appeal to both the 3 March 2016 and 7 March 2016 orders on 20 March 2016.

II. Jurisdiction

Plaintiff appeals the trial court's 3 and 7 March 2016 orders granting summary judgment in favor of Stores and Parts, respectively. Because these orders are the final judgments of the superior court in a civil action, jurisdiction is proper in this court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2015).

III. Standard of Review

Although both Parts and Stores moved to dismiss the respective claims against them, "[a] Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court." *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979). Here, both Parts and Stores asked for summary judgment in the alternative to dismissal. Moreover, Parts, Stores, and Plaintiff each submitted memoranda of law and documentary evidence to the trial court, which the court used to render its rulings. As a result, we review the orders as grants of summary judgment.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

A defendant may show he is entitled to summary judgment by "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing the plaintiff cannot surmount an affirmative defense which would bar the claim." *Frank v. Funkhouser*, 169 N.C. App. 108, 113, 609 S.E.2d 788, 793 (2005) (internal quotation marks and citation omitted).

The court must review the record in the light most favorable to the non-movant and draw all inferences in the non-movant's favor. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). *See also Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975); *Norfolk & W. Ry. Co. v. Werner Indus.*, 286 N.C. 89, 98, 209 S.E.2d 734, 739 (1974).

This Court reviews the trial court's grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

IV. Analysis

A. Amendment and Relation Back of the Complaint

[1] Plaintiff contends the trial court improperly granted summary judgment to both Parts and Stores because its amended complaint should have related back to the date of the original filing under Rule 15(c) of the North Carolina Rules of Civil Procedure. We disagree.

Plaintiff does not dispute the statute of limitations expired on his personal injury claim prior to the filing of the amended complaint. The statute of limitations is three years for personal injury cases. N.C. Gen. Stat. § 1-52(16) (2015). Because Plaintiff was under no disability when the action accrued and no other exception applies, the statute of limitations was not tolled. *Accord* N.C. Gen. Stat. § 1-17 (2015). As a result, the statute of limitations on Plaintiff's claim expired on 30 October 2015, seven weeks before the amended complaint was filed.

Under the North Carolina Rules of Civil Procedure, a party may amend a pleading "once as a matter of course at any time before a responsive pleading is served[.]" N.C. Gen. Stat. § 1A-1, Rule 15(a) (2015). 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); *Franklin v. Winn Dixie Raleigh*, 117 N.C. App. 28, 38, 450 S.E.2d 24, 30 (1994), *aff'd per curiam*, 342 N.C. 404, 464 S.E.2d 46 (1995). However, the plain language of Rule 15(c) makes clear the rule applies only to amendments to add claims, not parties. Our courts have repeatedly held that Rule 15(c) is "not authority for the relation back of a claim against a new party." *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 716 (1995). *See also Brown v. Kindred Nursing Ctrs. East, LLC.*, 364 N.C. 76, 81, 692 S.E.2d 87, 91 (2010).

Nevertheless, the trial court possesses discretion to amend "any process or proof of service thereof 'unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued. *Harris v. Maready*, 311 N.C. 536, 545-46, 319 S.E.2d 912, 918 (1984) (quoting N.C. Gen. Stat. § 1A-1, Rule 4(i) (2015). Thus, although time barred claims may not be amended under Rule 15(c) to add new parties, they may be amended in order to correct a misnomer in the "description of the party or parties actually served [with process]." *Maready*, 311 N.C. at 546-547, 319 S.E.2d at 919. *See also Pierce v. Johnson*, 154 N.C. App. 34, 39, 571 S.E.2d 661, 664-65 (2002); *Liss v. Seamark Foods*, 147 N.C. App. 281, 283-84, 555 S.E.2d 365, 367 (2001); *Piland v. Hertford County Bd. of Comm'rs*, 141 N.C. App. 293, 299, 539 S.E.2d 669, 673 (2000). A misnomer is a "mistake in name; giving an incorrect name to the person in accusation, indictment, pleading, deed, or other instrument." *Pierce*, 154 N.C. App. at 39, 571 S.E.2d at 665 (internal alterations omitted) (quoting Black's Law Dictionary 1000 (6th ed. 1990)). It is "technical in nature[.]" *Liss*, 147 N.C. App. at 285, 555 S.E.2d at 368.

This Court has generally distinguished between situations in which the plaintiff has used the wrong name of "one legal entity which uses two names," and situations in which the plaintiff attempts to "substitute one legal entity for another as defendant." *Liss*, 147 N.C. at 286, 555

S.E.2d at 369 (quoting *Tyson v. L'Eggs Products Inc.*, 84 N.C. App. 1, 6, 351 S.E.2d 834, 837 (1987)). The former may be corrected as a misnomer provided there is evidence the intended defendant was properly served and would not be prejudiced by the amendment. *Pierce*, 154 N.C. App. at 39, 571 S.E.2d at 665. The latter are barred even where the correct defendant may have received notice of the impending suit. *Piland*, 141 N.C. App. at 299-300, 539 S.E.2d at 673 (whether the new defendant received notice "is irrelevant under *Crossman's* analysis of the limited reach of Rule 15(c). [The plaintiff] sought to add a party, and such action is not authorized by the rule"). *See also Treadway v. Diez*, 209 N.C. App. 152, 157, 703 S.E.2d 832, 835 (Jackson, J., dissenting) ("[N]otice is immaterial with respect to the operation of amendments to pleadings pursuant to Rule 15(c)."), *rev'd per curiam per the dissent*, 365 N.C. 289, 715 S.E.2d 852 (2011).

In the instant case, the record establishes Plaintiff's amendment was an attempt to substitute one legal entity for another. The evidence before the trial court, even when construed in the light most favorable to Plaintiff, establishes Parts and Stores are separate corporations. Parts and Stores presented the court with the same three pieces of evidence: (1) Ms. Webster's affidavit stating Stores is a wholly owned subsidiary of Parts; (2) the Cumberland County deed establishing Stores as the owner of the store where Plaintiff was injured; and (3) the application for a certificate of authority showing Parts is a Delaware corporation. Plaintiff's evidence, consisting of his attorney's affidavit, the printout of results from the Secretary of State's website, and the Sedgwick letter, does not dispute the ownership of the store or the nature of the corporate relationship between Parts and Stores. It is probative only of the process by which Plaintiff came to name the wrong defendant in his original complaint.

While Plaintiff argues Stores was properly served and would suffer no prejudice from allowing the amendment to relate back, this analysis applies only when the evidence shows the complaint was amended to substitute the proper legal name of a single legal entity with multiple names. *Piland*, 141 N.C. App. at 300, 539 S.E.2d at 673. Here the record is clear; "[q]uite simply, plaintiff[] sued the wrong corporation." *Franklin*, 117 N.C. App. at 35, 450 S.E.2d at 28. Consequently, we hold the trial court properly concluded Plaintiff's amendment was not the correction of a mere misnomer, but an impermissible attempt to add a new defendant after the statute of limitations had expired.

B. Equitable Estoppel

[2] Plaintiff argues Stores should be estopped from invoking the statute of limitations defense because it negligently allowed Sedgwick to make an affirmative representation that Parts was legally responsible for the store in which Plaintiff was injured. We disagree.

Generally, equitable estoppel may be invoked to prevent a defendant from relying upon the statute of limitations as an affirmative defense. *Nowell v. Great Atlantic & Pacific Tea Co.*, 250 N.C. 575, 579, 18 S.E.2d 889, 891 (1959). The party seeking to invoke the doctrine must satisfy several essential elements:

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

Parker v. Thompson-Arthur Paving Co., 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990). In satisfying these elements, the party asserting estoppel need not show the other party acted with bad faith, fraud, or intent to deceive. *Friedland v. Gales*, 131 N.C. App. 802, 807, 509 S.E.2d 793, 797 (1998). However, even where the other party has engaged in misrepresentation, the proponent must have exercised due diligence in attempting to discover the relevant facts or omissions. *Bailey v. Handee Hugo's, Inc.*, 173 N.C. App. 723, 727, 620 S.E.2d 312, 315 (2005).

Plaintiff cannot invoke equitable estoppel in this case. Plaintiff's lone piece of evidence supporting his claim, the Sedgwick letter, states only that Sedgwick is the third party claims administrator for "Advance Auto" or "Advance Auto Parts." Plaintiff brings no evidence to suggest that Sedgwick's intent was to cause Plaintiff to act on its representation. Nor does he show that Sedgwick had actual or constructive knowledge that the owner of the retail store in question was Stores.

Furthermore, Plaintiff cannot show he exercised due diligence in discovering the legal owner of the retail store where he was injured. The record shows Sedgwick sent its letter to Plaintiff on 25 November 2012, almost three years before Plaintiff filed his original complaint on 26 October 2015. In the interim, a deed was on file with the Cumberland

County Register of Deeds identifying Stores as the true owner of the store where Plaintiff was injured. Although Plaintiff's examination of Advance Auto Parts' website and the Secretary of State's database proved insufficient to discover the legal owner of the store, "it is not an onerous burden for this Court to impose the task of a title search upon one filing suit." *Bailey*, 173 N.C. App. at 727, 620 S.E.2d at 316. Consequently, Plaintiff may not use equitable estoppel to prevent Stores from invoking the statute of limitations defense.

[3] Plaintiff also argues he is entitled to relief because Stores failed to file a certificate of assumed name and because Stores is merely Parts' alter ego. The record shows Plaintiff brought neither of these theories before the trial court. Because a party "cannot swap horses between courts in order to obtain a better mount on appeal," we decline to consider these arguments. *Bailey*, 173 N.C. App. at 727, 620 S.E.2d at 316.

As a result, we hold there was no genuine issue of material fact before the trial court and both Parts and Stores were entitled to judgment as a matter of law. The orders of the trial court are:

AFFIRMED.

Judges STROUD and DAVIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 JANUARY 2017)

ALMASON v. ALMASON No. 16-258	Mecklenburg (12CVD17617)	Remanded
BAKER v. GIBBONS No. 16-417	Hoke (13CVS871)	Affirmed
BREWINGTON v. N.C. AGRIC. & TECH. STATE UNIV. No. 15-1331	Wake (14CVS1374)	Affirmed
GOODYEAR TIRE & RUBBER CO. v. BERRY No. 16-520	Cumberland (15CVS2782)	Affirmed
HATTON v. GARRETT No. 15-1322	Mecklenburg (08CVD19133)	Affirmed in part, Vacated in part and Remanded
IN RE E.S.E. No. 16-616	New Hanover (14JT147-148)	Affirmed
STATE v. ANDREW No. 16-512	Mecklenburg (13CRS212231) (15CRS15980)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. ESTEBAN No. 16-716	Moore (12CRS52308)	Dismissed
STATE v. FIABEMA No. 16-560	Wake (14CRS211375)	Affirmed
STATE v. JAMES No. 16-314	Mecklenburg (13CRS247458) (14CRS8779-80)	No Error
STATE v. KERSEY No. 16-654	Mecklenburg (12CRS217536) (12CRS33966)	Affirmed
STATE v. LANHAM No. 16-387	Union (13CRS51627)	No Error
STATE v. MILES No. 16-562	Alamance (13CRS57279-80) (13IFS5081)	VACATED AND REMANDED FOR RESENTENCING

STATE v. MOSS No. 16-665	Cleveland (14CRS54997)	No Error
STATE v. POTEAT No. 16-535	Cabarrus (12CRS052151) (12CRS052152) (15CRS000274)	No Error
STATE v. SEARLS No. 16-676	Mecklenburg (13CRS246712)	No Error
STATE v. SUTTON No. 16-405	Pitt (13CRS60078)	No Error
STATE v. TAYLOR No. 16-723	Henderson (14CRS54122-23)	Affirmed
STATE v. WILLIAMS No. 16-229	Guilford (14CRS80806) (14CRS80954)	No error in part, vacated and remanded for resentencing
THORNTON v. C & J CARRIAGE HOUSE No. 16-538	N.C. Industrial Commission (860685)	Affirmed

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