253 N.C. App.—No. 1 Pages 1-240

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MAY 28, 2019

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

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ANN MARIE CALABRIA[9]
RICHARD A. ELMORE[10]

[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Retired 31 December 2016. [7]Retired 24 April 2017.
[8]Appointed 1 August 2016. Term ended 31 December 2016. [9]Retired 31 December 2018. [10]Retired 31 December 2018.

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FILED 18 APRIL 2017

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HEADNOTE INDEX

APPEAL AND ERROR

Appeal and Error—change of venue—interlocutory—substantial right—An order changing venue as a matter of right was interlocutory because it did not dispose of the case, but it was immediately appealable as affecting a substantial right. **Terry v. Cheesecake Factory Rests., Inc., 216.**

Appeal and Error—interlocutory appeal—heard in the discretion of the Court—In a case arising from a dispute between a town and its volunteer fire department, issues arising from the denial of the Town's Rule 12(b)(6) motion to dismiss and an order allowing amendment of a complaint and imposing a preliminary injunction

were heard in the Court of Appeals' discretion even though they were interlocutory. **Providence Vol. Fire Dep't v. The Town of Weddington, 126.**

Appeal and Error—interlocutory appeal—subject matter jurisdiction—personal jurisdiction—In a case arising from a dispute between a town and its volunteer fire department, plaintiff's motion to dismiss the Town's appeal as interlocutory was granted as to the Town's appeal under Rule 12(b)(1) (subject matter jurisdiction) and denied as to the Town's appeal under Rule 12(b)(2). Governmental immunity has been traditionally recognized as an issue of personal jurisdiction and is immediately appealable. **Providence Vol. Fire Dep't v. The Town of Weddington, 126.**

Appeal and Error—interlocutory orders—partial summary judgment—An appeal was dismissed as interlocutory where the case involved an action to collect attorney fees and a summary judgment for one of the two defendants. The judgment did not contain a certification that there was no just reason for delay and plaintiff made no argument on appeal that the order impacted a substantial right. **Moon Wright & Houston, PLLC v. Cole, 113.**

Appeal and Error—interlocutory orders and appeals—substantial right—pretrial order—partial taking—land affected by taking—An appeal from an interlocutory pretrial order involving land affected by a partial taking affected a substantial right and was immediately appealable. **Dep't of Transp. v. Riddle, 20.**

Appeal and Error—issue not raised at trial—considered under Rule 2—Although defendant did not raise at trial the issue of whether there was a fatal variance between an indictment and the evidence, the Court of Appeals elected to hear the matter on the merits under Rule 2 of the N.C. Rules of Appellate Procedure. It is difficult to contemplate a more manifest injustice than a conviction without adequate evidentiary support. **State v. McNair, 178.**

Appeal and Error—motion to dismiss appeal—violations—motion to strike portions of appellate brief—In a child neglect dependency case, the Court of Appeals denied a joint motion to dismiss respondent mother's appeal and an alternative motion to strike portions of respondent's appellate brief. The alleged violations were not jurisdictional or gross violations. Further, the pertinent portions of the brief were unnecessary. **In re A.P., 38.**

Appeal and Error—motions to dismiss denied—appellate issue not decided below—An appeal was dismissed where the action involved sovereign immunity and defendants argued a trial court order denying their motions to dismiss was interlocutory but immediately appealable. The question of whether defendants were immune from suit was never decided below. **Page v. Chaing, 117.**

Appeal and Error—relief granted on other grounds—issue not heard—The question of whether the trial court erred in a prosecution for possession of a firearm by a felon resulting from the search of defendant by officers was not considered where the relief sought by defendant was granted on another issue. **State v. Malachi, 170.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Burglary and Unlawful Breaking or Entering—mere presence—contention rejected—Defendant's contention that the evidence merely showed his presence at the scene of a breaking and entering was rejected. **State v. McNair, 178.**

Burglary and Unlawful Breaking or Entering—place of religious worship—storage building—In a case arising from a break-in at a barn behind a rented building used as a church, the trial court erred by denying defendant's motion to dismiss the charge of breaking or entering a place of religious worship. The barn was used to store equipment for the church, but the State presented no evidence that the barn was used as a place of worship. It is clear from the wording of N.C.G.S. § 14-54.1 that the specific building must have been a building regularly used and clearly identifiable as a place for religious worship. **State v. McNair, 178.**

Burglary and Unlawful Breaking or Entering—place of religious worship—curtilage—In a case arising from a break-in at a barn behind a rented building used as a church, the trial court erred by denying defendant's motion to dismiss the charge of breaking or entering a place of religious worship. Although the State argued that the barn was within the curtilage of the building used for church services, the term used in N.C.G.S. § 14-54 for "building" references "curtilage" solely by referring to a building within the curtilage of a dwelling house. The State did not argue that any portion of the portion of the property occupied by the church was used as a dwelling. **State v. McNair, 178.**

Burglary and Unlawful Breaking or Entering—possession of tools—control of area where tools found—The evidence was sufficient to support a finding that defendant had constructive possession of burglary tools that were found in a fenced area outside the building that was broken into. While defendant was not in exclusive control of the area where the tools were found, there were other incriminating circumstances. **State v. McNair, 178.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Child Abuse, Dependency, and Neglect—abuse adjudication—improperly compelled testimony—The trial court erred in a juvenile adjudication hearing by compelling the juvenile's mother to testify in violation of her Fifth Amendment right against self-incrimination. The trial court was instructed to disregard the portions of respondent mother's improperly compelled testimony at a hearing in which she testified to her belief regarding the source of the minor child's injuries. **In re L.C., 67.**

Child Abuse, Dependency, and Neglect—dependency adjudication—sufficiency of findings of fact—care or supervision—alternative child care arrangements—The trial court erred by adjudicating a child dependent where it failed to address the parent's ability to provide care or supervision and the availability to the parent of alternative child care arrangements. **In re L.C., 67.**

Child Abuse, Dependency, and Neglect—disposition order—ceasing reunification efforts—aggravating circumstances required in a prior order—The trial court failed to make adequate findings of fact in support of its decision to cease reunification efforts between respondent mother and her minor child in a child abuse, dependency, and neglect case. The trial court's determination as to the existence of aggravating circumstances appeared for the first time in its dispositional order rather than in a prior order. **In re L.C., 67.**

Child Abuse, Dependency, and Neglect—neglect adjudication—failure to seek timely medical attention—The trial court did not err in its adjudication of neglect where it made sufficient findings, including respondent's decision to not seek medical attention for two days despite being on notice of the minor child's injuries.

The findings were unaffected by the Fifth Amendment violation compelling respondent mother to testify. **In re L.C., 67.**

Child Abuse, Dependency, and Neglect—neglect and dependency—subject matter jurisdiction—standing—The trial court erred by concluding that the Department of Social Services (DSS) had standing to file a juvenile petition. The trial court lacked subject matter jurisdiction to adjudicate the minor child as dependent and neglected since the minor child was neither found in nor residing in Mecklenburg County at the time DSS filed its juvenile petition. **In re A.P., 38.**

Child Abuse, Dependency, and Neglect—permanency planning order—best interests of child—clerical errors—The trial court did not err in a child neglect and dependency case by granting custody of the minor child to respondent father and not respondent mother in the permanency planning order. The record supported that this was in the minor child's best interests. The references to "the Respondents" in conclusions of law 2 and 7 were clerical errors that should have read "Respondent Mother" only. **In re J.K., 57.**

Child Abuse, Dependency, and Neglect—permanent plan—adoption—appropriate relative placements—sufficiency of findings of fact—The trial court erred in a child abuse, dependency, and neglect case by setting adoption as the minor child's permanent plan without making sufficient findings of fact as to whether appropriate relative placements existed. While the trial court may have been waiting for the Department of Social Services to complete its evaluation, that fact did not obviate the need for specific findings of fact under N.C.G.S. § 7B-903(a1). **In re L.C., 67.**

CHILD CUSTODY AND SUPPORT

Child Custody and Support—civil custody order—child neglect and dependency—termination of juvenile court jurisdiction—The trial court erred in a child dependency and neglect case by entering a custody order that was not in compliance with N.C.G.S. § 7B-911. **In re J.K., 57.**

CIVIL PROCEDURE

Civil Procedure—motion to dismiss—unfounded allegation in verified complaint—alternate basis for ruling—The issue of whether an unfounded allegation in a verified complaint could be used as evidence for purposes of a motion to dismiss was not addressed where the trial court order was affirmed on an alternate basis. **Providence Vol. Fire Dep't v. The Town of Weddington, 126.**

Civil Procedure—Rule 12(b)(6) motion to dismiss—alternative ground in amended pleading—In a case arising from a dispute between a town and its volunteer fire department, the trial court properly denied defendant-town's motion to dismiss based on Rule 12(b)(6). That motion was based primarily on the first verified amended complaint and the trial court did not err by allowing plaintiff to amend the complaint. The second verified complaint alleged alternative grounds upon which immunity was unavailable beyond waiver by purchase of liability insurance and to which defendant did not adequately respond in its initial motion to dismiss or the accompanying affidavit. **Providence Vol. Fire Dep't v. The Town of Weddington, 126.**

CONDEMNATION

Condemnation—partial taking—entire tract—unity of use—Although the trial court did not err in a partial taking case by concluding that several lots were not part of the "entire tract," it erred by concluding that another lot was part of the "entire tract." The portions of two other lots were not reasonably or substantially necessary to defendant landowners' ability to use and enjoy any of the other lots. **Dep't of Transp. v. Riddle, 20.**

CONSTITUTIONAL LAW

Constitutional Law—right to counsel—prior conviction—clerk's electronic records—The trial court did not err by denying defendant's motion to suppress a prior conviction used for habitual offender status. Defendant contended that the prior conviction was obtained in violation of his right to counsel, but there were no written records of the trial court's order. The presumption of correctness was applied to the clerk's electronic records, which supported the trial court's findings and conclusion that the prior conviction was not obtained in violation of defendant's right to counsel. **State v. Thorpe, 210.**

CRIMINAL LAW

Criminal Law—continuance—time to prepare motion to dismiss—bodycam footage destroyed—no Brady violation—The trial court did not abuse its discretion by denying defendant's motion for a continuance in a prosecution for assaulting a government officer. The motion for a continuance was for the purpose of preparing a motion to dismiss based on the destruction of video footage from officers' body cameras. The recordings were erased in accordance with routine policy and had been reviewed by the prosecutor and defendant's original counsel. Defense counsel's decision not to preserve copies could not be the basis of a contention that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). Moreover, defendant did not establish precisely how a continuance would have helped him prepare for trial. **State v. Mylett, 198.**

DIVORCE

Divorce—equitable distribution—classification—car—sufficiency of findings—The trial court erred in an equitable distribution case by classifying a 2011 Suburban and the debt it secured as plaintiff husband's separate property and debt. The case was remanded for clear findings to support the classification, valuation, and distribution of the Suburban and its debt. **Miller v. Miller, 85.**

Divorce—equitable distribution—in-kind distribution—sale of real property—marital home—valuation of marital and divisible assets—The trial court erred in an equitable distribution case by failing to provide for an in-kind distribution and ordering the sale of real property (the marital home and the Virginia property). The case was reversed and remanded for valuation of each marital and divisible asset, and to determine the total net value of the entire marital estate. **Miller v. Miller, 85.**

Divorce—equitable distribution—valuation—Timber Agreement—speculation—The trial court erred in an equitable distribution case by its valuation of a Timber Agreement at $5,000.00. It involved timber of an unknown variety, age, and quantity, and was not supported by competent evidence. **Miller v. Miller, 85.**

DIVORCE—Continued

Divorce—setting aside divorce judgment—Rule of Civil Procedure 60(b)—equitable distribution—subject matter jurisdiction—The trial court did not abuse its discretion by entering a decree setting aside a divorce judgment under Rule of Civil Procedure 60(b). The trial court had subject matter jurisdiction over defendant wife's equitable distribution counterclaim as stated in her amended answer to the divorce complaint. **Miller v. Miller, 85.**

ENVIRONMENTAL LAW

Environmental Law—industrial contamination—post-closure clean-up—multiple successive owners—In a case involving the determination of who was responsible for the current clean-up of a closed industrial chemical storage site that had changed ownership multiple times, the trial court was correct to look for guidance in federal law when interpreting the term "operator" in the context of the State Hazardous Waste Rules and, specifically, the hazardous waste permit program. An "operator" is the person responsible for, or in charge of the facility subject to regulation; moreover, "operator" includes those parties in charge of or directing post-closure activities under the State Hazardous Waste Program and the federal Resource Conservation and Recovery Act. Petitioner WASCO was the party responsible for and directly involved in the post-closure activities subject to regulation. **WASCO LLC v. N.C. Dep't of Env't & Nat. Res., 222.**

EQUITABLE DISTRIBUTION

Equitable Distribution—distributional factors—failure to make findings—The trial court erred in an equitable distribution case by failing to make findings and give proper consideration to plaintiff husband's evidence of distributional factors. The case was remanded for findings regarding all distributional factors for which evidence was presented and to determine whether an equal division was equitable. **Miller v. Miller, 85.**

EVIDENCE

Evidence—photographs—not authenticated—used for illustrative purposes only—The trial court did not err in a prosecution for armed robbery by allowing a witness to use photographs for illustrative purposes even though the photographs had not been authenticated. **State v. Little, 159.**

Evidence—prior convictions—cross examination—instructions to defendant before testifying—The trial court did not err in a prosecution for armed robbery by instructing defendant that the prosecutor could question him about prior convictions if he testified. The trial court limited its discussion with defendant to the possibility of impeachment by proof of prior convictions and defendant identified nothing in the trial court's statements to defendant that suggested that defendant would be questioned beyond the permissible scope of limited cross-examination. **State v. Little, 159.**

FIREARMS AND OTHER WEAPONS

Firearms and Other Weapons—possession by a felon—evidence of possession—insufficient—The trial court should have granted defendant's motion to dismiss a charge of possession of a firearm by a felon where a rifle was found

seventy-five to one hundred yards from the spot to which a dog tracked defendant. No evidence was presented regarding the ownership of the rifle. Viewed in the light most favorable to the State, the evidence raised only a suspicion or conjecture and was not sufficient for an inference of actual or constructive possession of the rifle. **State v. Battle, 141.**

Firearms and Other Weapons—possession of firearm by felon—constructive possession—disjunctive instruction—The trial court erred in a prosecution for possession of a firearm by a felon by instructing the jury that defendant could be found guilty based on constructive possession where the State presented no evidence of constructive possession. The analysis in *State v. Boyd*, 366 N.C. 548 (2013), applies only to plain error review and did not change the established presumption that the jury relied on an erroneous disjunctive review not supported by the evidence and objected to by defendant. Here, there was a reasonable possibility that the jury would have reached a different result without the erroneous instruction. **State v. Malachi, 170.**

IMMUNITY

Immunity—governmental—contract waiver—not applicable to tort claims— The precedent that government immunity is waived when a town enters into a valid contract was not extended to tort claims arising from a contract. **Providence Vol. Fire Dep't v. The Town of Weddington, 126.**

Immunity—governmental—proprietary activity—The trial court did not err in case arising from a dispute between a town and its volunteer fire department by denying a motion to dismiss a fraud claim based on governmental immunity. There was an uncontroverted allegation in the second verified amended complaint that defendant-town's action was proprietary in nature. **Providence Vol. Fire Dep't v. The Town of Weddington, 126.**

Immunity—law enforcement training officer—public official—A community college Basic Law Enforcement Training firearms instructor was sufficiently exercising the sovereign's power and his own experience, judgment, and discretion to be a public official in an action arising from an accident during firearms training. **Chastain v. Arndt, 8.**

Immunity—piercing the veil—firearms training accident—malice—constructive intent—In an action against a community college Basic Law Enforcement Training (BLET) firearms instructor that arose from an accident during firearms training, plaintiff's pleadings were sufficient to pierce defendant's public official immunity to allow suit to proceed against him in his individual capacity. Plaintiff alleged that that defendant, an experienced law enforcement officer and a certified BLET firearms instructor, pulled the trigger of a loaded deadly weapon while it was pointed at a student's abdomen. **Chastain v. Arndt, 8.**

INDICTMENT AND INFORMATION

Indictment and Information—damage to personal property—lock and hasp—There was no variance between the charge alleged in the indictment and the evidence at trial in a prosecution for damage to personal property based on breaking and entering and damage to a lock. Defendant contended that the hasp affixed to the barn door was not owned by the church (Vision), which was allowed to use the

building for storage, and which rented the adjacent building for services. Viewing the evidence in the light most favorable to the State, there was sufficient evidence that Vision owned the lock and that the lock was damaged. **State v. McNair, 178.**

Indictment and Information—stealing from church storage building—capable of owning property—An indictment for injury to personal property owned by a church did not have a facial invalidity where defendant contended that the indictment did not allege that the victim (Vision) was capable of owning property. The indictment identified Vision as "a place of religious worship" and then subsequently listed Vision as the owner of the personal property that defendant damaged. **State v. McNair, 178.**

Indictments and Information—variance with evidence—possession of burglary tools—There was not a fatal variance between an indictment for the possession of burglary tools and the evidence where the indictment only identified two implements of housebreaking but the instruction was that the jury could find defendant guilty if he possessed either of those two tools or a pair of work gloves found at the scene. The trial court properly instructed the jury on the essential elements of the offense; the mere fact that the trial court mentioned three implements of housebreaking rather than two does not constitute err. Even if there was a variance, possession of either of the two items mentioned was sufficient to convict defendant. **State v. McNair, 178.**

INJUNCTIONS

Injunctions—preliminary—*lis pendens*— adequate remedy at law—The trial court erred by granting plaintiff's motion for a preliminary injunction in a case arising from a dispute between a town and its volunteer fire department where plaintiff, the volunteer fire department, had filed a *lis pendens* against the fire station. The *lis pendens* provided an adequate remedy at law. **Providence Vol. Fire Dep't v. The Town of Weddington, 126.**

JURISDICTION

Jurisdiction—action against a law enforcement instructor—official capacity—A claim against a Basic Law Enforcement Training firearms instructor in his official capacity was required to be asserted in the Industrial Commission under the Tort Claims Act. Such actions are within the exclusive and original jurisdiction of the Industrial Commission, not the Superior Court. The purchase of liability insurance by the community college at which the course was held had no bearing on the exclusive jurisdiction of the Industrial Commission. **Chastain v. Arndt, 8.**

MORTGAGES AND DEEDS OF TRUST

Mortgages and Deeds of Trust—foreclosure—latent ambiguity—description of property—extrinsic documents referenced in deed of trust—The trial court did not err by allowing a substitute trustee appointed by appellee bank to foreclose on a loan secured by property owned by appellants. The deed of trust's reference to "Section II-C" was a minor error that created only a latent ambiguity as to the description of the property, which could be rectified by examination of extrinsic documents referenced in the deed of trust. **In re Foreclosure of Thompson, 46.**

PLEADINGS

Pleadings—amendment of complaint—no abuse of discretion—The trial court did not abuse its discretion by granting plaintiff's motion to amend its complaint. Even though plaintiff admitted that it had no factual basis for alleging waiver of governmental immunity through the purchase of liability insurance, the record did not show that the trial court abused its discretion by allowing the motion to amend. **Providence Vol. Fire Dep't v. The Town of Weddington, 126.**

POLICE OFFICERS

Police Officers—assaulting a public officer—general intent crime—spitting at another—hitting officer—The trial court did not err by denying defendant's motion to dismiss a charge of assaulting a government officer where defendant said he spit at another but hit the officer.. In accord with *State v. Page*, 346 N.C. 689 (1997), assault on a government official is a general intent crime and N.C.G.S. § 14-33(c)(4) was satisfied. **State v. Mylett, 198.**

SEARCH AND SEIZURE

Sea**rch and Seizure—community caretaker doctrine—car doors open—intrusion into backyard—**The trial court erred in a prosecution for possession of marijuana with intent to sell or deliver by relying on the community caretaker doctrine where the officer approached defendant's back door after seeing a car with its doors open in defendant's driveway. The facts did not justify a warrantless intrusion; moreover, there are many innocent reasons to leave the doors open on a vehicle in a driveway and there were alternatives the officer could have used. **State v. Huddy, 148.**

Search and Seizure—knock and talk doctrine—curtilage of home—The trial court erred in a prosecution for possession of marijuana with intent to sell or deliver by relying on the knock and talk doctrine to justify an officer's warrantless search of the curtilage of defendant's home. The officer did more than knock and talk: he ran a license plate not visible from the street, checked windows for signs of a break-in, and walked around the entire residence to "clear" the sides of the home before approaching the back door, which was inside a chain link fence. **State v. Huddy, 148.**

SENTENCING

Sentencing—remand—lesser included offense—Where a conviction for breaking and entering a place of religious worship was reversed for insufficient evidence that the building was a place of worship, the matter was remanded for resentencing on the lesser-included offense of felony breaking or entering. **State v. McNair, 178.**

TERMINATION OF PARENTAL RIGHTS

Termination of Parental Rights—grounds—failure to make adjudicatory findings—safe home—incarceration—The trial court erred by concluding that grounds existed to terminate respondent father's parental rights where it failed to make any adjudicatory findings concerning the alleged failings of respondent to provide a safe home based on his incarceration. **In re J.D.A.D., 53.**

Termination of Parental Rights—grounds—sufficiency of findings and conclusions—circumstances at time of hearing—The trial court's order terminating respondent mother's parental rights was vacated where the trial court's findings and conclusions did not adequately account for respondent's circumstances at the time

of the termination hearing with regard to either the fitness of respondent to care for the children or the nature and extent of her reasonable progress. **In re A.B., 29.**

TRIALS

Trials—motion to consolidate cases—exclusive authority of presiding trial judge—Judge Hunt erred in a case arising from the unsuccessful sale of a 2013 Ford pickup truck by granting plaintiff Boone Ford's motion to consolidate cases. Judge Coward, who presided over the trial, had the exclusive authority to consolidate the actions. The order of consolidation was vacated and remanded to the superior court. **Boone Ford, Inc. v. IME Scheduler, Inc., 1.**

VENUE

Venue—chain restaurant—multiple counties—The trial court erred by transferring venue from Durham County to Wake County as a matter of right in a negligence action involving a restaurant that served cheesecake which contained nuts. Defendant, though formed in California, maintained a registered office in N.C. and was thus a domestic corporation, and defendant did business in both counties. Durham County was a proper venue and the trial court erred by changing venue as a matter of right. **Terry v. Cheesecake Factory Rests., Inc., 216.**

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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BOONE FORD, INC. D/B/A BOONE FORD LINCOLN MERCURY, INC.,
A DELAWARE CORPORATION, PLAINTIFF
v.
IME SCHEDULER, INC., A NEW YORK CORPORATION, DEFENDANT

AND

CASH FOR CRASH, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY, PLAINTIFF
v.
BOONE FORD, INC. D/B/A BOONE FORD LINCOLN MERCURY, INC.,
A DELAWARE CORPORATION, DEFENDANT

No. COA16-750

Filed 18 April 2017

Trials—motion to consolidate cases—exclusive authority of presiding trial judge

Judge Hunt erred in a case arising from the unsuccessful sale of a 2013 Ford pickup truck by granting plaintiff Boone Ford's motion to consolidate cases. Judge Coward, who presided over the trial, had the exclusive authority to consolidate the actions. The order of consolidation was vacated and remanded to the superior court.

Judge DILLON dissenting.

Appeal by defendant IME Scheduler, Inc. and plaintiff Cash for Crash, LLC from judgment entered 1 March 2016 by Judge William H. Coward in Watauga County Superior Court. Heard in the Court of Appeals 25 January 2017.

Miller & Johnson, PLLC, by Nathan A. Miller, for defendant-appellant IME Scheduler, Inc. and plaintiff-appellant Cash for Crash, LLC.

Walker DiVenere Wright, by Anné C. Wright, for appellee Boone Ford, Inc.

ELMORE, Judge.

This appeal involves a challenge to the consolidation of two actions for trial in superior court. Boone Ford, Inc. filed a complaint against IME Scheduler, Inc. alleging several claims arising from the unsuccessful sale of a 2013 Ford SVT Raptor pickup truck. IME Scheduler counterclaimed and its affiliate, Cash for Crash, LLC, filed a separate complaint against Boone Ford after the dealership refused to immediately return a $206,596.00 wire transfer on suspicion of money laundering.

Upon Boone Ford's motion, Judge Jeff Hunt entered an order consolidating the two cases for trial, which was held at the 1 February 2016 session of the Watauga County Superior Court, Judge William H. Coward presiding. The jury denied all claims raised by IME Scheduler and Cash for Crash and returned a verdict in favor of Boone Ford. IME Scheduler and Cash for Crash appeal, arguing, *inter alia*, that Judge Hunt lacked authority to consolidate the cases. Because that authority is reserved for the judge presiding over the trial, we vacate the order of consolidation and remand to the superior court.

I. Background

In October 2013, IME Scheduler contacted Boone Ford to purchase a 2013 Ford SVT Raptor pickup truck. At the time, Boone Ford did not have the truck in stock. In exchange for a newer model, Boone Ford acquired a 2013 SVT Raptor from a dealership in West Virginia to consummate the sale with IME Scheduler.

As alleged in the pleadings, Boone Ford believed that it was selling the 2013 SVT Raptor it had acquired from West Virginia, which had a VIN ending in -66435 and an 800A options package, for $49,385.50. On or about 6 November 2013, Boone Ford faxed to IME Scheduler a window sticker of the Raptor and a bill of sale for the same. After receiving the fax, IME Scheduler issued a $9,000.00 down payment via American Express credit card and, on 12 November 2013, wired the remaining balance of $40,385.50 to Boone Ford.

A dispute arose two days later when IME Scheduler requested another copy of the window sticker via e-mail. When the sticker described a Raptor 800A, IME Scheduler insisted that Boone Ford had sold the wrong truck. IME Scheduler believed it was purchasing a 2013

SVT Raptor with a VIN ending in -97953 and an 801A options package for $49,385.50. It also alleged that Boone Ford had previously faxed a window sticker of the Raptor 801A. Unable to resolve the conflict, IME Scheduler canceled the $9,000.00 down payment. Boone Ford refused to refund the $40,385.50 and, sometime later, sold the Raptor 800A to another party.

On 19 February 2014, Boone Ford received an unexpected wire of $206,596.00 into its account. The wire originated from Cash for Crash. Alfred Glover, the owner of Boone Ford, learned that Cash for Crash was affiliated with IME Scheduler and that the organizations were located in New Jersey and New York, respectively. Concerned that they were trying to launder money through his dealership or involve him in illegal activity, Glover contacted the Boone Police Department, Attorneys General, FBI, CIA, and Department of Homeland Security. Cash for Crash insisted that the wire was a result of human error and demanded the money be returned, but Glover refused to do so until an investigation was complete. Approximately two months later, Glover returned the $206,596.00 at the direction of the Boone Police Department which had found no connection to money laundering.

Boone Ford filed a complaint against IME Scheduler alleging breach of contract, fraud, negligent misrepresentation, unfair and deceptive trade practices (UDTP), and punitive damages arising out of the failed Raptor transaction. IME Scheduler filed a counterclaim alleging the same claims against Boone Ford. Cash for Crash also filed a complaint against Boone Ford, alleging conversion, UDTP, fraud, and punitive damages arising out of the $206,596.00 wire transfer.

Upon Boone Ford's motion, Judge Hunt consolidated the cases and they were tried together before Judge Coward in Watauga County Superior Court. The jury found for Boone Ford on its breach of contract, fraud, and UDTP claims against IME Scheduler, awarding $20,000.00 in compensatory damages and $50,000.00 in punitive damages. IME Scheduler and Cash for Crash appeal.

II. Discussion

Appellants argue that Judge Hunt erred in granting Boone Ford's motion to consolidate because Judge Coward, who presided over the trial, had the exclusive authority to consolidate the actions.

Rule 42(a) of the North Carolina Rules of Civil Procedure provides the trial court with authority to consolidate pending "actions involving a common question of law or fact." N.C. Gen. Stat. § 1A-1, Rule 42(a)

(2015). Whether two or more cases should be consolidated for trial is a decision left to the sound discretion of the judge who will preside over the trial. *Pickard v. Burlington Belt Corp.*, 2 N.C. App. 97, 103, 162 S.E.2d 601, 604–05 (1968). "[A] consolidation cannot be imposed upon the judge presiding at the trial by the preliminary [o]rder of another trial judge." *Id.*

In *Oxendine v. Catawba County Department of Social Services*, 303 N.C. 699, 703–04, 281 S.E.2d 370, 373 (1981), the North Carolina Supreme Court affirmed our decision to vacate a consolidation order entered by a judge who was not scheduled to preside over the trial. The plaintiffs had filed a complaint in district court seeking permanent custody of their foster child. *Id.* at 701, 281 S.E.2d at 372. Several weeks later, they filed a petition in superior court for the adoption of the same child. *Id.* Upon the defendant's motion, Judge Forrest A. Ferrell entered an order consolidating the custody action and adoption proceedings for a joint trial in superior court. *Id.* at 701–02, 281 S.E.2d at 372. The plaintiffs petitioned for writ of certiorari before the trial date, arguing that Judge Ferrell erred in granting the defendant's motion to consolidate. *Id.* at 702, 281 S.E.2d at 372.

Although the custody action and petition for adoption involved "related issues of fact and law," the North Carolina Supreme Court held that, procedurally, the consolidation was in error: "[T]he discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial." *Id.* at 703–04, 281 S.E.2d at 373. Judge Ferrell had entered the consolidation order "out of term and out of session." *Id.* at 704, 281 S.E.2d at 373. And because "[t]here was no indication that he was scheduled to preside at the session of court during which he set the consolidated cases to be presented for trial," the Court concluded that "Judge Ferrell's order of consolidation must be vacated." *Id.*

At the hearing on Boone Ford's motion to consolidate, appellants urged Judge Hunt that, pursuant to *Oxendine*, he did not have the authority to consolidate the two actions. That authority, appellants argued, was reserved for the judge presiding over the trial. Judge Hunt acknowledged that he did not know which trial judge would be assigned to the cases but nevertheless entered an order granting Boone Ford's motion to consolidate. The cases were ultimately tried together at the 1 February 2016 session of the Watauga County Superior Court before Judge Coward. Because Judge Hunt was not the judge who presided over the trial, he did not have authority to consolidate the actions.

Boone Ford nevertheless contends that appellants waived their right to object to the consolidation, directing our attention to the following stipulations in the signed pretrial order:

> 1. It is stipulated that all parties are properly before the Court, and that the Court has jurisdiction over the parties and the subject matter.
>
> 2. It is stipulated that all parties have been correctly designated and there is no issue as to misjoinder or non-joinder of parties.

Boone Ford argues that these stipulations are judicial admissions, the effect of which is to remove any controversy regarding the propriety of the consolidation.

We see no language within the pretrial stipulations that indicates a "definite and certain" assent to a consolidation of the claims, and we are not convinced that appellants intended for the stipulations to operate as a waiver to their challenge raised first in the trial court and now on appeal. *See State v. Hurt*, 361 N.C. 325, 329, 643 S.E.2d 915, 918 (2007) ("A stipulation must be 'definite and certain in order to afford a basis for judicial decision.' " (citations omitted)). If Judge Hunt lacked authority to consolidate the actions, moreover, any stipulation by the parties to the contrary would be "invalid and ineffective." *See State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979) ("Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." (citations omitted)).

In the alternative, Boone Ford maintains that even if Judge Hunt improperly entered the order of consolidation, the judicial action does not constitute reversible error. Relying on *In re Moore*, 11 N.C. App. 320, 181 S.E.2d 118 (1971), Boone Ford asserts that "when the consolidation of actions for the purpose of trial is assigned as error, the appellant must show injury or prejudice arising therefrom." *Id.* at 322, 181 S.E.2d at 120 (citations omitted). And in this case, Boone Ford contends, appellants have failed to demonstrate any resulting prejudice from the consolidation.

As with the other cases cited by Boone Ford, *In re Moore* involved a slightly different issue than the one before us. Generally, where an appellant challenges the decision to consolidate actions for trial, the appellant must show that the trial court abused its discretion and the appellant was prejudiced therefrom. *Barrier Geotechnical Contractors, Inc. v. Radford Quarries of Boone, Inc.*, 184 N.C. App. 741, 744, 646

S.E.2d 840, 841–42 (2007); *Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 448, 481 S.E.2d 349, 353 (1997); *Greenville City Bd. of Educ. v. Evans*, 21 N.C. App. 493, 495–96, 204 S.E.2d 899, 901 (1974); *In re Moore*, 11 N.C. App. at 322, 181 S.E.2d at 120. The issue in this case, however, is not whether consolidation was proper in light of the criteria set forth under Rule 42(a) but whether Judge Hunt, who was not assigned to preside over the trial, had *authority* to consolidate the two actions. *See Oxendine*, 303 N.C. at 703, 281 S.E.2d at 373 (concluding that consolidation order was "procedurally in error" even though the two actions involved "related issues of fact and law, and therefore could be properly consolidated under Rule 42(a)"). As *Oxendine* indicates, the latter does not demand an inquiry into prejudice. *Id.* at 704, 281 S.E.2d at 373 (vacating consolidation order without any requisite showing of prejudice); *see also Maness v. Bullins*, 27 N.C. App. 214, 217, 218 S.E.2d 507, 509–10 (1975) (reversing, without discussing prejudice, order granting separate trials on claims first tried jointly as corollary to rule that "consolidation of claims cannot be thrust upon a presiding judge by edict of another judge"). Rather, " '[w]hen the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.' " *Ferguson v. Ferguson*, 238 N.C. App. 257, 267, 768 S.E.2d 30, 37 (2014) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)).

III. Conclusion

Absent the requisite authority, Judge Hunt erred in consolidating the cases for trial. We vacate the consolidation order and remand the cases to superior court. Our holding and disposition render moot the other issues raised on appeal.

VACATED AND REMANDED.

Judge ZACHARY concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I respectfully dissent.

This appeal involves two pending civil actions. Boone Ford, who is a party to both actions, moved to consolidate the two actions for trial.

Boone Ford's motion was granted by Judge Hunt. Sometime later, the "consolidated" matter came on for trial before Judge Coward. None of the parties asked Judge Coward to sever the matter. A jury was empaneled and returned verdicts in favor of Boone Ford.

I agree with the majority and with the appellants that Judge Hunt's consolidation order had no binding effect on Judge Coward. Thus, it was within Judge Coward's discretion whether to sever the matter into two trials, notwithstanding Judge Hunt's prior order.

I disagree, however, that the appellants are entitled to have the jury verdicts set aside and the judgments vacated. When the matters came before Judge Coward for the "consolidated" trial, no party made any motion to sever. Had the appellants wanted the matter severed, they could have simply made a motion before Judge Coward requesting that the trial judge enter an order to do so. He had the authority, since Judge Hunt's order was reviewable by the judge presiding at trial. However, the appellants did not make a severance motion. Rather, *they stipulated to Judge Coward's jurisdiction* and proceeded with the trial. They picked a jury. The jury returned a verdict that the appellants did not like. There was no reversible error at trial. Therefore, I conclude that the appellants are not entitled to a new trial based on Judge Hunt's pre-trial consolidation order, which they failed to ask Judge Coward to revisit. To allow such relief would allow appellants two bites at the proverbial apple.

Our Supreme Court has oft stated that "one superior court judge ordinarily may not overrule a prior judgment of another superior judge in the same case on the same issue." *State v. Duvall*, 304 N.C. 557, 561, 284 S.E.2d 495, 498 (1981). Our Supreme Court has held that "[t] his rule does not apply, however, to *interlocutory* orders given during the progress of an action which affect the procedure and conduct of the trial." *State v. Stokes*, 308 N.C. 634, 642, 304 S.E.2d 184, 189 (1983). Relevant to the present appeal, our Supreme Court has held that "a pretrial ruling by a superior court judge consolidating claims for trial was not binding on the superior court judge who tried the case." *Id.* at 642, 304 S.E.2d at 190 (citing *Oxendine v. Dept. of Social Services*, 303 N.C. 699, 281 S.E.2d 370 (1981)).

Based on *Oxendine*, as the majority and the appellants stress, Judge Hunt's consolidation order in this matter had no binding effect on Judge Coward. However, I do not believe that *Oxendine* compels that we set aside the jury verdicts, vacate the judgments, and remand the matters for separate trials. In *Oxendine*, the posture of the case was totally different. No trial had yet occurred when the appeal was taken.

Rather, in *Oxendine*, a judge's consolidation order was appealed immediately. The Supreme Court vacated the consolidated order, holding that the order had no effect on the ability of the judge who would preside at trial to exercise discretion as to whether to consolidate the matters.

Here, however, the appellants did *not* immediately appeal Judge Hunt's consolidation order. And when the matter came on for trial, they *never* made any motion asking Judge Coward to sever the matter, though it was totally within Judge Coward's authority to consider such a motion, notwithstanding Judge Hunt's prior order. Rather, they rolled the dice and proceeded with the consolidated trial, *even stipulating that the matters were properly before Judge Coward's court*. They are only now complaining after the jury verdict did not go their way. To allow them a new trial would be totally unfair to Boone Ford.

I conclude that by failing to ask Judge Coward to sever the matter, the appellants failed to preserve their argument concerning Judge Hunt's order. I also conclude that there was no reversible error with respect to appellants' other arguments on appeal. Accordingly, my vote is no error.

SCOTTY CHASTAIN, Plaintiff

v.

JAMES D. ARNDT a/k/a JIMMY ARNDT, in his official and individual capacity, GASTON COLLEGE and GASTON COLLEGE BOARD OF TRUSTEES, Defendants

No. COA16-1151

Filed 18 April 2017

1. Jurisdiction—action against a law enforcement instructor—official capacity

A claim against a Basic Law Enforcement Training firearms instructor in his official capacity was required to be asserted in the Industrial Commission under the Tort Claims Act. Such actions are within the exclusive and original jurisdiction of the Industrial Commission, not the Superior Court. The purchase of liability insurance by the community college at which the course was held had no bearing on the exclusive jurisdiction of the Industrial Commission.

2. Immunity—law enforcement training officer—public official

A community college Basic Law Enforcement Training firearms instructor was sufficiently exercising the sovereign's power and his

own experience, judgment, and discretion to be a public official in an action arising from an accident during firearms training.

3. Immunity—piercing the veil—firearms training accident—malice—constructive intent

In an action against a community college Basic Law Enforcement Training (BLET) firearms instructor that arose from an accident during firearms training, plaintiff's pleadings were sufficient to pierce defendant's public official immunity to allow suit to proceed against him in his individual capacity. Plaintiff alleged that that defendant, an experienced law enforcement officer and a certified BLET firearms instructor, pulled the trigger of a loaded deadly weapon while it was pointed at a student's abdomen.

Appeal by defendant from order entered 1 September 2016 by Judge Timothy S. Kincaid in Gaston County Superior Court. Heard in the Court of Appeals 22 March 2017.

Roberts Law Firm, P.A., by Scott W. Roberts, for plaintiff-appellee.

Dean and Gibson, PLLC, by Jeremy S. Foster, for defendant-appellant Arndt.

TYSON, Judge.

James D. Arndt a/k/a Jimmy Arndt ("Defendant") appeals from the trial court's denial of his motion for summary judgment. We affirm in part, reverse in part, and remand.

I. Background

Gaston County Sheriff's Deputy Scotty Chastain ("Plaintiff") was enrolled in the Basic Law Enforcement Training ("BLET") course at Gaston College, a two-year community college operating under the North Carolina Board of Community Colleges. Gaston College provides BLET to Gaston County law enforcement officers. Defendant, a certified Specialized Firearms Instructor and an active Gastonia police officer, was employed by Gaston College to instruct the firearms portion of BLET.

On 22 March 2013, Plaintiff's BLET class was training on the firing range located at Gaston College. At the conclusion of the shooting portion of the class, the students were instructed to return to the building to break down and clean their firearms. Plaintiff alleges all of the BLET instructors present, including Defendant, failed to ensure all of

the students' weapons had been unloaded and cleared of ammunition before leaving the shooting range.

Another BLET student in Plaintiff's class failed to empty her weapon prior to returning to the building and experienced difficulty in breaking down her weapon. Defendant assisted the student to break down her weapon. Plaintiff alleges Defendant pulled the trigger of the firearm while assisting the other student to break down her weapon. The firearm discharged. Plaintiff was wounded by the discharge, but survived a bullet wound to his abdomen.

On 21 January 2016, Plaintiff filed suit against Defendant, in both his official and individual capacities, Gaston College, and Gaston College Board of Trustees ("the Board of Trustees") in superior court. Plaintiff alleged negligence, gross negligence, and negligent infliction of emotional distress. He alleged Gaston College and the Board of Trustees were negligent for torts committed by Defendant under the doctrine of *respondeat* superior.

Plaintiff has dismissed all his claims against Gaston College and the Board of Trustees, with prejudice. Both parties assert in their briefs that Plaintiff brought those dismissed claims before the Industrial Commission under the Tort Claims Act, and the action in the Industrial Commission has been stayed pending resolution of the superior court action.

Defendant filed a Rule 12 motion to dismiss Plaintiff's claims. Defendant asserts the superior court lacks personal jurisdiction (Rule 12(b)(1)) and subject matter jurisdiction (Rule 12(b)(2)), and Plaintiff also fails to state a claim under Rule 12(b)(6), because Plaintiff's claims must be brought before the North Carolina Industrial Commission under the Tort Claims Act. Defendant also asserts Plaintiff improperly alleges claims against him in his individual capacity, and all Defendants are entitled to sovereign immunity. On 26 August 2016, the trial court denied Defendant's motion. Defendant appeals.

II. Appellate Jurisdiction

"Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007) (citation omitted). " '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.' " *Britt v. Cusick*, 231 N.C. App. 528, 530-31, 753 S.E.2d 351,

353-54 (2014) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)).

Defendant contends, however, that this appeal is properly before the Court because his motion to dismiss is grounded on sovereign immunity and affects a substantial right that would be lost in the absence of an immediate appeal. *See* N.C. Gen. Stat. § 1-277(a) (2015) (authorizing interlocutory appeal of order that "affects a substantial right"); N.C. Gen. Stat. § 7A-27(b)(3) (2015) (providing for an appeal of right from an interlocutory order which "affects a substantial right").

"This Court has held that a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable." *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (citation omitted), *aff'd per curiam*, 367 N.C. 113, 748 S.E.2d 143 (2013). Furthermore, "this Court has held that an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable." *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001) (citations omitted). 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) (citation omitted), *aff'd in part and modified in part*, 357 N.C. 492, 586 S.E.2d 247 (2003). This appeal is properly before us.

III. Standard of Review

A. Ruling on 12(b)(6)

This Court reviews the trial court's denial of a motion to dismiss *de novo*. *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013). "When applying de novo review, we consider the case anew and may freely substitute our own ruling for the lower court's decision." *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 149, 731 S.E.2d 800, 806-07 (2012) (citation and quotation marks omitted).

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

Robinson v. Wadford, 222 N.C. App. 694, 696, 731 S.E.2d 539, 541 (2012) (citation omitted). "The complaint must be liberally construed, and the

court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Sain v. Adams Auto Grp.*, __ N.C. App. __, __, 781 S.E.2d 655, 659 (2016) (citation omitted).

B. Ruling on 12(b)(2)

"[W]hen neither party submits evidence [in support or opposition of the 12(b)(2) motion], the allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005) (citation and quotation marks omitted). "The trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction." *Id.*

"When this Court reviews a decision as to personal jurisdiction, it considers only whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Id.* at 694, 611 S.E.2d at 183 (citation and quotation marks omitted).

IV. Official Capacity Claims against Defendant

[1] Plaintiff sued Defendant in both his individual and official capacities. Defendant argues he is entitled to sovereign immunity on any claim asserted against him in his "official capacity," and Plaintiff's claim must be asserted in the Industrial Commission under the Tort Claims Act. We agree.

"It is a fundamental rule of law that the State is immune from suit unless it expressly consents to be sued." *Zimmer v. North Carolina Dep't of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 117 (1987) (citation omitted). "By enactment of the Tort Claims Act, N.C.G.S. § 143-291, *et seq.*, the General Assembly partially waived the sovereign immunity of the State to the extent that it consented that the State could be sued for injuries proximately caused by the negligence of a State employee acting within the scope of his employment." *Id.*

"The State may be sued in tort only as authorized in the Tort Claims Act." *Guthrie v. State Ports Auth.*, 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983) (citation omitted). The Tort Claims Act provides "[t]he North Carolina Industrial Commission is . . . a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions

and agencies of the State." N.C. Gen. Stat. § 143-291(a) (2015). If the Commission finds there was actionable "negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his . . . employment," the Commission shall determine the amount of damages the claimant is to be paid. *Id.* The statute specifically states "[c]ommunity colleges and technical colleges shall be deemed State agencies for purposes of this Article." *Id.*

"Because an action in tort against the State and its departments, institutions, and agencies is within the exclusive and original jurisdiction of the Industrial Commission, a tort action against the State is not within the jurisdiction of the Superior Court." *Guthrie*, 307 N.C. at 539-40, 299 S.E.2d at 628. It is undisputed that the North Carolina Industrial Commission has exclusive jurisdiction over Plaintiff's claims against Gaston College and its Board of Trustees. *See id.*

The trial court's order does not refer to the official or individual capacity of Defendant. "A suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent." *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997) (citing Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov't L. Bull. 67, at 7 (Inst. of Gov't, Univ. of N.C. at Chapel Hill), Apr. 1995). A suit in an official capacity is "another way of pleading an action against the governmental entity." *Mullis v. Sechrest*, 347 N.C. 548, 554-55, 495 S.E.2d 721, 725 (1998).

"[I]n a suit against a public employee in his official capacity, the law entitles the employee to the same protection as that of the entity." *Reid v. Town of Madison*, 137 N.C. App. 168, 171, 527 S.E.2d 87, 89 (2000) (citing *Warren v. Guilford Cty.*, 129 N.C. App. 836, 838, 500 S.E.2d 470, 472, *disc. review denied*, 349 N.C. 241, 516 S.E.2d 610 (1998)). "*Official capacity* is not synonymous with *official duties*; the phrase is a legal term of art with a narrow meaning -- the suit is in effect one against the entity." *Meyer*, 347 N.C. at 111, 489 S.E.2d at 888 (citation and internal quotation marks omitted) (emphases supplied).

Plaintiff's complaint alleges Gaston College and its Board of Trustees waived sovereign immunity by the purchase of liability insurance. Plaintiff argues his claim against Defendant in his official capacity is properly before the superior court pursuant to this waiver of sovereign immunity.

The Tort Claims Act provides:

> (b) If a State agency, otherwise authorized to purchase insurance, purchases a policy of commercial liability insurance providing coverage in an amount at least equal to the limits of the State Tort Claims Act, such insurance coverage shall be in lieu of the State's obligation for payment under this Article.

N.C. Gen. Stat. § 143-291(b) (2015). N.C. Gen. Stat. § 115D-24 permits community colleges to waive sovereign immunity by the purchase of liability insurance. The statute provides:

> The board of trustees of any [community college], by obtaining liability insurance as provided in G.S. 115D-53, is authorized to waive its governmental immunity from liability for . . . injury of person . . . by the negligence or tort of any agent or employee of the board of trustees . . . . Governmental immunity shall be deemed to have been waived by the act of obtaining liability insurance, but only to the extent that the board is indemnified for the negligence or torts of its agents and employees[.]

N.C. Gen. Stat. § 115D-24 (2015).

The interplay between the Tort Claims Act and statutes permitting state agencies to waive immunity was examined by this Court in *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 556 S.E.2d 38 (2001), *disc. review denied*, 355 N.C. 292, 561 S.E.2d 887 (2002). The Court determined, "the phrase 'such insurance coverage shall be in lieu of the State's obligation for payment under this Article,' N.C.G.S. § 143-291(b), is more consistent with a designation of the source of payment than with a designation of the forum for adjudication." *Id.* at 343, 556 S.E. 2d at 43. Although various statutes, such as N.C. Gen. Stat. § 115D-24 at issue here, permit State agencies to waive immunity through the purchase of insurance, it is settled that "jurisdiction over tort claims against the State and its agencies remains exclusively with the Industrial Commission." *Id.*

When sued in his official capacity, Defendant is entitled to the same sovereign immunity as Gaston College and its governing body. *Id.* A claim against Defendant in his official capacity is a claim against the entity and "is subject to the same jurisdictional rulings" as the suit against Gaston College and its Board of Trustees. *Meyer*, 347 N.C. at 111, 489 S.E.2d at 888. The allegation that Gaston College purchased liability insurance and waived sovereign immunity of Defendant in his official

capacity has no bearing on the exclusive jurisdiction of the Industrial Commission to adjudicate Plaintiff's claims against Gaston College, the Board of Trustees, and against Defendant in his official capacity. The trial court's denial of Defendant's motion to dismiss the suit against him in his official capacity is error and is reversed.

V. Individual Capacity Claims against Defendant and Defendant's assertion of Public Official Immunity

[2] Defendant argues the trial court erred by denying his motion to dismiss, because he is a public official and immune to suit, and Plaintiff's allegations were insufficient to pierce his immunity. We agree in part.

A. Individual Liability

Plaintiff may bring a State Tort Claims action against Gaston College before the Industrial Commission, and also bring a separate common law action in the superior court against Defendant individually. Our Supreme Court has explained:

> The only claim authorized by the Tort Claims Act is a claim against the State agency. True, recovery, if any, must be based upon the actionable negligence of an employee of such agency while acting within the scope of his employment. However, recovery, if any, against the alleged negligent employee must be by common law action. Plaintiffs could obtain no relief against [the defendant] under the Tort Claims Act.

Wirth v. Bracey, 258 N.C. 505, 507-08, 128 S.E.2d 810, 813 (1963).

> [T]he fact that the Tort Claims Act provides for subject matter jurisdiction in the Industrial Commission over a negligence claim against the State does not preclude a claim against defendants in Superior Court. A plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common-law negligence.

Meyer, 347 N.C. at 108, 489 S.E.2d at 886. "Of course, [P]laintiff[] may not recover from all sources an amount in excess of the damages [he] sustained." *Wirth*, 258 N.C. at 509, 128 S.E.2d at 814; *see also Meyer*, 347 N.C. at 108, 489 S.E.2d at 886 ("Although a plaintiff may not receive a double recovery, he may seek a judgment against the agent or the principal or both.").

B. Public Official versus Public Employee

Defendant asserts he was acting in the capacity of a public official at the time Plaintiff's injury occurred and is immune from suit. "The doctrine of public official immunity is a derivative form of governmental immunity." *Hart v. Brienza*, __ N.C. App. __, __, 784 S.E.2d 211, 215 (2016) (citation and internal quotation marks omitted). "[A] public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. However, a public employee may be held individually liable." *Isenhour v. Hutto*, 350 N.C. 601, 609-10, 517 S.E.2d 121, 127 (1999) (citation and quotation marks omitted).

> In distinguishing between a public official and a public employee, our courts have held that (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties. Additionally, an officer is generally required to take an oath of office while an agent or employee is not required to do so.

Fraley v. Griffin, 217 N.C. App. 624, 627, 720 S.E.2d 694, 696 (2011) (citation, quotation marks, and brackets omitted).

Plaintiff's complaint alleges Defendant is a "sergeant with the City of Gastonia Police Department" who was "employed by [Gaston College] as a basic law enforcement trainer." It is well settled that police officers are public officials. *Mills v. Duke Univ.*, 234 N.C. App. 380, 384, 759 S.E.2d 341, 344 (2014).

BLET instructors are not required to be either active duty or certified police officers. Citizens may also serve as BLET instructors, if they have acquired four years of practical experience as an "administrator or specialist in a field directly related to the criminal justice system." 12 N.C.A.C. 09B. 0302. While Defendant was employed as an active duty police officer for the City of Gastonia, he was clearly acting in the capacity of a BLET instructor, and was employed and compensated by Gaston College, when the incident occurred. We are guided by the factors set forth in *Fraley*, 217 N.C. App. at 627, 720 S.E.2d at 696, *supra*, to determine whether a BLET instructor is a public official or a public employee.

1. Position Created by Statute and the Exercise of the Sovereign's Power

Defendant first contends that the position of BLET instructor is created by statute and is regulated by the State. "This Court has noted that cases which have recognized the existence of a public officer did so when either the officer's position had 'a clear statutory basis' or the officer had been 'delegated a statutory duty by a person or organization created by statute.' " *Fraley*, 217 N.C. App. at 627, 720 S.E.2d at 696 (quoting *Farrell v. Transylvania Cty. Bd. of Educ.*, 199 N.C. App. 173, 177-79, 682 S.E.2d 224, 228-29 (2009)).

"It is in the public interest that . . . education and training be made available to persons who seek to become criminal justice officers." N.C. Gen. Stat. § 17C-1 (2015). Chapter 17C of our General Statutes establishes the North Carolina Criminal Justice Education and Training Standards Commission ("the Commission"). The Commission has the power to "[e]stablish minimum educational and training standards that must be met in order to qualify for entry level employment and retention as a criminal justice officer[.]" N.C. Gen. Stat. § 17C-6(a)(2) (2015).

The Commission also has the authority to "[e]stablish minimum standards for the certification of criminal justice training schools and programs or courses of instruction that are required by [Chapter 17C]," and "[e]stablish minimum standards and levels of education and experience for all criminal justice instructors[.]" N.C. Gen. Stat. § 17C-6(a)(4) and (a)(6). The Commission may "[c]ertify and recertify, suspend, revoke, or deny . . . criminal justice instructors and school directors who participate in programs or courses of instruction that are required by [Chapter 17C]." N.C. Gen. Stat. § 17C-6(a)(7).

The North Carolina Criminal Justice Education and Training System is statutorily created under the Commission, and is "a cooperative arrangement among criminal justice agencies, both State and local, and criminal justice education and training schools, both public and private, to provide education and training to the officers and employees of the criminal justice agencies of the State of North Carolina and its local governments." N.C. Gen. Stat. § 17C-8 (2015). These statutes demonstrate the General Assembly's determination and directive that "the administration of criminal justice is of statewide concern, and that proper administration is important to the health, safety and welfare of the people of the State and is of such nature as to require education and training of a professional nature" for law enforcement officers. N.C. Gen. Stat. § 17C-1. We find Defendant, in his role as a BLET firearms instructor,

was "delegated a statutory duty by a person or organization created by statute." *Fraley*, 217 N.C. App. at 627, 720 S.E.2d at 696.

"An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power." *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965) (citation omitted). The State possesses both the power and obligation to train, educate, regulate, and maintain all North Carolina law enforcement officers. We hold that Defendant was engaged in the "exercise of some portion of the sovereign power" in training officers to properly discharge their duties and to administer criminal justice. *Id.*

2. Exercise of Discretion

Our Supreme Court has explained that "[d]iscretionary acts are those requiring personal deliberation, decision and judgment. Ministerial duties, on the other hand, are absolute and involve merely execution of a specific duty arising from fixed and designated facts." *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127 (internal quotations and citations omitted). In *Baker v. Smith*, 224 N.C. App 432, 737 S.E.2d 144 (2012), this Court held an assistant jailer exercised sufficient discretion for public official immunity to apply. This Court explained, "we do not consider just one duty or one aspect of the assistant jailer's duties in deciding whether she exercises discretion. Rather, we must consider her duties as a whole." *Id.* at 431, 737 S.E.2d at 150.

Here, Defendant was tasked with educating and instructing law enforcement trainees in the proper use of firearms. The trainees were permitted to handle, load, fire, unload, breakdown and clean their weapons in close proximity to each other. Proper firearm training and safety is a serious undertaking and encompasses severe risks and hazards, as here. We hold Defendant's position as a public community college BLET instructor involved sufficient exercise of the sovereign's power and the exercise of his own experience, judgment and discretion to consider Defendant to be a public official.

C. Allegations Sufficient to Pierce Immunity

[3] Defendant argues Plaintiff failed to plead allegations sufficient to pierce Defendant's public official immunity to allow suit to proceed against him in his individual capacity. We disagree.

Plaintiff's complaint alleges Defendant failed to ensure all of the BLET trainees' weapons were unloaded before they left the firing range.

When another student in the class with Plaintiff experienced trouble in breaking down her weapon, Defendant took the weapon from her and began to manipulate its moving parts. Defendant pulled the trigger while the weapon was pointed at Plaintiff's abdomen. The still loaded weapon discharged and Plaintiff was shot at point blank range. Plaintiff alleges Defendant's actions amounted to gross negligence and willful and wanton conduct.

"[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).

> 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. Thus, elementally, a malicious act is an act (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another.

Id. at 289, 730 S.E.2d at 230.

" '[T]he intention to inflict injury may be constructive as well as actual' and . . . constructive intent to injure exists where the actor's conduct 'is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of [willfulness] and wantonness equivalent in spirit to an actual intent." *Id.* at 289, 730 S.E.2d at 231 (quoting *Foster v. Hyman*, 197 N.C. 189, 192, 148 S.E. 36, 38 (1929)).

"[A] showing of mere reckless indifference is insufficient, and a plaintiff seeking to prove malice based on constructive intent to injure must show that the level of recklessness of the officer's action was so great as to warrant a finding equivalent in spirit to actual intent." *Id.* at 292, 730 S.E.2d at 230. Plaintiff's allegation that Defendant, an experienced law enforcement officer and a certified BLET firearms instructor, pulled the trigger of a loaded deadly weapon while it was pointed at a student's abdomen, is sufficient to withstand Defendant's Rule 12(b)(6) motion to dismiss under this test. *Id.*

VI. Conclusion

When sued in his official capacity, Defendant is entitled to the same sovereign immunity as Gaston College and its Board of Trustees. The North Carolina Industrial Commission possesses exclusive personal

jurisdiction over the claim against Defendant in his official capacity. The trial court erred to the extent it denied Defendant's motion to dismiss the suit against him in his official capacity.

The Defendant meets the criteria for a public official, as opposed to a public employee, which would ordinarily entitle him to immunity from a negligence suit. However, liberally construing Plaintiff's allegations on the face of the complaint as we are bound to do on a motion to dismiss, we determine Plaintiff's complaint sufficiently alleges facts to pierce Defendant's public official immunity. The trial court did not err by denying Defendant's Rule 12(b)(6) motion to dismiss Plaintiff's claims against Defendant in his individual capacity. The trial court's order is affirmed in part, reversed in part, and is remanded to the trial court for further proceedings consistent with this opinion. *It is so ordered.*

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges ELMORE and DIETZ concur.

DEPARTMENT OF TRANSPORTATION, Plaintiff
v.
JOSEPH P. RIDDLE, III, and wife, TRINA T. RIDDLE, Defendants

No. COA16-445

Filed 18 April 2017

1. Appeal and Error—interlocutory orders and appeals—substantial right—pretrial order—partial taking—land affected by taking

An appeal from an interlocutory pretrial order involving land affected by a partial taking affected a substantial right and was immediately appealable.

2. Condemnation—partial taking—entire tract—unity of use

Although the trial court did not err in a partial taking case by concluding that several lots were not part of the "entire tract," it erred by concluding that another lot was part of the "entire tract." The portions of two other lots were not reasonably or substantially necessary to defendant landowners' ability to use and enjoy any of the other lots.

Appeal by Defendants and cross-appeal by Plaintiff from order entered 24 November 2015 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 18 October 2016.[1]

Attorney General Joshua H. Stein, by Alvin W. Keller, Jr., Elizabeth N. Strickland and Shawn R. Evans, for the Plaintiff-Appellant.

The Law Offices of Lonnie M. Player, Jr. PLLC, by Lonnie M. Player, Jr., and Jennifer L. Malone, for the Defendants.

DILLON, Judge.

This matter involves a *partial* taking by Plaintiff, the Department of Transportation ("DOT"), of land owned by Defendants (the "Riddles") as part of DOT's plan to re-route a section of NC Highway 24 in Cumberland County. This appeal is from an interlocutory order in which the trial court determined *how much* of the Riddles' entire land holdings in the relevant area constitute the "entire tract" for purposes of determining just compensation.

I. Factual Background

In 2002, Joseph Riddle acquired 26 acres of land on the northeast corner of two state roads. The land was bounded on the south by NC Highway 24 (a major east-west thoroughfare) and bounded on the west by Maxwell Road. Mr. Riddle acquired the land in order to develop a shopping center facing NC Highway 24 and to develop outparcels fronting NC Highway 24 and an outparcel fronting Maxwell Road.

Shortly after the purchase, Mr. Riddle subdivided the 26-acre parcel into seven (7) separate lots, referred to herein as Lots 1-7. In 2005, Mr. Riddle sold one of the outparcels fronting NC Highway 24 (Lot 5) to a fast-food restaurant developer. Mr. Riddle still controls the other six lots.

Lot 1 is the largest of the seven lots at over 9 acres, and is where Mr. Riddle has since developed the shopping center.[2] The shopping center is anchored by a Food Lion grocery store and a Family Dollar retail store.

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1. This opinion replaces the opinion filed on 30 December 2016 which was subsequently withdrawn by order of this Court.

2. Mr. Riddle transferred title to Lot 1 to an entity which he owns and controls.

Lot 2 is an undeveloped outparcel which fronts Maxwell Road to the west of the shopping center. Lots 3, 4 and 6 are undeveloped outparcels fronting NC Highway 24 in front of the shopping center.

Lot 7 is an undeveloped lot, shaped like an upside-down "L," fronting both NC Highway 24 and Maxwell Road. The main portion of this lot fronts NC Highway 24, just east of the shopping center lot, and runs behind the shopping center lot (Lot 1) and along the north side of Lot 2 where it fronts Maxwell Road.

Years ago, DOT adopted a plan to re-route the traffic flow of NC Highway 24 from the front of the shopping center and most of the outparcels to behind the shopping center. The DOT plan called for the portion of NC Highway 24 being replaced to remain as a secondary access road.

II. Procedural Background

In 2012, as part of its plan to re-route NC Highway 24, DOT commenced this action[3] by filing a complaint and declaration of taking for portions of Lot 2 and Lot 7. No portions of Lot 1 or Lots 3-6 were taken. In its Declaration of Taking, DOT identified only Lots 2 and 7 as land "affected" by the taking. The Riddles responded by alleging that all seven lots constitute a single tract for purposes of DOT's taking and, therefore, should be considered together by a jury in determining damages.

In 2014, the trial court entered an order concluding that the jury could only consider the effect of the taking on Lots 2 and 7. The Riddles appealed that order to this Court. In 2015, we remanded the matter, ordering the trial court to determine whether any of the other five lots should be unified with Lots 2 and 7 for purposes of determining just compensation. *See D.O.T. v. Riddle*, ___ N.C. App. ___, 775 S.E.2d 36 (2015) (unpublished).

On remand, the trial court conducted another pre-trial hearing and ordered that Lot 1 be unified with Lots 2 and 7 for purposes of determining just compensation. The Riddles appealed, contending that the effect of the taking on the other four lots should be considered by the jury. DOT cross-appealed, contending that the trial on damages should not include Lot 1 and should be limited to the effect the taking had on Lots 2 and 7.

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3. DOT actually commenced two separate actions: (1) 12 CVS 3993 concerned Lot 2 and (2) 12 CVS 4714 concerned Lot 7.

III. Appellate Jurisdiction

[1] This appeal is interlocutory, as the jury trial on damages has yet to occur. And "[g]enerally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999). We hold that, for the reasons stated below, the trial court's pretrial order affects a substantial right.

This appeal is from an order entered by the trial court from a hearing held pursuant to N.C. Gen. Stat. § 136-108, in which the trial court is to decide important issues before the jury trial on damages takes place. It is important to note what this appeal is about and what it is not about in determining whether the appeal affects a substantial right. This appeal is not about any determination regarding the land actually *taken* by DOT. There is no disagreement in this regard. DOT has physically taken slivers from Lots 2 and 7 along Maxwell Road, and nothing else. Rather, this appeal is about the trial court's determination regarding the land *affected* by the taking; that is, which lots should constitute the "entire tract."

Our case law is somewhat nuanced on the question of whether an interlocutory order determining boundaries of the "entire tract" affects a substantial right.

In 1967, our Supreme Court held that an interlocutory order determining the land *actually taken* had to be appealed *before* the trial on damages in order to be preserved for appellate review. *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 15, 155 S.E.2d 772, 784 (1967).

In 1999, our Supreme Court limited *Nuckles*, holding that an appeal from an interlocutory order determining the land *affected* – that is, the land which constitutes the "entire tract" – could be brought *after* the jury trial on damages. *Dep't of Transp. v. Rowe*, 351 N.C. 172, 521 S.E.2d 707 (1999). Unlike in *Nuckles*, the issue in *Rowe* was not the land actually taken, but rather the land affected, that is, the land to be incorporated into the "entire tract." In *Rowe*, our Supreme Court considered an appeal of a pre-trial order denying the landowner's attempt to incorporate two additional lots into the "entire tract" *after* the jury trial on damages. DOT argued that the landowner lost his right to appeal the trial court's determination because he did not appeal prior to the trial on damages. The *Rowe* Court, however, distinguished its holding in *Nuckles* and held that

a landowner does not lose the right to appeal a pre-trial order determining the scope of the "entire tract" if the appeal is not taken immediately. The *Rowe* Court gave alternate reasons for its holding to distinguish a pre-trial order determining the land *actually taken* from a pre-trial order which merely determines *the land affected* by the taking. First, the Court stated that the pre-trial order refusing to incorporate lots into the "entire tract" did not affect a substantial right in that case. Second, the Court stated that even if the order did affect a substantial right, the landowner was still not *required* to appeal prior to the jury trial on damages but was free to wait until final judgment. *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709.

Four years later, in 2003, our Court cited both *Rowe* and *Nuckles* in concluding that it had appellate jurisdiction to consider an interlocutory order determining the land affected by a partial taking, specifically holding that the issue addressed in the pre-trial order was a "vital preliminary issue." *Dep't of Transp. v. Airlie Park, Inc.*, 156 N.C. App. 63, 65-66, 576 S.E.2d 341, 343 (2003). Essentially, our Court read *Rowe* as not foreclosing the possibility that a substantial right might be affected by a trial court's pre-trial order regarding unification of lots where there was otherwise no disagreement as to the actual land taken. Indeed, the *Rowe* Court recognized that "[w]hether an interlocutory ruling affects a substantial right requires consideration of the particular facts of that case[.]" *Rowe*, 351 N.C. at 175, 521 S.E.2d at 709 (internal marks omitted). Ultimately, the *Airlie* Court concluded that the trial court's determination was "vital," based on the particular facts of that case.

More recently, in 2015, our Supreme Court exercised appellate jurisdiction to reach the merits of an interlocutory appeal of a pre-trial order, holding that a landowner's adjacent parcel should be unified with the landowner's parcel from which land was physically taken by a municipality. *See Town of Midland v. Wayne*, 368 N.C. 55, 773 S.E.2d 301 (2015). The *Midland* Court, though, did not cite Rowe nor did it directly address the jurisdictional issue.

Finally, a panel of this Court held in the first appeal of this present matter that the trial court's pre-trial order refusing to unify some of the Riddles' lots constitutes " 'a vital preliminary issue' to [this] proceeding and, therefore, affects a substantial right." *See Riddle*, 775 N.C. at *4. Our Supreme Court has held that "[o]nce a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case."

North Carolina National Bank. v. Virginia Carolina Builders, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983).[4]

The question of appellate jurisdiction in this case is a close one. *Rowe* could be construed as definitively holding that an interlocutory order which merely defines the boundaries of the "entire tract" does not affect a substantial right. However, based on the principles advanced in all the cases cited above, we conclude that we have appellate jurisdiction and proceed to address the merits of this appeal.

IV. Analysis

A. Condemnation Procedure

[2] The main issue on appeal is whether the trial court erred in determining that the area affected by DOT's taking for purposes of determining just compensation was comprised of Lots 1, 2 and 7, but not Lots 3-6. Before addressing this specific issue in this case, we first review some basics in condemnation law.

When the DOT takes land for a highway project, the divested owner is entitled to just compensation under the "Law of the Land" clause found in Article I, section 19 of our Constitution. *Yancey v. N.C. State Highway*, 222 N.C. 106, 108, 22 S.E.2d 256, 258-59 (1942)[5].

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4. We note that our Supreme Court later declined to rule definitively whether the "law of the case" principle applies to the issue of appellate jurisdiction; specifically, whether a second panel can revisit the question of appellate jurisdiction where a prior panel has already decided this legal issue in the case. *See State v. Stubbs*, 368 N.C. 40, 44, 770 S.E.2d 74, 76 (2015). *Stubbs* had produced majority, concurring, and dissenting opinions from our Court. The concurring and dissenting judges in *Stubbs* determined that the "law of the case" principle did *not* apply to jurisdictional determinations, and therefore that the Court was free to decide whether it had appellate jurisdiction, notwithstanding the holding of a prior panel on the issue. *See Stubbs*, 232 N.C. App. 274, 754 S.E.2d 174 (2014). However, this language in the concurring and dissenting opinions was dicta, and therefore not binding.

5. This right to just compensation for a public taking dates far back in our State's history. *See*, *e.g.*, *Johnston v. Rankin*, 70 N.C. 550, 555 (1870) ("Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation; . . . yet the principle is so grounded in natural equity, that it has never been denied to be part of the law of North Carolina."); *Raleigh and Gaston Rail Road Co. v. Davis*, 19 N.C. 451, 459 (1837) ("[T]he right of property involves the right to precedent compensation for it, when taken for public use."); *Trustees of University of North Carolina v. Foy*, 5 N.C. 58, (1805) ("The Legislature [has] no authority to make an act, divesting one citizen of his [property] without just compensation.").

A condemnation action involves a two-step process. First, prior to the jury trial on damages, the *trial court* is tasked with deciding "all issues raised by the pleadings other than the issue of damages." N.C. Gen. Stat. § 136-108. After the trial court has decided these preliminary issue, a *jury* is then empaneled and tasked with determining the amount that constitutes "just compensation" for the taking.

Our General Assembly has provided that where there has been a partial taking, where the DOT has only taken a portion of the landowner's property, the measure of damages is "the difference between the fair market value of *the landowner's entire tract* immediately prior to the taking and the fair market value of the remainder immediately after the taking . . . ." N.C. Gen. Stat. § 136-112(2) (emphasis added).

Identifying which land constitutes the affected landowner's "entire tract" for purposes of determining just compensation is not a point of contention where a partial taking is from the only lot in the immediate area owned by the affected landowner. However, the identity of the "entire tract" can be an issue, as is the case here, where the landowner has an interest in a lot or lots *in addition to* the lot(s) from which the physical taking is made. For instance, DOT may seek to include the landowner's adjacent lot(s) as part of the "entire tract," believing that a proposed road will increase the value of the landowner's adjacent lots, thereby reducing or eliminating the amount of the just compensation DOT would be required to award. Conversely, such as in the present matter, it is sometimes the landowner who seeks to include an adjacent lot or lots within the "entire tract," believing that DOT's project will diminish not only the value of the lot(s) from which the taking is made, but also the value of adjacent lot(s).

In North Carolina, the *before and after values* of the "entire tract" are questions to be decided by a jury. However, our Supreme Court has held that the process of identifying which of the affected landowner's lots constitute the "entire tract" is generally a question of law to be decided by the trial court. *Barnes v. North Carolina State Highway Comm'n*, 250 N.C. 378, 384, 109 S.E.2d 219, 224 (1959) ("Ordinarily the question [of] whether two or more parcels of land constitute one tract for the purpose of assessing damages for injury to the portion not taken . . . is one of law for the court."); *see also Town of Midland*, 368 N.C. at 66, 773 S.E.2d at 309 (determining as a matter of law that a landowner's adjacent parcel was part of the "entire tract" injured by the taking). In other words, before a jury can properly determine the amount of just compensation based on the before and after values of the landowner's

entire tract, the trial court must first determine which of the affected landowner's lots constitute the "entire tract."

B. Classification of Lots

In this action, DOT took portions of Lots 2 and 7. The trial court determined that the "entire tract" for purposes of the jury trial on just compensation would include Lots 1, 2 and 7. On appeal, DOT contends that Lot 1 should be excluded. The Riddles contend that Lots 3-6 should be included.

In determining which lots are part of the "entire tract," the Supreme Court has instructed as follows:

> There is no single rule or principle established for determining the unity of lands[.] The factors most generally emphasized are [1] unity of ownership, [2] physical unity[,] and [3] unity of use. . . . The respective importance of these factors depends upon the factual situations in individual cases. Usually unity of use is given greatest emphasis.

Barnes, 250 N.C. at 384, 109 S.E.2d at 224-25.

In the present case, unity of *ownership* exists, except with respect to Lot 5, the outparcel which was sold to the fast-food restaurant developer in 2005. Joseph Riddle has a quantum of ownership in the remaining tracts, owning Lots 2, 3, 4, 6, and 7 with his wife, and owning Lot 1 as the controlling member of the entity which owns Lot 1, where the shopping center is located. *See Town of Midland*, 368 N.C. at 67, 773 S.E.2d at 309.

Also, *physical* unity exists with respect to all of the lots, as each lot is contiguous to at least one of the other lots. We note that physical unity does not require that each of the lots be directly contiguous with either Lot 2 or Lot 7, the lots from which DOT actually took land.

However, we hold that the factor which controls in the present case is unity of *use*. *See Town of Midland*, 368 N.C. at 65, 773 S.E.2d at 308 (stating that unity of use is "given [the] greatest emphasis"); *see also Barnes*, 250 N.C. at 385, 109 S.E.2d at 225 (stating that "the factor most often applied and controlling in determining whether land is a single tract is unity of use").

Our Supreme Court has stated that for an adjacent lot to be incorporated based on unity of use, the lot must "be presently, actually, and permanently used in such a manner that the enjoyment of the [lot] taken is

reasonably and substantially necessary to the enjoyment of the remaining [lot]." *Town of Midland*, 368 N.C. at 65, 773 S.E.2d at 308 (quoting *Bd. of Transp. v. Martin*, 296 N.C. 20, 29, 249 S.E.2d 390, 396 (1978)).

Here, DOT has taken portions of an undeveloped outparcel (Lot 2) and the back corner of another undeveloped tract (Lot 7). The Riddles argue that all seven lots are part of an "integrated economic unit," the test found in N.C. Gen. Stat. § 40A-67, but which has been applied to takings by the DOT. *See North Carolina Dep't of Transp. v. Nelson*, 127 N.C. App. 365, 368, 489 S.E.2d 449, 451 (1997).

Our Supreme Court described the "integrated economic unit" test in a DOT case as follows:

> [T]here must be such a connection, or relation of adaptation, convenience, and actual and permanent use between them, as to make the enjoyment of the parcel taken, reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used. . . . The unifying use must be a *present* use.

Barnes, 250 N.C. at 385, 109 S.E.2d at 224.

In the present case, the re-routing of NC Highway 24 has impacted all of the lots. The value of the shopping center and the outparcels are impacted by the fact that they will no longer be fronting a well-traveled highway. However, our Supreme Court has held that any damage caused by the re-routing of traffic patterns is generally not compensable where reasonable access to a public road is provided. *Board of Transp. v. Terminal Warehouse Corp.*, 300 N.C. 700, 703, 268 S.E.2d 180, 182 (1980). And our Supreme Court further held that such "[n]oncompensable injuries to property . . . do not become compensable merely because some property was coincidentally taken in connection with [the] project." *Id.* at 703-04, 268 S.E.2d at 183.

Therefore, in determining whether there is a unity of use between Lots 2 and 7 and the other lots, we are not to consider the impact that the re-routing of NC Highway 24 had on the other lots. Rather, we are only to consider if the portions of Lots 2 and 7 taken by DOT were "reasonably and substantially necessary to the enjoyment of the [other lots]."

Following our Supreme Court's guidance in *Barnes* and *Terminal Warehouse*, we conclude as a matter of law that the portions of Lot 2 and of Lot 7 taken by DOT are not reasonably or substantially necessary to

the Riddles ability to use and enjoy any of the other lots.[6] Accordingly, we affirm the trial court's conclusion that Lots 3-6 are not part of the "entire tract," but we reverse the trial court's conclusion that Lot 1 is part of the "entire tract."

AFFIRMED IN PART, REVERSED IN PART.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF A.B., C.B., J.B., A.B.

No. COA16-1040

Filed 18 April 2017

Termination of Parental Rights—grounds—sufficiency of findings and conclusions—circumstances at time of hearing

The trial court's order terminating respondent mother's parental rights was vacated where the trial court's findings and conclusions did not adequately account for respondent's circumstances at the time of the termination hearing with regard to either the fitness of respondent to care for the children or the nature and extent of her reasonable progress.

Appeal by respondent mother from order entered 5 July 2016 by Judge Christy E. Wilhelm in Cabarrus County District Court. Heard in the Court of Appeals 3 April 2017.

Stephen A. Moore and H. Jay White for petitioner-appellee Cabarrus County Department of Human Services.

Mark L. Hayes for respondent-appellant.

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6. Had DOT taken a portion of the shopping center itself (Lot 1) rather than portions of Lot 2 and Lot 7, the Riddles might have a stronger argument for unification of the other lots since an existing shopping center with anchor tenants in place is generally necessary for the maximization of an outparcel. However, an undeveloped outparcel which is reduced in size does not generally affect the use and enjoyment of an existing shopping center or other outparcel lots. In sum, the other lots were damaged by DOT's decision to re-route traffic, an impact which is not compensable, rather than by the partial taking of portions of Lots 2 and 7.

Brandon J. Huffman for guardian ad litem.

BRYANT, Judge.

Where the trial court's findings and conclusions do not adequately account for respondent-mother's circumstances at the time of the termination hearing, as required to support a termination of her parental rights under N.C.G.S. § 7B-1111(a)(1) or (2), we vacate and remand.

On 22 October 2013, the Cabarrus County Department of Human Services ("CCDHS") obtained non-secure custody of the respondent-mother's[1] minor children A.B. (born October 2001), C.B. (born August 2006), J.B. (born March 2010), and A.B. (born November 2012) (collectively, "the children"). CCDHS filed petitions[2] alleging that they were neglected "due to ongoing substance abuse and domestic violence" by respondent-mother and respondent-father (collectively, "respondents"), which "place[d] their four young children at risk of harm" and created an environment injurious to their welfare. The petition described CCDHS's unsuccessful efforts to provide treatment services to respondents and implement a safety resource plan after substantiating reports of neglect and physical abuse, which reports included respondent-father's inappropriate physical discipline of respondents' two oldest daughters, who were then six and eleven years of age. The initial child protective services report was received on 25 February 2013.

The trial court held a hearing on CCDHS's petitions on 13 March 2014 and adjudicated the children to be neglected and dependent juveniles. It maintained the children in CCDHS custody and directed that they remain in their current placements. In its disposition, the court identified "substance abuse, improper supervision, injurious environment and domestic violence involving the parents" as the "issues which led to [the children's] placement" outside the home. It found that "[t]he following community-level services [were] needed to strengthen the home situation and to remediate or remedy the issues which led to placement:

a. Psychological Evaluation
b. Drug/Alcohol Screens
c. Mental Health Treatment

1. Respondent-father is not a party to this appeal.

2. We note that the record on appeal contains only the petition and non-secure custody order filed with regard to the youngest child, A.B, in case number 13 JA 124, but includes the summonses issued and returned in all four cases.

d. Medication Management
e. Parenting Education
f. Suitable [H]ousing[.]"

The trial court imposed separate case plans for each respondent to address these concerns. Respondent-mother was ordered to obtain a new substance abuse evaluation through Genesis and follow any recommendations; submit to random drug screens as requested by CCDHS; comply with the recommendations of her parenting capacity evaluation by Dr. Susan Hurt; complete a court-approved parenting course and demonstrate skills learned in the course during visitation; comply with her visitation plan; attend the children's medical, dental, and school appointments; maintain bi-weekly contact with her CCDHS social worker, reporting any changes in address, employment, or other significant events; sign releases allowing CCDHS to obtain information from service providers; "maintain her own suitable housing, including utilities, appropriate for the placement of all the children" for at least six months; and maintain employment allowing her to provide financially for her children for a continuous four- to six-month period. The court established reunification as the permanent plan.

The trial court ceased reunification efforts as to respondent-father in June 2015 and instituted concurrent permanent plans of reunification with respondent-mother only and adoption. At a subsequent review hearing on 13 August 2015, the court relieved CCDHS of further reunification efforts as to respondent-mother and changed the permanent plan to adoption with a secondary plan of legal guardianship.

CCDHS filed a motion to terminate respondents' parental rights on 28 October 2015. After hearing evidence on 12 and 31 May 2016, the trial court concluded that respondent-mother's parental rights were subject to termination for (1) neglect, and (2) willful failure to make reasonable progress to correct the conditions that led to the children's removal from the home over three years earlier. N.C. Gen. Stat. § 7B-1111(a)(1)–(2) (2015). The court further determined that terminating respondent-mother's parental rights was in the best interests of the children. Respondent-mother filed timely notice of appeal from the termination order.

On appeal, respondent-mother claims the trial court's findings of fact do not support its adjudication of grounds to terminate her parental rights under either N.C. Gen. Stat. § 7B-1111(a)(1) or (2). She contends the court found no facts tending to show that, at the time of the May

2016 termination hearing, she had failed to resolve the issues of substance abuse and domestic violence which led to the children's removal from her home and adjudication as neglected juveniles. As those issues were the only factors cited by CCDHS at the time of the initial removal and adjudication, respondent-mother argues that the court could not find a likelihood of a repetition of neglect if the children were returned to her care, *see* N.C.G.S. § 7B-1111(a)(1), or that she willfully failed to make reasonable progress to correct the conditions leading to the children's placement in foster care, *see id.* § 7B-1111(a)(2). For the following reasons, we agree.

We review an adjudication under N.C. Gen. Stat. § 7B-1111(a)(1) or (a)(2) to determine (1) whether the court's findings of fact are supported by clear, cogent, and convincing evidence, and (2) whether its findings in turn support its conclusions of law. *In re Shepard*, 162 N.C. App. 215, 221–22, 591 S.E.2d 1, 6 (2004) (citing *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)). Uncontested findings are deemed to be supported by the evidence for purposes of our review. *See In re H.S.F.*, 182 N.C. App. 739, 742, 645 S.E.2d 383, 384 (2007). "[E]rroneous findings unnecessary to the determination do not constitute reversible error" where an adjudication is supported by sufficient additional findings grounded in competent evidence. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (citation omitted). The adjudication of any single ground under N.C. Gen. Stat. § 7B-1111(a) will support an order terminating parental rights. *In re P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005) (citation omitted).

The trial court found grounds to terminate respondent-mother's parental rights for neglecting the children under N.C. Gen. Stat. § 7B-1111(a)(1). Where a child has been in a placement outside the home for a significant period of time, an adjudication under N.C.G.S. § 7B-1111(a)(1) may be supported by "evidence of prior neglect and [of] the probability of a repetition of neglect" if the child were returned to the parent's care. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). "The trial court must . . . consider any evidence of changed conditions" since the prior adjudication of neglect and "make an independent determination of whether neglect authorizing termination of the respondent's parental rights existed at the time of the termination hearing." *Id.* at 715–16, 319 S.E.2d at 232–33 (emphasis added); *accord In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) ("Termination of parental rights for neglect may not be based solely on past conditions which no longer exist." (citation omitted)). As our Supreme Court has emphasized, "[t]he determinative factors must be the best interests of the child and the

fitness of the parent to care for the child *at the time of the termination proceeding*." *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

The trial court also adjudicated grounds to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(2), which allows termination where "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). A finding that the parent acted "willfully" under N.C.G.S. § 7B-1111(a)(2) "does not require a finding of fault by the parent." *In re B.S.D.S.*, 163 N.C. App. 540, 545, 594 S.E.2d 89, 93 (2004) (citation omitted). "Willfulness may be found where a parent has made some attempt to regain custody of the child but has failed to exhibit 'reasonable progress or a positive response toward the diligent efforts of DSS.' " *Id.* (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 440, 473 S.E.2d 393, 398 (1996)). Moreover, though "[a] parent's failure to fully satisfy all elements of the case plan goals is not the equivalent of a lack of 'reasonable progress,' " *In re J.S.L.*, 177 N.C. App. 151, 163, 628 S.E.2d 387, 394 (2006) (citation omitted), a parent's "prolonged inability to improve her situation, despite some efforts in that direction, will support" an adjudication under N.C.G.S. § 7B-1111(a)(2). *In re B.S.D.S.*, 163 N.C. App. at 546, 594 S.E.2d at 93.

As with an adjudication of neglect under N.C.G.S. § 7B-1111(a)(1), "the nature and extent of the parent's <u>reasonable progress</u>" must be "evaluated for *the duration leading up to the hearing on the motion or petition to terminate parental rights.*" *In re A.C.F.*, 176 N.C. App. 520, 528, 626 S.E.2d 729, 735 (2006) (second emphasis added) (citing *In re O.C. & O.B.*, 171 N.C. App. 457, 466–67, 615 S.E.2d 391, 396 (2005)).

I. Preliminary Issue

Initially, we must address respondent-mother's argument that the trial court failed to enter affirmative findings of fact with regard to her conduct during the course of this case. Respondent-mother contends that the court's findings simply state what the court itself found at prior hearings. However, we read the court's findings as summarizing respondent-mother's progress—or lack thereof—at various points in these proceedings. Finding of Fact No. 23 is representative of the order's format:

> 23. At the Review Hearing on May 8, 2014, [respondent-mother was] present in the courtroom and represented by counsel. . . . *The mother's progress was as follows:*

a. Mother continues to reside at 224 Evans St. Concord, NC. This is the same home that the children resided in prior to coming into CCDHS custody.

b. Mother has not provided any information as to relative placement for her children during this reporting period.

c. Mother has not provided CCDHS with verification of income.

(Emphasis added).

The trial court did not find merely that certain findings of fact were made at the prior hearings in this cause. Rather, as shown in Finding of Fact No. 23, the court made specific findings with regard to respondent-mother's progress as of the date of each prior hearing.[3] As respondent-mother does not contest the evidentiary support for these findings, they are binding on appeal. *In re H.S.F.*, 182 N.C. App. at 742, 645 S.E.2d at 384 (citation omitted). Moreover, the fact that the court may have copied findings from its prior orders is "irrelevant," absent a claim that the findings are not supported by the evidence presented at the termination hearing. *In re J.W.*, ___ N.C. App. ___, ___, 772 S.E.2d 249, 253 (2015) ("The purpose of trial court orders is to do justice, not foster creative writing.").

II. Insufficient Findings of Fact

Respondent-mother claims that the findings of fact in the termination order are insufficient to support an adjudication under either N.C.G.S. § 7B-1111(a)(1) or (2). Specifically, she points to an absence of findings with regard to either the "fitness of [respondent-mother] to care

3. It is also true that the termination order refers to many of the trial court's prior findings in the cause. Finding of Fact No. 23, for example, states that "[a]t the Review hearing on May 8, 2014, . . . [*t*]*he Court found* that while the mother and father made progress . . ., the progress made is insufficient for the court to be assured that the juveniles could safely return to either mother or father's care." (Emphasis added). This type of procedural history is not necessarily out of place in an order terminating parental rights, particularly where a case has been pending for almost three years at the time of the termination hearing. However, we do not rely on the trial court's account of its own earlier findings when assessing the reasonableness of respondent-mother's progress under N.C.G.S. § 7B-1111(a)(2). *Cf. generally In re O.W.*, 164 N.C. App. 699, 703, 596 S.E.2d 851, 854 (2004) (explaining that a recitation of what a witness testified "is not even really a finding of fact"); *cf. also In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240–41 (allowing appellate court to disregard erroneous findings unnecessary to the trial court's adjudication).

for the child[ren]," or "the nature and extent of [respondent-mother's] reasonable progress" "*at the time of the termination proceeding*." *See Ballard*, 311 N.C. at 715, 319 S.E.2d at 232 ("The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*."); *A.C.F.*, 176 N.C. App. at 528, 626 S.E.2d at 735 (noting that a parent's reasonable progress "is evaluated for the duration leading up to the hearing on the motion or petition to terminate parental rights" (citation omitted)). We agree. Although the termination hearing was held more than three months after the 11 February 2016 review hearing, the court made no findings regarding respondent-mother's conduct or circumstances at any time subsequent to the 11 February 2016 hearing date.

We recognize that the trial court's ultimate findings with regard to the grounds for termination purport to describe present conditions:

> 46. The Court finds that the following grounds for termination exist to terminate the parental rights of mother and father pursuant to NC Gen Stat. §7B-1111(1) [sic]; that mother and father neglected the juveniles . . . and that *there is a likelihood* that such neglect would continue in the future; pursuant to NC Gen Stat. §7B-1111(a)(2), mother and father willfully left the juveniles in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances *have [sic] been made* in correcting those conditions which led to the removal of the juveniles from the custody and care of the parents . . . .

(Emphasis added). However, such ultimate findings must arise "by processes of logical reasoning from the evidentiary facts" found by the court. *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (citation omitted); *see also In re D.M.O.*, ___ N.C. App. ___, ___, 794 S.E.2d 858, 861 (2016) ("[A] trial court must make adequate evidentiary findings to support its ultimate finding of willful intent." (citation omitted)). Here, the evidentiary facts found and recited by the court are inadequate to support these ultimate facts.

Our review of the transcript reveals that CCDHS social worker Cynthia Bowers and respondent-mother presented testimony that would support additional findings up to the time of the termination hearing. We further believe "there are material conflicts in the evidence relating to the issue of respondent-mother's willfulness" and the reasonableness of her progress "that were not resolved by the trial court's order." *In re*

D.M.O., ___ N.C. App. at ___, 794 S.E.2d at 865–66 (vacating and remanding where the trial court's findings were "inadequate or fail[ed] to resolve conflicts in the evidence material to a conclusion that respondent-mother abandoned" the juvenile). Similarly, we believe the evidence would support different inferences and conclusions regarding the likelihood of a repetition of neglect based on evidence regarding respondent-mother's circumstances at the time of the hearing. "Given the findings of fact, however, we would be speculating as to the trial court's rationale" were we to affirm its adjudication under either N.C.G.S. § 7B-1111(a)(1) or (2). *In re F.G.J.*, 200 N.C. App. 681, 694, 684 S.E.2d 745, 754 (2009).

The evidence and the trial court's findings show that, following the initial adjudication of neglect and dependency in March 2014, respondent-mother engaged in an extended period of positive drug screens and general non-compliance with the court-ordered requirements for reunification. By the time of the May 2016 termination hearing, however, the nature and extent of respondent-mother's progress was improved.

As CCDHS conceded at the hearing, respondent-mother had an unbroken series of negative drug screens between June 2015 and March 2016, after completing her third substance abuse evaluation and third round of treatment. In July 2015, she attended and completed the six individual therapy sessions recommended by Genesis as part of her most recent substance abuse re-evaluation. Respondent-mother had separated from respondent-father in December 2014 and obtained a domestic violence protective order against him in June 2015, which remained in place at the time of the termination hearing. After obtaining her commercial driver's license, respondent-mother had obtained full-time employment as an interstate truck driver and was current on her child support payments.

In addition, with regard to respondent-mother's court-ordered parenting classes, the trial court found as follows:

> Mother completed parenting classes with Mar-Lee Cook, NC Certified Parent Educator, on June 5, 2014, and, as previously reported by Ms. Cook in her case summary, it is her experience with [respondent-mother and respondent-father] that, "nothing I say or present will change their parenting styles or the dysfunctional dynamics in the family."

Despite this negative report from Ms. Cook, which predates respondent-mother's separation from respondent-father, we find no evidence that CCDHS or the trial court ever prescribed additional parenting classes

for respondent-mother after June 2014. Nor do the court's prior orders suggest that respondent-mother failed to demonstrate appropriate parenting techniques during her visitations, as originally ordered by the trial court.

To the contrary, the permanency planning orders show that respondent-mother consistently attended visitation throughout these proceedings and was found to interact with the children in an appropriate—and sometimes praiseworthy—manner. These orders include findings that respondent-mother "brings interactive fun activities for all her children to engage in, such as how to sew, doing nails, decorating shoes, board games, etc.," and that she "does a wonderful job of acknowledging and spending equal amounts of time with the children." After CCDHS permitted the eldest daughter, A.B., who was nearly fifteen years old at the time of the hearing, to opt out of visitations based on her belief that respondent-mother was overly critical of her, the court subsequently reiterated its finding that "[v]isits with the three younger children and [respondent-mother] go well and she is appropriate with the children."

The parties offered conflicting testimony with regard to respondent-mother's willingness or ability to notify CCDHS in advance of her availability for random drug screens. Ms. Bowers testified that CCDHS had been unable to perform any subsequent random screens, because respondent-mother failed to notify the department of her availability based on her work schedule, other than during her scheduled visitations. Respondent-mother explained that, as a truck driver, she did not receive her work schedule in advance and had "no way" to know whether or when she would be in Cabarrus County during the work week. She provided CCDHS with the phone number of her fleet manager to verify this information.

While respondent-mother acknowledged that her current residence lacked water and electricity, she testified that she had the means to have these utilities turned on, but had chosen not to do so while her employment required her to stay out of town. We also note Ms. Bowers's testimony that respondent-mother's residence would "meet minimal standards" for the children, even without utilities, once a background check was performed on her aunt and any other adult residents in the downstairs dwelling.[4] Respondent-mother admitted having failed to provide CCDHS with the necessary personal information about her aunt but claimed her aunt had refused to authorize the disclosure.

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4. Respondent-mother testified that her aunt's husband and daughter also lived downstairs.

We hold the trial court's findings and conclusions do not adequately account for respondent-mother's circumstances at the time of the termination hearing, as required to support a termination of her parental rights under N.C.G.S. 7B-1111(a)(1) or (2). As discussed above, the parties' evidence supports competing findings on material issues of fact, which in turn would support competing inferences with regard to the existence of grounds for termination. Accordingly, "we vacate the trial court's order and remand for further findings of fact and conclusions of law regarding N.C. Gen. Stat. § 7B-1111(a)[(1)–(2)]. The trial court may hear and receive additional evidence." *In re D.M.O.*, ___ N.C. App. at ___, 794 S.E.2d at 866; *see also In re F.G.J.*, 200 N.C. App. at 695, 684 S.E.2d at 755.

VACATED AND REMANDED.

Judges DAVIS and TYSON concur.

IN THE MATTER OF A.P.

No. COA16-1010

Filed 18 April 2017

1. Appeal and Error—motion to dismiss appeal—violations—motion to strike portions of appellate brief

In a child neglect dependency case, the Court of Appeals denied a joint motion to dismiss respondent mother's appeal and an alternative motion to strike portions of respondent's appellate brief. The alleged violations were not jurisdictional or gross violations. Further, the pertinent portions of the brief were unnecessary.

2. Child Abuse, Dependency, and Neglect—neglect and dependency—subject matter jurisdiction—standing

The trial court erred by concluding that the Department of Social Services (DSS) had standing to file a juvenile petition. The trial court lacked subject matter jurisdiction to adjudicate the minor child as dependent and neglected since the minor child was neither found in nor residing in Mecklenburg County at the time DSS filed its juvenile petition.

Appeal by respondent from order entered 29 June 2016 by Judge Ty Hands in Mecklenburg County District Court. Heard in the Court of Appeals 3 April 2017.

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

Anné C. Wright for respondent-appellant.

Guardian ad Litem Appellate Counsel Matthew D. Wunsche for guardian ad litem.

TYSON, Judge.

Respondent-mother ("Respondent") appeals from an order adjudicating her minor daughter A.P. to be a neglected and dependent juvenile. The Mecklenburg County Department of Social Services ("MCDSS") did not have standing to file the juvenile petition. We vacate the trial court's order.

I. Background

At the time of A.P.'s birth in August 2015, Respondent was living at the Church of God Children's Home (the "Home") in Cabarrus County, North Carolina. Shortly after A.P.'s birth, Respondent began to display irrational behavior. The Home's staff believed Respondent demonstrated a need for a higher level of care than they could provide her. On 22 September 2015, Respondent was taken to the Carolinas Medical Center-Northeast emergency room in Cabarrus County. She was subsequently involuntarily committed for mental health treatment in Mecklenburg County. Respondent agreed to a safety plan with the Cabarrus County Department of Social Services ("CCDSS") to allow her daughter to live at the Rowan County home of Ms. B., an employee of the Church of God Children's Home, while Respondent was undergoing in-patient mental health treatment.

Respondent subsequently identified her grandfather's home in Mecklenburg County as a place where she could live with A.P. upon her release from in-patient mental health treatment. In October 2015, CCDSS asked MCDSS to investigate the appropriateness of the grandfather's home for A.P. MCDSS found her grandfather's home to be appropriate. Respondent moved into the home with A.P. Respondent entered

into an agreement with CCDSS that she would cooperate with MCDSS in developing and following an in-home family services plan, and CCDSS transferred the social services case to MCDSS.

On 25 November 2015, Respondent's sister discovered Respondent and A.P. were living away from her grandfather's home in a dilapidated house in Mecklenburg County. Respondent's sister took A.P. to Ms. B., and MCDSS subsequently approved the placement of A.P. with Ms. B. MCDSS investigated the conditions in which Respondent and A.P. had been living, and determined that Respondent needed intensive outpatient substance abuse treatment and other services. Respondent initially engaged in services, which were performed in Mecklenburg County. On 10 December 2015, Respondent notified MCDSS that she had moved to South Carolina.

At an 18 December 2015 meeting with MCDSS, Respondent agreed A.P. would continue to stay with Ms. B., while she lived with a family friend in South Carolina. Respondent returned to Mecklenburg County in January 2016. She was subsequently jailed in Mecklenburg County on unidentified criminal charges. From 18 to 20 February 2016, Respondent was again an inpatient at Davidson Mental Health Hospital in Mecklenburg County.

On 22 March 2016, Respondent informed MCDSS that she was residing in Cabarrus County. On 23 March 2016, Ms. B. informed MCDSS that she could no longer care for A.P. On 29 March, MCDSS obtained a nonsecure custody order from a Mecklenburg County magistrate, which did not list an address for either Respondent or A.P. Also on 29 March 2016, MCDSS retrieved the child from Ms. B. in Rowan County.

On 30 March 2017, MCDSS filed the nonsecure custody order and a juvenile petition alleging A.P. was a neglected and dependent juvenile. After a hearing on 17 May 2016, the trial court entered an adjudication and disposition order on 29 June 2016, in which it concluded that A.P. is a neglected and dependent juvenile. The court continued custody of A.P. with MCDSS, with placement in MCDSS's discretion. The court granted Respondent supervised visitation with A.P. and ordered Respondent to enter into an out-of-home family services agreement with MCDSS, and to comply with the terms of the agreement. Respondent filed timely notice of appeal from the court's order.

II. Motion to Dismiss

[1] We first address the joint motion to dismiss Respondent's appeal and alternative motion to strike portions of Respondent's appellate brief

filed by MCDSS and the guardian ad litem ("GAL"). MCDSS and the GAL argue that Respondent's appeal should be dismissed, because her brief contains (1) several footnotes which rely upon matters outside of the record on appeal and (2) a table of factual assertions without citation to the transcript or record on appeal. These alleged violations are not jurisdictional in nature and are not gross violations of our appellate rules to warrant dismissal. We deny the joint motion to dismiss Respondent's appeal. *See Dogwood Dev. & Mmgt. Co. v. White Oak Transport Co.*, 362 N.C. 191, 198-99, 657 S.E.2d 361, 365-66 (2008). We also deny the joint motion to strike, because the portions of Respondent's brief, which MCDSS and the GAL move to strike, are unnecessary to reach our decision in this appeal.

III. Jurisdiction

[2] Respondent asserts MCDSS did not have standing to file the juvenile petition, and argues the trial court lacked jurisdiction to adjudicate A.P. as dependent and neglected. District courts have "exclusive jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2015). However, "a trial court's general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action." *In re McKinney*, 158 N.C. App. 441, 447, 581 S.E.2d 793, 797 (2003) (citation omitted).

"[B]efore a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question." *Id.* at 444, 581 S.E.2d at 795 (citation and quotation marks omitted). To properly invoke the court's jurisdiction in a juvenile matter, the petitioner must have standing to file the juvenile petition. "Standing is jurisdictional in nature and '[c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved.' " *In re Miller*, 162 N.C. App. 355, 357, 590 S.E.2d 864, 865 (2004) (quoting *In re Will of Barnes*, 157 N.C. App. 144, 155, 579 S.E.2d 585, 592 (2003)); *see also In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006) ("A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition.").

Article 4 of the North Carolina Juvenile Code sets forth the requirements for the venue and proper parties of petitions. N.C. Gen. Stat. §§ 7B-400 to 408 (2015). N.C. Gen. Stat. § 7B-400(a) provides

> [a] proceeding in which a juvenile is alleged to be abused, neglected, or dependent may be commenced in the district

> in which the juvenile resides or is present. Notwithstanding G.S. 153A-257, the absence of a juvenile from the juvenile's home pursuant to a protection plan during an assessment or the provision of case management services by a department of social services shall not change the original venue if it subsequently becomes necessary to file a juvenile petition.

N.C. Gen. Stat. § 7B-401.1(a) requires that "[o]nly a county director of social services or the director's authorized representative may file a petition alleging that a juvenile is abused, neglected, or dependent."

As defined in the Juvenile Code, a "director" is "[t]he director of the county department of social services in the county in which the juvenile resides or is found, or the director's representative as authorized in G.S. 108A-14." N.C. Gen. Stat. § 7B-101(10) (2015). Thus, only the director of the county department of social services, or the director's representative, "*in the county in which the juvenile resides or is found*" has standing to file a petition alleging that a child is an abused, neglected, or dependent juvenile. No provision of the Juvenile Code defines the residence of a minor child. A minor child's legal residence for the purpose of receiving social services is determined as follows:

> A minor has the legal residence of the parent or other relative with whom he resides. If the minor does not reside with a parent or relative and is not in a foster home, hospital, mental institution, nursing home, boarding home, educational institution, confinement facility, or similar institution or facility, *he has the legal residence of the person with whom he resides*. Any other minor has the legal residence of his mother, or if her residence is not known then the legal residence of his father; *if his mother's or father's residence is not known*, *the minor is a legal resident of the county in which he is found*.

N.C. Gen. Stat. § 153A-257(a)(3) (2015) (emphasis supplied).

In the case of *In re S.D.A.*, 170 N.C. App. 354, 356, 612 S.E.2d 362, 363 (2005), the mother "agreed to voluntarily place" her minor children with custodians in Rutherford County until the Rutherford County DSS deemed it appropriate to return the children to her care. Allegations of abuse by the custodians surfaced and the Rutherford County DSS asked Lincoln County DSS to investigate. *Id.*, 612 S.E.2d at 363-64.

The Lincoln County DSS was unable to substantiate any abuse; however, the Rutherford County DSS filed a juvenile petition alleging the children were abused and neglected by the mother for exposing the children to neglect by the custodians. *Id.* at 357, 612 S.E.2d at 364. The district court in Rutherford County adjudicated the children abused and neglected and removed them from the custodians' care. *Id.* This Court vacated the district court's orders and held the trial court lacked subject matter jurisdiction. Rutherford County DSS failed to follow the statutorily imposed duties prior to filing its petition. *Id.* at 361, 612 S.E.2d at 366.

In the case of *In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787, our Supreme Court vacated a custody review order where the juvenile petition that initiated the case was not verified by the director of the county DSS, as mandated by statute. The Court acknowledged abuse, neglect and dependency cases are purely "statutory in nature and governed by Chapter 7B." *Id.* at 591, 636 S.E.2d at 790. Notwithstanding that the juvenile petition alleged the respondent was manufacturing methamphetamines in the home, and that respondent had not cooperated with DSS to establish a safety plan, the Court vacated the order removing the juvenile from the respondent's physical custody for lack of subject matter jurisdiction. *Id.* at 588-89, 636 S.E.2d at 789.

> 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. Thus, for certain causes of action created by statute, the requirement that pleadings be signed and verified is not a matter of form, but substance, and a defect therein is jurisdictional.

Id. at 590, 636 S.E.2d at 790 (internal quotation marks and citations omitted).

Here, A.P. initially resided with her mother, Respondent, at the Church of God Children's Home located in Cabarrus County. Upon Respondent's hospitalization in Mecklenburg County for inpatient mental health services, she placed A.P. with her case manager at the Home, Ms. B., who resided in Rowan County.

Because Respondent and A.P. were planning to move to Mecklenburg County, Respondent's case was referred by CCDSS to MCDSS on 20 October 2015. Respondent was discharged from

hospital care on 23 October 2015, and she and A.P. moved into her grandfather's home in Mecklenburg County. A.P. remained in Mecklenburg County, until she was removed by her aunt on 25 November 2015, and returned to the care of Ms. B. in Rowan County. At a Child and Family Team meeting held at MCDSS on 18 December 2015, Respondent agreed for A.P. to continue to reside with Ms. B., while Respondent would seek mental health, substance abuse, and parenting services in South Carolina. On 22 March 2016, Respondent reported to MCDSS that she was residing in Cabarrus County.

On 23 March 2016, Ms. B. notified MCDSS that she could no longer keep A.P. MCDSS contacted CCDSS to discuss transferring the case back to Cabarrus County. However, CCDSS was unable to confirm Respondent was living in Cabarrus County. The record reflects CCDSS indicated it was not willing to file a petition in this matter due to its lack of current involvement with the case. MCDSS sought and obtained a nonsecure custody order signed 29 March 2016 without alleging the address or residence of either Respondent or A.P. MCDSS found A.P. in Rowan County and took physical custody of A.P. on this date.

Based upon these facts, at the time MCDSS filed its juvenile petition A.P. was neither found in nor residing in Mecklenburg County. A.P. remained in the legal custody of Respondent until MCDSS attempted to obtain nonsecure custody of A.P. by filing its nonsecure custody order and juvenile petition on 30 March 2016.

From 25 November 2015 until 29 March 2016, A.P. resided with Ms. B. in Rowan County. A.P. was not residing in a foster home, hospital, mental institution, nursing home, boarding home, educational institution, confinement facility, or similar institution or facility. Her legal and physical residence was in Rowan County with Ms. B. N.C. Gen. Stat. § 153A-257(a)(3). The director of MCDSS lacked standing to file the juvenile petition, and the trial court lacked subject matter jurisdiction over this case. *Cf. In re J.M.*, __ N.C. App. __, __, __ S.E.2d __, __ (2016) (2016 WL 8542855) (holding the Durham County district court lacked jurisdiction to hear a petition to terminate parental rights where, at the time the petition was filed, the juvenile was not residing in Durham County, was not found in Durham County, and was not in the legal custody of a licensed child-placing agency in Durham County or Durham County DSS).

IV. N.C. Gen. Stat. § 7B-402(d)

On appeal, the GAL argues the plain language of N.C. Gen. Stat. § 7B-402(d) refutes Respondent's contention that MCDSS lacked authority

to file the juvenile petition in this case. Section 7B-402(d) provides that "[i]f the petition is filed in a county other than the county of the juvenile's residence, the petitioner shall provide a copy of the petition and any notices of hearing to the director of the department of social services in the county of the juvenile's residence." *Id.* The GAL asserts this statute anticipates that a jurisdictionally valid petition may be filed by a social services director of a county other than that where the juvenile resides. We disagree.

The GAL asserts that a social services director of a county in which the juvenile does not reside may file a juvenile abuse, neglect, or dependency petition, if the juvenile *is found* in the director's county. *See* N.C. Gen. Stat. § 7B-101(10) and § 7B-401.1(a). Section 7B-402(d) provides that in such instances, notice of the petition and hearings must then be given to the social services director in the county in which the juvenile resides. Section 7B-402(d) is clearly a notice requirement to another social services director and is not a standing provision. The statute's intent is to alert the department of social services of the juvenile's county of residence of an ongoing out-of-county juvenile case, which may require investigation on its part.

Here, A.P. was neither found in nor a resident of Mecklenburg County. MCDSS failed to allege either Respondent's or A.P.'s residence or physical presence in Mecklenburg County and lacked standing to file the petition alleging A.P. was a neglected or dependent juvenile. The petition failed to properly invoke the trial court's jurisdiction. Without jurisdiction, the trial court's order must be vacated.

V. Conclusion

The Mecklenburg County District Court did not obtain subject matter jurisdiction when MCDSS purportedly filed its petition without standing to do so. In light of our decision and mandate, it is unnecessary for us to address Respondent's remaining arguments. The district court's order is vacated. *It is so ordered.*

VACATED.

Judges BRYANT and DAVIS concur.

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM VICQUE THOMPSON AND CHRISTALYN THOMPSON, IN THE ORIGINAL AMOUNT OF $205,850.00, AND DATED SEPTEMBER 26, 2007 AND RECORDED ON SEPTEMBER 28, 2007 IN BOOK 2953 AT PAGE 653 AND RERECORDED/MODIFIED/CORRECTED ON FEBRUARY 27, 2015 IN BOOK 4266, PAGE 911, ONSLOW COUNTY REGISTRY[,] TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA16-1014

Filed 18 April 2017

Mortgages and Deeds of Trust—foreclosure—latent ambiguity—description of property—extrinsic documents referenced in deed of trust

The trial court did not err by allowing a substitute trustee appointed by appellee bank to foreclose on a loan secured by property owned by appellants. The deed of trust's reference to "Section II-C" was a minor error that created only a latent ambiguity as to the description of the property, which could be rectified by examination of extrinsic documents referenced in the deed of trust.

Appeal by respondents from order entered 30 March 2016 by Judge D. Jack Hooks in Onslow County Superior Court. Heard in the Court of Appeals 7 March 2017.

Blanco Tackabery & Matamoros, P.A., by Ashley S. Rusher and M. Rachael Dimont, for petitioner-appellee.

The Barber Law Firm, PLLC, by Terence O. Barber, for respondent-appellants.

ZACHARY, Judge.

Appellants Vicque and Christalyn Thompson ("the Thompsons") appeal from an order of the trial court that allowed the substitute trustee appointed by appellee USAA Federal Savings Bank ("the Bank") to foreclose on a loan secured by property owned by the Thompsons. On appeal, the Thompsons argue that the trial court erred by failing to vacate an earlier order of the Clerk of Superior Court of Onslow County allowing foreclosure and by entering the order permitting the foreclosure sale to proceed. The Thompsons contend that "the trustee did not hold legal title to the property owned by [the Thompsons] by virtue of the faulty description in the deed of trust" and that, as a result, the substitute trustee was "not entitled to foreclose under the instrument." For

the reasons discussed below, we conclude that the trial court did not err and that its order should be affirmed.

I. Background

The relevant facts of this case are largely undisputed and may be summarized as follows: On 28 September 2007, the Thompsons acquired property located at 303 Old Pine Court, Richlands, North Carolina ("the property"). In order to purchase the property, the Thompsons borrowed $205,850.00 from the Bank and secured the loan with a Deed of Trust on the property. The Thompsons later defaulted on the loan by failing to make the payment to the Bank that was due on 1 September 2013, or to make any payments thereafter. A letter informing the Thompsons of the default was mailed on 2 February 2014, and a pre-foreclosure notice was mailed to the Thompsons on 2 September 2014. On 23 July 2015, Trustee Services of Carolina, LLC was appointed as substitute trustee for the property. The Bank instructed the substitute trustee to institute foreclosure proceedings.

On 29 July 2015, the substitute trustee filed a notice of a foreclosure hearing to be conducted on 15 September 2015. The foreclosure hearing was continued until 17 November 2015, at which time the Clerk of Superior Court for Onslow County conducted a hearing and entered an order allowing the foreclosure to proceed. The Thompsons appealed the Clerk's order to the Superior Court of Onslow County for a *de novo* hearing. The trial court conducted a hearing on 15 February 2016. On 8 April 2016, the court entered an order allowing the foreclosure to proceed. The Thompsons entered timely notice of appeal to this Court from the trial court's order.

II. Standard of Review

"The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Foreclosure of Adams*, 204 N.C. App. 318, 320, 693 S.E.2d 705, 708 (2010) (quotations and citations omitted). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (citation omitted).

III. Right to Foreclose: General Principles

The general principles by which foreclosure must be conducted are well established. "Foreclosure by power-of-sale proceedings conducted pursuant to N.C. Gen. Stat. § 45-21.16 are limited in scope. A

power-of-sale provision contained in a deed of trust vests the trustee with the 'power to sell the real property mortgaged without any order of court in the event of a default.' " *In re Foreclosure of Collins*, __ N.C. App. __, __, __ S.E.2d __, __ (7 February 2017) (quoting *In re Foreclosure of Michael Weinman Associates*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993)). N.C. Gen. Stat. § 45-21.16(a) (2015) requires that in order to initiate a foreclosure proceeding, the mortgagee or trustee must file a notice of hearing with the clerk of court and serve notice of the hearing upon the appropriate parties. The Thompsons do not dispute that they were properly served with notice of the hearing. Thereafter, a hearing "shall be held before the clerk of court in the county where the land, or any portion thereof, is situated." N.C. Gen. Stat. § 45-21.16(d) (2015). At the hearing, the lender "bears the burden of proving that there was a valid debt, default, the right to foreclose under power of sale, and notice." *In re Foreclosure of Brown*, 156 N.C. App. 477, 489, 577 S.E.2d 398, 406 (2003). N.C. Gen. Stat. § 45-21.16(d) provides in relevant part that:

> If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, [and] (iv) notice to those entitled to such under subsection (b), . . . then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. . . .

IV. Discussion

In this case, the Thompsons' only challenge to the order allowing foreclosure is their contention that the evidence fails to show that the Bank has the right to foreclose on the property. The Thompsons assert that as a result of an error contained in the Deed of Trust's description of the property, the Bank "never received legal title" to the property and therefore has no right to foreclose on the loan secured by the Deed of Trust. Upon careful review of the relevant jurisprudence, in light of the facts of this case, we conclude that the Thompsons' argument lacks merit.

Resolution of this appeal requires an examination of the contents of the General Warranty Deed and the Deed of Trust. Both the General Warranty Deed and the Deed of Trust (1) identify the location of the property as 303 Old Pine Ct., Richlands, N.C., (2) identify the property as being Lot 46 as shown on a plat recorded in Map Book 51, Page 149, Slide 1485 of the Onslow County Registry, and (3) identify the property as

having Onslow County Tax Parcel ID Number 46B-153. The Thompsons' appellate argument is based upon a single error in the Deed of Trust, evidenced in the following discrepancy between the documents:

> 1. The General Warranty Deed describes the property as "all of Lot 46 as shown on a plat entitled 'Final Plat Walnut Hills, Section III-C', prepared by Parker & Associates, Inc., dated August 3, 2006 and recorded in Map Book 51, Page 149, Slide L-1485, Onslow County Registry."
>
> 2. The Deed of Trust describes the property as "all of Lot 46, as shown on a plat entitled 'Final Plat Walnut Hills, Section II-C' prepared by Parker & Associates, Inc., dated August 3, 2006 and recorded in Map Book 51, Page 149, Slide L-1485, Onslow County Registry."

(Emphasis added). The sole difference between these documents is that the Deed of Trust describes the property as being located in "Section II-C" of the Walnut Hills subdivision, and the General Warranty Deed identifies the property as being located in "Section III-C" of the Walnut Hills subdivision. The parties agree that the Walnut Hills subdivision did not include a "Section II-C" and that the reference in the Deed of Trust to "Section II-C" was incorrect and referred to a location that does not exist. The Thompsons contend that this error renders the Deed of Trust void as a matter of law. The Bank, however, argues that the Deed of Trust's reference to "Section II-C" is a minor error that creates only a latent ambiguity as to the description of the property, which may be rectified by examination of extrinsic documents referenced in the Deed of Trust. We agree with the Bank's analysis.

Neither the transfer of property from a buyer to a seller, nor the execution of documents securing a loan used to purchase real estate is a modern phenomenon or an unusual occurrence. Property has changed hands throughout North Carolina's history and there have been many occasions in which a party has challenged the validity of a document evidencing a property transaction on the grounds that the document contained an error or failed to identify the property with sufficient certainty. Our courts have had numerous opportunities during the last 150 years to consider the effect of an error or misnomer in a deed, promissory note, or other real estate-related document. As a result, the law governing the issue of errors or uncertainty in such documents has been firmly established for more than a century.

N.C. Gen. Stat. § 22-2 (2015), known as the statute of frauds, requires that all contracts to convey land "shall be void unless said contract, or

some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." The Supreme Court of North Carolina has held that "[a] valid contract to convey land, therefore, must contain expressly or by necessary implication all the essential features of an agreement to sell, one of which is a description of the land, certain in itself or capable of being rendered certain by reference to an extrinsic source designated therein." *Kidd v. Early*, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976). The general rule regarding the validity of the description of property in a deed or related document is as follows:

> The decisions in this State are in very general recognition of the principle that a deed conveying real estate or a contract concerning it, within the meaning of the statute of frauds, must contain a description of the land, the subject-matter of the contract, "either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers."

Patton v. Sluder, 167 N.C. 500, 502, 83 S.E. 818, 819 (1914) (quoting *Massey v. Belisle*, 24 N.C. 170, 177 (1841)).[1]

"It is presumed that the grantor in a deed of conveyance intended to convey something, and the deed will be upheld unless the description is so vague or contradictory that it cannot be ascertained what thing in particular is meant." *Duckett v. Lyda*, 223 N.C. 356, 358, 26 S.E.2d 918, 919 (1943) (citations omitted). Thus, "[w]hile the contract must contain a description of the land to be sold, it is not essential that the description be so minute or particular as to make resort to extrinsic evidence unnecessary. The line of separation is the distinction between a patent and a latent ambiguity." *Gilbert v. Wright*, 195 N.C. 165, 166, 141 S.E. 577, 578 (1928) (citing *Lewis v. Murray*, 177 N.C. 17, 97 S.E. 750 (1919)). "Whether a description is patently ambiguous is a question of law." *Kidd*, 289 N.C. at 353, 222 S.E.2d at 400 (citation omitted).

Although a description of real property must adequately identify the subject property, the law will support a deed if possible. "When a description leaves the land 'in a state of absolute uncertainty, and refers to nothing extrinsic by which it might be identified with certainty,' it is patently ambiguous and parol evidence is not admissible to aid the description. The deed or contract is void." *Kidd*, 289 N.C. at 353, 222

1. The Southeastern Reporter does not report cases decided prior to 1887.

S.E.2d at 400 (quoting *Lane v. Coe*, 262 N.C. 8, 13, 136 S.E. 2d 269, 273 (1964)). " 'A description is . . . latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made.' Thus, a description missing or uncertain in one document may be rendered certain by another and together the documents may satisfy the statute of frauds." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 123, 388 S.E.2d 538, 551 (1990) (quoting *Lane*, 262 N.C. at 13, 136 S.E. 2d at 273 (other citation omitted). In sum:

> It is a general rule, that if the description be so vague or contradictory, that it cannot be told what thing in particular is meant; the deed is void. But it is also a general rule, that the deed shall be supported, if possible; and if by any means different descriptions can be reconciled, they shall be, or if they be irreconcilable, yet if one of them sufficiently points out the thing, so as to render it certain that it was the one intended, a false or mistaken reference to another particular shall not overrule that which is already rendered certain.

Proctor v. Pool, 15 N.C., 370, 373 (1833).

We have reviewed our appellate jurisprudence addressing challenges to the validity of the identification of property described in documents such as a deed, deed of trust, or contract for the sale of property, and observe that our Courts have generally affirmed the validity of such documents when it is possible to ascertain the identity of the subject property. For example, in *Carson v. Ray*, 52 N.C. 609, 609 (1860), our Supreme Court upheld as valid a deed in which the grantor agreed to transfer "[m]y house and lot in the town of Jefferson, in Ashe County, North Carolina." The Court noted that "there was no evidence that [the grantor] owned any other house and lot" in Jefferson, and that the deed presented only a latent ambiguity. Similarly, in *Gilbert v. Wright*, *supra*, our Supreme Court upheld an order of the lower court ordering specific performance of a contract to sell "the vacant lot" on the grounds that the other documents and the factual circumstances associated with the transaction clearly identified a specific vacant lot.

Where a document that constitutes part of the transfer of property, such as a deed or deed of trust, describes the property in a manner that is uncertain or contains an error, our appellate courts generally have upheld the decision of a trial court to admit extrinsic evidence derived from sources referred to in the challenged document, in order

to establish with greater certainty the identity of the subject property. Thus, in *Taylor v. Bailey*, 34 N.C. App. 290, 237 S.E.2d 918 (1977), this Court upheld an order by the trial court granting specific performance of a contract for the sale of property. The contract erroneously described the property as being located in Buncombe County, rather than giving its correct location in Henderson County. We held that this discrepancy created only a latent ambiguity:

> Defendant argues that the description before us for construction is clearly patently ambiguous. We cannot agree. True, there is no metes and bounds description. However, the description gives the acreage and refers to a deed of trust, naming the parties and the date thereof, in which the land is described with particularity. This is adequate to satisfy the "something extrinsic by which identification might possibly be made." Further, the complaint locates the property in Henderson County.

Taylor, 34 N.C. App. at 292, 237 S.E.2d at 919 (quoting *Lane* at 13, 136 S.E. 2d at 273). In *River Birch*, *supra*, our Supreme Court held that "[t]he trial court incorrectly excluded evidence of the preliminary plat for the purpose of resolving a latent ambiguity in the identity of the common area referred to in the covenants." *River Birch*, 326 N.C. at 126, 388 S.E.2d at 553. And, in *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God, Inc.*, 136 N.C. App. 493, 524 S.E.2d 591 (2000), the defendant claimed that the subject deed was void because of the misstatement of the name of one of the parties. This Court held that "there is only a latent ambiguity in the deed" that did not render the deed void. *Tomika*, 136 N.C. App. at 497, 524 S.E.2d at 594.

Applying the principles discussed above to the present case, we conclude that the erroneous reference in the Deed of Trust to "Section II-C" instead of "Section III-C" is merely a scrivener's error and creates only a latent ambiguity in the description of the property. This uncertainty may be remedied by examination of the four corners of the Deed of Trust and documents referenced therein. The Deed of Trust identifies the property as Lot 46 of a subdivision depicted on a plat "prepared by Parker & Associates, Inc., dated August 3, 2006 and recorded in Map Book 51, Page 149, Slide L-1485, Onslow County Registry." This plat correctly identifies Lot 46 as being located in "Section III-C." In addition, the Deed of Trust identifies the property with a street address and tax parcel ID number, both of which correspond to the information in the General Warranty Deed and the plat. Upon examination of the information in the record, in the context of the long-established jurisprudence on this

subject, we conclude that the erroneous reference to "Section II-C" in the Deed of Trust did not render the document void and that the trial court did not err by allowing the foreclosure to go forward.

In their arguments seeking a contrary result, the Thompsons do not acknowledge that extrinsic evidence may be utilized to clarify a latent ambiguity and do not discuss the law on this issue or make any attempt to distinguish cases such as those cited above. Instead, the Thompsons cite cases that, although they may involve a deed of trust or the transfer of property, do not address in any respect the principles discussed in this opinion. We conclude that the Thompsons have failed to establish that the trial court erred or that they are entitled to relief on appeal. Accordingly, we conclude that the trial court's order should be

AFFIRMED.

Judges BRYANT and INMAN concur.

IN THE MATTER OF J.D.A.D.

No. COA16-1076

Filed 18 April 2017

Termination of Parental Rights—grounds—failure to make adjudicatory findings—safe home—incarceration

The trial court erred by concluding that grounds existed to terminate respondent father's parental rights where it failed to make any adjudicatory findings concerning the alleged failings of respondent to provide a safe home based on his incarceration.

Appeal by respondent from order entered 25 August 2016 by Judge Ted McEntire in Yancey County District Court. Heard in the Court of Appeals 3 April 2017.

Hockaday & Hockaday, P.A., by Daniel M. Hockaday, for petitioner-appellee.

Julie C. Boyer for respondent-appellant.

TYSON, Judge.

Respondent-father appeals from an order terminating his parental rights. We reverse.

I. Background

Respondent is the father of the juvenile, J.D.A.D. Petitioner is the juvenile's mother. Petitioner and Respondent never married, and J.D.A.D. was born out of wedlock. On 21 August 2014, the district court entered an order, in which it adjudicated Respondent to be J.D.A.D.'s father and awarded permanent primary legal and physical custody to Petitioner. The court declined to grant Respondent any visitation whatsoever with J.D.A.D.

On 10 February 2016, Petitioner filed a petition to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(5) (failure to legitimate) and (7) (abandonment) (2015). On 20 May 2016, Petitioner took a voluntary dismissal of the allegation of abandonment. Petitioner filed an amended petition to terminate Respondent's parental rights and alleged Respondent's parental rights to other children had been involuntarily terminated and Respondent lacked the ability or willingness to establish a safe home as an additional ground. *See* N.C. Gen. Stat. § 7B-1111(a)(9) (2015). On 25 August 2016, the trial court terminated Respondent's parental rights. Respondent filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(6) (2015).

III. Background

Respondent argues the trial court erred by concluding that grounds existed to terminate his parental rights. We agree.

IV. Standard of Review

"[O]ur standard of review for the termination of parental rights is whether the trial court's findings of fact are based on clear, cogent and convincing evidence and whether the findings support the conclusions of law. The trial court's conclusions of law are reviewable *de novo* on appeal." *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

V. Analysis

The trial court concluded grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(9). This statute

allows parental rights to be terminated when "the parental rights of a parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." N.C. Gen. Stat. § 7B-1111(a)(9).

To terminate a parent's rights under N.C. Gen. Stat. § 7B-1111(a)(9), the trial court must perform a two-part analysis. The trial court must find by clear, cogent and convincing evidence that: (1) there has been an involuntary termination of parental rights of another child of the parent, and (2) the parent has an inability or unwillingness to establish a safe home. *In re L.A.B.*, 178 N.C. App. 295, 299, 631 S.E.2d 61, 64 (2006). A safe home is defined as a "home in which the juvenile is not at substantial risk of physical or emotional abuse or neglect." N.C. Gen. Stat. § 7B-101(19) (2015).

Respondent challenges the court's finding of the second element. Respondent asserts the court's findings of fact and the admitted evidence do not support a conclusion that he lacked the ability or willingness to provide a safe home.

The trial court found, in pertinent part:

> That the respondent father lacks the ability to establish a safe home for the juvenile in that he has been incarcerated in the NC Department of Adult Corrections since October, 2015 and was incarcerated in local confinement from July, 2015, until October, 2015; that his expected release date is not until October, 2018; that the Court finds the respondent is unable to provide a home for the juvenile although the Court does not find the respondent . . . willfully failed to establish a safe home for the juvenile.

This Court has repeatedly stated that while a parent's imprisonment is relevant to determining whether grounds exist for termination, "incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re C.W.*, 182 N.C. App. 214, 220, 641 S.E.2d 725, 730 (2007) (citation omitted); *see also In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (affirming termination of parental rights based on neglect where trial court found by clear, cogent and convincing evidence that the incarcerated respondent "(1) 'could have written' but did not do so; (2) 'made no efforts to provide anything for the minor child'; (3) 'has not provided any love, nurtur[ing] or support for the minor child'; and (4) 'would continue to neglect the minor child

if the child was placed in his care' "), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006).

The only rationale cited by the trial court in its adjudicatory findings to support termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(9) is Respondent's incarceration. Petitioner cites evidence that Respondent has not been approved for visitation with the juvenile, has provided minimal financial support, continues to abuse illegal substances, and has not obtained necessary substance abuse treatment, to support her argument that Respondent is unable to establish a safe home for J.D.A.D.

While record evidence may support Petitioner's claims, and the trial court relied upon some of this evidence at disposition when determining best interests, the trial court failed to make any adjudicatory findings concerning these alleged failings by Respondent. It is not this Court's duty or responsibility to make and issue findings of fact. *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552-53 (2009). Our review is to determine whether there is clear, cogent and convincing evidence in the record supports the findings and whether the findings support the conclusions of law. *In re J.S.L.*, 177 N.C. App. at 154, 628 S.E.2d at 389.

VI. Conclusion

The trial court's findings of fact do not find clear, cogent and convincing evidence and are insufficient to support its conclusion of law that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(9). *Cf. In re D.J.D.*, 171 N.C. App. 230, 242, 615 S.E.2d 26, 34 (2005) (respondent's "incarceration *and* his inability to suggest alternate arrangements for his children, supports the trial court's conclusion that respondent was unable to establish a safe home." (emphasis supplied)).

The trial court found no other grounds existed upon which to base termination of Respondent's parental rights. The trial court erred by concluding grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(9). We need not address Respondent's remaining argument on appeal that it was not in J.D.A.D.'s best interest to terminate Respondent's parental rights. The order terminating Respondent's parental rights is reversed. *It is so ordered.*

REVERSED.

Judges BRYANT and DAVIS concur.

IN THE MATTER OF J.K.

No. COA16-823

Filed 18 April 2017

1. Child Abuse, Dependency, and Neglect—permanency planning order—best interests of child—clerical errors

The trial court did not err in a child neglect and dependency case by granting custody of the minor child to respondent father and not respondent mother in the permanency planning order. The record supported that this was in the minor child's best interests. The references to "the Respondents" in conclusions of law 2 and 7 were clerical errors that should have read "Respondent Mother" only.

2. Child Custody and Support—civil custody order—child neglect and dependency—termination of juvenile court jurisdiction

The trial court erred in a child dependency and neglect case by entering a custody order that was not in compliance with N.C.G.S. § 7B-911.

Appeal by respondent-mother from order entered 17 May 2016 by Judge Cheri L. Siler-Mack in District Court, Cumberland County. Heard in the Court of Appeals 13 March 2017.

Christopher L. Carr, for petitioner-appellee Cumberland County Department of Social Services and Beth A. Hall, for guardian ad litem.

Robert W. Ewing for respondent-appellant-mother.

STROUD, Judge.

Respondent-mother appeals from a permanency planning order and a custody order, both entered the same day, both of which grant legal and physical custody of her daughter to respondent-father. We affirm the permanency planning order and remand for correction of a clerical error. We also reverse and remand the custody order since it does not comply with the requirements of North Carolina General Statute § 7B-911 for termination of juvenile court jurisdiction and entry of a civil custody order enforceable and modifiable under North Carolina General

Statute Chapter 50. On remand, the trial court should enter a new order in accord with North Carolina General Statute § 7B-911.

I. Background

On 29 September 2014, the Cumberland County Department of Social Services ("DSS") filed a juvenile petition alleging that one-year-old Jennifer[1] was neglected and dependent. According to the petition, DSS received two child protective services referrals in September of 2014. Respondent-mother had a history of problems due to her mental illness, and she failed to take her medication as prescribed. On 28 September 2014, respondent-mother was admitted to Cape Fear Valley Medical Center because she was having auditory and visual hallucinations; this was respondent-mother's second hospital admission in one month due to the same issues. Shortly after her admission to the hospital, respondent-mother tested positive for marijuana. At that time, DSS was unable to locate any suitable relatives to provide temporary care and supervision for Jennifer, so DSS took Jennifer into non-secure custody. On 1 December 2014, the trial court had a hearing regarding the non-secure custody order; the trial court ordered "[t]hat the juvenile shall continue to be placed in the home with the Respondent Father and Paternal Grandmother."[2] On 18 August 2015, the trial court entered an order adjudicating Jennifer dependent.

On 17 February 2016, the trial court held a permanency planning hearing. On 17 May 2016, the trial court entered two orders based upon the 17 February 2016 hearing. First, the trial court entered an order entitled "Permanency Planning Order and Order to Close Juvenile Court Case File" ("Permanency Planning Order"). (Original in all caps.) In the Permanency Planning Order the trial court made findings of fact regarding both respondents' and the juvenile's circumstances. The trial court also found as follows:

> 23. That the permanent plan of reunification with the Respondent Father has been achieved.
>
> 24. That a termination of parental rights should not be pursued in this matter inasmuch as the permanent plan of reunification has been accomplished.
>
> . . . .

1. A pseudonym is used to protect the juvenile's privacy and for ease of reading.

2. The December 2014 order was not actually entered -- signed and filed -- until 22 April 2016, nearly two years later.

> 26. The Court finds that at this time it would be appropriate to return legal and physical custody of the juvenile to the Respondent Father, . . ., and that will be the Order of the Court. The Court finds that this will achieve the permanent plan of care for the juvenile and that further Judicial Review hearings are no longer necessary. The Court will allow the Department and Guardian ad Litem to close their respective Juvenile Court case files in this matter[.]

The trial court then ordered "[t]hat legal and physical custody of the juvenile . . . shall be returned to the Respondent Father" and "[t]hat the Cumberland County Department of Social Service and the Guardian ad Litem should be allowed to close their Juvenile Court case files[.]" The trial court also released the respondents' court-appointed counsel and granted visitation to respondent-mother for an hour of visitation supervised by respondent–father every other week at a particular McDonald's restaurant.[3]

Also on 17 May 2016, the trial court entered another order, entitled simply "ORDER" ("Custody Order").[4] The brief, two-page Custody Order incorporates the findings from the Permanency Planning Order. The Custody Order includes a conclusion of law that "North Carolina is the home state of the juvenile[] and this Court has jurisdiction over the juvenile under the provisions of the Uniform Child Custody Jurisdiction Enforcement Act for the purpose of entering an Order on Custody." The Custody order then grants legal and physical custody of the juvenile to respondent-father and supervised visitation to respondent-mother, just as set forth in the Permanency Planning Order. Respondent-mother filed notice of appeal "from the Review Order changing custody of the above minor child that was filed on May 17, 2016."

II. Standard of Review

> Our review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the

3. Previously, DSS had been providing the supervision for visitation.

4. Within the text of the Custody Order, the trial court calls the order an "Order on Custody[.]" The Custody Order does not refer to any particular statutory basis for its provisions but only notes that it was based upon evidence presented "at a Permanency Planning hearing[.]"

> findings support the conclusions of law. The trial court's findings of fact are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings. In choosing an appropriate permanent plan under N.C. Gen. Stat. § 7B–906.1 (2013), the juvenile's best interests are paramount. We review a trial court's determination as to the best interest of the child for an abuse of discretion. Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court.
>
> Unchallenged findings of fact are deemed to be supported by the evidence and are binding on appeal. Moreover, erroneous findings that are unnecessary to support the trial court's conclusions of law may be disregarded as harmless.

In re A.C., ___ N.C. App. ___, ___, 786 S.E.2d 728, 733 (2016) (citations and quotation marks omitted).

III. Permanency Planning Order

[1] Respondent-mother argues that "the trial court erred in granting . . . Jennifer[']s custody to the respondent father when it concluded that the return of the juvenile to the respondents would be contrary [] to the welfare and best interests of the juvenile." (Original in all caps.) Specifically, respondent-mother argues the trial court's conclusions of law in the Permanency Planning Order are contradictory and prevent this Court from adequately determining whether granting respondent-father custody of Jennifer was in her best interests.

Here, the trial court made the following pertinent conclusions of law:

> 2. No reasonable means were available to protect the juvenile, short of out-of-home placement, because return to the custody of the Respondents would be contrary to the welfare of the juvenile.
>
> 3. That the primary permanent plan of reunification with the Respondent Father with a secondary permanent plan of guardianship with the Paternal Grandmother; the Court approves of the permanent plans and the plans are consistent with the juvenile's best interests.
>
> 4. That the primary permanent plan has been achieved today.

> 5. That the Respondent Mother . . . is not a fit and proper person for the care, custody and control of the juvenile. That it is in the juvenile's best interests to have supervised visitation with the Respondent Mother.
>
> 6. That the Respondent Father . . . is a fit and proper person for the care, custody and control of the juvenile.
>
> 7. That return of the juvenile to the custody of the Respondents would be contrary to the welfare and best interests of the juvenile.
>
> 8. That the juvenile remains in need of more care and supervision than the Respondent Mother can provide for the juvenile at this time.
>
> . . . .
>
> 10. That in the best interests of the juvenile, legal and physical custody should be with the Respondent Father . . . .

Respondent-mother argues that the trial court's conclusions are contradictory as conclusions of law 2 and 7 do not support the court's order awarding custody to respondent-father because they conclude that the return of Jennifer's custody to "respondents" was contrary to her welfare and best interests. After careful review of the record, we conclude the references to "the Respondents" instead of "Respondent Mother" in conclusions of law 2 and 7 were clerical errors. *See* N.C. Gen. Stat. § 1A-1, Rule 60(a) (2015).

Clerical mistakes are "mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission . . . ." *Id.*

> A clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination. When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.

In re D.B., 214 N.C. App. 489, 497, 714 S.E.2d 522, 527 (2011) (citations, quotation marks, and brackets omitted).

After conducting the permanency planning hearing on 17 February 2016, the trial court made the following unchallenged findings of fact:

> 5. That the juvenile has been placed in the home with the Respondent Father since November 16, 2014. That the juvenile is doing very well in the placement.
>
> 6. That the Paternal Grandmother is a good support system for the Respondent Father.
>
> 7. That the juvenile attends day care five (5) days per week. She interacts well with the other children at the day care center. [Jennifer] is on a schedule[] for toilet training. The juvenile is able to speak a few words.
>
> . . . .
>
> 9. That the juvenile continues to display self injurious behaviors such as scratching her face and neck as well as grabbing her hair to the point of pulling it out. That Dr. [Smith] at Coastal Carolina Neuropsychiatric Center indicated that [Jennifer]'s behaviors are most likely due to her lacking a stable nurturing environment. That the Respondent Father was provided with techniques to help with the behaviors.
>
> 10. That the Respondent Mother is unemployed. She receives disability benefits.
>
> . . . .
>
> 12. That the Respondent Mother has history of mental health issues and hospitalizations. That the Respondent Mother believes she was in witness protection with Cape Fear Valley Medical Center. That the Respondent Mother continues to deny having any mental health problem and continues to refuse to obtain and maintain treatment for her mental health issues.
>
> . . . .
>
> 15. That the Respondent Mother has a CPS history in Sampson County where she lost custody of two children to their father.
>
> 16. That the Respondent Mother has not been compliant with recommended Court ordered services.

. . . .

20. That the Respondent Father is employed with Goodyear. He works as a driver for Uber Car Services and has enrolled in school.

21. That the Respondent Father has completed Court ordered services.

. . . .

23. That the permanent plan of reunification with the Respondent Father has been achieved.

. . . .

26. The Court finds at this time it would be appropriate to return legal and physical custody of the juvenile to the Respondent Father . . . and that will be the Order of the Court.

These binding findings of fact, *see In re A.C.*, ___ N.C. App. at ___, 786 S.E.2d at 733, support the trial court's conclusion of law 10 that "in the best interests of the juvenile, legal and physical custody should be with the Respondent Father" which supports the ultimate decree granting custody of Jennifer to respondent-father's custody. Furthermore, the record fully supports a determination that it was in Jennifer's best interests to live with respondent-father and not respondent-mother. Thus, we conclude the references to "the Respondents" in conclusions of law 2 and 7 were clerical errors in that they should read "Respondent Mother" only. Accordingly, we remand the Permanency Planning Order to the trial court to correct the clerical errors in conclusions of law 2 and 7 to read "Respondent Mother."

IV. Custody Order

[2] Respondent-mother next argues "the trial court erred in entering a civil custody order without first terminating the jurisdiction of the juvenile court and making the required finding that there was no need for continued State intervention on behalf of the child." (Original in all caps.) Specifically, respondent-mother contends the trial court failed to make the requisite findings of fact pursuant to North Carolina General Statute § 7B-911 to terminate the juvenile court's jurisdiction before entering a civil custody order. Again, "[q]uestions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re A.C.*, ___ N.C. App. at ___, 786 S.E.2d at 733.

We first note that the Custody Order is not really a "civil custody order" as contemplated by North Carolina General Statute § 7B-911. The Custody Order was entered in the juvenile court file and does not include any provisions transferring jurisdiction of the case to a Chapter 50 custody matter:

> N.C. Gen. Stat. § 7B–911 specifically provides the procedure for transferring a Chapter 7B juvenile proceeding to a Chapter 50 civil action. In certain cases which have originated as abuse, neglect, or dependency proceedings under Chapter 7B of the General Statutes, a time may come when involvement by the Department of Social Services is no longer needed and the case becomes a custody dispute between private parties which is properly handled pursuant to the provisions of Chapter 50. N.C. Gen. Stat. § 7B–911 sets forth a detailed procedure for transfer of such cases which will ensure that the juvenile is protected and that the juvenile's custodial situation is stable throughout this transition. For this reason, N.C. Gen. Stat. § 7B–911(b) requires that the juvenile court enter a permanent order prior to termination of its jurisdiction. After transfer, if a party desires modification of the juvenile's custodial situation under Chapter 50, that party must file the appropriate motion for modification and demonstrate a substantial change in circumstances affecting the best interests of the child. The procedure required by N.C. Gen. Stat. § 7B–911 is not a mere formality which can be dispensed with just because the parties agree to a consent order. Jurisdiction cannot be conferred upon the court by consent, but the trial court must exercise its jurisdiction only in accordance with the applicable statutes.

Sherrick v. Sherrick, 209 N.C. App. 166, 169–70, 704 S.E.2d 314, 317 (2011) (citations omitted). Indeed, North Carolina General Statute § 7B-911 provides in relevant part:

> (a) Upon placing custody with a parent or other appropriate person, the court *shall* determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7.

> (b) When the court enters a custody order under this section, the court *shall* either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.
>
> . . . .
>
> If the court's order initiates a civil action, the court shall designate the parties to the action and determine the most appropriate caption for the case. The civil filing fee is waived unless the court orders one or more of the parties to pay the filing fee for a civil action into the office of the clerk of superior court. The order shall constitute a custody determination, and any motion to enforce or modify the custody order shall be filed in the newly created civil action in accordance with the provisions of Chapter 50 of the General Statutes. The Administrative Office of the Courts may adopt rules and shall develop and make available appropriate forms for establishing a civil file to implement this section.[5]
>
> (c) When entering an order under this section, the court *shall* satisfy the following:
>
> (1) Make findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes . . . .
>
> (2) Make the following findings:
>
> a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.

N.C. Gen. Stat. § 7B-911 (2015) (emphasis added).

Here, after the 17 February 2016 permanency planning hearing, on 17 May 2016 the trial court entered the Permanency Planning Order establishing the permanent plan as custody with respondent-father, ordering DSS and the guardian ad litem to close their juveniles case files, and relieving the respondents' attorneys from any further duties;

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5. Unfortunately, from our research it appears that no forms for implementation of North Carolina General Statute § 7B-911 have yet been developed.

all of these provisions indicate that the trial court intended to terminate juvenile jurisdiction. The trial court's separate Custody Order returning legal and physical custody of Jennifer to respondent-father appears to be intended to transfer the case to be addressed in the future as a Chapter 50 civil custody matter, but the order does not include the provisions required by North Carolina General Statute § 7B-911. *See id.* Specifically, since the respondents did not have another custody matter already pending, any civil custody order would need to:

- "instruct the clerk to treat the order as the initiation of a civil action for custody"
- "initiate[] a civil custody action"
- "designate the parties to the action and determine the most appropriate caption for the case"
- "[m]ake findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes"
- make a finding that "[t]here is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding."

Id.

The trial court's Custody Order did "[m]ake findings and conclusions that support the entry of a custody order in an action under Chapter 50"and made findings which tend to show that "[t]here is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding[,]" although the order did not use exactly these words. *Id.* At this point in time, the primary permanent plan for placement with respondent-father has been in place since 17 May 2016 and we have affirmed the Permanency Planning Order, with remand for the correction of minor clerical errors. We also reverse and remand the Custody Order so that the trial court may on remand enter a civil custody order terminating the juvenile court's jurisdiction in compliance with North Carolina General Statute § 7B-911. The trial court may, in its sole discretion, hold an additional hearing prior to entry of the new order on remand.

V. Conclusion

For the reasons discussed above, we affirm the Permanency Planning Order but remand for correction of clerical errors. We reverse and remand the Custody Order for additional proceedings before the trial court to enter a new order consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Chief Judge McGEE and Judge McCULLOUGH concur.

IN THE MATTER OF L.C.

No. COA16-1009

Filed 18 April 2017

1. **Child Abuse, Dependency, and Neglect—abuse adjudication—improperly compelled testimony**

   The trial court erred in a juvenile adjudication hearing by compelling the juvenile's mother to testify in violation of her Fifth Amendment right against self-incrimination. The trial court was instructed to disregard the portions of respondent mother's improperly compelled testimony at a hearing in which she testified to her belief regarding the source of the minor child's injuries.

2. **Child Abuse, Dependency, and Neglect—neglect adjudication—failure to seek timely medical attention**

   The trial court did not err in its adjudication of neglect where it made sufficient findings, including respondent's decision to not seek medical attention for two days despite being on notice of the minor child's injuries. The findings were unaffected by the Fifth Amendment violation compelling respondent mother to testify.

3. **Child Abuse, Dependency, and Neglect—dependency adjudication—sufficiency of findings of fact—care or supervision—alternative child care arrangements**

   The trial court erred by adjudicating a child dependent where it failed to address the parent's ability to provide care or supervision and the availability to the parent of alternative child care arrangements.

4. **Child Abuse, Dependency, and Neglect—disposition order—ceasing reunification efforts—aggravating circumstances required in a prior order**

   The trial court failed to make adequate findings of fact in support of its decision to cease reunification efforts between respondent mother and her minor child in a child abuse, dependency, and neglect case. The trial court's determination as to the existence of

aggravating circumstances appeared for the first time in its dispositional order rather than in a prior order.

5. Child Abuse, Dependency, and Neglect—permanent plan—adoption—appropriate relative placements—sufficiency of findings of fact

The trial court erred in a child abuse, dependency, and neglect case by setting adoption as the minor child's permanent plan without making sufficient findings of fact as to whether appropriate relative placements existed. While the trial court may have been waiting for the Department of Social Services to complete its evaluation, that fact did not obviate the need for specific findings of fact under N.C.G.S. § 7B-903(a1).

Appeal by respondent from order entered 5 July 2016 by Judge Betty J. Brown in Guilford County District Court. Heard in the Court of Appeals 3 April 2017.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Social Services.

Elysia Jones for guardian ad litem.

N. Elise Putnam for respondent-appellant.

DAVIS, Judge.

This appeal involves a variety of issues stemming from the trial court's order adjudicating a juvenile to be abused, neglected, and dependent. Among the issues presented is whether a parent who was compelled to testify in a juvenile adjudication hearing was deprived of her Fifth Amendment right against self-incrimination when — despite her clear invocation of that right — the trial court ordered her to answer a question likely to elicit an incriminating response. A.S. ("Respondent") appeals from an order (1) adjudicating her daughter L.C. ("Lily")[1] to be an abused, neglected, and dependent juvenile; (2) ceasing reunification efforts; and (3) setting adoption as the juvenile's permanent plan along with a concurrent plan of guardianship. After careful review, we affirm in part, vacate in part, and remand.

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

Factual and Procedural Background

On 4 February 2016, the Guilford County Department of Social Services ("DSS") received a report alleging that Lily had been physically abused. Lily, who was less than eight months old at the time, had been admitted to Brenner Children's Hospital in Winston-Salem, North Carolina with various injuries, including three fractured ribs, a bruise consistent with a bite mark on her left shoulder, and bruises on both feet. Lily's femur was also injured, although the pediatrician could not conclusively state whether it was fractured.

At the time these injuries occurred, Respondent was living in an apartment with her adult sister ("Ida"), her friend ("Becky"), the minor children of Ida and Becky, and Respondent's boyfriend ("Matt"). After DSS became involved, Respondent, Ida, and Becky submitted to polygraph testing at the request of DSS regarding the cause of Lily's injuries, but Matt failed to do so. As a result, Respondent entered into a safety plan with DSS that barred Matt from having any future contact with Lily.

On 9 April 2016, DSS received another report that Lily had been physically abused based on her admission to Brenner Children's Hospital with new injuries, including a right fractured clavicle, hemorrhaging in her brain, bruising on various parts of her body, a swollen right eye, and a left rib fracture. Respondent admitted to a law enforcement officer that she had violated her safety plan by allowing Matt to care for Lily while she was at work on the evening of 7 April 2016. Respondent testified that when she came home from work at approximately 10:30 p.m., she noticed that Lily "was not acting like herself," "had bruises on her," and had one eye "rolled in the back of her head[.]" Respondent accused Matt of having harmed Lily and did not believe him when he denied responsibility for her injuries.

That night, Respondent gave Pedialyte to Lily but did not immediately seek medical attention for her because Respondent was afraid that DSS would "take [Lily] from me because [Matt] was not supposed to be there . . . ." Two days later — after having observed Lily alternate between acting normally and "[j]ust go[ing] into a daze" — Respondent took Lily to Thomasville Hospital. On 10 April 2016, Respondent was charged with misdemeanor child abuse, and Matt was charged with two counts of felony assault on a child inflicting serious injury.

On 11 April 2016, DSS filed a petition alleging that Lily was an abused, neglected, and dependent juvenile and obtained non-secure custody of her. At the time the petition was filed, both Respondent and Matt were confined in the Guilford County Jail on the above-referenced charges.

On 12 May 2016, an adjudicatory and dispositional hearing was held before the Honorable Betty J. Brown in Guilford County District Court. DSS called Respondent as its sole witness during the adjudicatory portion of the hearing. In an order entered on 5 July 2016, the trial court adjudicated Lily to be an abused, neglected, and dependent juvenile. In the dispositional portion of the order, the trial court ceased reunification efforts and ordered that the permanent plan for Lily be changed to adoption with a concurrent plan of guardianship. Respondent filed a timely notice of appeal.

Analysis

I. Adjudication

Respondent argues that the trial court erred in adjudicating Lily to be an abused, neglected, and dependent juvenile. We review the trial court's order of adjudication to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Q.A.*, __ N.C. App. __, __, 781 S.E.2d 862, 864 (2016) (citation, quotation marks, and brackets omitted). Findings of fact that are supported by competent evidence or are unchallenged by the appellant are binding on appeal. *In re A.B.*, __ N.C. App. __, __, 781 S.E.2d 685, 689, *disc. review denied*, __ N.C. __, 793 S.E.2d 695 (2016). "Such findings are . . . conclusive on appeal even though the evidence might support a finding to the contrary." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003). We review a trial court's conclusions of law *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

As an initial matter, Respondent argues that Finding No. 22 and its subparts in the trial court's 5 July 2016 order merely contain recitations of her testimony and, therefore, do not constitute actual findings of fact by the trial court. Finding No. 22 states, in relevant part, that at the 12 May 2016 hearing Respondent "proffered, in pertinent part, the following testimony" and then summarizes Respondent's testimony in 99 subparts. We agree with Respondent on this issue. *See In re Bullock*, 229 N.C. App. 373, 378, 748 S.E.2d 27, 30 ("Recitations of the testimony of each witness do not constitute findings of fact by the trial judge." (emphasis omitted)), *disc. review denied*, 367 N.C. 277, 752 S.E.2d 149 (2013). Accordingly, we do not treat those recitations of testimony as actual "findings" in conducting our analysis.

Respondent also challenges Findings Nos. 12-21, 25-29, and 33 on the ground that they are verbatim recitations of allegations contained in the petition and, as such, should be disregarded. As a general matter,

"the trial court's findings must consist of more than a recitation of the allegations" contained in the juvenile petition. *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (citation omitted). However,

> it is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party. Instead, this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did so, it is irrelevant whether those findings are taken verbatim from an earlier pleading.

In re J.W., __ N.C. App. __, __, 772 S.E.2d 249, 253, *disc. review denied*, 368 N.C. 290, 776 S.E.2d 202 (2015). Accordingly, we will only consider those findings that are, in fact, supported by evidence in the record regardless of whether they mirror the language used in the petition.[2]

The following findings of fact are supported by Respondent's own testimony: (1) in February 2016, Lily was admitted to Brenner Children's Hospital after having sustained numerous injuries, including three fractured ribs, multiple bruises, a bite mark on her shoulder, and a possible fractured femur (Finding No. 12); (2) at the time that these injuries occurred, Lily was living with Respondent and three other adults, including Matt (Finding No. 13); (3) at DSS's request, all of these adults except for Matt took a polygraph test regarding the cause of Lily's injuries (Finding No. 14); (4) in March 2016, Respondent and DSS entered into a safety plan that forbade Matt from having any future contact with Lily (Finding No. 15); (5) on 7 April 2016, Respondent left Lily in Matt's care (Finding No. 17); (6) when Lily was taken to the hospital on 9 April 2016, medical professionals discovered that she had suffered multiple injuries including a fractured collarbone, a brain hemorrhage, and bruising on various parts of her body, including her face (Finding No. 16); and (7) Respondent had noticed injuries to Lily at least two days prior to taking Lily to the hospital but had delayed seeking medical care because she feared DSS would take custody of the child based on her violation of her safety plan in allowing Matt to have contact with Lily (Finding Nos. 19, 24(d)).

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2. The mere fact that some of the trial court's findings may not be supported in the record constitutes harmless error to the extent that those findings are not required to sustain the trial court's ultimate determinations. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) (erroneous findings that are unnecessary to support adjudication of neglect do not constitute reversible error).

We must next determine whether the trial court's adjudication of Lily as an abused, neglected, and dependent juvenile was supported by adequate findings that were based upon competent evidence in the record.

A. Abuse

[1] An abused juvenile is defined, in pertinent part, as

> [a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
>
> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; [or]
>
> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]

N.C. Gen. Stat. § 7B-101(1)(a)-(b) (2015).

Although the trial court's order does not specify which particular findings provided the basis for its determination that Lily was an abused juvenile, it appears that this determination was primarily based upon Finding No. 24(b), wherein the trial court found that Respondent "did in fact know that [Matt] caused the first round of injuries that her child suffered in February 2016." Such knowledge would support a determination that Respondent "allow[ed] to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1)(b).

However, Respondent argues that Finding No. 24(b) was impermissibly based upon testimony by her that was elicited in violation of her right against self-incrimination under the Fifth Amendment to the United States Constitution. The standard of review for alleged violations of constitutional rights is *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed*, 363 N.C. 857, 694 S.E.2d 766 (2010).

The Fifth Amendment — which is applicable to the states through the Fourteenth Amendment — "privileges an individual not to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Debnam v. N.C. Dep't of Correction*, 334 N.C. 380, 384-85, 432 S.E.2d 324, 328 (1993) (citation, quotation marks, and emphasis omitted). Our Supreme Court has held that "[t]he

claim of privilege should be liberally construed." *Herndon v. Herndon*, 368 N.C. 826, 830, 785 S.E.2d 922, 925 (2016) (citation and quotation marks omitted).

It is well established that "[t]his Fifth Amendment protection extends to civil proceedings." *Id.* at 829, 785 S.E.2d at 925 (citation omitted). When the privilege is invoked in a civil case, "the finder of fact in a civil cause may use a witness' invocation of his fifth amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him." *In re Estate of Trogdon*, 330 N.C. 143, 152, 409 S.E.2d 897, 902 (1991) (citation omitted).

In the present case, Respondent received a summons ordering her to appear at the 12 May 2016 hearing. At the adjudicatory phase of the hearing, DSS's attorney called Respondent as its sole witness. At the beginning of her examination, the following exchange occurred between Respondent and DSS's counsel.

> Q. Has any one [sic] informed you that you have a right to plead the Fifth Amendment in regards to questions that may incriminate you, specifically, including incriminating you as to the charges that you're currently facing?
>
> A. Yes, sir.
>
> Q. And they also explained to you that should you decide to plead The Fifth, in this particular case, that The Court, under the case law, can take civil inference and infer that had you testified, and answered the questions asked, that your testimony would have been harmful to your case?
>
> A. Yes, sir.
>
> Q. And it's my understanding that you wish to proceed with this hearing?
>
> A. Yes, sir.

Respondent then began answering questions posed by DSS's attorney regarding the events that caused DSS to first become involved with Respondent's family in February 2016, including questions regarding Lily's initial injuries and hospitalization. However, as shown in the following exchange, after answering several questions regarding Matt's status under the safety plan entered as a result of Lily's February 2016 injuries, Respondent attempted to invoke her right against self-incrimination when she was explicitly asked who she thought was responsible for those injuries.

Q. And the first Safety Plan, back in February, was there anything that prevented [Becky or Ida] from being around the child?

A. They just couldn't be around her by theirself [sic] . . . .

Q. You couldn't either at first?

A. No, sir.

Q. Right, but [Matt] couldn't be around [Lily] at all?

A. Yes, sir.

Q. Why do you reckon the Department and you, entered into an agreement, that for some reason treated one out of those four people completely different?

. . . .

Q. Do you know why [Matt] was treated differently than the other three people in that Safety Plan?

A. Because he didn't take his lie detector test.

THE COURT: Because what?

A. He did not take his lie detector test.

Q. And everybody else did?

A. Yes, sir.

Q. So after you found that out, of the four people --

A. Yes, sir, and that's the first Safety Plan [sic] it's not the only Safety Plan.

Q. -- of those four people; you, [Becky, Ida, and Matt], those are the only four people that could have done it; right?

A. Yes, sir.

Q. Who did you think did it?

A. After everything that's done happened --

Q. Uh-Uh. *At that time, before the child got the next round of injuries, after [Matt] refused to cooperate with police, who did you think hurt your child; breaking three ribs, a leg, bite marks, and bruises to the feet?*

A. *I plead the Fifth.*

(Emphasis added.)

DSS's attorney argued that Respondent had waived her Fifth Amendment privilege by "open[ing] the door to this line of testimony through her prior testimony . . . ." After hearing arguments from both sides, the trial court ruled that Respondent had "waived her Fifth Amendment rights, and is required to answer the questions." Respondent proceeded to testify as to her belief that Matt had most likely been responsible for Lily's February 2016 injuries. In its subsequent order, the trial court found that Respondent "did in fact know that [Matt] caused the first round of injuries that her child suffered in February 2016."

Respondent contends on appeal that the trial court erred by ordering her to respond to the questions of the DSS attorney after she clearly invoked her right against self-incrimination. DSS, conversely, argues that her Fifth Amendment rights were not violated because during the initial portion of her testimony Respondent had voluntarily answered questions regarding some of the circumstances surrounding Lily's February 2016 injuries, thereby waiving her right to refuse to answer further questions on that topic.

Our Supreme Court has recently emphasized the importance of distinguishing between *compelled* witnesses and *voluntary* witnesses when analyzing whether a witness's Fifth Amendment rights have been violated:

> Depending on whether a witness is compelled to testify or testifies voluntarily, the right against self-incrimination operates differently. . . . *A compelled witness has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate.* . . . By contrast, a *voluntary* witness has the benefit of choosing whether to testify and determines the area of disclosure and therefore of inquiry. For that reason, a voluntary witness cannot claim an immunity from cross-examination on the matters he has himself put in dispute.

Herndon, 368 N.C. at 830, 785 S.E.2d at 925 (internal citations and quotation marks omitted and emphasis added).

This distinction between compelled and voluntary witnesses was explained in *Brown v. United States*, 356 U.S. 148, 2 L. Ed. 2d 589 (1958), a case that was relied upon by our Supreme Court in *Herndon*. As the

United States Supreme Court observed in *Brown*, a voluntary witness is treated differently from a compelled witness because the voluntary witness "has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, *not to testify at all*." *Id.* at 155, 2 L. Ed. 2d at 597 (emphasis added).

Accordingly, when a witness testifies *voluntarily*, the Fifth Amendment privilege will not provide a shield against questions as to matters that the witness has herself put into contention. When a witness is *compelled* to testify, however, her right to assert the privilege is preserved until such time as an answer to a particular question would incriminate her. At that point, the witness must decide whether to invoke the privilege or waive it. *See Herndon*, 368 N.C. at 830, 785 S.E.2d at 925. Once "the individual invokes the fifth amendment privilege, the trial court [then] must determine whether the question is such that it may reasonably be inferred that the answer may be self-incriminating. In situations where the trial court determines that the answer will not be self-incriminating, the trial court may compel the individual to answer the question." *State v. Eason*, 328 N.C. 409, 418-19, 402 S.E.2d 809, 813 (1991) (internal citations omitted).

Here, Respondent was a compelled witness rather than a voluntary witness because she was called by DSS and did not have a choice regarding whether or not to testify. As explained in *In re Davis*, 116 N.C. App. 409, 448 S.E.2d 303, *disc. review denied*, 338 N.C. 516, 452 S.E.2d 808 (1994), a respondent at a hearing upon a juvenile petition may be compelled by the petitioner to give testimony even in the absence of a subpoena. *See id.* at 412, 448 S.E.2d at 305 (holding that despite the respondent's objection to testifying, "DSS was . . . free to call [the respondent] to testify as an adverse party when she appeared at the proceeding, and a subpoena was not required").

Thus, this case involves a situation in which Respondent, a compelled witness, invoked the Fifth Amendment when DSS directly asked her who she thought had hurt her child. At the time DSS's attorney propounded this question, child abuse charges were pending against Respondent related to her decision to leave Lily in Matt's care on 7 April 2016. Accordingly, her testimony that she thought Matt had been responsible for the February 2016 injuries to Lily was clearly incriminating as it constituted evidence that she was aware leaving Lily with Matt for a second time created a substantial risk of harm to the child. *See* N.C. Gen. Stat. § 14-318.2(a) (2015) (providing that a person may be convicted of

child abuse who "allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means . . .").

DSS argues that "having voluntarily and knowingly waived her Fifth Amendment privilege, [Respondent] could not then pick and choose which questions she wanted to answer." The fatal flaw with this argument, however, is that it incorrectly applies the Fifth Amendment standard applicable to voluntary witnesses rather than that applicable to compelled witnesses. Because, as discussed above, Respondent was a compelled witness, she did *not* "ha[ve] the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward h[er] version of the facts and h[er] reliability as a witness, *not to testify at all*." *Brown*, 356 U.S at 155, 2 L. Ed. 2d at 597 (emphasis added).

Our decision in this case is fully consistent with our Supreme Court's recent decision in *Herndon*. In that case, the plaintiff sought a domestic violence protective order ("DVPO") against his wife on the ground that she had secretly drugged his food on several occasions. *Herndon*, 368 N.C. at 827, 785 S.E.2d at 923. At the DVPO hearing, the plaintiff presented several witnesses and then rested his case. When the defendant's attorney called the defendant to the stand to testify on her own behalf, the following exchange occurred:

> [DEFENSE COUNSEL]: Call [the defendant].
>
> THE COURT: All right. Before we do that, let me make a statement. You're calling her. She ain't going to get up there and plead no Fifth Amendment?
>
> [DEFENSE COUNSEL]: No, she's not.
>
> THE COURT: I want to make sure that wasn't going to happen because you—somebody might be going to jail then. I just want to let you know. I'm not doing no Fifth Amendment.
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: Okay. Call your witness.

Id. at 827, 785 S.E.2d at 923-24.

Following the direct examination of defendant by her counsel, the trial court proceeded to ask her questions regarding the plaintiff's allegations. The trial court subsequently granted the plaintiff's DVPO. *Id.* at 828, 785 S.E.2d at 924.

On appeal, a divided panel of this Court held that the defendant's Fifth Amendment right against self-incrimination was violated when the trial court required her to choose between "forgoing her right to testify at a hearing where her liberty was threatened or forgoing her constitutional right against self-incrimination." *Herndon*, __ N.C. App. __, __, 777 S.E.2d 141, 144 (2015), rev'd, 368 N.C. 826, 785 S.E.2d 922 (2016). Moreover, the majority determined that the trial court had asked questions exceeding the scope of the defendant's testimony on direct examination and that "[t]he trial court's threat to imprison [her] if she invoked her Fifth Amendment rights may have forced [her] to answer these questions differently than she otherwise would have if she felt free to assert that constitutional right." *Id.* at __, 777 S.E.2d at 145. For these reasons, the majority vacated the trial court's order and remanded for a new hearing in which the trial court was directed to disregard the defendant's testimony from the previous hearing. *Id.* at __, 777 S.E.2d at 145.

The Supreme Court reversed the majority's decision, stating the following:

> *At no point during direct examination or the trial court's questioning did defendant, a voluntary witness, give any indication that answering any question posed to her would tend to incriminate her.* Put simply, defendant never attempted to invoke the privilege against self-incrimination . . . . We are not aware of, and the parties do not cite to, any case holding that a trial court infringes upon a witness's Fifth Amendment rights when the witness does not invoke the privilege.

Herndon, 368 N.C. at 832, 785 S.E.2d at 926 (emphasis added).

Thus, the present case differs from *Herndon* in two critical respects: (1) Respondent here was a compelled witness rather than a witness who voluntarily took the stand as the witness did in *Herndon*; and (2) unlike the defendant in *Herndon*, Respondent explicitly invoked her Fifth Amendment right when faced with a question that would — and did — elicit an incriminating answer.

Accordingly, we conclude that Respondent was deprived of her constitutional right against self-incrimination when the trial court ordered her to answer the question of DSS's attorney regarding who she thought was responsible for Lily's February 2016 injuries prior to her decision to leave Lily in Matt's care on 7 April 2016. Consequently, the trial court was not permitted to consider her response to this question in the course of making its determination as to whether Lily was an abused juvenile.

Having determined that a Fifth Amendment violation occurred, we must still determine whether Respondent was actually prejudiced. *See Hill v. Cox*, 108 N.C. App. 454, 461, 424 S.E.2d 201, 206 (1993) ("[E]very violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt." (citation, quotation marks, and ellipsis omitted)).

Based on our review of the trial court's order, it appears that (1) the challenged portion of Respondent's testimony likely constituted the primary basis for the trial court's finding that Respondent "did in fact know that [Matt] caused the first round of injuries that her child suffered in February 2016[;]" and (2) this finding, in turn, served as the primary ground for the trial court's adjudication of Lily as an abused juvenile. Although it is conceivable that the trial court *might* have still made such a finding — and an ensuing adjudication of Lily as an abused juvenile — even in the absence of the testimony elicited in violation of Respondent's right against self-incrimination, we are not at liberty to speculate as to the precise weight the trial court gave to this testimony in reaching its conclusion that Lily was an abused child. *See*, *e.g.*, *Alvarez v. Alvarez*, 134 N.C. App. 321, 327, 517 S.E.2d 420, 424 (1999) ("Given our inability to determine the weight that the trial court assigned to these erroneous findings of facts, its use of these findings to support the apparent conclusions of law . . . requires the reversal and remand of its judgment." (citation omitted)).

Thus, because we cannot ascertain with any degree of certainty whether the trial court's adjudication of abuse would have been made even absent Respondent's improperly compelled testimony, we are unable to uphold that adjudication. We therefore vacate the adjudication of abuse and remand for further proceedings. On remand, we direct the trial court to disregard the portions of Respondent's testimony at the 12 May 2016 hearing in which she testified to her belief as of 7 April 2016 regarding the source of Lily's injuries from February 2016.

B. Neglect

[2] N.C. Gen. Stat. § 7B-101(15) includes in the definition of a neglected juvenile a juvenile "who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who is not provided necessary medical care; . . . or who lives in an environment injurious to the juvenile's welfare . . . ." N.C. Gen. Stat. § 7B-101(15). Additionally, "[t]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile

or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline in order to adjudicate a juvenile neglected." *In re L.Z.A.*, __ N.C. App. __, __, 792 S.E.2d 160, 168-69 (2016) (citation, quotation marks, and emphasis omitted).

We are satisfied that the trial court made findings supported by competent evidence sufficient to establish that Lily was a neglected juvenile and that those findings were unaffected by the above-referenced Fifth Amendment violation. The trial court found that Respondent made the decision to leave Lily in Matt's care on 7 April 2016 despite knowing that the safety plan in effect at that time specifically barred him from having contact with Lily. Moreover, after learning of the significant injuries to Lily on that date, Respondent waited two days to seek medical treatment for her because of Respondent's concern that DSS would "take [Lily] from me because [Matt] was not supposed to be there . . . ."

These facts adequately support an adjudication of neglect. Indeed, Respondent herself testified as to the distressed state Lily was in on 7 April 2016, including the fact that Lily "was not acting like herself," "had bruises on her," and had one eye "rolled in the back of her head[.]" Respondent's decision to not seek medical attention for two days despite being on notice of Lily's condition fully supports the trial court's adjudication of neglect. *See State v. Stevens*, 228 N.C. App. 352, 357, 745 S.E.2d 64, 68 ("[A] [parent's] delay in seeking necessary medical care for a child supported the conclusion of law that the child was neglected." (citation and quotation marks omitted)), *appeal dismissed and disc. review denied*, 367 N.C. 256, 749 S.E.2d 886 (2013).

C. Dependency

[3] Respondent next contends that the trial court failed to make adequate findings to support its adjudication of dependency. A "dependent juvenile" is defined, in pertinent part, as one whose "parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9). In order to sustain an adjudication of dependency, "the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007).

DSS acknowledges that the trial court failed to make findings of fact addressing either of these prongs. Accordingly, we must also vacate the trial court's adjudication of dependency and remand for additional findings on these issues. *See id.* (remanding for "entry of findings as to the ability of the parent to provide care or supervision and the availability of alternative child care arrangements" (emphasis omitted)).

II. Disposition

Respondent next challenges several aspects of the dispositional portion of the trial court's order. Following an adjudication of neglect, abuse, or dependency, the trial court must enter an appropriate disposition based on the juvenile's best interests. *See* N.C. Gen. Stat. § 7B-903(a) (2015). We review a trial court's determination regarding the best interests of a child under an abuse of discretion standard. *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 9 (2013).

A. Ceasing Reunification Efforts

[4] Respondent contends that the trial court failed to make adequate findings of fact in support of its decision to cease reunification efforts between her and Lily. The pertinent section of the Juvenile Code that governs initial dispositional hearings provides as follows:

> (c) If the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to any of the following:
>
> (1) A court of competent jurisdiction *has determined* that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
>
> a. Sexual abuse.
>
> b. Chronic physical or emotional abuse.
>
> c. Torture.
>
> d. Abandonment.
>
> e. Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.

> f. Any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.

N.C. Gen. Stat. § 7B-901(c) (2015) (emphasis added).[3]

In the present case, the trial court ceased reunification efforts based upon its finding that "this Court has determined that aggravated circumstances exist because [Respondent] has committed or encouraged the commission of, or allowed the continuation of" the aggravated circumstances set forth in N.C. Gen. Stat. § 7B-901(c)(1)b, c, and f.

However, in the recent case of *In re G.T.* __ N.C. App. __, 791 S.E.2d 274 (2016), *appeal docketed*, No. 420A16 (N.C. Nov. 17, 2016), a divided panel of this Court construed N.C. Gen. Stat. § 7B-901(c) as follows:

> [T]he dispositional court must make a finding that "[a] court of competent jurisdiction has determined" that the parent allowed one of the aggravating circumstances to occur. We conclude that the language at issue is clear and unambiguous and that in order to give effect to the term "has determined," *it must refer to a prior court order*. The legislature specifically used the present perfect tense in subsections (c)(1) through (c)(3) to define the determination necessary. Use of this tense indicates that the determination must have already been made by a trial court — either at a previously-held adjudication hearing or some other hearing in the same juvenile case, or at a collateral proceeding in the trial court.

Id. at __, 791 S.E.2d at 279 (emphasis added).

We are bound by the majority's decision in *G.T. See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent,

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3. We note that N.C. Gen. Stat. § 7B-901(c) was amended by the General Assembly in 2016 to provide that even if the trial court finds that one of the aggravating circumstances set forth in N.C. Gen. Stat. § 7B-901(c)(1) exists, the trial court is not required to cease reunification efforts if it "concludes that there is compelling evidence warranting continued reunification efforts[.]" *See* 2016-3 N.C. Adv. Legis. Serv. 49. That statutory language was made effective 1 July 2016. *See* 2016-3 N.C. Adv. Legis. Serv. 302. However, we apply the version of the statute in effect on the date — 12 May 2016 — that the trial court held the dispositional hearing and rendered its decision. *See In re E.M.*, __ N.C. App. __, __, 790 S.E.2d 863, 870 (2016) (applying version of statute in effect when dispositional hearing was held and decision rendered rather than version in effect at time order was filed).

unless it has been overturned by a higher court."). Here, the trial court's determination as to the existence of aggravating circumstances under N.C. Gen. Stat. § 7B-901(c) appears for the first time in its 5 July 2016 dispositional order rather than in a prior order. Thus, pursuant to *G.T.*, the trial court's conclusion that reasonable reunification efforts must cease pursuant to N.C. Gen. Stat. § 7B-901(c)(1) was erroneous. Accordingly, we vacate that portion of the dispositional order and remand to the trial court.

B. Findings Regarding Appropriate Relative Placements

[5] Finally, Respondent contends that the trial court erred in setting adoption as Lily's permanent plan without making sufficient findings of fact as to whether appropriate relative placements existed for her. Section 7B-903 of the Juvenile Code prescribes the dispositional alternatives available to a trial court following an adjudication of abuse, neglect, or dependency. *See* N.C. Gen. Stat. § 7B-903. Subsection (a1) provides, in pertinent part, as follows:

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

N.C. Gen. Stat. § 7B-903(a1).

We have held that a "[f]ailure to make specific findings of fact explaining [why] the placement with the relative is not in the juvenile's best interest will result in remand." *In re A.S.*, 203 N.C. App. 140, 141-42, 693 S.E.2d 659, 660 (2010) (citation omitted). Here, the trial court found that "[r]elatives have been identified as potential placement options for the juvenile. The mother provided the maternal great-aunt [Ms. J.] as a possible placement for the juvenile. The Department is in the process of scheduling a home study for [Ms. J.]." The court also made a finding that "[t]he Department is evaluating relatives, and if the home study on a relative is approved, the child will be placed there or otherwise in a foster home."

Despite these findings, the trial court proceeded to determine that neither custody nor legal guardianship with a relative should be pursued

and instead set the primary permanent plan as adoption along with a concurrent permanent plan of guardianship. We note that the order does not specify whether adoption or guardianship would be with a relative. While the trial court may have been taking a cautious route by waiting for DSS to complete its evaluation of potential relative placements, this did not obviate the need for specific findings of fact under N.C. Gen. Stat. § 7B-903(a1). Because the trial court failed to make the required findings, we vacate and remand this part of the dispositional order in order for the trial court to make appropriate findings concerning Lily's possible placement with relatives.

Conclusion

For the reasons stated above, we affirm the trial court's adjudication of neglect but vacate the trial court's adjudications of abuse and dependency. We also vacate the dispositional portion of the court's 5 July 2016 order with respect to its decision to cease reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c) and its failure to make sufficient findings of fact concerning Lily's potential placement with a relative as required by N.C. Gen. Stat. § 7B-903(a1). We remand for further proceedings not inconsistent with this opinion.[4]

AFFIRMED IN PART; VACATED IN PART; AND REMANDED WITH INSTRUCTIONS.

Judges BRYANT and TYSON concur.

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4. On remand, the trial court may, in its discretion, choose to take new evidence. *See In re J.M.D.*, 210 N.C. App. 420, 428, 708 S.E.2d 167, 173 (2011) ("Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court." (citation and quotation marks omitted)).

MILLER v. MILLER

[253 N.C. App. 85 (2017)]

WAYNE MORGAN MILLER, PLAINTIFF
v.
CYNTHIA BAILEY MILLER AKA CYNTHIA BAILEY, DEFENDANT

AND

CYNTHIA BAILEY MILLER, PLAINTIFF
v.
WAYNE MORGAN MILLER, DEFENDANT

No. COA16-486

Filed 18 April 2017

1. Divorce—setting aside divorce judgment—Rule of Civil Procedure 60(b)—equitable distribution—subject matter jurisdiction

The trial court did not abuse its discretion by entering a decree setting aside a divorce judgment under Rule of Civil Procedure 60(b). The trial court had subject matter jurisdiction over defendant wife's equitable distribution counterclaim as stated in her amended answer to the divorce complaint.

2. Divorce—equitable distribution—in-kind distribution—sale of real property—marital home—valuation of marital and divisible assets

The trial court erred in an equitable distribution case by failing to provide for an in-kind distribution and ordering the sale of real property (the marital home and the Virginia property). The case was reversed and remanded for valuation of each marital and divisible asset, and to determine the total net value of the entire marital estate.

3. Equitable Distribution—distributional factors—failure to make findings

The trial court erred in an equitable distribution case by failing to make findings and give proper consideration to plaintiff husband's evidence of distributional factors. The case was remanded for findings regarding all distributional factors for which evidence was presented and to determine whether an equal division was equitable.

4. Divorce—equitable distribution—valuation—Timber Agreement—speculation

The trial court erred in an equitable distribution case by its valuation of a Timber Agreement at $5,000.00. It involved timber of an unknown variety, age, and quantity, and was not supported by competent evidence.

5. Divorce—equitable distribution—classification—car—sufficiency of findings

The trial court erred in an equitable distribution case by classifying a 2011 Suburban and the debt it secured as plaintiff husband's separate property and debt. The case was remanded for clear findings to support the classification, valuation, and distribution of the Suburban and its debt.

Appeal by plaintiff Wayne Morgan Miller from judgment and orders entered 17 March 2014, 16 July 2014[1], and 17 November 2015 by Judge Lunsford Long in District Court, Chatham County. Heard in the Court of Appeals 3 November 2016.

Doster, Post, Foushee, Post & Patton, P.A., by Norman C. Post, Jr., for plaintiff-appellant.

Cynthia Bailey, pro se.

STROUD, Judge.

Plaintiff Wayne Morgan Miller ("Husband") appeals from several orders entered by the district court related to his divorce from defendant Cynthia Bailey Miller ("Wife"). Husband raises both procedural and substantive issues with the trial court's equitable distribution order. Although the trial court properly entered its order vacating the divorce judgment under Rule 60(b) and therefore had jurisdiction over the equitable distribution claims, we remand for the trial court to address substantive issues contained in the equitable distribution order itself.

Facts

The parties were married on 4 July 1983 and had no children. On 27 July 2011, Wife filed her complaint for divorce from bed and board and equitable distribution; the parties were still living together at that time. Husband filed his answer on 23 September 2011, which alleged in part that "[n]o facts exist to justify an unequal division of marital property." His answer also alleged that the parties were "not living separate and apart." Wife filed a motion to amend her complaint, and after the trial court granted the motion, Wife filed her amendment on 12 October 2011, adding detailed factual allegations to the fault grounds of her

1. Husband's notices of appeal for these earlier orders are in a referred motion to amend the record on appeal, which we have granted.

divorce from bed and board claim. On 3 January 2012, the trial court began the hearing on Wife's claim for divorce from bed and board. That same day, a "Memorandum of Judgment/Order" was apparently entered without prejudice which granted Wife exclusive possession of the marital home, prohibited the parties from disposing of personal property, and provided that "[t]his matter is continued until January 23, 2012".[2] On 19 January 2012, Husband filed his answer to the amended complaint. On 30 January 2012, the hearing on divorce from bed and board concluded, and on 15 March 2012, the district court entered an order granting Wife a divorce from bed and board and exclusive possession of the marital home, giving Husband ten days to vacate the home. The district court found Wife's testimony "more credible" than Husband's. The trial court found that Husband had admitted to committing adultery during the marriage and that he was "an excessive user of alcohol[.]" When drunk, Husband called Wife "stupid" and many derogatory and profane names. He had also told her that he wished she were dead and "threatened to punch [Wife] in her face on occasions when the [Wife] asked him questions about their properties."

In the divorce from bed and board order, the trial court also found that Wife had found evidence of Husband's affair at their Virginia residence, including a used condom, an earring, and "lips painted with lipstick on the bathroom mirror [and] the words 'Love You' underneath them." The trial court also found that Husband had been asked "whether he recently acquired a Virginia driver's license, and he falsely said 'no' under oath." Husband had also registered a vehicle in Virginia, using a Virginia address, although he had been living in North Carolina since "as early as June of 2010." He also "continued to have his ex-girlfriend of 26 years ago as a beneficiary on his life insurance policy."

A series of motions, countermotions, and orders arising from disputes regarding various items of personal property and Husband's move out of the marital home followed. The parties finally began living separate and apart on 21 March 2012. On 16 April 2012, the trial court entered an order appointing a referee to inventory the parties' marital and separate personal property. In addition, on the same date, the trial court

2. Only the first page of this memorandum of order is in the record; the second page where the signatures of the parties and judge would normally appear is not. We note this problem mainly because the last page is missing from several of the orders in the record, but fortunately, none of those orders are directly material to the legal issues presented. We are also not positive exactly what "matter" was continued until 23 January, but it was probably the divorce from bed and board hearing.

entered a "Consent Order to Add Supplemental Pleading" which stated in relevant part as follows:

> 1. Since the filing of the complaint certain facts and events have occurred which makes it just to file a supplemental proceeding, to wit: the parties hereto have legally separated.
>
> 2. The Parties consent to republish the Second Claim for Relief as set forth in the original complaint in which both parties join in the relief sought. The Parties hereto do so move and the motion is granted by the Court.
>
> 3. The Defendant does not pray that an unequal division of the marital property be made.
>
> 4. Said Second Claim as contained in Plaintiff's Complaint is hereby republished as of the date of entry of this Consent Order.
>
> 5. The Defendant's defense to dismiss the Equitable Distribution claim due to it being filed before the date of separation is hereby withdrawn by the Defendant.

The parties engaged in extensive discovery related to equitable distribution, the referee's report was filed, and both parties filed various motions regarding discovery and valuation of property, which led to the trial court entering several orders based on these motions. On 12 June 2012, Husband filed a motion for interim distribution, requesting sale of the marital home, as well as distribution of various items of personal property to him. On 3 December 2012, the trial court apparently entered a consent order on a "Memorandum of Judgment/Order" form in which the parties agreed that the fair market value of the marital home as of the date of separation was $250,173.00; they also agreed that the fair market value of the Virginia real property as of the date of separation was $87,200.00.[3] The parties attended mediation of the equitable distribution claim on 17 December 2012 but did not reach an agreement.

On 22 March 2013, Husband filed a complaint for absolute divorce. Wife filed a motion for extension of time to answer. Husband filed a motion for summary judgment on 22 April 2013, alleging that "there is no genuine issue of a material fact and [Husband] is entitled to an absolute divorce as a matter of law." Husband's motion also noted: "In addition,

3. Again, the signature page of this consent order is not in our record.

[Husband] requests that the Court take judicial notice of the entire files in those actions between the same parties hereto being 12 CVD 288, and 11 CVD 701."[4] Wife filed her answer on 16 May 2013, admitting the date of separation and alleging that the parties "currently have pending claims for equitable distribution in Chatham County District Court Case No. 11 CVD 701." The district court entered an order on 22 May 2013 granting Husband's claim for an absolute divorce while noting that "[a]ll existing issues raised in 11 CVD 701 between the same parties hereto should survive this absolute divorce."

On 3 June 2013, Husband filed a motion to continue the equitable distribution trial scheduled for the next day and a motion for the trial judge to be recused on the basis that Husband thought the judge was unable to "complete the proceedings in a fair and impartial manner." The trial court denied the motions but the trial was continued to 24 June 2013 after Husband's counsel was granted leave to withdraw from the case. On 24 June 2013, Husband's new counsel appeared but the trial was again continued.

On 1 July 2013, Husband's new counsel made an oral motion to amend his pleadings to seek an unequal distribution in Husband's favor; Wife did not oppose this motion and the trial court entered an order allowing it on 19 July 2013. But on 5 August 2013, Husband's legal strategy changed course and he filed a motion to dismiss Wife's equitable distribution claim for lack of subject matter jurisdiction, since the parties were not yet separated when the claim was filed. Husband alleged that he had not counterclaimed for equitable distribution and that the divorce from bed and board action in which Wife filed her claim was resolved on 15 March 2012 upon entry of the order granting divorce from bed and board. He also alleged that Wife had not filed any supplemental pleadings containing an equitable distribution claim and that the parties had already been divorced, ending Wife's ability to bring a claim for equitable distribution.

Wife sought to preserve her equitable distribution claim on all fronts. In the divorce from bed and board case, she filed an affidavit opposing Husband's motion to dismiss her equitable distribution claim;

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4. File No. 11 CVD 701 is Wife's claim for divorce from bed and board and equitable distribution; File No. 12 CVD 288 is Wife's claim for a domestic violence protective order which was filed on 21 March 2012. Husband moved out of the martial home as a result of the *ex parte* domestic violence protective order entered on 21 March 2012, which was a few days earlier than he would have been required to move based upon the order for divorce from bed and board.

in the absolute divorce case, she filed a Rule 60(b) motion asking the district court to set aside the absolute divorce judgment and allow her to file a new answer including a counterclaim for equitable distribution in the divorce case. The district court held a hearing on the motions filed by both parties on 23 October 2013 and rendered a ruling in open court, with both parties present, declaring that the court was granting Wife's motion to set aside the divorce judgment and allowing her to file a counterclaim for equitable distribution and dismissing Husband's motion to dismiss Wife's equitable distribution claim in the divorce from bed and board case.

Before the court filed a written order based upon its rendition of the ruling on 23 October 2013, Husband was remarried, on 28 October 2013, in Virginia. On 10 December 2013, Husband filed a motion to re-open evidence, noting that at the time of the hearing on 23 October 2013, he had not re-married, but that subsequent to the hearing and prior to the entry of an order vacating the divorce judgment, he had remarried. Thus, Husband argued that he "should be afforded an opportunity to present evidence to [the district court] as to his remarriage since the entry of an order vacating his divorce judgment would not be in any way equitable and would create great legal hardship for him, additionally the entry of such order would interfere with his right to remarry." Further, Husband alleged that "[t]he entry of an order vacating the divorce judgment is unnecessary given that [the district court] is prepared to enter an order dismissing [Husband's] motion to dismiss equitable distribution in 11 CVD 701 for lack of subject matter jurisdiction, and thus [Wife] will not be prejudiced."[5]

Husband also submitted his requested findings of fact for the court's "order vacating the divorce judgment entered in this action[,]" including that he began living with Dorothy Virginia Brinkley in January 2013 and that they then married on 28 October 2013. He noted that when he heard the trial court's

> declaration made in open Court on October 23, 2013, that being that it was going to vacate the otherwise properly entered judgment of absolute divorce in this action, he informed Ms. Brinkley of this and Ms. Brinkley expressed concern about being unable to marry [Husband] for a considerable period of time in the event that an order

5. Since Husband appealed from the trial court's order dismissing his motion in 11 CVD 701, his allegation that vacating the divorce judgment would be "unnecessary" and Wife would not be prejudiced seems disingenuous at best.

> was actually entered vacating the divorce judgment and [Husband] was concerned about being able to maintain his relationship with Ms. Brinkley without being able to marry her for a considerable period of time. [Husband] loved Ms. Brinkley and did not want to lose the relationship. Ms. Brinkley was seventy-one years old as of October 23, 2013.

The trial court held a hearing on 23 January 2014 regarding Husband's motion to reopen evidence. Husband testified that he married Ms. Brinkley five days after the 23 October 2013 hearing, on 28 October 2013, and they had created and signed a prenuptial agreement during the time between the hearing and the marriage.[6] After hearing the additional evidence, the trial judge noted that his "inclination is to find the evidence is not persuasive[.]"

Near the end of the hearing, after Wife's counsel noted that he had never faced this situation, the court agreed, noting: "I don't think any human being ever has, so we're all sailing uncharted seas here." In trying to figure out how to address the motions at issue, Husband's counsel argued that the court needed "to make findings about the new evidence that [it] heard and it all needs to be embodied in one order, and you can say that despite, uh it-it being equitable relief that, in your discretion, you don't think [Husband] having two wives is a problem."

The trial court replied:

> I don't believe there's any prejudice to him that cannot be ameliorated by a remarriage, and I believe he married with full knowledge of the Court's intent and that [the], um, marriage should not be an impediment to the granting of the motion under these circumstances, and the motion should be allowed.

After more back and forth with Husband's trial counsel, the Court reiterated its position:

> THE COURT: ---- he attempted to enter a marriage with full knowledge of the Court's intent, and I think it was a tactical marriage, entered for tactical reasons only, as demonstrated by the circumstances and by the prenuptial

6. October 23, 2013 was a Wednesday, and Husband was remarried on the following Monday, 28 October 2013, so they got the prenuptial agreement drafted and executed in just two business days.

> agreement and what its provisions appear to be. It doesn't appear to be a bona fide marriage that has any legitimate purpose other than to circumvent the Court's intended ruling, and you can put that in the order if you like, [Wife's counsel]. And he can live with the consequences on him and her because he made the decision to contract it. So, that's my decision.

On 17 March 2014, the court entered its order granting Wife's Rule 60(b) motion and setting aside the 22 May 2013 divorce judgment. In its very long and detailed order, the court addressed much of the procedural history of the various cases as summarized above and found that the hearing had been held on the motion on 23 October 2013 and before Wife's counsel completed drafting an order, Husband "proceeded to get remarried[.]" The order granting Wife's 60(b) motion included numerous findings, including that:

> 16. At the time of the entry of the Absolute Divorce Judgment in this action, *both parties* were operating under the *unequivocal belief* that both parties had pending claims for equitable distribution in the companion court action. This was evident based upon the actions of *both parties* in vigorously and continuously pursuing their equitable distribution claims in the companion court action for the 13 month period prior to the entry of the Absolute Divorce Judgment in this court action. This was also evident given the court filings of *both parties* in this court action, including the fact that [Husband] and his then counsel . . . submitted the Absolute Divorce Judgment to the Court for signature which contained express language stating that both parties have "pending, equitable distribution claims" in the companion court action and that these claims should be reserved for future hearing.
>
> 17. Nevertheless, *after* entry of the Absolute Divorce Judgment in this court action, [Husband] filed a Rule 12(b)(1) Motion to Dismiss as to [Wife's] equitable distribution claim in the companion court action. The Motion to Dismiss was filed in the companion court action on August 5, 2013.
>
> 18. Contrary to his earlier indications, [Husband] now contends that [Wife] does not have a valid, pending claim for equitable distribution in the companion court action

> and further contends that it is too late for [Wife] to file a new claim for equitable distribution in this action, in the companion court action or otherwise since the parties are now divorced.
>
> 19. In order to prevent the great injustice of [Wife] potentially being denied the right to proceed with an equitable distribution claim due to this newfound contention of [Husband], it is necessary to set aside the Absolute Divorce Judgment in its entirety and to allow [Wife] to file a counterclaim for equitable distribution in this court action.

(Emphasis in original).

In addition, while the order noted that Wife initially filed her request for equitable distribution prematurely, the court also found that "[i]n the Consent Order to Add Supplemental Pleading, [Husband] expressly joined in the request for an equitable distribution[.]" The order includes detailed findings addressing all of the many "Actions Taken in the Companion Court Action by Both Parties in Pursuit of their Respective Equitable Distribution Claims" and then finds:

> 42. At the time of the entry of the Absolute Divorce Judgment in this court action, both parties reasonably believed that the Consent Order to Add Supplemental Pleading effectively established the parties' respective equitable distribution claims in the companion court action, and [Wife] had no knowledge otherwise until the Rule 12(b)(1) Motion to Dismiss was raised.

The court found that Wife "reasonably relied" on Husband's statements and actions and reasonably believed "that both parties had valid equitable distribution claims pending[.]" Additionally, the trial court concluded in its findings that the parties had a "mutual belief" that they both had claims for equitable distribution pending at the time the trial court entered its absolute divorce decree.

The trial court also explicitly described its concerns regarding whether its ruling dismissing Husband's motion in the divorce from bed and board action would be sufficient to protect Wife's claim:

> 118. The Court believes that [Husband's] Rule 12(b)(1) Motion to Dismiss in the companion court action should be denied. The decision as to denying said Motion in the companion court action was made after much thought and consideration. However, the Court does have concerns as

> to whether the appellate courts will come to the same conclusion despite the clearly expressed intent of the parties contained in the Consent Order to Add Supplemental Pleading. The concern is strong enough for the Court to believe that this Rule 60(b) Order should be entered to ensure that [Wife] can file a counterclaim in this action so that she can pursue her right to equitable distribution. To refuse the granting of this Rule 60(b) Order in this action would allow [Husband] to potentially benefit from a mutual mistake.
>
> 119. [Husband] has the right to appeal the Court's decision in the companion court action (as to the denial of his rule 12(b)(1) Motion to Dismiss). This Court is fully aware that the North Carolina Court of Appeals or a higher authority could determine that this Court should have granted [Husband's] Rule 12(b)(1) Motion to dismiss in the companion court action. The legal issues raised in the companion court action are very complex and the matter could be decided either way on appeal. The likelihood of the North Carolina Court of Appeals determining that no valid equitable distribution claims exist in the companion court action weighs heavily on this Court due to the great prejudice that would result to [Wife] under the circumstances. The Court cannot simply wait to set aside the Absolute Divorce Judgment pending a decision from the North Carolina Court of Appeals in the companion court action due to the great risk and prejudice that [Wife] would face by delaying the ruling in this matter. The only way to ensure that [Wife] has a valid equitable distribution claim is to set aside the Absolute Divorce Judgment entered in this action and allow [Wife] to file a counterclaim for equitable distribution. Justice requires that this occur now.

The court also entered its order denying Husband's 12(b)(1) motion to dismiss Wife's equitable distribution claim in the divorce from bed and board action on 17 March 2014. In that even more extensive order, the trial court made the following relevant conclusions of law:

> 4. Rule 15(d) of the North Carolina Rules of Civil Procedure allows for defective pleadings to be corrected by the filing of a supplemental pleading.

5. Rule 13(e) of the North Carolina Rules of Civil Procedure allowed [Husband] the right to pursue his own counterclaim for equitable distribution by supplemental pleading.

6. The entry of the Consent Order to Add Supplemental Pleading, the "republishing" of the second claim for relief in [Wife's] original complaint (for equitable distribution) as of April 16, 2012, and the parties' act of joining in the relief sought therein effectively established [Wife's] claim for equitable distribution.

7. Further, [Wife's] various court filings after entry of the Consent Order to Add Supplemental Pleading further support the conclusion that [Wife] effectively established a valid claim for equitable distribution[.]

8. The entry of the Consent Order to Add Supplemental Pleading, the "republishing" of the second claim for relief in [Wife's] original complaint (for equitable distribution) as of April 16, 2012, and [Husband's] act of joining in the relief sought therein effectively established [Husband's] claim for equitable distribution.

9. Further, [Husband's] various court filings after entry of the Consent Order to Add Supplemental Pleading further support the conclusion that [Husband] effectively established a valid claim for equitable distribution[.]

10. In the event the Consent Order to Add Supplemental Pleading and any subsequent filings in this court action did not effectively establish a claim for equitable distribution for either party or in the event that it is determined that no valid claim for equitable distribution was filed by either party in this court action, then [Husband] is still estopped from defeating [Wife's] right to pursue a claim for equitable distribution[.]

11. The principles of equitable estoppel prevent the dismissal of [Wife's] claim for equitable distribution.

12. [Wife] has clean hands in this court action.

13. Justice requires that [Wife] be deemed to have the right to proceed with a claim for equitable distribution.

On or about 7 April 2014, Wife filed an amended or supplemental answer to Husband's complaint for absolute divorce including a

counterclaim for equitable distribution and a motion to consolidate the divorce claim with the 2011 action for divorce from bed and board. Husband filed a motion to dismiss Wife's counterclaim for equitable distribution, arguing that "he believes that the Court erred in vacating the divorce judgment in this action and that the counterclaim is being filed after the parties were properly divorced." Husband also noted that he "additionally opposes [Wife's] claim for an unequal distribution in her favor." The trial court filed an order granting Wife's motion and denying Husband's motion to dismiss on 16 July 2014, although it appears the order was never signed by the judge.[7]

The equitable distribution trial began on 29 September 2014 and was held over the course of four nonconsecutive days before coming to conclusion over a year later, on 17 November 2015. On 19 March 2015, the court made a partial ruling, and the trial court entered its judgment and order granting Husband an absolute divorce from Wife and dissolving the marriage. The order noted that the trial court "shall retain jurisdiction over the matter of equitable distribution in order to enter and enforce any final orders in these consolidated proceedings[.]" That same date, the trial court entered several "Court Order[s] Acceptable for Processing" ("COAP") for both parties' employee annuities and former spouse survivor annuities, addressing distribution of the retirement benefits of both parties. Husband filed a motion requesting findings of fact and modifications to the court's proposed equitable distribution judgment and order on 17 September 2015.

The district court entered its equitable distribution judgment and order on 17 November 2015. The court found that as of the date of separation and presently Husband and Wife were the joint owners of marital property in Siler City, North Carolina ("the marital home"). After noting that both parties testified that they did not want the property distributed to them, the court found that the marital home "should be listed for sale . . . within sixty (60) days after the entry of this Order at a price agreed upon by the parties, or in the event the parties are unable to agree, a price recommended by the realtor." The proceeds were to be divided equally between the parties. The court similarly found the parties to be joint owners of seven acres of land in Virginia (the "Virginia Property") and ordered that this marital property be sold as well, with the proceeds again split equally between the parties. If either property had not sold before the expiration of the six month listing agreement, the parties were to return to court for further review.

7. The order in our record is file stamped but not signed by the trial court.

The court also found that "[a]s of the date of separation [Husband] and Randy A. Winkleman were parties to a Timber Agreement dated November 20, 2009, which entitled [Husband] to receive fifty percent of the proceeds from timbering certain property located in . . . Pennsylvania." The court concluded that the Timber Agreement was marital property and that it should be distributed to Husband at its current value of $5,000.00.

In addition, the trial court's order adopted the COAP's, which divided the monthly retirement benefits each party receives under the Civil Service Retirement System (CSRS) equally and requires Husband to pay Wife $13,009.50, one-half of the difference between the monthly CSRS annuity payments received by the parties from the date of separation through 30 September 2014. In addition, the court ordered Husband to pay Wife a distributive award of $13,462.00 within 30 days of the entry of the order.

Finally, the trial court classified Husband's 2011 Suburban vehicle as his separate property with a value of $49,000.00 and found that both it and the secured debt attached to it of $64,638.82 were acquired after Wife filed her action for divorce from bed and board and not for the joint benefit of the parties. Wife filed a motion on 3 December 2015 to amend and correct issues related to the judgment and order and for reconsideration of all of the issues raised on 17 November 2015. Husband timely appealed the equitable distribution judgment and order to this Court.

Husband filed a motion to amend the record on appeal on or about 15 July 2016, claiming that he "inadvertently failed to include" his notices of appeal from: (1) the denial of his Rule 12(b)(1) motion to dismiss, filed 28 March 2014, (2) the order granting Wife Rule 60(b) relief, filed 18 March 2014, and (3) orders granting Wife's motion to consolidate and strike and denying Husband's motion to dismiss, filed 29 July 2014. On 18 August 2016, Wife filed a motion to amend the record on appeal, asking to include: (1) a copy of the 11 July 2016 OPM notice regarding the award of monthly annuity and survivor annuity; and (2) a copy of Husband's 22 July 2016 COAP filing, a copy of the sanitized order for the record redacting certain personal and private information, and a copy of the un-redacted version for the file. By separate order, we have granted both motions to amend the record.

Discussion

On appeal, Husband raises multiple issues, both procedural and substantive, with the trial court's equitable distribution order. We first

address the procedural concerns and then address some of the substantive issues.

I. Subject Matter Jurisdiction Over Equitable Distribution Claims

[1] First, Husband argues that the trial court erred both by denying his motion to dismiss the equitable distribution claim Wife filed prior to the date of separation for lack of subject matter jurisdiction and its order vacating the divorce judgment pursuant to Rules 60(b)(1), (3), and (6), thus allowing Wife the opportunity to file a new equitable distribution claim after separation and prior to entry of the absolute divorce. Essentially, the trial court entered these two orders which have the same practical effect -- preservation of Wife's equitable distribution claim -- by two different legal routes, in full recognition of jurisdictional problems caused by the filing of Wife's equitable distribution claim before the parties had separated. Thus, Wife's equitable distribution claim must be dismissed only if *both* orders were in error and reversed. We will therefore address only the order granting Wife's Rule 60 motion since it is dispositive.

"Rule 60(b) has been described as a grand reservoir of equitable power to do justice in a particular case. The North Carolina Supreme Court has stated that its broad language gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice." *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 712, 222 S.E.2d 706, 708 (1976) (citations, quotation marks, and ellipses omitted). "Our courts have long held that a Rule 60(b) motion is addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of that discretion." *Venters v. Albritton*, 184 N.C. App. 230, 234, 645 S.E.2d 839, 842 (2007) (citations and quotation marks omitted). Under Rule 60(b)(6), the trial court "may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . [a]ny other reason justifying relief from the operation of the judgment." N.C. R. Civ. P. 60(b)(6). "The grounds for setting aside judgment pursuant to Rule 60(b)(6) are equitable in nature. What constitutes cause to set aside judgment pursuant to Rule 60(b)(6) is determined by whether (1) extraordinary circumstances exist; and (2) whether the action is necessary to accomplish justice." *Trivette v. Trivette*, 162 N.C. App. 55, 63, 590 S.E.2d 298, 304 (2004) (citations omitted).

Husband relies in part on *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987), where our Supreme Court reversed an order by this Court upholding a trial court order granting the defendant's motion to set aside the effect of a divorce judgment "to the extent that it barred

her claim for equitable distribution[.]" The Supreme Court noted in *Howell*, however, that it disagreed with this Court "on a narrow ground." *Id.* Specifically, our Supreme Court stated:

> Ms. Howell did not seek to have the trial court, and the trial court did not, set aside the divorce judgment. Rather, pursuant to Ms. Howell's motion, the trial court ordered that she be given "relief from the effect of the divorce judgment . . . to the extent of allowing her to assert a counterclaim against the plaintiff for equitable distribution. . . ." Because the trial court did not set aside the divorce judgment itself, its terms and validity still abide. Likewise, the legal effects of the divorce judgment still obtain. Neither Rule 60(b)(6) nor any other provision of law authorizes a court to nullify or avoid one or more of the legal effects of a valid judgment while leaving the judgment itself intact.
>
> In so ruling we are not insensitive to the plight of Ms. Howell and, if her testimony is believed, her apparently diligent reliance on counsel's advice. We simply are unwilling to hold that a court may leave intact a judgment of absolute divorce, yet order that one or more of the legal effects of that judgment may somehow be avoided. Such a holding would empower a court to say, for example, that a divorce decree would not have the legal effect of permitting the parties to remarry or of dissolving other various rights arising out of the marital relation. These kinds of judicial rulings would negate the provisions of N.C.G.S. § 50–11 by which the legislature has prescribed the legal effects of judgments of absolute divorce. These effects are beyond the power of a court to change.

Id. at 91-92, 361 S.E.2d at 588 (footnote omitted).

Husband claims that the *Howell* Court "implicitly concluded that the failure to timely file an equitable distribution claim was not an extraordinary circumstance." The Supreme Court's own language in *Howell*, though, refutes this argument, as the Court specifically stated that it was reversing this Court "on a narrow ground." *Id.* at 91, 361 S.E.2d at 588. The *Howell* decision is based upon the fact that the defendant, Ms. Howell, asked for relief from an effect of a divorce judgment while leaving the divorce decree itself intact. *Id.* at 92, 361 S.E.2d at 588. The Supreme Court never addressed whether failure to file a timely equitable distribution claim was or was not an extraordinary circumstance.

Here, by contrast, the trial court completely vacated the divorce decree, using its discretion under Rule 60(b) and explicitly weighing the equities of the situation to both parties. Husband even alleged in his motion to reopen the evidence -- so that he could present evidence of his remarriage days after the court's rendition of its ruling -- that "[t]he entry of an order vacating the divorce judgment is unnecessary given that [the district court] is prepared to enter an order dismissing [Husband's] motion to dismiss equitable distribution in 11 CVD 701 for lack of subject matter jurisdiction, and *thus [Wife] will not be prejudiced*." (Emphasis added). He then appealed from that very ruling with the obvious goal of prejudicing Wife by eliminating her equitable distribution claim. Fortunately, the trial court recognized Husband's legal strategy of setting up a jurisdictional defect which he could then exploit on appeal, since a lack of subject matter jurisdiction cannot be waived and can be raised at any time.

Furthermore, Husband's requested findings and statements at the hearing show that he was well aware that the trial court had decided to vacate the divorce judgment and would be entering an order accordingly when he arranged to have a prenuptial agreement prepared and signed immediately and got married only five days later. His calculated actions, which were obviously intended to eliminate Wife's equitable distribution claim, created the predicament of bigamy that he now claims to face, and the trial court rightfully concluded that "extraordinary circumstances exist" in this case and that vacating the divorce decree was an action "necessary to accomplish justice." *Trivette*, 162 N.C. App. at 63, 590 S.E.2d at 304. Since we have concluded the trial court was well within its discretion to enter its decree setting aside the divorce judgment with Rule 60(b), the trial court had subject matter jurisdiction over Wife's equitable distribution counterclaim as stated in her amended answer to the divorce complaint.

II. In-Kind Distribution and Distributive Awards

[2] Next, Husband argues that the trial court erred by failing to provide for an in-kind distribution and ordering the sale of real property regarding the marital home and the Virginia property. We agree.

> When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to

> support those findings, conclusions of law are reviewable *de novo*. Our review of an equitable distribution order is limited to determining whether the trial court abused its discretion in distributing the parties' marital property. Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record.

Robbins v. Robbins, __ N.C. App. __, __, 770 S.E.2d 723, 728, *disc. review denied*, __ N.C. __, 775 S.E.2d 858 (2015) (citations, quotation marks, and brackets omitted).

In this case, the trial court's equitable distribution order contained the following findings of fact regarding the sale of the marital home and the Virginia Property and the payment of a distributive award:

> 10. As of the date of separation and presently, the parties were and are the joint owners of real property located at 566 Melvin Clark Road, Siler City, North Carolina and more fully described in the Warranty Deed filed at Book 1456, Page 1104 of the Chatham County Registry on April 30, 2009 [the "marital home"]. Prior to the date of separation, this had been the parties' marital residence. The [marital home] is marital property.
>
> 11. The [marital home] was unencumbered as of the date of separation and currently. The parties stipulated that the fair market value of the [marital home] as of the date of separation and currently is $250,173. Both [Husband] and [Wife] testified that they did not want to be distributed the [marital home]. [Husband] testified that the property should be distributed to [Wife] and [Wife] requested that the property be sold.
>
> 12. This Court finds that the [marital home] should be sold with the help of Elizabeth Anderson of Caldwell Banker in Pittsboro, North Carolina, and the net proceeds divided equally between the parties at closing. The [marital home] should be listed for sale, as is, with Ms. Anderson within sixty (60) days after the entry of this Order at a price agreed upon by the parties, or in the event the parties are unable to agree, a price recommended by the realtor. The listing agreement should be for a term of six months and Ms. Anderson should be entitled to receive her standard commission of six percent. In the event the [marital home] has not been sold prior to the expiration of the listing

agreement, the parties should return to Court to determine if the listing agreement should be extended or if the property should be sold by auction[.]

. . . .

14. From the date of separation through November of 2013, Defendant resided in the [marital home] and enjoyed the benefits associated with the said residence. From the date of separation through the date of trial, [Wife] also testified that she had paid $18,011 for property taxes, materials, labor, insurance and utilities to maintain and preserve the property. After November of 2013, neither party has resided in the residence[.]

. . . .

16. As of the date of separation and presently, the parties were and are the joint owners of 7 acres of unimproved land located in Augusta County, Virginia (the "Virginia Property"). The Virginia Property is marital property[.] The Virginia Property was unencumbered as of the date of separation and currently. The parties stipulated that the fair market value of the Virginia Property as of the date of separation and currently is $87,200. Both [Husband] and [Wife] testified that they did not want to be distributed the Virginia Property[.] [Wife] requested that the property be sold.

17. This Court finds that the Virginia Property should be sold with the help of a real estate agent selected by [Wife] and the net proceeds divided equally between the parties at closing. The Virginia Property should be listed for sale, as is, within sixty (60) days after the entry of this Order at a price agreed upon by the parties, or in the event the parties are unable to agree, a price recommended by the realtor. The listing agreement should be for a term of six months and the realtor should receive a standard commission for the sale of land[.] In the event the Virginia Property has not been sold prior to the expiration of the listing agreement, the parties should return to Court to determine if the listing agreement should be extended or if the property should be sold by auction.

. . . .

28[.] During their marriage, both [Husband] and [Wife] were federal employees and received retirement benefits under the Civil Service Retirement System ("CSRS"). The CSRS is administered by the United States Office of Personnel Management ("OPM"). Prior to the date of separation, [Husband] and [Wife] retired and each of them began receiving monthly annuity payments from OPM through the CSRS.

. . . .

32. Based upon a valuation performed by Williams Overman Pierce, LLP, the total value of [Husband's] CSRS defined benefit plan as of the date of separation was $1,354,235 with a survivor benefit awarded to [Wife]. The value of the marital portion of said benefit plan as of the date of separation was $1,014,655. The balance of the benefit plan valued at $339,580 was [Husband's] separate property[.]

33. Based upon a valuation performed by Williams Overman Pierce, LLP, the total value of [Wife's] CSRS defined benefit plan as of the date of separation was $11,004,191 [sic][8] with a survivor benefit awarded to [Husband]. The value of the marital portion of said benefit plan as of the date of separation was $797,026. The balance of the benefit plan valued at $207,165 was [Wife's] separate property[.]

34. On March 19, 2015, this Court entered two separate CSRS COAP's equally dividing the marital portion of the parties' annuity payments from OPM through the CSRS, and awarding each party a former spouse survivor annuity under CSRS in the same amount to which the party would have been entitled if the divorce had not occurred[.]

. . . .

36. The parties stipulated that from the date of separation through September 30, 2014, [Husband] owed [Wife] the sum of [$13,009.50] to compensate her for the difference in the annuity payments the parties had received since the date of separation. This Court finds that [Husband] should

8. We note this clerical error to ensure it is not repeated in the order entered after remand, as the marital and separate portions of Wife's benefit plan (as stated in the same finding) add up to $1,004,191.00, *not* $11,004,191.00.

> and has the ability to pay the sum of [$13,009.50] to [Wife] within thirty (30) days after the entry of this Order.
>
> . . . .
>
> 47. Based upon the spreadsheet hereto attached as Exhibit 4, the amount of the distributive award [Husband] should pay to [Wife] to achieve an equal division of the marital and divisible property and debt is $13,462.

On the Spreadsheet attached as Exhibit 4 of the order, the trial court did not list a value for the marital home or the Virginia property but instead listed "50% of Net Proceeds" in the column for each party. Likewise, instead of finding a value for the parties' retirement plans, the trial court stated "Equal Division -- CSRS COAP" in the column for each party. Thus, the total value of the marital estate listed on the spreadsheet includes only those items of property which were assigned a value on that spreadsheet, so that total value excludes the four largest marital assets. The trial court determined the distributive award based upon that partial "total" value of the marital estate.

In addition, the trial court made the following conclusions of law:

> 9. An in-kind distribution of the marital and divisible property and debt is not practical given that neither party desires to be distributed certain assets and the assets are capable of being sold in the marketplace with the assistance of qualified realtors.
>
> 10. The presumption of an in-kind distribution has been rebutted for the reasons set forth herein.
>
> 11. The payment of a distributive award by [Husband] to [Wife] is fair and reasonable, and [Husband] has the ability to pay the distributive award ordered herein[.]

"Under [N.C. Gen. Stat. § 50-20(c)], equitable distribution is a three-step process; the trial court must (1) determine what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property." *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (citation, quotation marks, and brackets omitted). In order to properly conduct this process, it is clear that the second step is for the trial court to actually place a value on the property to be distributed. *See, e.g.*, *Thomas v. Thomas*, 102 N.C. App. 127, 129, 401 S.E.2d 367, 368 (1991) ("By appointing commissioners to sell the property and divide the net proceeds after paying expenses and

costs, the trial judge did not satisfy the requirement of the statute that the judge must place a value on the property."); *Soares v. Soares*, 86 N.C. App. 369, 371-72, 357 S.E.2d 418, 419 (1987) (holding trial court erred by ordering sale of marital home for not less than the appraised value without first determining its value.).

The trial court's role is to classify, value, and distribute property, not simply to order that it be sold. In doing so, "the trial court must consider the property's market value, if any, less the amount of any encumbrance serving to offset or reduce the market value." *Robinson*, 210 N.C. App. at 323, 707 S.E.2d at 789. Here, the parties had actually stipulated to the values of the marital home and the Virginia Property as of the date of separation and neither was encumbered by a mortgage. The trial court found that neither party wanted the real property, and the record reflects that Wife wanted the property to be sold.[9] We understand that neither party *wanted* the real properties to be distributed to them for various reasons, but they also had not agreed to sell the properties. Sometimes the law does not allow the parties to get what they want; but sometimes they might find that that they get what they need.[10] This is one of those times. What they need -- and what the law requires -- is an order classifying, valuing, and distributing all of the martial and divisible property. *See Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 418, 588 S.E.2d 517, 520 (2003) ("In making an equitable distribution of marital assets, the trial court is required to undertake a three-step process: (1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner." (Citation and quotation marks omitted)). The trial court must value and distribute each parcel of real property to a party, and a distributive award may be needed to equalize the division or to make the distribution equitable. Then, the party who receives distribution of the real property is free to keep it or sell it. We therefore reverse and remand for the trial court to value each marital and divisible asset -- including the real property and the retirement plans -- as of the date of separation and the date of division, and to determine the total net value of the entire marital estate, whether an equal division will be equitable, and if any distributive award will be needed, and to enter an order accordingly.

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9. In his 12 June 2012 motion, Husband had requested that the marital home be sold, but by the time of trial, he no longer requested sale.

10. With apologies to The Rolling Stones. Jagger, Mick and Richards, Keith. "You Can't Always Get What You Want." The Rolling Stones, Let It Bleed. (London Records 1969).

III. Distributional Factors

[3] Next, Husband argues that the trial court erred by failing to make findings and give proper consideration to his evidence of distributional factors. Wife seems to agree, noting that she "is not in disagreement with [Husband] that the Court order of November 17, 2015 lacks Findings of Facts and Conclusions of Law regarding the distributive award."[11] (Emphasis omitted).

> Pursuant to [N.C. Gen. Stat. § 50-20(c)], there shall be an equal division of marital and divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. When making an unequal distribution, the trial court must consider the factors enumerated in G.S. § 50-20(c) and must make findings which indicate that it has done so. It is not necessary that the findings recite in detail the evidence considered but they must include the ultimate facts considered by the trial court.

Britt v. Britt, 168 N.C. App. 198, 204, 606 S.E.2d 910, 914 (2005) (citations, quotation marks, brackets, and ellipses omitted). "[W]hen evidence of a particular distributional factor is introduced, the court must consider the factor and make an appropriate finding of fact with regard to it." *Fox v. Fox*, 114 N.C. App. 125, 135, 441 S.E.2d 613, 619 (1994); *see also Warren v. Warren*, 175 N.C. App. 509, 518-19, 623 S.E.2d 800, 806 (2006) (remanded for further findings of fact where evidence offered relating to N.C. Gen. Stat. § 50-20(c)(9), (11a), and (12) but court made no findings regarding those factors). The requirement to make such findings regarding the factors for which evidence is presented "exists regardless whether the trial court ultimately decides to divide the property equally or unequally." *Warren*, 175 N.C. App. at 518, 623 S.E.2d at 806.

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11. Despite this statement, Wife's Reply brief stresses that her Appellee brief "does not agree with the Appellant's attorney position." Her Appellee brief also argues that the trial court "offered an explanation" of why it ordered sale of the real property and that the court considered Wife's health and age in that she was "physically incapable of taking care of . . . approximately 15 acres" while Husband is "in a much better position physically to care for" the real property. According to the transcript, the trial court did discuss this rationale, but the order on appeal did not make these findings, and as discussed above, ordering that the real property be sold is not a distribution.

Furthermore,

> N.C. Gen. Stat. § 50–20(e) (2013) creates a presumption that an in-kind distribution of marital or divisible property is equitable, but permits a distributive award 'to facilitate, effectuate, or supplement' the distribution. If the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination. Should a party successfully rebut the equity of an in-kind distribution, a trial court may order a distributive award pursuant to N.C. Gen. Stat. § 50-20(c) (2013). This statute sets forth distributional factors that the trial court must consider before ordering a distributive award. One of those factors is the liquid or nonliquid character of all marital property and divisible property. In other words, the trial court is required to make findings as to whether the defendant has sufficient liquid assets from which he can make the distributive award payment.

Sauls v. Sauls, 236 N.C. App. 371, 375, 763 S.E.2d 328, 331 (2014) (citations, quotation marks, brackets, and italics omitted).

At trial, the court and Wife's counsel stated the following regarding the distributional factors evidence presented:

> THE COURT: Heard a lot of evidence about distributional factors along the way.
>
> [Wife's Counsel]: Yes, we have.
>
> THE COURT: And the court order has -- the Court of Appeals says that the court order has to address each distributional factor in which any evidence was presented and make findings of fact about that and then make conclusions about the meaning of all the distributional factors. *So someone's going to have to identify every distributional factor we've talked about, not just the one's we're about to talk about.* Okay?

(Emphasis added).

The trial court made the following finding -- perhaps more properly characterized as a conclusion of law -- regarding distribution in its equitable distribution order:

> 46. Based upon the above findings and after considering the distributional factors raised by the parties at trial, this Court finds that an equal division of the marital and divisible property and debt is equitable. Based upon the in-kind division of the marital and divisible property set forth above and the equal division of the proceeds from the sale of the [marital home], the Virginia Property and the sale of the tangible personal property, this Court finds it necessary to order a distributive award for [Husband] to pay to [Wife] in order to equitably divide the parties' marital and divisible property.

Thus, while the court noted that it "consider[ed] the distributional factors" and concluded that an equal division was equitable, the order does not include sufficient findings about the distributional factors for us to review this conclusion. In addition, the trial court concluded that a distributive award was necessary to equalize the division of the marital and divisible assets of the parties, although that conclusion was based in part upon its erroneous decree that the real properties be sold instead of distributing them. The trial court then concluded:

> 6. An equal division of the marital and divisible property and debts is equitable.
>
> . . . .
>
> 11. The payment of a distributive award by [Husband] to [Wife] is fair and reasonable, and [Husband] has the ability to pay the distributive award ordered herein[.]

The order did not identify the distributional factors "we're about to talk about[,]" much less "every distributional factor we've talked about" during the trial, as the trial court correctly noted should be addressed by the order. Those distributional factors are listed in N.C. Gen. Stat. § 50-20(c) (2015). Evidence was presented about several of these factors, most notably the liquidity of the marital estate (N.C. Gen. Stat. § 50-20(c)(9)); Wife's early retirement (N.C. Gen. Stat. § 50-20(c)(12) (catchall provision)); the physical health of the parties (N.C. Gen. Stat. § 50-20(c)(3)); and the "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property . . . during the period after separation of the parties and before the time of distribution" (N.C. Gen. Stat. § 50-20(c)(11a)); but the trial court erred by failing to make any findings regarding that evidence. *See Warren*, 175 N.C. App. at 518, 623 S.E.2d at 806. On remand, the trial court must make findings regarding all distributional factors for

which evidence was presented and determine in its discretion whether an equal division is equitable, since the trial court's analysis of this issue may change on remand considering the distribution instead of sale of the real property, as well as other matters addressed on remand.[12]

IV. Timber Agreement

[4] Husband next argues that the trial court's valuation of the Timber Agreement, which was an agreement between plaintiff and his cousin involving timber on land in Pennsylvania that the trial court classified as marital property, was not supported by competent evidence, and Wife seems to agree.[13] Husband argues that "[i]t is completely unknown as to what the status or condition of that timber will be beginning in January 2018, when it will actually be cut or valued and [Wife]'s testimony as to the value, which was the only information before the trial court, was completely speculative."

The trial court made the following finding about the Timber Agreement:

> 39[.] As of the date of separation [Husband] and Randy A. Winkleman were parties to a Timber Agreement dated November 20, 2009, which entitled [Husband] to receive fifty percent of the proceeds from timbering certain property located in . . . Pennsylvania. The Timber Agreement is marital property, and the value of the Timber Agreement to the parties as of the date of separation and currently is $5,000.

The court then concluded that Husband "shall be distributed as his sole and separate property the Timber Agreement and all benefits associated therewith."

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12. In a related argument, Husband contends that the trial court erred by concluding that he had the ability to pay 50% of the costs to maintain the real property in addition to payment of the distributive awards within 30 days of entry of the order. We will not address this issue in detail since the new order on remand will address a new distribution of the real property and other related issues such as distributional factors including "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property . . . during the period after separation of the parties and before the time of distribution." N.C. Gen. Stat. § 50-20(c)(11a).

13. Again, in her reply brief, Wife claims that she does not agree with any of Husband's arguments on appeal. But in her Appellee brief, as to this issue she stated, "The Appellee concurs with the Appellant's attorney. There is no creditable [sic] evidence before the Court."

Husband is correct that the evidence regarding the Timber Agreement was speculative, at best. The timber in question was on land which the parties had owned during the marriage, but Husband had sold in 2009 to his cousin. Wife testified that she was unaware of the sale until later and that it was done without her signature. Neither party knew exactly what sort of timber was there or how much, although Wife estimated the value to be $10,000.00. The Timber Agreement itself was quite unusual, as noted by the trial court:

> THE COURT: "If the buyer should endure any financial hardship, the buyer, Randy Winkleman, divorce, bankruptcy, foreclosure, the buyer shall initiate the sale as soon as possible to ensure the seller will receive any proceeds owed to him under this agreement." That's an odd provision.
>
> [Husband's trial counsel]: It's a very odd contract.
>
> THE COURT: Uh-huh (yes).
>
> [Wife]: Well, apparently when Mr. Miller bought this from my in-laws the same timber agreement existed between them and his parents.
>
> THE COURT: I wonder if this is recorded anywhere in the Register of Deeds office.
>
> [Wife]: There's no indication that there is.

In any event, the future value of timber, planted during marriage on marital property but which will not mature until some years in the future, is too speculative to be considered a vested property right for purposes of equitable distribution. *See Cobb v. Cobb*, 107 N.C. App. 382, 386, 420 S.E.2d 212, 214 (1992) ("In the case at bar, we find that the future value of the timber is more analogous to an option which may be lost as a result of future events . . . . Appellee may never realize the future value of the timber if, for example, the trees are destroyed by fire or insects, or if appellee decides to sell the property or to not cut the trees at all."). This Court concluded in *Cobb* that the future value of timber that would not mature until many years later should not be considered marital property or a distributional factor, since "characterizing growing trees as a vested property right is far too speculative," and "[an] equitable distribution trial would become overwhelmingly complicated." *Id.* at 386, 387, 420 S.E.2d at 214, 215. We therefore conclude that the valuation of the Timber Agreement in this case at $5,000.00, which involved

timber of an unknown variety, age, and quantity, was not supported by competent evidence.

V. Classification of 2011 Suburban and Debt as Separate Property

[5] Finally, Husband argues that the trial court erred in classifying the 2011 Suburban and debt secured by it as his separate property and debt. Specifically, Husband contends that "[t]he record does not support the Court's finding that the vehicle was not acquired for the joint benefit of the parties and the judgment contains no findings or conclusions indicating that the Defendant rebutted the marital property presumption[.]" Husband also argues that the court below erred because it "apparently believ[ed] that property acquired prior to separation, but after the filing of an action for divorce from bed and board falls outside of the marital property definition."

Here, the trial court valued Husband's 2011 Suburban at $49,000.00 with a secured debt of $64,638.82. The trial court classified it as Husband's separate property and debt. The court's findings include the fact that the Suburban and debt was "acquired/incurred by [Husband] after [Wife] filed the 2011 Proceeding [for divorce from bed and board] and were not acquired/incurred for the joint benefit of the parties."

Although the trial court noted that the Suburban was acquired after Wife filed her claim for divorce from bed and board, the relevant date for classification of property for equitable distribution purposes is the date of separation. *See* N.C. Gen. Stat. § 50-20(b)(1) (2015) (" 'Marital property' means all real and personal property acquired by either spouse or both spouses during the course of the marriage and *before the date of separation of the parties*, and presently owned, except property determined to be separate property or divisible property[.]") (emphasis added). Furthermore, "[t]he spouse claiming that the property is separate bears the burden of proof, as under N.C. Gen. Stat. § 50-20(b)(1), it is presumed that all property acquired after the date of marriage and before the date of separation is marital property[.]" *Allen v. Allen*, 168 N.C. App. 368, 374, 607 S.E.2d 331, 335 (2005) (quotation marks omitted). The presumption may, however, "be rebutted by the greater weight of the evidence." N.C. Gen. Stat. § 50-20(b)(1).

Here, at the equitable distribution hearing, Husband testified that the Suburban was purchased on or about 12 November 2011 while the parties still resided together and that he did not believe the marriage was over when he purchased the vehicle. The date of separation was 21 March 2012. Thus, the Suburban was purchased before the parties were separated and is presumed to be marital property. Although the

trial court also heard testimony that Husband purchased the vehicle on his own and financed the vehicle himself, that Wife never drove the vehicle, and that Husband put all 33,000 miles on it, the court made no findings indicating that Wife rebutted the marital property presumption. There was no evidence that Husband purchased the Suburban with separate funds. Based upon the record, it appears that the Suburban and its associated debt should have been classified as marital. On remand, the trial court must clearly make findings to support its classification, valuation, and distribution of the Suburban and its debt. But we note that on remand, the trial court may, in its discretion, also consider the circumstances of Husband's purchase of the Suburban and associated debt he incurred as a factor favoring an unequal distribution in favor of Wife, thus accomplishing the same result in the actual distribution. In other words, the trial court should do the "equity" in equitable distribution in the distribution phase of the order, not in the classification of the property or debt as marital or separate.

Conclusion

If ever there was a case where it was proper for the trial court to use the "grand reservoir of equitable power to do justice in a particular case" under Rule 60(b), this is it. *Jim Walter Homes, Inc.*, 28 N.C. App. at 712, 222 S.E.2d at 708 (citation and quotation marks omitted). We commend the trial court's extensive and detailed orders addressing the facts and equities of this very unusual situation. The trial court acted well within its discretion when it entered a decree vacating the divorce decree under Rule 60(b) and thus had jurisdiction over Wife's equitable distribution claim. We also appreciate the complexity of the case and the difficulty of dealing with all of the issues raised over several years of litigation. But for the reasons noted above, we must reverse the equitable distribution order and remand for the trial court to enter a new equitable distribution order which addresses the substantive issues in a manner consistent with this opinion. On remand, the trial court may in its discretion receive additional evidence limited to the issues of classification, valuation and distribution of property as necessary for preparation of a new equitable distribution order.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges McCULLOUGH and ZACHARY concur.

MOON WRIGHT & HOUSTON, PLLC, PLAINTIFF,
v.
CHARLES J. COLE AND SANDRA D. COLE, DEFENDANTS.

No. COA16-1046

Filed 18 April 2017

Appeal and Error—interlocutory orders—partial summary judgment

An appeal was dismissed as interlocutory where the case involved an action to collect attorney fees and a summary judgment for one of the two defendants. The judgment did not contain a certification that there was no just reason for delay and plaintiff made no argument on appeal that the order impacted a substantial right.

Appeal by plaintiff from order entered 17 June 2016 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 March 2017.

Moon Wright & Houston, PLLC, by Caleb Brown, Richard S. Wright, and Andrew T. Houston, for plaintiff-appellant.

Copeland Richards, PLLC, by Drew A. Richards, for defendant-appellee Charles J. Cole.

MURPHY, Judge.

Moon Wright & Houston, PLLC ("Plaintiff"), appeals from the trial court's order partially granting Sandra and Charles Cole's (collectively "Defendants") motion for summary judgment. After careful review, we dismiss Plaintiff's appeal as interlocutory.

Factual Background

On 27 August 2015, Plaintiff, a law firm operating out of Charlotte, North Carolina, filed a complaint in Mecklenburg County Superior Court against Sandra Cole ("Sandra") and Charles Cole ("Charles") concerning their failure to pay certain legal fees owed to Plaintiff. In its complaint, Plaintiff alleged (1) a breach of contract claim against Sandra; (2) a claim for unjust enrichment and *quantum meruit* against both Sandra and Charles; (3) a violation of the doctrine of necessities against Charles; (4) a fraud claim against Charles; and (5) a claim for negligent misrepresentation against both Sandra and Charles.

On 12 May 2016, Defendants filed a motion for summary judgment as to Plaintiff's claims. On 25 May 2016, Sandra filed for bankruptcy in the United States Bankruptcy Court for the Western District of North Carolina under Chapter 13 of the United States Bankruptcy Code.[1] As a result of her filing, the automatic stay provided pursuant to 11 U.S.C. § 362 was triggered.

A hearing on Defendants' motion was held before the Honorable Richard D. Boner in Mecklenburg County Superior Court on 8 June 2016. On 17 June 2016, Judge Boner entered an order granting summary judgment in Charles' favor. The order did not address Plaintiff's claims against Sandra. Plaintiff filed a notice of appeal of the trial court's summary judgment order on 15 July 2016.

Analysis

As an initial matter, we note that the present appeal is interlocutory. "Since summary judgment was allowed for fewer than all the defendants and the judgment did not contain a certification pursuant to G.S. § 1A-1, Rule 54(b), that there was 'no just reason for delay,' plaintiff's appeal is premature unless the order allowing summary judgment affected a substantial right." *Bernick v. Jurden*, 306 N.C. 435, 438, 293 S.E.2d 405, 408 (1982). Although not raised by either party on appeal, "whether an appeal is interlocutory presents a jurisdictional issue, and this Court has an obligation to address the issue *sua sponte*." *Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) (citation, internal quotation marks, and brackets omitted). "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* (citation omitted). Conversely, an order or judgment is interlocutory if it does not settle all of the issues in the case but rather "directs some further proceeding preliminary to the final decree." *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985).

> Generally, there is no right of immediate appeal from an interlocutory order. The prohibition against appeals from interlocutory orders prevents fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts. However, there are two avenues by which a party may immediately appeal an interlocutory

1. Charles Cole did not file for bankruptcy.

> order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

Feltman v. City of Wilson, 238 N.C. App. 246, 250, 767 S.E.2d 615, 618-19 (2014) (internal citations and quotation marks omitted).

In the present case, it is readily apparent that the trial court's summary judgment order only resolved Plaintiff's claims against Charles, and not Plaintiff's claims against Sandra:

> This matter coming on for hearing before the undersigned judge at the June 8, 2016 Civil Session of the Superior Court in Mecklenburg County, North Carolina upon motion by *Defendant Charles J. Cole* for Summary Judgment regarding all of Plaintiff's claims against *Defendant Charles J. Cole*.
>
> After reviewing the pleadings, affidavits, briefs and the court file in this matter, and hearing the arguments of counsel, the Court concludes as a matter of law that there are no genuine issues of material fact such that Defendant *Charles J. Cole's* Motion for Summary Judgment should be and is hereby **GRANTED**.
>
> **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that summary judgment is granted in favor of *Defendant Charles J. Cole* and Plaintiff's Complaint against *Defendant Charles J. Cole* is hereby dismissed with prejudice.

(Emphasis added).

Nowhere in the trial court's order are Plaintiff's claims against Sandra resolved, or even, for that matter, addressed. Furthermore, the record on appeal is devoid of any documentation tending to show that Plaintiff's claims against Sandra have either been subsequently determined by the trial court, discharged in bankruptcy, or voluntarily dismissed by Plaintiff. We note that while Plaintiff complied with Local Rule 19 of the 26th Judicial District Superior Court Division Local Rules and Procedures insofar as it filed a notice of Sandra's bankruptcy filing

with the Clerk of Superior Court, Local Rule 19 does nothing more than administratively close the case against Sandra and hold it in abeyance. See Local Rule 19.3 ("Upon submission of paperwork, as described above, the Clerk of Superior Court shall administratively close the case, but only as to the claims against the party in bankruptcy."). Jurisdiction over Plaintiff's claims against Sandra remains with the trial court pending resolution of Sandra's bankruptcy case or a dismissal of the claims against her.

Plaintiff has made no argument on appeal that the trial court's order impacts a substantial right which would be lost absent immediate appellate review. Nor has the trial court certified its summary judgment order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Consequently, because Plaintiff's claims against Sandra remain outstanding, we dismiss the present appeal as interlocutory.

Conclusion

For the reasons stated above, Plaintiff's interlocutory appeal is dismissed.

DISMISSED.

Judges STROUD and DILLON concur.

PAGE v. CHAING

[253 N.C. App. 117 (2017)]

JONATHAN PAGE, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, JOHN M. McCABE, AND LOREE OLIVER, PLAINTIFFS

v.

SHU CHAING, PH.D., INDIVIDUALLY AND IN HER INDIVIDUAL CAPACITY, AND SUSAN BOWMAN, INDIVIDUALLY AND IN HER INDIVIDUAL CAPACITY, DEFENDANTS

No. COA16-611

Filed 18 April 2017

Appeal and Error—motions to dismiss denied—appellate issue not decided below

An appeal was dismissed where the action involved sovereign immunity and defendants argued a trial court order denying their motions to dismiss was interlocutory but immediately appealable. The question of whether defendants were immune from suit was never decided below.

Appeal by defendants from order entered 7 March 2016 by Judge W. Osmond Smith III in Wake County Superior Court. Heard in the Court of Appeals 1 December 2016.

Abrams & Abrams, P.A., by Douglas B. Abrams, Noah B. Abrams, and Melissa N. Abrams, and Raynes McCarty, by Charles Hehmeyer and Martin McLaughlin, for plaintiff-appellees.

Attorney General Joshua H. Stein, by Assistant Attorney General John P. Barkley and Special Deputy Attorney General Gerald K. Robbins, for defendant-appellants.

McCULLOUGH, Judge.

Shu Chaing, Ph.D., and Susan Bowman (together "defendants") appeal from an interlocutory order denying their motions to dismiss the case on grounds of public official immunity. For the following reasons, we dismiss the appeal.

I. Background

Jonathan Page ("juvenile") and Loree Oliver ("mother") (together "plaintiffs") first filed a complaint in this matter on 10 August 2015. Plaintiffs then filed an amended complaint on 18 August 2015 (the "first amended complaint") with the sole purpose to correct the last name of one of the defendants. In the first amended complaint, plaintiffs asserted negligence, gross negligence, punitive damages, negligent infliction of

emotional distress, and medical malpractice claims based on allegations that after juvenile was born to mother on 8 September 2010, defendants, both North Carolina Department of Health and Human Services employees in the State Laboratory of Public Health, followed newborn screening procedures that they knew to be inadequate to evaluate older infants. Plaintiffs allege, in the present case this failure resulted in a missed diagnosis of a treatable inborn metabolism error in juvenile that later caused juvenile to suffer a medical emergency, resulting in severe and permanent brain damage.

Defendants filed motions to dismiss and motions to strike on 21 October 2015. Pertinent to this appeal, defendants' motions to dismiss asserted that the court lacks subject matter jurisdiction because (1) defendants are being sued in their official capacity and the State has not waived sovereign immunity, (2) plaintiffs have not specifically pleaded that the State waived sovereign immunity, and (3) defendants are public officials and are entitled to all immunities afforded public officials. Notice of hearing filed 11 December 2015 indicated defendants' motions to dismiss would be heard on 1 February 2016.[1]

Prior to the hearing on defendants' motion to dismiss, plaintiffs filed a motion to amend the first amended complaint and then filed a notice of hearing on 21 January 2016 indicating the motion to amend would also be heard on 1 February 2016. Plaintiffs then filed an amended motion to amend the first amended complaint on 29 January 2016. Pertinent to this appeal, the amended motion sought to insert the words "individually and in her individual capacity" after the names of each defendant, each time the name of a defendant appeared in the first amended complaint.

The motions came on for hearing in Wake County Superior Court before the Honorable W. Osmond Smith III on 1 February 2016. At the beginning of the hearing, defendants informed the judge that they were proceeding on their motions to dismiss on the bases that (1) the court lacked subject matter jurisdiction, Rule 12(b)(1), because plaintiffs failed to allege in the original complaint and the first amended complaint in what capacity defendants were being sued and (2) plaintiffs' failed to state a claim, Rule 12(b)(6), because there was no duty owed to plaintiffs by defendants. Defendants withdrew the remainder of their

1. The notice of hearing actually states the matter will be heard "1 February 2015." However, because the notice was filed on 11 December 2015, well after the indicated hearing date, it is obvious that the hearing date was recorded in error. It appears from the rest of the record that the court intended to notice a hearing for 1 February 2016.

motions to dismiss. In response, plaintiffs argued that they believed the amended complaint was sufficient to show that defendants were being sued in their individual capacities; but in any event, plaintiffs filed the amended motion to amend the first amended complaint to address defendants' confusion and avoid "this kind of hypertechnical argument about the form of the complaint." Upon considering the arguments, the court granted plaintiffs' amended motion to amend the first amended complaint. The court then heard and considered arguments on defendants' motions to dismiss. The court held the subject matter jurisdiction portion of defendants' motions to dismiss was moot as a result of its granting plaintiffs' motion to amend. The court then denied defendants' Rule 12(b)(6) motion based on the argument that defendants owed no duty to plaintiffs.

On 2 February 2016, the court filed an order allowing plaintiffs' amended motion to amend the first amended complaint. That same day, plaintiffs filed the second amended complaint against defendants individually and in their individual capacities. Defendants filed separate answers to the second amended complaint on 2 March 2016. On 7 March 2016, the court filed an order denying "each and every of the Motions to Dismiss by [defendants]."

Defendants filed notice of appeal from the order denying their motions to dismiss on 1 April 2016. The notice specifically referenced "motions to dismiss based on claims of public official and sovereign immunity under Rule 12(b)(2) and (6) of the North Carolina Rules of Civil Procedure."

II. Discussion

The sole issue raised on appeal is whether the trial court erred in denying defendants' motions to dismiss based on assertions of public official immunity. Defendants contend they are immune from suit because they are public officials and not employees. Yet, it appears the trial court never decided that issue below. Thus, we must first address whether defendants' arguments are proper for appeal.

"Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

In this case, defendants acknowledge that the order denying their motions to dismiss is interlocutory. Nevertheless, defendants contend that immediate appeal of the interlocutory order is available pursuant to N.C. Gen. Stat. § 1-277(a) and (b) because the denial of their motions to dismiss on grounds of public official immunity affects a substantial right.

"[I]mmediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted); *see also* N.C. Gen. Stat. § 1-277 (2015). This court has held that,

> "[o]rders denying dispositive motions based on 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). A substantial right is affected because "[a] valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit. Were the case to be erroneously permitted to proceed to trial, immunity would be effectively lost." *Slade v. Vernon*, 110 N.C. App. 422, 425, 429 S.E.2d 744, 746 (1993), *implied overruling based on other grounds*, *Boyd v. Robeson County*, 169 N.C. App. 460, 621 S.E.2d 1 (2005).

Farrell v. Transylvania Cnty. Bd. of Educ., 175 N.C. App. 689, 694, 625 S.E.2d 128, 132-33 (2006); *see also Royal Oak Concerned Citizens Ass'n v. Brunswick Cnty.*, 233 N.C. App. 145, 149, 756 S.E.2d 833, 836 (2014) ("As an initial matter, we note that claims of immunity . . . affect a substantial right for purposes of appellate review."). However, this Court has also made it clear that it matters how a motion to dismiss based on immunity is presented to the court.

Recently in *Murray v. University of North Carolina at Chapel Hill*, __ N.C. App. __, 782 S.E.2d 531 (2016) (Tyson, J. dissenting), this court addressed whether it had jurisdiction to hear the defendant's appeal from a denial of a motion to dismiss. In *Murray*, this Court explained that the defendant filed a motion to dismiss "in which defendant asserted that pursuant to Rules 12(b)(1) and/or 12(b)(6) . . . , plaintiff's complaint should be dismissed for 'mootness, lack of standing, lack of subject matter jurisdiction, and failure to state a claim upon which relief may be granted.' " *Id.* at__, 782 S.E.2d at 534. When the defendant's motion came on for hearing, the defendant argued for the first time that "the complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(2) based on the doctrine of sovereign immunity." *Id.* at__, 782 S.E.2d at 535. In denying the defendant's motion, the trial court addressed Rules 12(b)(1)

and 12(b)(6), finding "that it possesses subject matter jurisdiction over this action and that the Plaintiff's complaint has made allegations sufficient to state a claim upon which relief may be granted under some legal theory." *Id.* at__, 782 S.E.2d at 535. On appeal from the denial of its motion to dismiss, the defendant argued the appeal was properly before this Court because the trial court rejected its claim that the action was barred by sovereign immunity and, therefore, the order affects a substantial right. *Id.* at__, 782 S.E.2d at 535. Over dissent, this Court held that it did not have jurisdiction.

In so holding, this Court relied on its decision in *Can Am South, LLC v. State*, 234 N.C. App. 119, 759 S.E.2d 304, disc. review denied, 367 N.C. 791, 766 S.E.2d 624 (2014). As this court explained in *Murray*,

> [i]n *Can Am*, the defendants moved to dismiss on sovereign immunity grounds under Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(2) for lack of personal jurisdiction, "but notably not Rule 12(b)(6) . . . ." 234 N.C. App. at 122, 759 S.E.2d at 307. Although the defendants had moved to dismiss for failure to state a claim for relief under Rule 12(b)(6), they based their Rule 12(b)(6) motion on the plaintiff's failure to adequately plead an actual controversy and not on the sovereign immunity doctrine. *Id.* at 123-24, 759 S.E.2d at 308.
>
> This Court held in *Can Am* that "[h]ad defendants moved to dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6), we would be bound by the longstanding rule that the denial of such a motion affects a substantial right and is immediately appealable under section 1-277(a)." *Id.* at 122, 759 S.E.2d at 307. *See also Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) ("This Court has held that a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable."), *aff'd per curiam*, 367 N.C. 113, 748 S.E.2d 143 (2013). However, since the defendants had only based their sovereign immunity defense on a lack of either subject matter jurisdiction under Rule 12(b)(1) or personal jurisdiction under Rule 12(b)(2), that longstanding rule was inapplicable. *Can Am*, 234 N.C. App. at 122, 759 S.E.2d at 307.
>
> The Court next concluded that the defendants' Rule 12(b)(1) motion could not justify an interlocutory appeal because "[a] denial of a Rule 12(b)(1) motion based on

> sovereign immunity does not affect a substantial right [and] is therefore not immediately appealable under section 1-277(a)." *Id.* at 122, 759 S.E.2d at 307. *See also Green*, 203 N.C. App. at 265-66, 690 S.E.2d at 760 ("[T]his Court has declined to address interlocutory appeals of a lower court's denial of a Rule 12(b)(1) motion to dismiss despite the movant's reliance upon the doctrine of sovereign immunity."); *Meherrin Indian Tribe v. Lewis*, 197 N.C. App. 380, 385, 677 S.E.2d 203, 207 (2009) (holding "defendants' appeal from the denial of their Rule 12(b)(1) motion based on sovereign immunity is neither immediately appealable pursuant to N.C. Gen. Stat. § 1-277(b), nor affects a substantial right.").
>
> In *Can Am*, this Court concluded its analysis of the jurisdictional issue by addressing Rule 12(b)(2) motions invoking the sovereign immunity doctrine. This Court pointed out that "beginning with *Sides v. Hospital*, 22 N.C. App. 117, 205 S.E.2d 784 (1974), *mod. on other grounds*, 287 N.C. 14, 213 S.E.2d 297 (1975), this Court has consistently held that: (1) the defense of sovereign immunity presents a question of personal, not subject matter, jurisdiction, and (2) denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under section 1-277(b)." 234 N.C. App. at 124, 759 S.E.2d at 308.
>
> As a result, the Court concluded in *Can Am* that it could consider the merits of the defendants' Rule 12(b)(2) motion to dismiss, concluding "[a]s has been held consistently by this Court, [that] denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b)." *Id.* at 125, 759 S.E.2d at 308. *See also Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001) ("[T]his Court has held that an appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable.").

Murray, __ N.C. App. at__, 782 S.E.2d at 535-36.

Similar to *Can Am*, in *Murray*, this Court held defendant could not rely on its motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6)

because, "[d]uring the oral argument, where [the] defendant raised the sovereign immunity doctrine for the first time, [the] defendant relied only on Rules 12(b)(1) and 12(b)(2) in arguing that the complaint was barred by sovereign immunity and did not rely upon Rule 12(b)(6)[]" and, "[a]s *Can Am* emphasizes, to the extent that defendant relied on Rule 12(b)(1) in moving to dismiss on sovereign immunity grounds, that motion does not support an interlocutory appeal." *Id.* at __, 782 S.E.2d at 536. Concerning defendant's oral assertion of a sovereign immunity defense based on personal jurisdiction pursuant to Rule 12(b)(2), this Court held that "the trial court reasonably confined its order to the bases asserted in the motion: Rules 12(b)(1) and 12(b)(6)." *Id.* at __, 782 S.E.2d at 536. Furthermore, "[s]ince [the] defendant did not take any action to obtain a ruling on its oral Rule 12(b)(2) motion, [the] defendant did not preserve for appellate review the question whether the trial court erred in not applying the sovereign immunity doctrine under Rule 12(b)(2)." *Id.* at __, 782 S.E.2d at 537.

The dissenting opinion in *Murray* disagreed that the defendant did not preserve its sovereign immunity argument under Rule 12(b)(6) by obtaining a ruling. *Id.* at __, 782 S.E.2d at 538. The dissent concluded that because "[the] [d]efendant's motion to dismiss states [the] defendant 'moves to dismiss [p]laintiff's [c]omplaint pursuant to Rules 12(b)(1) and/or 12(b)(6) of the North Carolina Rules of Civil Procedure for mootness, *lack of standing*, *lack of subject matter jurisdiction*, *and failure to state a claim upon which relief may be granted*[,]' " *Id.* at __, 782 S.E.2d at 538 (emphasis in original), the defendant's subsequent argument at the hearing that the plaintiff's complaint "neither alleged a waiver of immunity nor demonstrated the basis for such a waiver[]" was sufficient to assert sovereign immunity under Rule 12(b)(6) for failure to state a claim because "[i]t is well-settled that '[i]n order to overcome a defense of [sovereign] immunity, the complaint must specifically allege a waiver of [sovereign] immunity. Absent such an allegation, the complaint fails to state a cause of action.' " *Id.* at __, 782 S.E.2d at 538 (quoting *Green*, 203 N.C. App. at 268, 690 S.E.2d at 762).

As a result of the dissenting opinion in *Murray*, that case is currently before our Supreme Court for review. Yet, it is even more clear in the present case that dismissal of this appeal for lack of jurisdiction is appropriate.

To elaborate on the background above, in defendants' motions to dismiss, defendants labeled all immunity defenses as issues of subject matter jurisdiction. In those defenses, defendants contended the trial court "lacks jurisdiction of the subject matter presented by the

complaint" in that (1) defendants are being sued in their official capacity and the State had not waived sovereign immunity; (2) plaintiffs did not specifically plead waiver of sovereign immunity; and (3) defendants' are public officials and entitled to all immunities afforded public officials. Defendants also moved to dismiss for failure to state a claim on the bases that (1) defendants owed no duty to plaintiffs; (2) the negligence claims are, or should be, determined to be claims for medical malpractice; and (3) the medical malpractice claims fail to allege a physician/patient relationship.

At the 1 February 2016 hearing on defendants' motions to dismiss, defendants stated they wanted to proceed only on their motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim. In regards to subject matter jurisdiction, defendants clarified that the Rule 12(b)(1) motion was on the basis that plaintiffs failed to allege whether defendants were being sued in their individual or official capacity. In regards to failure to state a claim, defendants clarified that the Rule 12(b)(6) motion was on the basis that defendants owed no duty to plaintiffs to support the negligence claims. Defendants withdrew the remainder of their motions at that time.

Thereafter, the court granted plaintiffs' motion to file a second amended complaint that made clear that plaintiffs were suing defendants in their individual capacities. The court then considered arguments on defendants' two motions to dismiss based on "subject matter" and "duty." As a result of allowing the motion to amend, the court held that defendants' subject matter jurisdiction argument was moot. Defense counsel appeared to agree, replying "[i]t's been dealt with[]" and "[y]es, sir." The court then held the second amended complaint survived defendants' motion to dismiss for failure to state a claim, indicating the issue of duty would be "litigated significantly down the road."

Following the filing of plaintiffs' second amended complaint, defendants never filed further motions to dismiss. The trial courts written order, filed on 7 March 2016, indicates defendants' motions to dismiss came on for hearing with plaintiffs' motion to amend the complaint and that all of defendants' motions to dismiss are denied.

Upon review, it is evident that defendants' immunity arguments in this case were presented to the trial court and decided solely as motions to dismiss for lack of subject matter jurisdiction. In keeping with *Murray*, *Can Am*, and the cases cited therein, we hold that the interlocutory denial of a motion to dismiss for lack of subject matter jurisdiction based on immunity is not immediately appealable. Moreover, contrary to

the assertion in defendants' notice of appeal that the trial court denied "motions to dismiss based on claims of public official and sovereign immunity under Rule 12(b)(2) and (6) of the North Carolina Rules of Civil Procedure[,]" nothing in the record shows that defendants' argued for a dismissal based on immunity pursuant to Rules 12(b)(2) or 12(b)(6). Defendants' motion to dismiss pursuant to Rule 12(b)(6) was argued solely on the basis that defendants owed no duty to plaintiffs. Dismissal on grounds of immunity for lack of personal jurisdiction pursuant to Rule 12(b)(2) was never mentioned in defendants' motion to dismiss or in defendants' arguments to the trial court. The first mention in the record of personal jurisdiction as grounds for dismissal is in defendants' notice of appeal.

As this Court stated in *Murray*, "since our role is simply to review the actions of the court below, we find no basis for concluding that this Court has jurisdiction over the appeal pursuant to Rule 12(b)(2) [or Rule 12(b)(6)]." __ N.C. App. at __, 782 S.E.2d at 537. As a result, we must dismiss the appeal.

III. Conclusion

For the reasons discussed, we dismiss defendants' appeal from the trial court's order denying their motions to dismiss.

DISMISSED.

Judges DILLON and TYSON concur.

PROVIDENCE VOLUNTEER FIRE DEPARTMENT,
A NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFF
v.
THE TOWN OF WEDDINGTON,
A NORTH CAROLINA MUNICIPAL CORPORATION, DEFENDANT

No. COA16-80

Filed 18 April 2017

1. Appeal and Error—interlocutory appeal—subject matter jurisdiction—personal jurisdiction

In a case arising from a dispute between a town and its volunteer fire department, plaintiff's motion to dismiss the Town's appeal as interlocutory was granted as to the Town's appeal under Rule 12(b)(1) (subject matter jurisdiction) and denied as to the Town's appeal under Rule 12(b)(2). Governmental immunity has been traditionally recognized as an issue of personal jurisdiction and is immediately appealable.

2. Appeal and Error—interlocutory appeal—heard in the discretion of the Court

In a case arising from a dispute between a town and its volunteer fire department, issues arising from the denial of the Town's Rule 12(b)(6) motion to dismiss and an order allowing amendment of a complaint and imposing a preliminary injunction were heard in the Court of Appeals' discretion even though they were interlocutory.

3. Pleadings—amendment of complaint—no abuse of discretion

The trial court did not abuse its discretion by granting plaintiff's motion to amend its complaint. Even though plaintiff admitted that it had no factual basis for alleging waiver of governmental immunity through the purchase of liability insurance, the record did not show that the trial court abused its discretion by allowing the motion to amend.

4. Civil Procedure—Rule 12(b)(6) motion to dismiss—alternative ground in amended pleading

In a case arising from a dispute between a town and its volunteer fire department, the trial court properly denied defendant-town's motion to dismiss based on Rule 12(b)(6). That motion was based primarily on the first verified amended complaint and the trial court did not err by allowing plaintiff to amend the complaint. The second verified complaint alleged alternative grounds upon which

immunity was unavailable beyond waiver by purchase of liability insurance and to which defendant did not adequately respond in its initial motion to dismiss or the accompanying affidavit.

5. Immunity—governmental—proprietary activity

The trial court did not err in case arising from a dispute between a town and its volunteer fire department by denying a motion to dismiss a fraud claim based on governmental immunity. There was an uncontroverted allegation in the second verified amended complaint that defendant-town's action was proprietary in nature.

6. Immunity—governmental—contract waiver—not applicable to tort claims

The precedent that government immunity is waived when a town enters into a valid contract was not extended to tort claims arising from a contract.

7. Civil Procedure—motion to dismiss—unfounded allegation in verified complaint—alternate basis for ruling

The issue of whether an unfounded allegation in a verified complaint could be used as evidence for purposes of a motion to dismiss was not addressed where the trial court order was affirmed on an alternate basis.

8. Injunctions—preliminary—*lis pendens*— adequate remedy at law

The trial court erred by granting plaintiff's motion for a preliminary injunction in a case arising from a dispute between a town and its volunteer fire department where plaintiff, the volunteer fire department, had filed a *lis pendens* against the fire station. The *lis pendens* provided an adequate remedy at law.

Appeal by Defendant from orders entered 25 August 2015 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 9 August 2016.

The Duggan Law Firm, PC, by Christopher Duggan, Henderson, Nystrom, Fletcher & Tydings, by Robert E. Henderson and John Fletcher, for Plaintiff-Appellee.

Parker Poe Adams & Bernstein, LLP, by Anthony Fox and Benjamin R. Sullivan, for Defendant-Appellant.

INMAN, Judge.

A municipality's motion to dismiss a tort claim based on governmental immunity is properly denied when the motion does not refute a verified complaint alleging that the tort occurred when the municipality was engaged in a proprietary function. A preliminary injunction is inappropriate where a plaintiff has filed a notice of *lis pendens*, thereby securing a full, adequate, and complete remedy at law.

Providence Volunteer Fire Department, Inc. ("Plaintiff" or "Providence") owned a fire station in Union County that needed substantial and cost prohibitive repairs and improvements. Providence agreed to convey the fire station to the Town of Weddington ("Defendant" or the "Town") in exchange for the Town's agreement to pay for repairs and improvements. The Town also agreed to lease the improved fire station back to Providence and to continue to pay for fire suppression and emergency medical services from Providence for ten years. After the conveyance and completion of repairs, the Town terminated its relationship with Providence and leased the fire station to another fire department. Providence filed a law suit against the Town for breach of contract, fraud, and unfair and deceptive trade practices and filed a notice of *lis pendens* in Union County Superior Court.

The Town appeals from orders (1) granting a motion by Providence to amend its complaint, (2) denying in part its motion to dismiss Providence's tort claims based on governmental immunity, and (3) granting Providence's motion for a preliminary injunction. After careful review, we reverse the order granting injunctive relieve and otherwise affirm the trial court.

Factual Background

From 1954 to 2012, Providence provided fire protection service to the Town and the surrounding areas in Union and Mecklenburg counties. In May 2012, the Town Council passed a resolution establishing a Municipal Fire District and taking responsibility for overseeing and funding this new district. To do so, the Town raised taxes and entered into various agreements with Providence and two other area fire departments, the Wesley Chapel Volunteer Fire Department and the Stallings Fire Department.

At the heart of this action is a series of agreements between Providence and the Town stemming from the creation of the new fire district. In October 2013, Providence and the Town entered into an Interlocal Agreement, which contemplated, *inter alia*, that the Town would invest approximately one million dollars in repairs and improvements to the Hemby Road fire station owned by Providence, and in

exchange, Providence would convey the fire station and the land upon which it rests (the "Property") to the Town. In addition to the Interlocal Agreement, the parties entered into a Fire Suppression Agreement (the "Suppression Agreement"), which designated Providence as the Town's primary fire protection and emergency medical service provider for ten years.

The Suppression Agreement provided that after the first year of the ten-year term, the amount of compensation paid to Providence would be "established during the Town's annual budget process." Either party could terminate the Suppression Agreement for cause, but if the Town terminated the agreement without cause, it was obligated to pay liquidated damages to Providence:

> If this Agreement is terminated by the Town for a reason other than cause or mutual agreement of the parties, the Department shall be entitled to $750,000 as liquidated damages. . . . Such liquidated damages shall be the sole and exclusive remedy of the Department by reason of a default by Town under this Agreement, and the Department hereby waives and releases any right to sue Town, and hereby covenants not to sue Town, for specific performance of this Agreement or to prove that the Department's actual damages exceed the amount which is herein provided the department as full liquidated damages.

Almost a year later after executing the Interlocal Agreement and the Suppression Agreement, in August 2014, Providence conveyed the Property by deed[1] and the parties entered into a third agreement (the "Lease Agreement") providing that the Town would lease the Property to Providence for the same ten-year period as the term of the Suppression Agreement. The Lease Agreement also provided that if the Suppression Agreement were terminated early, the Lease Agreement would be terminated at the same time.

During the year following the Interlocal and Suppression Agreements and preceding the Lease Agreement, several new Town Council members were elected. Providence alleges that the new Town Council members opposed the first two agreements and that the new council

1. The deed is not included in the record on appeal, but the Second Verified Amended Complaint alleges that the agreement in which the Town purchased and leased back the Property was executed on 19 August 2014.

members' acts and omissions fraudulently induced Providence to convey the Property to the Town through the Lease Agreement.

In February 2015, Providence projected a deficit of approximately $70,000 in its operations budget and requested increased funding from the Town in order to meet its obligations to provide fire suppression and emergency medical services according to the standards required by the Suppression Agreement. On 15 April 2015, the Town notified Providence that unless it could provide documents and information confirming that it would be able to meet its performance obligations without increased funding, the Town intended to terminate the Suppression Agreement for cause. Providence responded with a revised operating budget and other documents. The Town Council reviewed the documents and voted to terminate the Suppression Agreement. On 29 April 2015, the Town notified Providence that it was terminating the Suppression Agreement for cause, effective 29 July 2015, because Providence had failed to provide adequate assurances that it could meet its ongoing and future obligations; the Lease Agreement also would terminate on that date.

The Town then contracted with the Wesley Chapel Volunteer Fire Department ("Wesley Chapel") as its new primary fire service provider to begin on 29 July 2015. The Town and Wesley Chapel signed an agreement requiring Wesley Chapel to use the Hemby Road fire station and containing a lease for the Property. The agreement also provided an option for Wesley Chapel to purchase the Property from the Town for $750,000.

Procedural Background

On 4 June 2015, Providence filed a complaint alleging that the Town breached the Suppression Agreement and seeking $750,000 in liquidated damages. On 10 July 2015, Providence filed a First Verified Amended Complaint, which added claims for fraud in the inducement and unfair and deceptive trade practices. On the same day, Providence filed a notice of *lis pendens* on the Property.

The Town on 17 July 2015 filed a motion for a preliminary injunction seeking to force Providence to surrender possession of the fire station. The trial court granted the motion and ordered Providence to vacate the Property and enjoined Providence from obstructing or interfering with the Property's use, occupancy, or possession by the Town or the Town's designees.

On 27 July 2015, Providence filed a motion for a temporary restraining order and a preliminary injunction seeking to prevent the Town from

selling, transferring, or conveying the Property or any interest therein. The trial court granted Providence's request for a temporary restraining order on 29 July 2015.

The Town filed a motion to dismiss Providence's tort claims on 29 July 2015, asserting complete governmental immunity. On 6 August 2015, Providence filed a motion to amend the First Verified Amended Complaint.

The trial court granted Providence's motion to amend and Providence filed its Second Verified Amended Complaint on 27 August 2015. The trial court granted the Town's motion to dismiss Providence's unfair and deceptive trade practices claim but denied the Town's motion to dismiss Providence's fraud claim.

The Town filed a notice of appeal from the orders denying its motion to dismiss the fraud claim, granting Providence's motion to amend, and granting Providence's motion for a preliminary injunction.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we address Providence's motion to dismiss the Town's appeal as interlocutory. Because the Town is appealing the trial court's denial of its motion to dismiss based in part on a challenge to personal jurisdiction, we hold that it is properly before us.

The North Carolina Supreme Court has not directly addressed whether governmental immunity is an issue of personal jurisdiction or subject matter jurisdiction, and consequently whether an appeal of a denial of immunity should be reviewed either as a challenge to personal jurisdiction or subject matter jurisdiction. However, this Court has classified the issue as one of personal jurisdiction, which permits an immediate appeal. *See, e.g.*, *Can Am S., LLC v. State*, 234 N.C. App. 119, 123-24, 759 S.E.2d 304, 308 (2014) ("[B]eginning with *Sides v. Hosp.*, 22 N.C. App. 117, 205 S.E.2d 784 (1974), *mod. on other grounds*, 287 N.C. 14, 213 S.E.2d 297 (1975), this Court has consistently held that: (1) the defense of sovereign immunity presents a question of personal, not subject matter jurisdiction, and (2) denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under section 1-277(b)."); *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245-46 (2001) ("[A]n appeal of a motion to dismiss based on sovereign immunity presents a question of personal jurisdiction rather than subject matter jurisdiction, and is therefore immediately appealable.") (citations omitted).

The Town asserts, citing *Church v. Carter*, 94 N.C. App. 286, 288, 380 S.E.2d 167, 168 (1989), and N.C. Gen. Stat. § 1-75.4 (2015), that because subject matter jurisdiction is a prerequisite to personal jurisdiction, our Court may properly review a challenge to subject matter jurisdiction when there was an accompanying challenge to personal jurisdiction. *Church*, 94 N.C. App. at 288, 380 S.E.2d at 168 (holding that when a defendant challenges both subject matter jurisdiction and personal jurisdiction, the court was required to "decide the issue [the defendant] ha[d] raised concerning subject matter jurisdiction"). The Town's argument overlooks the difference in the nature of the Rule 12(b)(1) challenges at issue in *Church* and in the present case. In *Church*, the defendant's motion to dismiss for lack of subject matter jurisdiction was not based on sovereign immunity, but rather on the defendant's status as a non-North Carolina entity. *Id.* Here, the Town's motion to dismiss for lack of subject matter jurisdiction is based on governmental immunity.

In *Can Am*, our Court denied a defendant's appeal asserting sovereign immunity as an issue of subject matter jurisdiction as interlocutory, while granting the defendant's appeal of the lower court's denial of the defendant's motion to dismiss for sovereign immunity as an issue of personal jurisdiction. 234 N.C. App. at 124, 759 S.E.2d at 308. This case presents a procedural posture in line with that of *Can Am*. Because governmental immunity has traditionally been recognized as an issue of personal jurisdiction and not subject matter jurisdiction, we grant Providence's motion to dismiss the Town's appeal under Rule 12(b)(1) (subject matter jurisdiction) and deny Providence's motion to dismiss the Town's appeal under Rule 12(b)(2) (personal jurisdiction).

[2] The remainder of the Town's appeal—challenging the denial of the motion to dismiss based on Rule 12(b)(6) and the orders allowing Providence to amend its complaint and imposing a preliminary injunction—raises issues that generally are not subject to interlocutory review. We agree that the Town's appeal based upon substantive defenses other than governmental immunity do not affect a substantial right. However, in our discretion, because all of the remaining issues appealed are closely interrelated, we choose to address the Town's additional arguments to avoid "fragmentary appeals." *RPR & Assocs., Inc. v. State*, 139 N.C. App. 525, 530-31, 534 S.E.2d 247, 251-52 (2000) (choosing to address the defendant's additional question on appeal, despite its interlocutory nature, noting "to address but one interlocutory or related issue would create fragmentary appeals"). We first address the Town's appeal from the trial court's order allowing a motion by Providence to file a Second Verified Amended Complaint because that amendment is ultimately dispositive of the Town's motion to dismiss the tort claims.

II. Motion to Amend

[3] The Town asserts that the trial court erred in granting Providence's motion to amend its complaint. We disagree.

We review a trial court's decision on a motion to amend the pleadings for abuse of discretion. *Williams v. Owens*, 211 N.C. App. 393, 394, 712 S.E.2d 359, 360 (2011) (citation omitted). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Warren v. Gen. Motors Corp.*, 142 N.C. App. 316, 319, 542 S.E.2d 317, 319 (2001) (internal quotation marks and citations omitted).

"The party opposing the amendment has the burden to establish that it would be prejudiced by the amendment." *Carter v. Rockingham Cnty. Bd. of Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003) (citations omitted). "Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985) (citations omitted).

Here, the Town challenges the order allowing Providence's motion to amend because counsel for Providence has admitted that it had no factual basis for alleging waiver of governmental immunity through the purchase of liability insurance and had not conducted any inquiry into the matter. As discussed *infra*, Providence concedes this issue; however, even with this concession, the record before us does not establish that the trial court abused its discretion in allowing the motion to amend. We therefore affirm the trial court.

[4] Because the Town's 12(b)(6) motion to dismiss was based primarily on Providence's First Verified Amended Complaint and we hold that the trial court did not err in allowing Providence to amend its complaint, the Town's 12(b)(6) motion to dismiss was properly denied. Additionally, we hold that the trial court properly denied the motion to the extent that the Town's argument was applicable to Providence's Second Verified Amended Complaint. As discussed *infra*, the Second Verified Amended Complaint alleged alternative grounds upon which governmental immunity was unavailable beyond waiver by purchase of liability insurance and to which the Town did not adequately respond in its initial motion to dismiss or accompanying affidavit. Therefore, the trial court was proper in denying the Town's motion to dismiss based on Rule 12(b)(6).

III. Governmental Immunity

[5] The Town argues that the trial court erred by denying its motion to dismiss the fraud claim based on governmental immunity because (1) the Town was acting in its governmental capacity when it entered into the agreements, (2) waiver of immunity through contractual agreement does not waive immunity as to tort claims that may arise out of the contract, and (3) the Town did not have insurance to cover such claims. We disagree.

Because we hold that the trial court did not abuse its discretion in allowing Providence's motion to amend, the Second Verified Amended Complaint, verified under oath by Jack E. Parks, Jr., President of the Providence Volunteer Fire Department, was properly before the trial court as a source of evidence. The trial court, therefore, was permitted to consider its weight and credibility, along with the weight and credibility of the affidavit of Peggy Piontek, the Town Clerk of Weddington, submitted by the Town in support of its motion to dismiss.

A. Standard of Review

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999) (citations omitted). However, our review is also "depend[ent] upon the procedural context confronting the court." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). Three procedural postures are typical: "(1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues." *Id.*

In this first category where neither party submits evidence, "[t]he allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217 (2000) (citations omitted). If, however, the defendant submits supportive evidence—for example an affidavit—along with the motion to dismiss, the complaint's allegations "can no longer be taken as true or controlling and [the] plaintiff[] cannot rest on the allegations of the complaint." *Id.* at 615-16, 532 S.E.2d at 218 (citation omitted). In this instance, the court must consider "(1) any allegations in the complaint that are not

controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence)." *Banc of Am.*, 169 N.C. App. at 693-94, 611 S.E.2d at 182-83 (citations omitted).

In the third category, when the parties submit competing evidence—such as affidavits or an affidavit and a verified complaint[2]—"the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." N.C. R. Civ. P. 43(e) (2015); *see also Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217 ("If the exercise of personal jurisdiction is challenged by a defendant, a trial court may hold an evidentiary hearing including oral testimony or depositions or may decide the matter based on affidavits.") (citation omitted). When the trial court decides the motion on affidavits, "[t]he trial judge must determine the weight and sufficiency of the evidence [presented in the affidavits] much as a juror." *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981). Even when the trial court is required to weigh evidence, it is not required to make findings of fact unless requested by a party when deciding a motion to dismiss. N.C. R. Civ. P. 52(e) (2015). When the record contains no findings of fact, "it will be presumed that the judge, upon proper evidence, found facts sufficient to support his ruling." *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d 111, 114 (1986) (citation omitted). "Where such presumed findings are supported by competent evidence, they are deemed conclusive on appeal, despite the existence of evidence to the contrary." *Data Gen.*, 143 N.C. App. at 101, 545 S.E.2d at 246.

In order to deny the Town's motion to dismiss based on governmental immunity, the trial court presumably determined that the Town was precluded from its governmental immunity defense by one of the three following alternatives: (1) acting in a proprietary capacity, (2) entering into a valid contract thereby implicitly waiving immunity, or (3) purchasing liability insurance.

B. Proprietary Function

Providence's primary contention on appeal is that the Town was engaged in a proprietary function when the parties entered into the

2. "A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (citations omitted).

series of agreements, particularly the Lease Agreement and the Interlocal Agreement, so that governmental immunity does not shield the Town from suit for torts related to those agreements.

Whether an entity is entitled to governmental immunity can turn on whether its alleged tortious conduct arose out of an activity that was governmental or proprietary in nature. *Estate of Williams v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012) (reviewing the Court of Appeals analysis of whether a county's operation of a swimming hole was governmental or proprietary in nature). A governmental function has long been held as an activity that is "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself." *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). Conversely, a proprietary function is one that is "commercial or chiefly for the private advantage of the compact community." *Id.* (citations omitted). The reason for this distinction is that "[w]hen a municipality is acting 'in behalf of the State' in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers." *Id.* at 450-51, 73 S.E.2d at 293.

Our Supreme Court recently provided guidance on this often difficult and fact determinative distinction. In *Williams*, the Court laid out a three-step procedure with "the threshold inquiry" being "whether, and to what degree, the legislature has addressed the issue." 366 N.C. at 200, 732 S.E.2d at 141-42. This determination "turns on the facts alleged in the complaint." *Id.* at 201, 732 S.E.2d at 143. The Court remanded the case in *Williams* to this Court with instructions for further remand to the trial court "for detailed consideration of the degree of effect, if any, of section 160A-351," the policy provision of the Recreation Enabling Law providing that recreation is a governmental function, had on whether the defendant's operation of a swimming hole was a governmental or a proprietary endeavor. *Id.*

The Court in *Williams* addressed additional considerations necessary when the legislature has not specifically commented on the function to aid in a court's determination of the nature of an activity. *Williams*, 366 N.C. at 202, 732 S.E.2d at 142. "[W]hen an activity has not been designated as governmental or proprietary by the legislature, that activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality." *Id.* If, however, as

is increasingly more often the case, the activity may be performed both privately and publicly, "the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive." *Id.* at 202, 732 S.E.2d at 143. The Court concluded that "[r]elevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." *Id.* at 202-03, 732 S.E.2d at 143. Ultimately, "the proper designation of a particular action of a county or municipality is a fact intensive inquiry, turning on the facts alleged in the complaint, and may differ from case to case." *Id.* at 203, 732 S.E.2d at 143.

The Town's motion to dismiss, but not its supporting affidavit, refutes a theory of waiver based on proprietary activity underlying the alleged fraud. We therefore consider whether the complaint contains sufficient allegations to support the court's exercise of jurisdiction on this basis. After a careful review of the pleadings, we hold that it does.

Because the trial court did not abuse its discretion in allowing Providence's motion to amend, the Second Verified Amended Complaint controls our review. The Second Verified Amended Complaint alleges that "[t]he Town's function in entering into the purchase agreement with lease back dated August 19, 2014 . . . with the Plaintiff is proprietary in nature and as such the Town can be sued by the Plaintiff for the causes of action stated herein." This allegation was unchallenged by the Town through any evidence submitted in support of its motion. Therefore, we are required to take this allegation as true. The allegation is sufficient to support the trial court's presumed finding that the Town was not entitled to immunity because it was performing a proprietary function. Accordingly, we hold that the trial court did not err in denying the Town's motion to dismiss.

In affirming the trial court's denial of the Town's motion to dismiss based upon the theory of proprietary activity, we emphasize that our holding addresses only the sufficiency of the allegations in the Second Verified Amended Complaint that were not controverted by any evidence produced by the Town.

On remand should the trial court, at a subsequent procedural posture, base its jurisdiction over the Town on the ground that the Town was acting in a proprietary function when it entered into the agreements, the trial court must adhere to the guidance provided by this opinion and the Supreme Court's precedent.

C. Waiver by Contract

[6] Providence also asserts that the Town waived its immunity by entering into a valid contract, and based on this waiver, the trial court's denial of the Town's motion to dismiss was proper. Providence relies on two decisions by our Supreme Court, *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), and *Ports Authority v. Fry Roofing Co.*, 294 N.C. 73, 82, 240 S.E.2d 345 (1978), *rejected on other grounds by Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 328 S.E.2d 274 (1985), to extend the principles of waiver of governmental immunity by contract to tort claims arising out of a particular contract—we disagree.

The Supreme Court held in *Smith* that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24. *Smith* involved only a breach of contract claim. *Id.* at 307-08, 222 S.E.2d at 415-16. Its holding has not been extended to tort claims against a government entity. *See Dickens v. Thorne*, 110 N.C. App. 39, 47, 429 S.E.2d 176, 181 (1993) (rejecting the argument that an employee's employment contract with a county was sufficient to trigger a waiver of governmental immunity for tort liability on a libel claim because the complaint was not based on a breach of contract).

Ports Authority established that a tort claim may arise out of a breach of contract in the following instances:

> (1) The injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee.
>
> (2) The injury, proximately caused by the promisor's negligent, or wilful[sic], act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee.
>
> (3) The injury, proximately caused by the promisor's negligent, or wilful[sic], act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from

> harm, as in the case of a common carrier, an innkeeper, or other bailee.
>
> (4) The injury so caused was a wilful[sic] injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor.

Ports Authority, 294 N.C. at 82, 240 S.E.2d at 350-51 (internal citations omitted). But the holding is limited to the context of an applicable statute of limitations and does not address governmental immunity. *Id.* at 81-86, 240 S.E.2d at 350-52.

Providence asks this Court to combine the principles delineated in *Smith* and *Ports Authority* to establish that the Town implicitly waived immunity against tort claims arising out of a breach of contract claim. Providence contends that because its claim of fraud in the inducement alleges a willful conversion of the Property, the claim arises out of the agreements and the Town implicitly waived its immunity to the fraud claim.

In light of *Dickens* and the lack of any precedent extending the holding of *Ports Authority* to a governmental immunity case, we decline to do so here. We therefore reject this theory of waiver asserted by Providence.

D. Waiver by Insurance

[7] The parties dispute whether Providence's Second Verified Amended Complaint's allegation concerning the purchase of insurance was properly made on the basis of personal knowledge.

During oral argument before this Court, Providence's counsel conceded that he was not aware of any factual basis for the allegation in the Second Verified Amended Complaint that the Town had purchased liability insurance, thereby waiving its governmental immunity as to the fraud claim. Although the parties agree that this allegation was unsubstantiated, because we affirm the trial court's order on an alternative theory of wavier of governmental immunity, we decline to address the Town's argument that an unfounded allegation contained in a verified complaint may not be used as evidence for the purposes of a motion to dismiss.

IV. Preliminary Injunction

[8] The Town argues that the trial court erred in granting Providence's motion for a preliminary injunction because Providence's filing of a *lis pendens* provided for an adequate remedy at law and Providence failed to establish a likelihood of success on the merits. We agree.

"A preliminary injunction is an interlocutory injunction which restrains a party pending trial on the merits." *N.C. Baptist Hosp. v. Novant Health, Inc.*, 195 N.C. App. 721, 724, 673 S.E.2d 794, 796 (2009) (citing *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983); N.C. Gen. Stat. § 1A-1, Rule 65 (2007)). "[O]n appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P.*, 308 N.C. at 402, 302 S.E.2d at 760 (citations omitted).

A preliminary injunction will be issued only "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (emphasis omitted) (citations omitted). "Ordinarily, an injunction will not be granted where there is a full, adequate and complete remedy at law, which is as practical and efficient as is the equitable remedy." *City of Durham v. Public Serv. Co. of N.C., Inc.*, 257 N.C. 546, 557, 126 S.E.2d 315, 323-24 (1962) (citations omitted).

Our Supreme Court has held that the filing of a *lis pendens* provides "a full, complete and adequate remedy at law." *Whitford v. N.C. Joint Stock Land Bank of Durham*, 207 N.C. 229, 232, 176 S.E. 740, 742 (1934). The Court went on to note that "[b]y complying with these plain statutory provisions [regarding *lis pendens*] the plaintiffs can preserve every right they may have under their pleadings; and it is too well settled in this jurisdiction to require citations of authority that where there is a full, complete, and adequate remedy at law, the equitable remedy of injunction will not lie." *Id.* at 233, 176 S.E. at 742.

Here, the record is clear that Providence filed a notice of *lis pendens* on the Property. This provided constructive notice to any subsequent purchaser and binds him to "all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action." N.C. Gen. Stat. § 1-118 (2015). Therefore, Providence was provided an adequate remedy at law and the issuance of the preliminary injunction was improper. Accordingly, we reverse the trial court's grant of Providence's motion for a preliminary injunction.

Conclusion

For the above reasons, we affirm the trial court's order granting Providence's motion to amend and denying the Town's motion to dismiss

based on governmental immunity pursuant to Rules 12(b)(2) and (6). We reverse the trial court's order granting Providence's motion for a preliminary injunction. We remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Judges BRYANT and TYSON concur.

STATE OF NORTH CAROLINA
v.
KENRICK J. BATTLE

No. COA16-1002

Filed 18 April 2017

Firearms and Other Weapons—possession by a felon—evidence of possession—insufficient

The trial court should have granted defendant's motion to dismiss a charge of possession of a firearm by a felon where a rifle was found seventy-five to one hundred yards from the spot to which a dog tracked defendant. No evidence was presented regarding the ownership of the rifle. Viewed in the light most favorable to the State, the evidence raised only a suspicion or conjecture and was not sufficient for an inference of actual or constructive possession of the rifle.

Appeal by defendant from judgment entered 10 February 2016 by Judge Wayland J. Sermons, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 22 March 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

William D. Spence for defendant-appellant.

TYSON, Judge.

Kenrick J. Battle ("Defendant") appeals from judgment entered upon a jury's conviction of felonious possession of a firearm by a felon. We reverse the trial court's denial of Defendant's motion to dismiss.

I. Background

On 3 February 2015, Edgecombe County Sheriff's deputies arrived at a residence in a rural part of the county in an attempt to locate Defendant. They determined Defendant was not present inside the residence and left. The deputies received a "tip" approximately fifteen minutes later, which caused them to establish a perimeter around a large section of woods adjacent to the residence.

Deputy Kenneth Wooten deployed a canine, a Dutch Shepherd, "Max," to track human scent in the wooded area. Deputy Wooten testified Max is trained "to track human beings that have fled from an area" and "indicate where someone is hiding" by tracking a combination of human scent, crushed vegetation, and sedimentation. Deputy Wooten further testified Max is trained to "ensure [he] is not going to veer off of one track onto another," and to remain on the original track in the event he detects the scent of another human being.

Deputy Wooten took Max along a wood line and was accompanied by Detective Greg Weeks. Max detected a human scent on a footpath, which led into the woods. Max led the deputies and proceeded along the footpath, which ended approximately fifteen to twenty yards from the beginning of the wood line. Max continued to track into the woods, and led the deputies across a ditch and into a dense thicket. While in the vegetation, Max raised his head and began sniffing the air. This behavior, Deputy Wooten referred to as "air scenting," indicated they were "close to someone or something." The deputies saw an "assault rifle" in front of Max, which they retrieved and determined it was loaded.

Max began tracking away from the area from where the rifle was found. He led the deputies through the woods, parallel to Highway 122. The deputies continued to follow Max parallel to the highway, until they came upon a ditch at the edge of a field. A footprint was visible on the other side of the ditch. Max led the deputies across the ditch, but lost the track. Another man, Anthony Lyons, emerged from the woods at another location, while Max and the deputies were near the ditch. Another deputy arrested Lyons at the perimeter of the woods.

The deputies and Max emerged from the woods after Max lost the track. They gave the recovered rifle to their supervisor, and allowed Max to rest for approximately five minutes. The deputies and Max returned to the ditch, where Max had lost the track. According to Deputy Wooten, Max "immediately picked the track back up," and led the officers toward the highway. Max led the officers into an area of extremely thick briars and began "air scenting." Defendant was discovered lying upon the

ground. Deputy Wooten testified the distance between where the rifle was recovered and Defendant was found was between seventy-five and one hundred yards.

No evidence was presented regarding the ownership of the rifle. DNA swabs that were taken from the rifle and compared to Defendant's DNA were inconclusive. The State did not present any fingerprint or additional evidence to connect Defendant to the rifle.

The State presented evidence tending to show Defendant was previously convicted of a felony offense, taking indecent liberties with a child, in 2009. The jury convicted Defendant of possession of a firearm by a felon. The trial court sentenced Defendant to an active prison term of nineteen to thirty-two months. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court from final judgment of the superior court entered upon the jury's verdict pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2015).

III. Sufficiency of the Evidence

In his sole argument on appeal, Defendant argues the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon. Defendant asserts the State presented insufficient evidence to show he possessed the rifle found in the woods. We agree.

A. Standard of Review

"We review the trial court's denial of a motion to dismiss *de novo*." *State v. Sanders*, 208 N.C. App. 142, 144, 701 S.E.2d 380, 382 (2010). Under a *de novo* standard of review, this Court "considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.*

In ruling on a motion to dismiss for insufficiency of the evidence,

> the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. All evidence, competent or incompetent, must be considered. Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. In its analysis, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.

> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. When the evidence raises no more than a suspicion of guilt, a motion to dismiss should be granted. However, so long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence. The test for sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both.

State v. Bradshaw, 366 N.C. 90, 92-93, 728 S.E.2d 345, 347 (2012) (internal citation and quotation marks omitted).

B. Possession of the Firearm

To convict Defendant of felonious possession of a firearm by a felon, the State must prove: (1) Defendant was previously convicted of a felony; and (2) Defendant thereafter possessed a firearm. N.C. Gen. Stat. § 14-415.1 (2015); *State v. Best*, 214 N.C. App. 39, 45, 713 S.E.2d 556, 561, *disc. review denied*, 365 N.C. 361, 718 S.E.2d 397 (2011). Defendant does not challenge his status as a convicted felon. He argues the State failed to present sufficient evidence he possessed the firearm the deputies discovered in the woods.

Possession of a firearm may be actual or constructive. *State v. Billinger*, 213 N.C. App. 249, 253, 714 S.E.2d 201, 205 (2011). Our Court has explained:

> A person has actual possession of a firearm if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use. In contrast, a person has constructive possession of a firearm when, although not having actual possession, the person has the intent and capability to maintain control and dominion over the firearm.

Id. at 253-54, 714 S.E.2d at 205.

" 'It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue.' " *State v. Brooks*, 136 N.C. App. 124, 129, 523 S.E.2d 704, 708 (1999) (quoting *State v. Johnson*, 199 N.C. 429, 154 S.E. 730 (1930)), *disc. review denied*, 351 N.C. 475, 543 S.E.2d 496 (2000). If the evidence "is sufficient only to raise a suspicion

or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. This is true even though the suspicion so aroused by the evidence is strong." *In re Vinson*, 298 N.C. 640, 656-57, 260 S.E.2d 591, 602 (1979) (citations omitted). Here, the testimonies of Deputy Wooten and Detective Weeks regarding Max's tracking behavior may raise a "strong suspicion" that Defendant possessed the rifle, constructively or otherwise, "but [is] not sufficient to remove that issue from the realm of suspicion and conjecture." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

Our Court has declined to uphold convictions based upon constructive possession in cases where the defendant is not the sole occupant of the area where the firearm is found, and no other incriminating evidence links the defendant to the weapon. For example, Defendant cites *State v. Bailey* to support his argument the State failed to present sufficient evidence to show he constructively possessed the rifle. 233 N.C. App. 688, 757 S.E.2d 491, *disc. review denied*, 367 N.C. 789, 766 S.E.2d 678 (2014). In *Bailey*, officers responded to a report of gunshots at an apartment complex, and saw a vehicle drive away. *Id.* at 689, 757 S.E.2d at 492. Officers stopped the vehicle, which was owned and driven by the defendant's girlfriend. *Id.* The defendant was seated in the passenger's seat and told the officers that a firearm was located on the rear floorboard. Id. The firearm was warm, had recently been fired, and was registered to the defendant's girlfriend. *Id.* A gunshot residue test taken of the defendant's hands was inconclusive. *Id.* at 689-90, 757 S.E.2d at 492. This Court held "the only evidence linking [the] defendant to the rifle was his presence in the vehicle and his knowledge that the gun was in the backseat[,]" and was insufficient to allow the jury to infer constructive possession. *Id.* at 693, 757 S.E.2d at 494.

We acknowledge the officers' testimonies that Max tracked an unknown human scent from the wood line to the area where the rifle was recovered, and that Max is trained not to veer off one human scent and onto another. However the rifle was not found in Defendant's physical possession or in the immediate area under his "capability to maintain control and dominion over the firearm." *Billinger*, 213 N.C. App at 254, 714 S.E.2d at 205. Another man was also present in the same woods as Defendant, while the officers searched for Defendant. Furthermore, Max lost the original track at the ditch, took a break to rest outside of the woods, and then resumed tracking.

This Court has upheld a defendant's conviction, where the defendant was identified as the perpetrator by a tracking canine. *State*

v. Green, 76 N.C. App. 642, 334 S.E.2d 263, *disc. review denied*, 315 N.C. 187, 340 S.E.2d 751 (1985). In *Green*, the officers utilized two canines to investigate a breaking and entering and larceny from a store. *Id.* at 643, 334 S.E.2d at 264-65. The canines were offered a "scent source" at the crime scene, which consisted of gloves and shoes taken from the defendant and the codefendant. *Id.* at 643, 334 S.E.2d at 265. One of the dogs, a Doberman pinscher, tracked the scent to a location where two stolen microwave ovens had been abandoned. *Id.* The Doberman was taken off the trail to protect the dog from the cold rain. *Id.* The other dog, a Rottweiler, "then traced the scent along the same path . . . to where the defendant and the codefendant were apprehended." *Id.*

The defendant in *Green* argued the trial court erred by admitting the dog tracking evidence without testimony of the characteristics of the breeds, and by failing to dismiss the charges of larceny and breaking and entering for insufficient evidence. *Id.* Our Court held the trial court properly admitted the evidence and the defendant's motion to dismiss was properly denied. *Id.* at 646, 334 S.E.2d at 266.

In *State v. Styles*, 93 N.C. App. 596, 599, 379 S.E.2d 255, 258 (1989), two bloodhounds tracked a human scent originating from the rape scene to the front door of a trailer where the defendant was staying. The defendant argued on appeal that the evidence was insufficient to convict him, because the victim was unable to identify the defendant as the perpetrator of the rape. *Id.* at 603, 379 S.E.2d at 260.

Our Court disagreed, and explained "a bloodhound specially trained in tracking human beings led a path from the front of the victim's house to the culvert where shoe prints were found and then to the trailer where the defendant was staying." *Id.* An expert testified the defendant's shoes made the prints at the rape scene and by the culvert. *Id.* at 600, 379 S.E.2d at 258. Additional expert testimony showed hairs found and recovered at the scene were consistent with the defendant's hair. *Id.*

The facts of this case are distinguishable from those in both *Green* and *Styles*. Here, the testimony of Max's tracking behaviors was the *sole* testimony offered by the State to establish that Defendant constructively possessed the rifle. In *Styles*, hair and shoe print evidence was also presented to show Defendant was the perpetrator. *Id.* In *Green*, the canines were offered a scent source of the defendant and codefendant, and were tracking a known scent. *Green*, 76 N.C. App. at 643, 334 S.E.2d at 265. Further, unlike the facts in this case, nothing in *Green* and *Styles* indicates the canine lost the track, took a break for a period of time, and then resumed. Defendant was not alone in the immediate area

where the rifle was found. No other evidence, such as fingerprints, DNA, or ownership, linked Defendant to the rifle or the site from which it was recovered.

The officers' testimony is insufficient to establish any link between Defendant and the firearm. The canine tracking evidence on an unknown scent fails to raise, as a matter of law, a reasonable inference of either actual or constructive possession of a firearm by Defendant as a convicted felon. Viewed in the light most favorable to the State, the evidence raises only a "suspicion [or] conjecture" that Defendant possessed the rifle. The trial court erred in denying Defendant's motion to dismiss. *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720.

IV. Conclusion

After viewing the evidence in the light most favorable to the State, the evidence is insufficient to raise or permit an inference that Defendant actually or constructively possessed the rifle, and to "remove that issue from the realm of suspicion and conjecture." *Id.* The trial court erred by denying Defendant's motion to dismiss the charge of possession of a firearm by a felon.

The trial court's judgment is reversed. This matter is remanded to the trial court for entry of an order granting Defendant's motion to dismiss. *It is so ordered.*

REVERSED AND REMANDED.

Judges ELMORE and DIETZ concur.

STATE v. HUDDY

[253 N.C. App. 148 (2017)]

STATE OF NORTH CAROLINA
v.
MICHAEL VERNON HUDDY

No. COA16-904

Filed 18 April 2017

1. Search and Seizure—knock and talk doctrine—curtilage of home

The trial court erred in a prosecution for possession of marijuana with intent to sell or deliver by relying on the knock and talk doctrine to justify an officer's warrantless search of the curtilage of defendant's home. The officer did more than knock and talk: he ran a license plate not visible from the street, checked windows for signs of a break-in, and walked around the entire residence to "clear" the sides of the home before approaching the back door, which was inside a chain link fence.

2. Search and Seizure—community caretaker doctrine—car doors open—intrusion into backyard

The trial court erred in a prosecution for possession of marijuana with intent to sell or deliver by relying on the community caretaker doctrine where the officer approached defendant's back door after seeing a car with its doors open in defendant's driveway. The facts did not justify a warrantless intrusion; moreover, there are many innocent reasons to leave the doors open on a vehicle in a driveway and there were alternatives the officer could have used.

Judge TYSON concurring.

Appeal by defendant from judgment entered 8 June 2016 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Martin T. McCracken, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for defendant.

DIETZ, Judge.

Defendant Michael Vernon Huddy appeals the trial court's denial of his motion to suppress evidence obtained after a law enforcement officer searched the curtilage of Huddy's home without a warrant. The officer saw a vehicle with its doors open at the back of a 150-yard driveway leading to Huddy's home. Concerned that the vehicle may be part of a break-in or home invasion, the officer drove down Huddy's 150-yard driveway, ran the tags on the vehicle, checked the front door (but did not knock), checked the home's windows, "cleared" the sides of the house, and then went through a gate in a chain-link fence enclosing the home's backyard and approached the storm door at the back of the house, not visible from the street—all without a warrant or probable cause and accompanying exigent circumstances. As the officer approached the back door, he smelled marijuana, which ultimately led to Huddy's arrest and conviction for possession of marijuana.

We hold that the officer's conduct violated the Fourth Amendment and thus Huddy's motion to suppress should have been granted. At the suppression hearing, the State relied on two exceptions to the warrant requirement to justify the officer's search of the curtilage of Huddy's home: the "knock and talk" doctrine and the "community caretaker" doctrine. As explained below, neither exception applies here. First, the State cannot rely on the knock and talk doctrine because the officer did more than merely knock and talk. The officer ran a license plate not visible from the street, walked around the house examining windows and searching for signs of a break-in, and went first to the front door (without knocking) and then to a rear door not visible from the street and located behind a closed gate. These actions went beyond what the U.S. Supreme Court has held are the permissible actions during a knock and talk. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

Likewise, the State cannot rely on the community caretaker doctrine. The presence of a vehicle in one's driveway with its doors open is not the sort of emergency that justifies the community caretaker exception. *State v. Smathers*, 232 N.C. App. 120, 126, 753 S.E.2d 380, 384 (2014). Accordingly, the trial court erred by denying Huddy's motion to suppress. We reverse the trial court's order and remand for further proceedings.

Facts and Procedural History

On 16 July 2016, around 11:00 a.m., Deputy Tracy Smith of the Guilford County Sherriff's Department was patrolling an area that law enforcement believed was at risk of home invasions or break-ins. Deputy Smith approached Huddy's home and saw a parked vehicle with

open doors at the end of a 150-yard driveway leading to the rear of the home. Deputy Smith thought it was unusual for a vehicle to be parked in a driveway with the doors open at that time of day. Deputy Smith also observed that the house was surrounded by trees, which Deputy Smith believed made it susceptible to break-ins.

Deputy Smith drove to the back of the driveway, parked behind the vehicle, and ran the vehicle's license plate. The address on record for the vehicle did not match the address for Huddy's home. Deputy Smith continued to investigate by walking to the front of the house and checking windows and doors for signs of forced entry. Deputy Smith saw that the front door was "covered in cobwebs" and did not appear to be used as the main entrance to the house. Deputy Smith did not knock on the front door. Observing no signs of forced entry, Deputy Smith then "cleared" the sides of the home before walking to the back of the house.

The back yard of Huddy's home was enclosed by a chain-link fence. Deputy Smith opened the gate in that chain-link fence and entered the enclosed back yard. Deputy Smith then approached a storm door on the rear porch, which was not visible from the street. Deputy Smith smelled marijuana in the area around the storm door.

Deputy Smith knocked on the door and Huddy answered. Deputy Smith asked Huddy to verify that he was lawfully present in the house. Huddy first offered his driver's license, which matched the address for the vehicle in the driveway, but not the house. Deputy Smith requested additional verification, and Huddy eventually produced a rental agreement for the house.

Based on the odor of marijuana, Deputy Smith secured a warrant to search the house. Law enforcement later seized a large quantity of marijuana. The State indicted Huddy on 14 September 2015 for possession of marijuana with intent to sell or deliver, possession of marijuana, and possession of marijuana paraphernalia. On 16 February 2016, Huddy moved to suppress the evidence of marijuana seized from the residence. On 4 April 2016, the trial court entered a written order denying the motion.

On 16 May 2016, Huddy entered an *Alford* plea to one count of possession of marijuana with intent to sell or deliver while reserving his right to appeal the denial of his motion to suppress. The court sentenced Huddy to a 4 to 14 month active sentence, suspended the sentence, and ordered 12 months of supervised probation. Huddy timely appealed.

Analysis

Huddy challenges the denial of his motion to suppress. He contends that the investigating officer violated the Fourth Amendment when he searched throughout the curtilage of Huddy's home to "check the windows, check the doors" for signs of a possible break-in. As explained below, we agree that neither the knock and talk doctrine nor the community caretaker doctrine permitted the officer to conduct this type of warrantless search of the home's curtilage. Accordingly, we reverse the trial court's order and remand for further proceedings.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011). Unchallenged findings of fact "are deemed to be supported by competent evidence and are binding on appeal." *Id.* at 168, 712 S.E.2d at 878. "Conclusions of law are reviewed de novo and are subject to full review." *Id.*

We start by reviewing the Fourth Amendment's core principles. "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). This protection extends not only to the interior of one's home, but also to the "curtilage," which is "the area immediately surrounding and associated with the home." *Id.* As a result, law enforcement ordinarily cannot enter the curtilage of one's home without either a warrant or probable cause and the presence of exigent circumstances that justify the warrantless intrusion. *Id.*

Courts have recognized several exceptions to this general rule, and the trial court relied on two of these exceptions: the "knock and talk" doctrine and the "community caretaker" doctrine. We address these two exceptions in turn below.

I. Knock and Talk Doctrine

[1] We begin with the knock and talk doctrine. Because "no search of the curtilage occurs when an officer is in a place where the public is allowed to be, such as at the front door of a house," officers are permitted to approach the front door of a home, knock, and engage in consensual conversation with the occupants. *State v. Lupek*, 214 N.C. App. 146, 151, 712 S.E.2d 915, 919 (2011). Put another way, law enforcement may

do what occupants of a home implicitly permit anyone to do, which is "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 133 S. Ct. at 1415.

Importantly, law enforcement may not use a knock and talk as a pretext to search the home's curtilage. *Id.* at 1416. "[N]o one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." *Id.* at n.4. Likewise, the knock and talk doctrine does not permit law enforcement to approach *any* exterior door to a home. An officer's implied right to knock and talk extends only to the entrance of the home that a "reasonably respectful citizen" unfamiliar with the home would believe is the appropriate door at which to knock. *Id.* at 1415 n.2. This limitation is necessary to prevent the knock and talk doctrine from swallowing the core Fourth Amendment protection of a home's curtilage. Without this limitation, law enforcement freely could wander around one's home searching for exterior doors and, in the process, search any area of a home's curtilage without a warrant.

Under *Jardines*, the officer in this case did not conduct a permissible knock and talk. The court found—and the record supports—that the officer searched throughout the home's curtilage *before* going to the back door to knock. Indeed, the officer conceded during the suppression hearing that he was searching for signs of a break-in before he knocked on any door to the home:

> Q. You stated that you guess that the driveway was approximately 150 yards, but you didn't measure it.
>
> A. No.
>
> Q. And based on your experience, when you're looking at a residence such as this, what are the signs for a burglary?
>
> A. Forced entry on the doors, doors unlocked, doors—you can always shimmy a door to make entry on the back door, side door, just by moving a credit card or sliding something in the doorjamb. *I'm looking for any kind of signs of forced entry, opened doors, unlocked doors, things of that nature.*
>
> Q. Based on your experience, what would cause you to approach a residence like this in the first place?
>
> A. My primarily [*sic*] duty there was, once I saw the vehicle in the driveway, doors were open on it, there was no

> other cars there. The house—at least to my—all my years, it's typically a type of house that's surrounded by woods. The vehicle was—there's no other vehicle in the driveway. The doors are open on the vehicle. The tag comes back to a residence other than that residence, which is—okay, that's things I might need to know. *I get out*, *walk around to the front*, *check the windows*, *check the doors*, don't see any indicators. Since the back is, to me, there's a primary entrance, that's also where the vehicle was parked, that's probably my point that I may be close—paying close attention to. *So I went around to the other side*, *cleared the other side and came around to the back of the residence.*
>
> Q. *And is walking around the entire residence like that*, *is that normal procedure?*
>
> A. *Yes*, *ma'am*.

(Emphasis added.)

Simply put, the officer, by his own admission, did more than simply knock and talk. The officer ran a license plate on a car whose license plate was not visible from the street, checked windows for signs of a break-in, and walked around the entire residence to "clear" the sides of the home before approaching the back door. Under *Jardines*, this is precisely the sort of search of a residence that falls outside the knock and talk doctrine. As the Court explained in *Jardines*, "the background social norms that invite a visitor to the front door do not invite him there to conduct a search." 133 S. Ct. at 1416. Accordingly, we hold that the trial court erred by relying on the knock and talk doctrine to justify the officer's warrantless search of the curtilage of Huddy's home.

II. Community Caretaker Doctrine

[2] We next turn to the community caretaker doctrine. Our State first recognized the community caretaker doctrine in *State v. Smathers*, 232 N.C. App. 120, 126, 753 S.E.2d 380, 384 (2014). The origin of the doctrine "is the desire to give police officers the flexibility to help citizens in need or protect the public even if the prerequisite suspicion of criminal activity which would otherwise be necessary for a constitutional intrusion is nonexistent." *Smathers*, at 125, 753 S.E.2d at 384. In applying the doctrine, courts must assess whether "the public need or interest outweighs the intrusion upon the privacy of the individual." *Id.* at 129, 753 S.E.2d at 386. Factors that courts should consider include "(1) the degree of the public interest and the exigency of the situation; (2)

the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished." *Id.*

Notably, our State's appellate courts have never applied the community caretaker doctrine to a search of a home. As explained above, the Fourth Amendment's protections are at their very strongest within one's home, and thus the public need must be particularly strong to justify a warrantless search of a home under the community caretaker exception.

We hold that the facts in this case do not justify that warrantless intrusion. At the time the officer searched the curtilage of the home, the only indication that there was an emergency was a vehicle in the home's driveway with its doors open. Although this *might* suggest a home invasion is in progress, there are countless innocent reasons why one might leave doors open in a vehicle parked in a driveway—for example, to make it easier to grab the rest of the groceries or other items the homeowner is in the process of bringing into the home. Thus, this situation is unlike one in which the facts point unquestionably to some public emergency, such as a door that has been broken open, or signs that someone inside the home needs emergency medical attention.

Moreover, there were other available alternatives to the search that the officer could have used, such as knocking at the front door and calling out to ask if anyone needed assistance, or waiting at the entrance to the driveway to observe the vehicle. Applying the objective "totality of the circumstances" test established in *Smathers*, we hold that the trial court's findings in this case are insufficient to justify a search of the curtilage of Huddy's home under the community caretaker exception.

In sum, the officer's warrantless search of the curtilage of the home was not justified by either the knock and talk doctrine or the community caretaker doctrine. Accordingly, the trial court should have granted Huddy's motion to suppress. *See State v. Pope*, 333 N.C. 106, 113–14, 423 S.E.2d 740, 744 (1992). We reverse the trial court's order and remand for further proceedings.

Conclusion

For the foregoing reasons, we reverse the trial court's order and remand for further proceedings.

REVERSED AND REMANDED.

Judge ELMORE concurs.

Judge TYSON concurs with separate opinion.

TYSON, Judge, concurring.

I fully concur in this Court's opinion. I write separately to further address the State's argument and the trial court's conclusion that Deputy Smith's actions were lawful under the "knock and talk" exception to the requirement for a warrant. The trial court relied upon the fact that Huddy's front door "was covered in cobwebs and did not appear to [be] in use or the primary door to the residence" to justify Deputy Smith's decision to walk around the sides of the house and enter a gated fence to the backyard to look for a different door.

An officer conducting a knock and talk cannot ignore an unobstructed, accessible front door simply because it has cobwebs and does not appear to be used as regularly as the homeowner's customary entrance to the home. Like Huddy's, many homes have driveways, entrances, or garages on the back or sides of the house. The home's occupants, family, or frequent invitees may use a closer side or back door or a door within a garage to enter the home, rather than walk further to use a front door.

Nonetheless, even a seldom-used front door is the door uninvited members of the public are expected to use when they arrive. *See State v. Jardines*, 133 S. Ct. 1409, 1415, 185 L. Ed. 2d 495, 502 (2013) (holding there is an implicit license, which "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave."). Were law enforcement officers always allowed to proceed directly to the door they subjectively believed to be the homeowner's customary entrance, the officers' warrantless intrusion into the home's curtilage could potentially exceed the limited "implied license" discussed by the Supreme Court of the United States in *Jardines*.

Although the implied license to approach a person's home traditionally contemplates a knock at the front door, this Court and others have recognized instances where officers might be justified in approaching an alternate door in appropriate circumstances. *See State v. Gentile*, 237 N.C. App. 304, 309-10, 766 S.E.2d 349, 353 (2014); *State v. Pasour*, 223 N.C. App. 175, 178, 741 S.E.2d 323, 325 (2012); *Alvarez v. Montgomery Cty.*, 147 F.3d 354, 358-59 (4th Cir. 1998); *Pena v. Porter*, 316 Fed.Appx.

303, 313-14 (4th Cir. 2009) (unpublished). In this case, the State relies upon *Alvarez* to argue law enforcement officers may enter a person's backyard, without a warrant, when the officers assert a legitimate law enforcement purpose to do so.

In *Alvarez*, the officers received a complaint about an underage drinking party underway at a home in a nearby neighborhood. *Alvarez*, 147 F.3d at 356. The officers arrived and approached the home with the intent to simply "notify the homeowner or the party's host about the complaint and to ask that no one drive while intoxicated." *Id.* at 358. When the officers reached the front porch, they noticed a sign on the door, which read "Party In Back" and displayed an arrow pointing guests toward the backyard. *Id.* at 357. Without knocking on the front door first, the officers proceeded to the backyard and asked to speak to the hosts of the party. *Id.* Upon discovering underage drinking, Alvarez was issued a citation for furnishing an alcoholic beverage to a person under the age of twenty-one. Alvarez challenged the officers' actions as an unreasonable search. *Id.* at 358.

The Court of Appeals emphasized that "the textual touchstone of the Fourth Amendment is reasonableness." *Id.* at 358 (citation and quotation marks omitted). Under these circumstances, the court held the officers' entry into the backyard, without knocking on the front door first, satisfied this reasonableness requirement. *Id.* at 358-59. The court noted:

> Though we conclude the officers' conduct comported with the Fourth Amendment, we reiterate that the area within the curtilage of the home typically is afforded the most stringent Fourth Amendment protection. *It was not unreasonable, however, for officers responding to a 911 call to enter the backyard when circumstances indicated they might find the homeowner there.*

Id. at 359 (emphasis supplied).

However, this Court has further concluded, "where officers have no reason to believe that entering a homeowner's curtilage will produce a different response than knocking on the residence's front door, the Fourth Amendment is violated." *Gentile*, 237 N.C. App. at 309, 766 S.E.2d at 353; *see Pasour*, 223 N.C. App. at 178, 741 S.E.2d at 325 (citing *Pena*, 316 Fed.Appx. at 314). In *Gentile*, the officers proceeded to the back of the house after they knocked on the front door and received no response. *Id.* at 309-10, 766 S.E.2d at 353. While the officers' testified they only proceeded to the back of the house because they believed the occupant may

not have heard their knock due to the barking dogs nearby, this Court held the officers' actions violated the Fourth Amendment and noted:

> [t]here was no evidence of any vehicles on the property, persons present, lights illuminated in the residence, or furniture in the house, and the detectives believed that no one resided there. Accordingly, the sound of barking dogs, alone, was not sufficient to support the detectives' decision to enter the curtilage of defendant's property by walking into the back yard of the home and the area on the driveway within ten feet of the garage.

Id. at 310, 766 S.E.2d at 353 (citing *Jardines*, 133 S. Ct. at 415, 185 L. Ed. 2d at 502).

Unlike in *Alvarez*, where a sign posted on the front door invited and directed visitors to the backyard, nothing indicated Deputy Smith would find Huddy or others in the backyard. Deputy Smith never saw anyone come out of the house, nor did he hear any noises coming from the house or backyard, nor detect any other suspicious activity. While Deputy Smith testified he believed the front door was unused because it had cobwebs hanging from the door but was otherwise "nice and clean," no evidence indicates he had reason to believe entering Huddy's gated and fenced backyard to knock on the back door would "produce a different result than knocking on the home's front door[.]" *Pasour*, 223 N.C. App. at 178, 741 S.E.2d at 325; *see Gentile*, 237 N.C. App. 310, 766 S.E.2d at 353.

Even if the back door was the entrance primarily used by Huddy or regular visitors, an uninvited visitor would not necessarily acquire any "implied license" to also use that door. In cases where other jurisdictions have permitted an officer to knock at a back or side door, the door was easily visible to the public and not within any defined curtilage or fenced enclosure. *See, e.g.*, *United States v. Shuck*, 713 F.3d 563, 565 (10th Cir. 2013) (holding the officers reasonably approached the back door when a chain-link fence enclosed the front door, but not the back door); *United States v. James*, 40 F.3d 850, 862 (7th Cir. 1994), *vacated on other grounds*, 516 U.S. 1022, 133 L. Ed. 2d 515 (1995), and *modified*, 79 F.3d 553 (7th Cir. 1996) ("The passage to the rear side door was not impeded by a gate or fence. Both the paved walkway and the rear side door were accessible to the general public and the rear side door was commonly used for entering the duplex from the nearby alley.").

No gate or fence blocked access to Huddy's front door, but his back door was located within a gated and fenced-in backyard. After crossing

the yard, the back door could only be accessed by further opening a storm door and walking across a small porch. While the front door in this case may have been covered in cobwebs or not frequently used, a "reasonably respectful citizen" would not have taken this fact as an "implied license" to go to the back areas of the house, open the closed fence gate, cross the fenced backyard, open the storm door, and walk across the porch, just to knock upon the back door. *See Jardines*, 133 S. Ct. at 1415, 185 L. Ed. 2d at 502. However, the record demonstrates Deputy Smith followed this exact process to knock on Huddy's back door.

Deputy Smith's actions far exceeded the scope of any implied license to conduct a knock and talk at Huddy's home without a warrant. *See Pasour*, 223 N.C. App. at 178, 741 S.E.2d at 325 ("[w]here officers have no reason to believe that entering a homeowner's backyard will produce a different result than knocking on the home's front door, the Fourth Amendment is violated.").

Under *de novo* review, Deputy Smith's conduct, after failing to knock upon the front door of Huddy's home and with the absence of anything other than a car registered to another address parked with an open door in the driveway, cannot be justified as a "knock and talk" to excuse the requirement of a warrant. The trial court's conclusions of law 3, 4, 5, 7, and 8 to deny the motion to suppress are not supported by the evidence presented or the order's findings of fact. Huddy's motion to suppress should have been allowed under these facts. This Court properly rules error occurred in the denial of Defendant's motion to suppress.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
LAQUAN TIRIK LITTLE, DEFENDANT

No. COA16-870

Filed 18 April 2017

1. Evidence—prior convictions—cross examination—instructions to defendant before testifying

The trial court did not err in a prosecution for armed robbery by instructing defendant that the prosecutor could question him about prior convictions if he testified. The trial court limited its discussion with defendant to the possibility of impeachment by proof of prior convictions and defendant identified nothing in the trial court's statements to defendant that suggested that defendant would be questioned beyond the permissible scope of limited cross-examination.

2. Evidence—photographs—not authenticated—used for illustrative purposes only

The trial court did not err in a prosecution for armed robbery by allowing a witness to use photographs for illustrative purposes even though the photographs had not been authenticated.

Judge BRYANT concurring in the result only.

Appeal by defendant from judgment entered 8 March 2016 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 21 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Charles G. Whitehead, for the State.

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

ZACHARY, Judge.

Laquan Tirik Little (defendant) appeals from judgment entered upon his conviction for robbery with a dangerous weapon. On appeal, defendant argues that the trial court erred in its colloquy with defendant concerning the scope of cross-examination to which defendant would be exposed if he chose to testify. Defendant also contends that the trial court committed error and plain error by admitting certain photographs

downloaded from the Facebook and Instagram websites to illustrate the testimony of the State's witnesses. Upon careful consideration of defendant's arguments in light of the record and the applicable law, we conclude that these arguments lack merit and that defendant is not entitled to relief on appeal.

I. Factual and Procedural Background

This appeal arises from an incident in which a motorcycle was stolen at gunpoint from the bike's fourteen-year-old owner. On 12 October 2015, the Grand Jury of Guilford County indicted defendant for robbery with a dangerous weapon and for possession of a firearm by a felon. At some point after these indictments were returned, defendant was also charged with possession of a controlled substance in a confinement facility. The charges against defendant came on for trial at the 17 February 2015 criminal session of Superior Court for Guilford County, the Honorable L. Todd Burke presiding. At the outset of the trial, the prosecutor dismissed the charge of possession of a firearm by a felon and announced that the State was postponing its prosecution on the charge of possession of a controlled substance in a confinement facility. Defendant did not testify or present evidence at trial. The State's evidence tended to show, in relevant part, the following:

Randy Garcia testified that he was fifteen years old and attended high school. On 13 May 2015, the date of the incident giving rise to the charge against defendant, Mr. Garcia had been fourteen years old. Mr. Garcia owned a Honda motorcycle and during the afternoon of 13 May 2015, Mr. Garcia was riding his motorcycle in his neighborhood. Mr. Garcia's ten-year-old friend, Anthony Salazar, was a passenger on the bike. During the ride, a car approached the motorcycle and stopped about five feet from the boys. The passenger in the car pointed a gun through the window, and then exited the car and ran toward Mr. Garcia and Mr. Salazar, pointing the gun at them. The man demanded that the boys get off the motorcycle and when they complied, he got on the motorcycle and drove away. Mr. Garcia testified that when defendant got out of the car, he approached Mr. Garcia until they were close together. Mr. Garcia noticed that defendant had tattoos on his neck and arm, and described defendant's firearm as a gray handgun with an extended barrel. In court, Mr. Garcia identified defendant as the man who had stolen his motorcycle at gunpoint.

After defendant rode away on Mr. Garcia's motorbike, the two boys walked to Mr. Garcia's home. Soon thereafter, a neighbor, Victor Rivera-Salazar, came to Mr. Garcia's house. Mr. Garcia called the police and gave

a statement about the incident. Law enforcement officers later showed Mr. Garcia a photographic lineup from which he identified defendant as the person who had robbed him. At trial, Mr. Garcia was shown several photographic exhibits which he used to illustrate his testimony about the appearance of his motorcycle, defendant, and the gun that defendant had brandished.

Victor Rivera-Salazar testified that he was a seventeen-year-old high school senior, that Anthony Salazar was his younger brother, and that they lived in the same neighborhood as Mr. Garcia. On 13 May 2015, Mr. Rivera-Salazar heard the sound of Mr. Garcia's motorcycle and went to look for him. When Mr. Rivera-Salazar located the motorcycle, defendant was attempting to start it and Mr. Rivera-Salazar confronted defendant about his possession of the motorcycle. Defendant claimed that Mr. Rivera-Salazar's friend had loaned him the bike and then rode away on the bike. During his conversation with defendant, Mr. Rivera-Salazar stood very close, "face to face," and observed that defendant had tattoos on his hands and neck. He identified defendant at trial and testified that he was "a hundred percent" sure that defendant was the person with whom he had spoken. After defendant rode away, Mr. Rivera-Salazar went to Mr. Garcia's house. Mr. Rivera-Salazar later identified defendant in a photographic line-up. Mr. Rivera-Salazar used State's Exhibits Nos. 1 - 3 to illustrate his testimony.

Greensboro Police Officer D.T. Sims testified that on 13 May 2015 he was dispatched to Mr. Garcia's house, where Mr. Rivera-Salazar and Mr. Garcia gave statements similar to their trial testimony. Greensboro Police Detective R. E. Ferrell testified that, after he had interviewed Mr. Garcia and read the police reports about the robbery, he then looked at photographs that had been shared on the social media sites Facebook and Instagram. On the Facebook page for an individual who identified himself online as "L-Nice Little," Detective Ferrell found the photograph that was marked as State's Exhibit No. 1, depicting a motorcycle that matched the description that the detective had been given for Mr. Garcia's motorbike. On Instagram, Detective Ferrell found the photographs designated as State's Exhibits Nos. 4 and 5.[1] In the course of his investigation, Detective Ferrell also obtained a possible home address for defendant. Greensboro Police Officer B.E. Faust testified that on 16 May 2015 he observed a motorcycle parked behind the house at this

1. No evidence was introduced regarding the source for the photographs marked as State's Exhibits Nos. 2 and 3. Because defendant has not challenged the admission of these exhibits, we do not discuss them further.

address, and used State's Exhibit No. 1 to illustrate his testimony about this motorcycle.

On 17 February 2016, the jury returned a verdict finding defendant guilty of robbery with a dangerous weapon. The prosecutor dismissed the charge of possession of a controlled substance in a confinement facility. The trial court imposed a sentence of 72 to 99 months' imprisonment. Defendant gave notice of appeal in open court.

II. Trial Court's Instructions to Defendant on the Right to Testify

After the State rested, defense counsel informed the trial court outside the presence of the jury that she and defendant had been discussing whether defendant would testify at trial and that she thought defendant wanted to testify. Defendant's counsel asked the court to "just put that on the record." In response, the trial court conducted the following colloquy in which the court warned defendant that he would be subject to cross-examination if he testified at trial:

> THE COURT: All right. Mr. Little, you have the right to remain silent.
>
> BAILIFF: Stand up, sir.
>
> THE COURT: You don't have to testify. You have the right to remain silent. That's your Fifth Amendment constitutional right that you not self-incriminate yourself. However, if you want to waive your right of silence and testify, you can do that also. Are you trying to determine which one you're going -- how you're going to proceed at this time, whether you're going to testify or not, is that correct?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Now you must understand that if you take the witness stand to testify, your attorney will ask you questions, but also the prosecutor will be able to ask you questions. The prosecutor also will be able to ask you about your prior record, and I instruct the jury about persons who have prior criminal convictions on their record, and if they feel like that conviction impacts the witness credibility, they can consider it for that purpose. They're not -- they're instructed they're not necessarily to convict you for something now just because you've been charged with something previously, but, as you can imagine, when they hear that you have criminal convictions, they're going

> to -- you take the witness stand, the State is going to ask you about it and they're going to hear that you have a criminal record, and do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And the DA can ask you about convictions all the way back 10 years ago, and your convictions are within 10 years. Your oldest conviction is in 2010. So he'll be able to ask you about all of your prior criminal convictions. You have an attempted breaking and entering, possession of stolen property, another breaking and entering, a larceny, discharging a weapon into occupied property, and a possession of a firearm by a felon. The DA will be able to ask you and the jury will hear all of this criminal history if you take the witness stand. So it's up to you whether you want to take the witness stand or not. So I just wanted to advise you of your rights and let you know what will be allowed and what the jury will hear and how it may be perceived. I don't know exactly how it will be perceived, but I give them an instruction on how they're to consider it. All right. Anything else before we take our recess?

[1] On appeal, defendant argues that the trial court's instructions to defendant concerning defendant's exposure to cross-examination if he testified "impermissibly and unconstitutionally chilled" defendant's right to testify. Defendant contends that the trial court "misadvised the defendant" and "gave a coercive explanation of the law that evidenced judicial intimidation[.]" We do not agree.

We first observe that defendant did not object to the court's statements, which were made outside of the jury's presence, and did not ask the trial court to amplify or modify its comments to defendant. Assuming, without deciding, that this issue is nonetheless preserved for appellate review, we conclude that defendant's argument lacks merit.

N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 611(b) (2015) provides that a witness "may be cross-examined on any matter relevant to any issue in the case, including credibility." "Moreover, a witness may be impeached on cross-examination by, among other things, evidence of prior convictions, opinion testimony as to reputation, and evidence of specific instances of conduct if probative of truthfulness or untruthfulness." *State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998) (citing N.C. Gen. Stat. § 8C-1, Rules 404, 405, 608, 609). "In North Carolina, a 'trial

court has broad discretion over the scope of cross-examination.' " *State v. Edmonds*, 236 N.C. App. 588, 597, 763 S.E.2d 552, 558 (2014) (quoting *Call*, 349 N.C. at 411, 508 S.E.2d at 514). Regarding impeachment by evidence of a witness's prior criminal convictions, Rule 609 of the North Carolina Rules of Evidence provides that "for the purpose of attacking the credibility of a witness" evidence may be admitted that within the previous ten years, the witness was convicted of "a felony, or of a Class A1, Class 1, or Class 2 misdemeanor[.]"

The rules governing impeachment of a witness apply to a criminal defendant. "Once the defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.' " *State v. Fair*, 354 N.C. 131, 161, 557 S.E.2d 500, 521 (2001) (quoting *Brown v. United States*, 356 U.S. 148, 154, 2 L. Ed. 2d 589, 596 (1958)). In this case, the trial court limited its discussion with defendant to the possibility of impeachment by proof of prior convictions.

Defendant argues that the trial court erred in its statements to defendant regarding the scope of permissible cross-examination concerning defendant's prior criminal convictions. We disagree. In its discussion with defendant, the trial court informed him, in relevant part, that:

> THE COURT: Now you must understand that if you take the witness stand to testify, your attorney will ask you questions, but also the prosecutor will be able to ask you questions. The prosecutor also will be able to ask you about your prior record[.]
>
> . . .
>
> THE COURT: And the DA can ask you about convictions all the way back 10 years ago, and your convictions are within 10 years. Your oldest conviction is in 2010. So he'll be able to ask you about all of your prior criminal convictions. . . . The DA will be able to ask you and the jury will hear all of this criminal history if you take the witness stand.

Defendant contends that the trial court erred by stating that the prosecutor would be able to cross-examine him regarding "all of your prior criminal convictions." However, this statement was made in the context of the trial court's determination that all of defendant's prior convictions occurred within the past ten years. The court was not suggesting that defendant could be cross-examined about convictions that were more than ten years old. Defendant also asserts that the trial court "did not

explain the limited scope" of cross-examination, and directs our attention to cases holding that a defendant may not be cross-examined about the factual details of the offense that led to a prior conviction. However, defendant identifies nothing in the trial court's instructions to defendant suggesting that defendant would be subject to cross-examination beyond the permissible inquiry into the name of the crime, the time and place of conviction, and the punishment imposed. We conclude that defendant has failed to establish that the trial court gave an incorrect instruction as to the scope of permissible cross-examination regarding his prior criminal convictions.

In addition, defendant contends that the court's comments were incorrect insofar as they addressed the limiting instruction that the court would give the jury on the purpose for which the jury could consider evidence of defendant's prior convictions. The trial court made the following statements on this issue:

> THE COURT: . . . I instruct the jury about persons who have prior criminal convictions on their record, and if they feel like that conviction impacts the witness credibility, they can consider it for that purpose. They're not -- they're instructed they're not necessarily to convict you for something now just because you've been charged with something previously, but, as you can imagine, when they hear that you have criminal convictions, they're going to -- you take the witness stand, the State is going to ask you about it and they're going to hear that you have a criminal record, and do you understand that?
>
> . . .
>
> I don't know exactly how it will be perceived, but I give them an instruction on how they're to consider it.

We conclude that the trial court accurately informed defendant that, if he chose to testify, the court would instruct the jury that it could consider his prior convictions only to the extent that the jury found defendant's criminal record relevant to his credibility. Defendant contrasts the trial court's statements with the Pattern Jury Instruction that a trial court typically gives a jury on its duty to consider a defendant's prior convictions only in regard to defendant's credibility. It is true that, while the Pattern Jury Instruction expressly directs the jury that evidence of a defendant's prior convictions may be considered "for one purpose only," the trial court told defendant that the jury would be instructed that it should "not necessarily convict" defendant "just because you've been

charged with something previously[.]" However, the trial court also told defendant that it would instruct the jury to consider defendant's prior convictions as they pertained to defendant's credibility.

We conclude that the court's use of the word "necessarily," even if technically erroneous, was insignificant in the context of the court's entire discussion with defendant. Moreover, defendant was represented by counsel with whom he was able to consult. In *State v. Autry*, 321 N.C. 392, 404, 364 S.E.2d 341, 348 (1988), the defendant argued that the trial court had made an error of constitutional magnitude in its misstatements to the defendant about the effect of a defendant's decision to testify at trial. Our Supreme Court held that:

> [T]hough the trial court did misstate the law in its instruction to defendant concerning his decision as to whether to testify, the trial court repeatedly made very clear to defendant that he should consult his attorney before making any decision on the matter. . . . We hold that, here, where the trial court's error in its instructions to defendant was insulated by defendant's access to and actual conference with his attorney, the trial court's instructional error is harmless beyond a reasonable doubt.

Id. at 404, 364 S.E.2d at 348. Defendant argues further that the trial court gave defendant "a slanted and negative explanation of the law" that "focused on the negative aspects of the right to testify" rather than "provid[ing] a balanced approach." Defendant cites no authority for his view that the trial court had a duty to provide defendant with a comprehensive summary of the advantages and disadvantages of a decision to testify. "[W]e have never required trial courts to inform a defendant of his right not to testify and to make an inquiry on the record indicating that any waiver of this right was knowing and voluntary." *State v. Carroll*, 356 N.C. 526, 533, 573 S.E.2d 899, 905 (2002). Given that the trial court had no obligation to inform defendant of the possible consequences of a decision to testify, we conclude that the trial court was not required to balance its discussion of impeachment with an instruction on the advantages of testifying.

For the reasons discussed above, we conclude that the trial court did not err in its warning to defendant that if he chose to testify he would be exposed to impeachment on cross-examination by evidence of his prior convictions. Defendant is not entitled to relief on the basis of this argument.

III. Introduction of Photographs for Illustrative Purposes

[2] During trial, Mr. Garcia was shown four photographs, comprising State's Exhibits Nos. 1 through 4. Mr. Garcia identified Exhibit No. 1 as depicting his motorcycle, Exhibits Nos. 2 and 3 as photographs of defendant, and Exhibit No. 4 as depicting defendant holding the firearm with which he robbed Mr. Garcia. Defendant did not object to the prosecutor's questions to Mr. Garcia about the photographs. At the conclusion of his examination of Mr. Garcia, the prosecutor asked to introduce the photographs that he had shown the witness for illustrative purposes. Defendant objected on the grounds that no evidence had been introduced to establish who had taken the photographs and when they were taken. The trial court overruled defendant's objection and the jury was shown the photographs. The State also introduced State's Exhibit No. 5 for illustrative purposes, without objection. State's Exhibit No. 5 depicted defendant with an extended magazine handgun. On appeal, defendant argues that the trial court erred by admitting State's Exhibits Nos. 1 and 4, and committed plain error by admitting State's Exhibit No. 5. We conclude that defendant's argument lacks merit.

A. Admission of Photographs: Legal Principles

N.C. Gen. Stat. § 8-97 (2015) provides that

> Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.

"Rule 901 of our Rules of Evidence requires authentication or identification 'by evidence sufficient to support a finding that the matter in question is what its proponent claims.' N.C. Gen. Stat. § 8C-1, Rule 901 [(2015)]." *State v. Murray*, 229 N.C. App. 285, 288, 746 S.E.2d 452, 455 (2013). "In order for a photograph to be introduced, it must first be properly authenticated by a witness with knowledge that the evidence is in fact what it purports to be." *State v. Lee*, 335 N.C. 244, 270, 439 S.E.2d 547, 560 (1994).

" 'Photographs are usually competent to be used by a witness to explain or illustrate anything that is competent for him to describe in

words.' " *State v. Robinson*, 355 N.C. 320, 334, 561 S.E.2d 245, 254 (2002) (quoting *State v. Watson*, 310 N.C. 384, 397, 312 S.E.2d 448, 457 (1984)). *See*, *e.g.*, *State v. Thibodeaux*, 341 N.C. 53, 63-64, 459 S.E.2d 501, 508 (1995) (upholding admission of photograph of the defendant "wearing a shoulder holster containing a .357-caliber revolver" that was used "to illustrate [a witness's] testimony concerning defendant's possession and control of the murder weapon"). Photographs are admissible for illustrative purposes if they fairly and accurately illustrate the subject of a witness's testimony. *State v. Alston*, 91 N.C. App. 707, 713, 373 S.E.2d 306, 311 (1988) ("The trial court admitted the photographs for illustrative purposes only. . . . The officer clearly indicated that the photographs accurately portrayed what he had observed. Thus, the photographs were properly authenticated for illustrative purposes.").

B. Discussion

In the present case, it is undisputed that the photographs challenged by defendant were introduced solely to illustrate the testimony of Mr. Garcia and other witnesses. The transcript includes the following dialogue, which took place prior to the admission of the photographs:

> PROSECUTOR: Sir, if the jury were to see those photographs, 1 through 4, you looked at, would it help them understand what those people or items looked like at the time of this incident?
>
> MR. GARCIA: Yes.
>
> PROSECUTOR: If the jury were to see them, would it help them understand what those people or items looked like?
>
> MR. GARCIA: Yes.
>
> PROSECUTOR: Your Honor, I'd move to introduce State's Exhibits 1 through 4 for illustrative --
>
> THE COURT: Any objection?
>
> DEFENSE COUNSEL: Yes, Your Honor. We don't have -- I don't think there's been any evidence about when they were taken or anything such as that, or who took them; who took the photographs, when they were taken.
>
> THE COURT: Overruled. Allowed.

In its instructions to the jury, the trial court stated that: "Photographs were introduced into evidence in the case for the purpose of illustrating

and explaining the testimony of the witness. These photographs may not be considered by you for any other purpose." We also note that defendant has not argued on appeal that the photographs were introduced as substantive evidence. We conclude that State's Exhibits Nos. 1, 4, and 5 were introduced to illustrate the testimony of the State's witnesses. As previously noted, defendant does not challenge the admission of State's Exhibits Nos. 2 and 3.

In his appellate brief, defendant does not argue that the photographs did not illustrate the testimony of the witnesses, or otherwise failed to meet the standard for introduction of a photograph solely to illustrate the testimony of a witness. Nor does defendant argue that the limiting instruction given by the trial court was insufficient to cure the prejudice arising from the use of the photographs as illustrative evidence. Instead, defendant contends that the photographs should not have been admitted, on the grounds that the State failed properly authenticate the exhibits. Defendant maintains that the State failed to introduce evidence establishing that the Facebook and Instagram accounts from which the photographs were downloaded were linked to defendant, or to introduce evidence identifying the photographer and the time and place where the photographs were taken. Defendant is essentially asking that the standard for authentication of a photograph to be admitted as <u>substantive</u> evidence be applied in the present case, in which the photographs were introduced only to illustrate the witnesses' testimony. The cases cited by defendant are ones in which a party sought to introduce a photograph as substantive evidence, and defendant has failed to cite any cases in which a court required a party to provide the type of authentication that defendant contends was necessary in order to introduce a photograph as <u>illustrative</u> evidence. Defendant has also failed to cite any authority or offer a legal argument for the proposition that the requirements for admission of a photograph from a website as illustrative evidence should be any different from the use of a photograph from another source. We conclude that the trial court did not err by allowing the State's witnesses to illustrate their testimony with State's Exhibits Nos. 1, 4, and 5, and that defendant has failed to show that he is entitled to relief on the basis of this argument.

<u>IV. Conclusion</u>

For the reasons discussed above, we conclude that the trial court did not err in its colloquy with defendant regarding the implications of his decision on whether to testify at trial, or in its admission of photographs

from social media sites as illustrative evidence, and that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges INMAN concurs.

Judge BRYANT concurs in result only.

THE STATE OF NORTH CAROLINA
v.
TERANCE GERMAINE MALACHI, DEFENDANT

No. COA16-752

Filed 18 April 2017

1. Firearms and Other Weapons—possession of firearm by felon—constructive possession—disjunctive instruction

The trial court erred in a prosecution for possession of a firearm by a felon by instructing the jury that defendant could be found guilty based on constructive possession where the State presented no evidence of constructive possession. The analysis in *State v. Boyd*, 366 N.C. 548 (2013), applies only to plain error review and did not change the established presumption that the jury relied on an erroneous disjunctive review not supported by the evidence and objected to by defendant. Here, there was a reasonable possibility that the jury would have reached a different result without the erroneous instruction.

2. Appeal and Error—relief granted on other grounds—issue not heard

The question of whether the trial court erred in a prosecution for possession of a firearm by a felon resulting from the search of defendant by officers was not considered where the relief sought by defendant was granted on another issue.

Appeal by Defendant by writ of certiorari from judgment entered 28 January 2016 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General John R. Green, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Constance E. Widenhouse, for Defendant-Appellant.

INMAN, Judge.

When a trial judge instructs the jury that it can find a criminal defendant guilty based upon alternative theories of a crime, including one theory not supported by the evidence, over the defendant's objection, precedent requires us to vacate and order a new trial.

Terance Germaine Malachi ("Defendant") appeals from his conviction for possession of a firearm by a felon following a jury trial and a related conviction for attaining habitual felon status. Defendant argues that the trial court erred by instructing the jury that it could find Defendant guilty if he constructively possessed the firearm, even though the State failed to present any evidence supporting that theory. Defendant also argues that the trial court committed plain error by allowing the jury to hear evidence obtained as a result of an unconstitutional stop and seizure of Defendant. After careful review, we vacate the judgment and award Defendant a new trial based on the trial court's erroneous jury instruction.

Factual and Procedural Background

Defendant was indicted on 16 November 2015 for one count of possession of a firearm by a felon, one count of carrying a concealed weapon, and one count of having attained habitual felon status.[1] Defendant was tried before a jury on 19 and 20 January 2016. The evidence at trial tended to show the following:

Shortly after midnight on 14 August 2014, the Charlotte-Mecklenburg Police Department received a 911 call from an anonymous caller. The caller told the dispatcher that in the rear parking lot of a gas station located at 3416 Freedom Drive in Charlotte, North Carolina, a black male wearing a red shirt and black pants had just placed a handgun in the waistband of his pants.

1. Defendant also was charged with resisting a public officer, but the State did not proceed on that charge and dismissed it following the trial.

Officer Ethan Clark, in uniform and a marked car, first responded to the call. Officer Clark's arrival was followed almost immediately by Officer Jason Van Aken. Officer Clark saw about six to eight people standing in the parking lot, including a person who matched the description provided to the dispatcher and was later identified as Defendant.

When Officer Clark got out of his car, Defendant looked directly at him, "bladed, turned his body away, [and] started to walk away." Officer Clark immediately approached Defendant and took hold of his arm. Officer Van Aken held Defendant's other arm and the two officers walked Defendant away from the crowd of people. Defendant was squirming. Officer Clark told Defendant to relax. Prior to this, neither officer spoke with Defendant.

Officer Clark placed Defendant in handcuffs and told him that he was not under arrest. Officer Van Aken then frisked Defendant and pulled a revolver from his right hip waistband. Neither officer saw the weapon until after it was produced during the search. As the two officers were conducting the search, a third officer, Officer Kevin Hawkins, arrived. The officers then told Defendant he was under arrest and placed him in the back of Officer Clark's patrol vehicle.

The trial court instructed the jury on the elements of a felon in possession of a firearm, and, over defense counsel's objection, that Defendant could be convicted if he was found to have possessed a weapon by means of actual or constructive possession. During deliberations, the jury sought clarification of "possession of a firearm" to which the trial court, again over defense counsel's objection, responded with the definitions of both actual and constructive possession.

The jury returned a verdict of not guilty on the charge of carrying a concealed weapon and guilty of possession of a firearm by a felon. Defendant pleaded guilty, pursuant to *N.C. v. Alford*, 400 U.S. 25, 27 L. Ed.2d 162 (1970), to attaining habitual felon status. In sentencing, the trial court found two mitigating factors—that Defendant supported his family and that Defendant suffered injuries at the hands of the Charlotte-Mecklenburg Police Department that required hospitalization. The trial court sentenced Defendant in the mitigated range to 100 to 132 months of imprisonment.

Defendant gave notice of appeal in open court. Defendant filed a Petition of Writ of Certiorari with this Court on 30 August 2016. We granted Defendant's petition on 12 September 2016.

Analysis

I. Jury Instructions

[1] Defendant argues that the trial court erroneously instructed the jury that Defendant could be found guilty of possession of a firearm by a felon based on the theory of constructive possession when the State had failed to present any evidence of constructive possession. We agree.

"This Court reviews assignments of error regarding jury instructions *de novo*." *State v. Pender*, 218 N.C. App. 233, 243, 720 S.E.2d 836, 842 (2012) (citing *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)). "Under a *de novo* review, [this C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotation marks and citations omitted).

Pursuant to N.C. Gen. Stat. § 14-415.1, "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]" N.C. Gen. Stat. § 14-415.1(a) (2015). "[T]he State need only prove two elements to establish the crime of possession of a firearm by a felon: (1) [the] defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Perry*, 222 N.C. App. 813, 818, 731 S.E.2d 714, 718 (2012) (citations omitted). Possession of a firearm "may be actual or constructive. Actual possession requires that a party have physical or personal custody of the [firearm]. A person has constructive possession of [a firearm] when the [firearm] is not in his physical custody, but he nonetheless has the power and intent to control its disposition." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted), *superseded in part on other grounds by statute as stated in State v. Gaither*, 161 N.C. App. 96, 587 S.E.2d 505 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004).

North Carolina's appellate courts have consistently held that "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973) (citations omitted). That is because the purpose of jury instructions is "the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *Id.* An instruction related to a theory not supported by the evidence confuses the issues, introduces an extraneous matter, and does not declare the law applicable to the evidence.

Our courts also have consistently held that a trial court's inclusion of a jury instruction unsupported by the evidence presented at trial is an error requiring a new trial. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (holding that the defendant was entitled to a new trial because "the trial court erroneously submit[ed] the case to the jury on alternative theories, one of which [was] not supported by the evidence and . . . it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict"); *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) (holding that a defendant is entitled to a new trial where the trial court instructed the jury on an alternate theory that was unsupported by the evidence); *State v. Johnson*, 183 N.C. App. 576, 584-85, 646 S.E.2d 123, 128 (2007) (holding that the defendant was entitled to a new trial where the trial court instructed the jury on alternative theories, one of which was not supported by the evidence, and it could not be discerned from the record upon which theory the jury based its verdict); *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79 (1994) (ordering a new trial where the trial court instructed on a theory that was unsupported by the evidence and it could not be discerned from the record upon which theory the jury relied in arriving at its verdict); *State v. O'Rourke*, 114 N.C. App. 435, 442, 442 S.E.2d 137, 140 (1994) ("Where the trial court instructs on alternative theories, one of which is not supported by the evidence, and it cannot be discerned from the record upon which theory the jury relied in arriving at its verdict, the error entitles the defendant to a new trial.").

When a trial judge has instructed jurors on alternative theories of guilt, one of which is supported by the evidence and the other is unsupported, in keeping with the of the rule of lenity, we have presumed that the defendant was found guilty based on the theory that was not supported by the evidence. *Lynch*, 327 N.C. at 219, 393 S.E.2d at 816; *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326 ("[T]his Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant."). Our courts previously applied this presumption regardless of whether a defendant properly objected to an extraneous instruction at trial, resulting in the erroneous instruction amounting to plain error *per se*. *O'Rourke*, 114 N.C. App. at 442, 442 S.E.2d at 140; *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326; *State v. Jefferies*, __ N.C. App. __, __, 776 S.E.2d 872, 880 (2015) (holding, in a case in which the defendant did not object at trial, that "we must resolve the ambiguity created by the erroneous instruction in favor of [the] defendant. [The d]efendant is entitled to a new trial . . . .") (internal citations omitted).

Recently however, our Supreme Court has declared that such instructional errors not objected to at trial are not plain error *per se*. In *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013), the Supreme Court, adopting a dissent from this Court, 222 N.C. App. 160, 730 S.E.2d 193 (2012) (Stroud, J., dissenting), declared an additional requirement for a defendant arguing an unpreserved challenge to a jury instruction as unsupported by the evidence. The Court in *Boyd* shifted away from the long standing assumption that "the jury based its verdict on the theory for which it received an improper instruction," *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993), and instead placed the burden on the defendant to show that an erroneous disjunctive jury instruction had a probable impact on the jury's verdict. *Boyd*, 222 N.C. App. at 173, 730 S.E.2d at 201. The *Boyd* decision does not address erroneous disjunctive jury instructions given over the objection of a defendant's trial counsel, *id.*, and this Court has continued to follow precedent on this issue when properly preserved. *See*, *e.g.*, *Jefferies*, __ N.C. App. at __, 776 S.E.2d at 880; *State v. Dick*, __ N.C. App. __, 791 S.E.2d 873, COA15-1400, 2016 WL 5746395, *1, *4-5 (2016) (remanding for a new trial because "the trial court's disjunctive instruction on the charge of first degree sexual offense was erroneous, and that error prejudiced [the d]efendant") (citing *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326); *State v. Collington*, __ N.C. App. __, 775 S.E.2d 926, 2015 WL 4081786 *1, *4 (2015) (citing *Pakulski* for the proposition that "a trial court commits plain error when it instructs a jury on disjunctive theories of a crime, where one of the theories is improper . . . .").

It is not this Court's duty to rewrite well settled law, so we must seek to reconcile *Boyd* with existing precedent. Accordingly, we hold that *Boyd*'s analysis, considered in the full context of that decision, applies only to plain error review and does not eliminate the long established presumption that the jury relied on an erroneous disjunctive instruction not supported by the evidence when given over an objection by the defendant's trial counsel.

Here, the trial court twice instructed the jury, over Defendant's objections, on the theory of constructive possession. Following the trial court's initial instruction, the jury sought clarification of the "legal definition" of "possession of a firearm." The trial court responded by repeating the definitions for both actual and constructive possession. The jury returned a verdict of not guilty on the charge of carrying a concealed weapon and guilty of possession of a firearm by a felon. The jury's verdict did not indicate the theory under which it found Defendant guilty of the possession charge.

Defendant argues, and we agree, that the State's evidence supported an instruction only for actual possession and that the trial court erroneously instructed the jury on constructive possession. The State's evidence at trial regarding possession was testimony by Officers Clark and Hawkins. Officer Clark testified that "[t]here was a chrome revolver with a black handle that was on [Defendant's] right hip." Officer Hawkins similarly testified that "[w]hen [he] arrived on the scene Officer Clark had [Defendant's] hands behind his back and [he] observed Officer Van Aken in the process of removing a large, silver revolver from [Defendant's] person." In response to Defendant's objection to the instruction on constructive possession, the trial court noted, "I think [the State] may have a good argument for actual, but nothing for constructive. And if the jury believes the witnesses, they're going to believe actual possession, right?" Yet the trial court denied Defendant's objection and instructed the jury on both actual and constructive possession.

The State asserts that the evidence was sufficient to support constructive possession because during the time after officers removed the revolver from Defendant, he theoretically could have broken free from the officers and taken hold of the revolver. We are unpersuaded. Although Defendant certainly was aware of the presence of the revolver taken from him by police, no evidence was presented that he had the power to control its disposition or use by the officers who had secured it.[2]

Because the trial court instructed the jury that it could find Defendant guilty based on either actual or constructive possession and because the State presented evidence supporting only actual possession, we hold the trial court erred. Further, because the record is silent regarding the theory of Defendant's guilt found by jurors, as required by precedent, we hold the error is reversible.

Even if *Boyd* were interpreted to eliminate the presumption of prejudice by jury instructions unsupported by the evidence and objected to at trial, it would not change the outcome of this decision because Defendant has demonstrated prejudicial error.

Properly preserved non-constitutional challenges to jury instructions are reviewed for prejudicial error. *See* N.C. Gen. Stat. § 15A-1443 (2015). Under prejudicial error, an error becomes reversible only where a defendant can show he was prejudiced, *i.e.*, that "there was 'a

2. Constructive possession requires that Defendant have "the intent and capability to maintain control and dominion over" the gun. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986) (citations omitted).

reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Maske*, 358 N.C. 40, 50, 591 S.E.2d 521, 528 (2004) (citing N.C. Gen. Stat. § 15A-1443(a) (2003)).

Here, there is a reasonable possibility that the jury would have reached a different result had the trial court not provided instruction about the theory of constructive possession. The jury's question about the legal definition of possession during its deliberations, combined with the jury's acquittal of Defendant on the charge of carrying a concealed weapon, allows for a reasonable chance that jurors would not have found Defendant guilty if instructed on the single theory of actual possession.

II. Evidence Seized from Defendant

[2] Defendant also argues that the trial court committed plain error by allowing the jury to hear evidence resulting from the search of Defendant by officers, which Defendant asserts violated his Fourth Amendment rights. However, because the relief Defendant seeks for this claimed error is the same relief he is entitled to as a result of the erroneous jury instruction, we need not address this issue.

Conclusion

For the above reasons, we hold the trial court committed reversible error in instructing the jury that it could find Defendant guilty of possession of a firearm by a felon based on a theory of constructive possession. Because Defendant's conviction for possession of a firearm by a felon was an essential element underlying his *Alford* plea of guilty to the charge of attaining the status of an habitual felon, we also vacate that conviction and remand for a new trial.

VACATED AND REMANDED.

Judges CALABRIA and McCULLOUGH concur.

STATE v. McNAIR

[253 N.C. App. 178 (2017)]

STATE OF NORTH CAROLINA
v.
ANTHONY LEE McNAIR

No. COA16-707

Filed 18 April 2017

1. Burglary and Unlawful Breaking or Entering—place of religious worship—storage building

In a case arising from a break-in at a barn behind a rented building used as a church, the trial court erred by denying defendant's motion to dismiss the charge of breaking or entering a place of religious worship. The barn was used to store equipment for the church, but the State presented no evidence that the barn was used as a place of worship. It is clear from the wording of N.C.G.S. § 14-54.1 that the specific building must have been a building regularly used and clearly identifiable as a place for religious worship.

2. Burglary and Unlawful Breaking or Entering—place of religious worship—curtilage

In a case arising from a break-in at a barn behind a rented building used as a church, the trial court erred by denying defendant's motion to dismiss the charge of breaking or entering a place of religious worship. Although the State argued that the barn was within the curtilage of the building used for church services, the term used in N.C.G.S. § 14-54 for "building" references "curtilage" solely by referring to a building within the curtilage of a dwelling house. The State did not argue that any portion of the portion of the property occupied by the church was used as a dwelling.

3. Sentencing—remand—lesser included offense

Where a conviction for breaking and entering a place of religious worship was reversed for insufficient evidence that the building was a place of worship, the matter was remanded for resentencing on the lesser-included offense of felony breaking or entering.

4. Burglary and Unlawful Breaking or Entering—possession of tools—control of area where tools found

The evidence was sufficient to support a finding that defendant had constructive possession of burglary tools that were found in a fenced area outside the building that was broken into. While defendant was not in exclusive control of the area where the tools were found, there were other incriminating circumstances.

5. Indictments and Information—variance with evidence—possession of burglary tools

There was not a fatal variance between an indictment for the possession of burglary tools and the evidence where the indictment only identified two implements of housebreaking but the instruction was that the jury could find defendant guilty if he possessed either of those two tools or a pair of work gloves found at the scene. The trial court properly instructed the jury on the essential elements of the offense; the mere fact that the trial court mentioned three implements of housebreaking rather than two does not constitute err. Even if there was a variance, possession of either of the two items mentioned was sufficient to convict defendant.

6. Indictment and Information—stealing from church storage building—capable of owning property

An indictment for injury to personal property owned by a church did not have a facial invalidity where defendant contended that the indictment did not allege that the victim (Vision) was capable of owning property. The indictment identified Vision as "a place of religious worship" and then subsequently listed Vision as the owner of the personal property that defendant damaged.

7. Appeal and Error—issue not raised at trial—considered under Rule 2

Although defendant did not raise at trial the issue of whether there was a fatal variance between an indictment and the evidence, the Court of Appeals elected to hear the matter on the merits under Rule 2 of the N.C. Rules of Appellate Procedure. It is difficult to contemplate a more manifest injustice than a conviction without adequate evidentiary support.

8. Indictment and Information—damage to personal property—lock and hasp

There was no variance between the charge alleged in the indictment and the evidence at trial in a prosecution for damage to personal property based on breaking and entering and damage to a lock. Defendant contended that the hasp affixed to the barn door was not owned by the church (Vision), which was allowed to use the building for storage, and which rented the adjacent building for services. Viewing the evidence in the light most favorable to the State, there was sufficient evidence that Vision owned the lock and that the lock was damaged.

9. Burglary and Unlawful Breaking or Entering—mere presence—contention rejected

Defendant's contention that the evidence merely showed his presence at the scene of a breaking and entering was rejected.

Appeal by defendant from judgments entered 19 August 2015 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 26 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State.

Kimberly P. Hoppin for defendant-appellant.

DAVIS, Judge.

This case presents a number of issues stemming from the defendant's act of breaking into a barn adjacent to a building that was being rented by a church for the purpose of holding religious services. Anthony Lee McNair ("Defendant") appeals from his convictions of breaking or entering into a place of religious worship, possession of burglary tools, and injury to personal property. On appeal, Defendant argues that the trial court erred in denying his motion to dismiss the charges against him due to (1) insufficiency of the evidence to support his convictions; (2) the existence of fatal variances between his indictment and both the evidence at trial and the trial court's jury instructions; and (3) the facial invalidity of the indictment. After careful review, we find no error in part, vacate in part, and remand.

Factual and Procedural Background

The State presented evidence at trial tending to show the following facts: In February of 2014, Vision Phase III International Outreach Center ("Vision") — a church "engaged in international missions" — was renting a building (the "Chapel") in Greenville, North Carolina owned by Sutton Amusement Company ("Sutton") for the purpose of conducting its church services. The Chapel and several other structures situated behind it were located on a half block along Raleigh Street. One of these structures was a small barn (the "Barn"), which was located approximately 50 feet behind the Chapel. Although Sutton owned the Barn, it allowed Vision to use the Barn to store equipment that it could not keep in the Chapel.

A six-foot-tall chain link fence stood along the sidewalk adjacent to Raleigh Street beside the Chapel. A large building also owned by Sutton and used for its storage purposes was located behind the Chapel and the Barn along the back side of the half block. Directly behind the Chapel and to the right of the Barn stood a ten-foot brick wall, which closed off access to the premises such that entry was only possible through the main gate of the chain link fence. Both the Chapel and the Barn were located within the area enclosed by the chain link fence, Sutton's large storage building, and the ten foot brick wall.

A padlock secured the main gate of the chain link fence. A second padlock affixed to a hasp was used to secure the door of the Barn. One part of the hasp was screwed into the door frame and the other part was fastened to the door. The padlock was used to secure both parts of the hasp together in order to keep the Barn door locked.

At approximately 1:00 a.m. on 19 February 2014, Officer Adam Smith of the Greenville Police Department was notified by dispatch that a 911 caller had reported the presence of a person "inside the fence" on the Sutton property near the Chapel. Detective Joshua Smith and Officer Chad Bowen of the Greenville Police Department were also dispatched to the scene.

When Officer Smith arrived at the Raleigh Street side of the premises, he looked inside the fenced-in area and observed Defendant climbing over the ten-foot brick wall from the inside out. The officers discovered that the padlock securing the main gate at the front of the property had been cut off and was laying on the ground next to the gate. Outside the fenced-in area near the main gate, the officers discovered bolt cutters and an electrical cord.

Inside the fenced-in area, the officers also discovered that (1) the Barn door had been opened; (2) "the whole padlock assembly" had been "pried off" of the Barn door; and (3) a pry bar that had previously been stored inside the Barn was laying on the ground inside the fenced-in area. The officers also found a pair of work gloves in the fenced-in area near the ten-foot wall. Detective Smith noticed "a metal gate propped up against the wall . . . sort of like a ramp type, where [sic] somebody may have used to go up over" the brick wall.

Defendant was subsequently arrested, advised of his *Miranda* rights, and questioned by Detective Matt McKnight at the Greenville Police Department. Detective McKnight testified that Defendant had stated that he was homeless and that he had "illegally entered the premises of

the church for the purpose of sleeping and that all he did was sleep on a bench near the courtyard of the church."

Defendant was indicted on the charges of: (1) breaking or entering into a place of religious worship; (2) possession of burglary tools; (3) injury to the personal property of Vision; (4) breaking or entering a building occupied by Sutton; and (5) injury to the personal property of Sutton. A jury trial was held beginning on 18 August 2015 before the Honorable W. Russell Duke, Jr. in Pitt County Superior Court. At trial, the State presented testimony from Officer Smith, Detective Smith, Officer Bowen, William Harper (the pastor of Vision), and Jonathan Sutton (the owner of Sutton Amusement Company). Defendant and his brother, Lynwood Leon McNair, testified for the defense.

At the close of the State's evidence, counsel for Defendant made a motion to dismiss, which was denied by the trial court. The jury found Defendant guilty of: (1) breaking or entering into Vision, a place of religious worship; (2) possession of burglary tools; (3) injuring the personal property of Vision; and (4) injuring the personal property of Sutton. The jury found him not guilty of breaking or entering into a building occupied by Sutton. Defendant was also found guilty of attaining the status of a habitual felon.

The trial court consolidated the judgments and sentenced Defendant to 146 to 188 months imprisonment. Defendant gave oral notice of appeal and also filed a written notice of appeal.

Analysis

On appeal, Defendant contends that the trial court erred by denying his motion to dismiss the charges against him. "When reviewing a defendant's motion to dismiss, this Court determines only whether there is substantial evidence of (1) each essential element of the offense charged and of (2) the defendant's identity as the perpetrator of the offense. Whether the evidence presented at trial is substantial evidence is a question of law for the court. Appellate review of a denial of a motion to dismiss for insufficient evidence is *de novo*." *State v. Fisher*, 228 N.C. App. 463, 471, 745 S.E.2d 894, 900-01 (internal citations and quotation marks omitted), *disc. review denied*, 367 N.C. 274, 752 S.E.2d 470 (2013).

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The

> test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (internal citations and quotation marks omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

Our Supreme Court has held that "[i]f there is any evidence tending to prove guilt or which reasonably leads to this conclusion as a fairly logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable doubt of defendant's guilt." *State v. Franklin*, 327 N.C. 162, 171-72, 393 S.E.2d 781, 787 (1990). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted).

I. Breaking or Entering into a Place of Religious Worship

[1] Defendant's first argument is that the trial court erred in denying his motion to dismiss the charge of breaking or entering into a place of religious worship. Specifically, he contends that (1) the Barn was not a place of worship; and (2) the State presented insufficient evidence to support a finding that Defendant was guilty of the lesser-included offense of felony breaking or entering. We address each argument in turn.

> A. "Place of Religious Worship" Element
>
> N.C. Gen. Stat. § 14-54.1 states as follows:
>
> (a) Any person who wrongfully breaks or enters any building that is a place of religious worship with intent to commit any felony or larceny therein is guilty of a Class G felony.
>
> (b) As used in this section, a "building that is a place of religious worship" shall be construed to include any church, chapel, meetinghouse, synagogue, temple, longhouse, or mosque, or *other building that is regularly used, and clearly identifiable, as a place for religious worship.*

N.C. Gen. Stat. § 14-54.1 (2015) (emphasis added). Therefore, the elements of this offense are that a person "[1] wrongfully breaks or

enters [2] any building that is a place of religious worship [3] with intent to commit any felony or larceny therein." *State v. Campbell*, 234 N.C. App. 551, 557, 759 S.E.2d 380, 384 (2014) (citation omitted), *rev'd on other grounds*, 368 N.C. 83, 772 S.E.2d 440 (2015).

As an initial matter, it is important to note that the only building Defendant is alleged to have broken into was the Barn, and the State concedes that the Barn itself was not used for religious worship. However, the State asserts that Defendant's act of breaking into the Barn nevertheless constituted breaking or entering a place of religious worship for purposes of N.C. Gen. Stat. § 14-54.1 because "[t]he church was more than just a single building." Moreover, according to the State, the Barn was within the curtilage of the Chapel and, for this reason, the Barn should be deemed an extension of the Chapel for purposes of N.C. Gen. Stat. § 14-54.1. We reject the State's arguments on this issue.

"The duty of a court is to construe a statute as it is written." *Campbell v. First Baptist Church*, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979) (citation omitted). N.C. Gen. Stat. § 14-54(c) defines the word "building" to include "any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." N.C. Gen. Stat. § 14-54(c) (2015).

Based on the manner in which N.C. Gen. Stat. § 14-54.1 is worded, it is clear that in order for Defendant to have been convicted of violating this statute, the specific building Defendant is alleged to have broken into must have been a "building that is regularly used, and clearly identifiable, as a place for religious worship." See N.C. Gen. Stat. § 14-54.1. Although both the Chapel and the Barn meet the statutory definition of "building," it is clear that the Chapel and the Barn are separate structures. The State presented evidence at trial that the Chapel was used for religious services but presented no evidence that the Barn was used as a place of religious worship — a fact which the State also concedes in its brief.

Thus, because the Barn was not itself used for religious worship and because the General Assembly has limited the reach of this offense to "building[s] that [are] regularly used, and clearly identifiable, as a place for religious worship[,]" the State cannot establish that Defendant was guilty of violating N.C. Gen. Stat. § 14-54.1. This Court is not at liberty to broaden the statutory text to encompass structures *adjacent to* buildings being used as a place of religious worship. *State v. Wagner*, __ N.C. App. __, __, 790 S.E.2d 575, 582 (2016) ("Our courts lack the authority to

rewrite a statute, and instead, the duty of a court is to construe a statute as it is written." (citation, quotation marks, and brackets omitted)), *disc. review denied*, __ N.C. __, 795 S.E.2d 221 (2017).

[2] We are also unable to accept the State's argument that because the Chapel was a building that held religious services and the Barn was within the curtilage of the Chapel, the Barn was "clearly identifiable[ ] as a place for religious worship" as required by N.C. Gen. Stat. § 14-54.1(b). As quoted above, the definition of the term "building" contained in N.C. Gen. Stat. § 14-54 references the term "curtilage" solely by referring to a "building within the curtilage of a *dwelling house*." *See* N.C. Gen. Stat. § 14-54 (emphasis added). Here, the State does not attempt to argue that any portion of the property occupied by Vision was being used as a dwelling house.

We observe that the language in N.C. Gen. Stat. § 14-54 linking the term "curtilage" to proximity to a dwelling house is consistent with caselaw from North Carolina's appellate courts defining curtilage. *See*, *e.g.*, *State v. Fields*, 315 N.C. 191, 194, 337 S.E.2d 518, 520 (1985) ("The curtilage is the land around a *dwelling house* upon which those outbuildings lie that are commonly used with the dwelling house." (citation and quotation marks omitted and emphasis added)).

Thus, the evidence presented by the State was not sufficient to convict Defendant of violating N.C. Gen. Stat. § 14-54.1. Accordingly, we must vacate Defendant's conviction of that offense.

B. Sufficiency of Evidence as to Breaking or Entering

[3] Alternatively, the State contends that in the event we determine the evidence was insufficient to convict Defendant under N.C. Gen. Stat. § 14-54.1, this Court should remand to the trial court for entry of judgment on the lesser-included offense of breaking or entering. Defendant, conversely, argues that the State not only failed to introduce evidence showing a violation of N.C. Gen. Stat. § 14-54.1 but also failed to produce adequate evidence to support a charge of breaking or entering. Specifically, Defendant contends that his mere presence at the scene was insufficient to establish his guilt as to this offense.

> The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. The criminal intent of the defendant at the time of breaking or entering may be inferred from the acts he committed subsequent to his breaking or entering [into] the building.

State v. Bowden, 216 N.C. App. 275, 278, 717 S.E.2d 230, 232-33 (2011) (internal citation and quotation marks omitted).

Defendant asserts that the only evidence connecting him to the break-in was his presence in the area when law enforcement officers arrived. It is well settled that "a defendant's mere presence at the scene of the crime does not make him guilty . . . ." *Id.* at 279, 717 S.E.2d at 233 (citation and quotation marks omitted). However, the State presented the following evidence establishing that Defendant broke into the Barn: (1) Pastor Harper testified that on 18 February 2014 Vision had secured the Barn's door with a lock; (2) at 1:00 a.m. on 19 February 2014, a 911 call was received stating that an individual was inside the fenced-in area; (3) Defendant was found by law enforcement officers scaling a ten-foot brick wall near the Barn; (4) officers discovered a pry bar on the ground next to the Barn; and (5) a broken lock was found beside the Barn door.

The evidence further supported an inference that Defendant intended to commit larceny when he entered the Barn. Upon their arrival at the scene, officers determined that the Barn "appeared to have been rummaged through" and "was kind of in disarray[.]" The officers also discovered that certain items, including a grill and a pressure washer, had been removed from the Barn and placed in the fenced-in area. Pastor Harper testified that these items had been present inside the Barn earlier that day. Thus, the State presented sufficient evidence that Defendant was guilty of breaking or entering into the Barn.

"When the actual instructions given are sufficient to sustain a conviction on a lesser included offense, we consider the conviction a verdict on the lesser charge and then remand for appropriate sentencing." *State v. Stokes*, 367 N.C. 474, 479, 756 S.E.2d 32, 36 (2014). "There are two lesser-included offenses to [N.C. Gen. Stat. § 14-54.1]: felony breaking or entering under N.C. Gen. Stat. § 14-54(a) . . . which lacks the 'place of religious worship' element, and misdemeanor breaking or entering under N.C. Gen. Stat. § 14-54(b) . . . which lacks both the 'place of religious worship' element and the intent [to commit a felony or larceny therein] element." *Campbell*, 234 N.C. App. at 557, 759 S.E.2d at 384-85.

Taking all the evidence in the light most favorable to the State, we are satisfied that although — as discussed above — the State did not put forth adequate evidence to satisfy the "place of religious worship" element of N.C. Gen. Stat. § 14-54.1, the State did present sufficient evidence for the jury to convict Defendant of the lesser-included offense of felony breaking or entering under N.C. Gen. Stat. § 14-54(a). Accordingly, we remand to the trial court for entry of judgment and resentencing on

the lesser-included offense of felony breaking or entering. *See State v. Clark*, 137 N.C. App. 90, 97, 527 S.E.2d 319, 323 (2000) (remanding for entry of judgment and resentencing on lesser-included offense where evidence was insufficient to establish guilt of greater offense).

II. Possession of Burglary Tools

Defendant makes two arguments with respect to his conviction for possession of burglary tools: (1) he did not have either actual or constructive possession of the burglary tools at issue; and (2) a fatal variance existed between the indictment and the court's instructions to the jury because the jury instructions — unlike the indictment — referenced the work gloves found on the ground inside the fenced-in area.

A. Constructive Possession

[4] The State does not contend that Defendant had *actual* possession of the burglary tools, and there is no indication in the record that would support such an argument. However, the State does contend that Defendant had *constructive* possession of the pry bar and the bolt cutters at the time he was apprehended.

> Under the theory of constructive possession, a person may be charged with possession of an item . . . when he has both the power and intent to control its disposition or use, even though he does not have actual possession. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. However, unless the person has exclusive possession of the place where the [items] are found, the State must show other incriminating circumstances before constructive possession may be inferred.

State v. Davis, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (internal citations and quotation marks omitted). Thus "[t]here must be more than mere association or presence linking the person to the item in order to establish constructive possession." *State v. McNeil*, 209 N.C. App. 654, 663, 707 S.E.2d 674, 682 (2011) (citation and quotation marks omitted).

In the present case, burglary tools were found within the fenced-in area. While Defendant was not in exclusive possession of the area where the tools were found, the State presented the following other incriminating circumstances: (1) Defendant was found alone inside a privately-owned, fenced-in area at 1:00 a.m.; (2) as the officers entered

the fenced-in area, they observed Defendant scaling a ten-foot brick wall in an apparent attempt to avoid apprehension; (3) the officers determined that someone had broken into the Barn, observing that toolboxes and cabinets in the Barn "appeared to [have been] rummaged through"; (4) padlocks were laying on the ground both next to the main gate and adjacent to the Barn door; and (5) several items, including a grill and pressure washer, that had previously been stored inside the Barn were found in the fenced-in area. These incriminating circumstances support a finding that Defendant had constructive possession of the burglary tools.

B. Fatal Variance Between Indictment and Jury Instructions

[5] Defendant also argues that a fatal variance existed between the indictment and the trial court's instructions to the jury with respect to the charge of possession of burglary tools. Based upon our review of the trial transcript, it is clear that Defendant's trial counsel did not specifically raise this issue at trial. Our appellate courts, however, have "chosen to review . . . unpreserved issues for plain error when the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *State v. Holbrook*, 137 N.C. App. 766, 768, 529 S.E.2d 510, 511 (2000) (citation, quotation marks, and brackets omitted). This Court has expressly applied this rule to unpreserved arguments alleging a fatal variance between an indictment and the trial court's jury instructions. *See State v. Ross*, __ N.C. App. __, __, 792 S.E.2d 155, 158 (2016) ("Our review of this issue on appeal is for plain error, as Defendant failed to object to the jury instruction at trial on the basis that it varied materially from the indictment." (citations and emphasis omitted)).

> 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) (internal citations, quotation marks, and brackets omitted).

Defendant's argument is premised on his assertion that although the indictment on the charge of possession of burglary tools only identified

the pry bar and the bolt cutters as implements of housebreaking in Defendant's possession, the trial court nevertheless instructed the jury that it could find Defendant guilty if it found that he possessed either the pry bar, the bolt cutters, *or the work gloves*.

"Our Courts have found that a trial court's jury instructions which vary from the allegations of the indictment might constitute error where the variance is regarding an *essential element* of the crime charged." *State v. Lark*, 198 N.C. App. 82, 92, 678 S.E.2d 693, 700-01 (2009), *disc. review denied*, 363 N.C. 808, 692 S.E.2d 111 (2010). However, "[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Bollinger*, 192 N.C. App. 241, 246, 665 S.E.2d 136, 139 (2008), *aff'd per curiam*, 363 N.C. 251, 675 S.E.2d 333 (2009).

We find instructive our decision in *Bollinger*. In that case, the defendant was charged with carrying a concealed weapon, and his indictment stated that the defendant was carrying a "set of metallic knuckles" whereas the evidence at trial showed that the defendant was also carrying "one or more knives." *Id.* at 243, 665 S.E.2d at 138 (quotation marks, brackets, and emphasis omitted). The trial court did not instruct the jury on the defendant's act of carrying a "set of metallic knuckles" and instead instructed on his carrying of "one or more knives." *Id.* (quotation marks, brackets, and emphasis omitted).

On appeal, we rejected the defendant's fatal variance argument, concluding that the indictment's language identifying the "metallic knuckles" was "mere surplusage." *Id.* at 246, 665 S.E.2d at 139-40. We reasoned that "[t]he gist of the offense [was] carrying a concealed *weapon*." *Id.* at 246, 665 S.E.2d at 140. Thus, we held that although "the indictment alleged metallic knuckles while the evidence introduced at trial showed defendant carried knives in addition to metallic knuckles, the trial court's instructions on carrying a concealed weapon were not erroneous." *Id.* Moreover, we noted that even assuming *arguendo* that the trial court had, in fact, erred, the "mention of 'knives' in the jury instructions as opposed to 'metallic knuckles' . . . did not affect the burden of proof required of the State or constitute a substantial change or variance from the indictment." *Id.* at 247, 665 S.E.2d at 140.

The essential elements of possession of burglary tools are "(1) the possession of an implement of housebreaking (2) without lawful excuse, and the State has the burden of proving both of these elements." *State v. Campbell*, 188 N.C. App. 701, 711, 656 S.E.2d 721, 728 (citation and quotation marks omitted), *appeal dismissed*, 362 N.C. 364, 664 S.E.2d

311 (2008). The indictment charging Defendant with this offense stated as follows:

> **POSSESSION OF BURGLARY TOOLS**
>
> And the jurors for the State upon their oath present that on or about the 19th day of February, 2014, in the County named above the defendant named above unlawfully, willfully and feloniously did without lawful excuse have in the defendant's possession an implement of housebreaking, a wooden handle pry bar and 24" bolt cutters, in violation of G.S. 14-55.

As in *Bollinger*, the indictment charged the defendant with both of the essential elements of the offense by asserting that defendant "ha[d] in [his] possession an implement of housebreaking" and this possession was "without lawful excuse . . . ." Thus, the mention of specific tools was "mere surplusage." *See Bollinger*, 192 N.C. App. at 246, 665 S.E.2d at 139-40.

The trial court's instructions to the jury on this charge stated, in pertinent part, as follows:

> The Defendant has also been charged with possession without lawful excuse of implements of housebreaking. For you to find the Defendant guilty of this offense the State must prove two things beyond a reasonable doubt.
>
> First, that the *Defendant was in possession of implements of housebreaking*. A pry bar, bolt cutters and gloves are implements of house-breaking if you find from the evidence beyond a reasonable doubt that they are made and designed for the purpose of house-breaking or they are commonly carried and used by housebreakers or is [sic] reasonably adapted for such use.
>
> . . . .
>
> And, second, that there was *no lawful excuse* for the Defendant's possession. The State must prove beyond a reasonable doubt that the Defendant intended to use the implements to break into a house or building or did use them for that purpose.

(Emphasis added.)

The above-quoted instruction confirms that the trial court properly instructed the jury as to both essential elements of the offense. The mere

fact that the court mentioned three implements of housebreaking rather than two does not constitute error.[1]

Moreover, even assuming *arguendo* that there was a variance, the evidence — as discussed above — supported a finding that Defendant had constructive possession of the pry bar and the bolt cutters. Defendant's possession of either the pry bar or the bolt cutters was sufficient to convict him of possession of burglary tools, and both of these tools were expressly mentioned in the indictment. As in *Bollinger*, the discrepancy cited by Defendant "did not affect the burden of proof required of the State or constitute a substantial change or variance from the indictment." *See Bollinger*, 192 N.C. App. at 246-47, 665 S.E.2d at 140. Thus, the trial court's instruction did not constitute plain error.

III. Injury to Personal Property

Finally, Defendant argues that the trial court erred in denying his motion to dismiss the two charges of injury to personal property for which he was convicted. Specifically, he contends that (1) the indictment charging injury to personal property of Vision was facially invalid because it did not identify Vision as an entity capable of owning property; (2) there was a fatal variance between the indictment and the evidence at trial as to the charge of injury to Vision's personal property because the State's evidence suggested that the damaged lock on the Barn door was actually owned by Sutton; and (3) his mere presence at the scene was insufficient to support a finding that Defendant was guilty of injury to the personal property of Sutton and Vision.

A. Facial Validity of Indictment

[6] Defendant contends that the portion of his indictment charging him with injury to Vision's personal property was facially invalid because the indictment did not allege that Vision was capable of owning property. Although Defendant did not assert this argument at trial, our Supreme Court has held that "where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (citations omitted), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). The Supreme Court has made clear that

1. Defendant does not dispute the fact that there was sufficient evidence presented at trial to allow the jury to find that he possessed the work gloves.

> [t]he identity of the owner of the property that the defendant allegedly injured is a material element of the offense of injury to personal property. For that reason, a criminal pleading seeking to charge the commission of crimes involving theft of or damage to personal property, including injury to personal property, must allege ownership of the property in a person, corporation, or other legal entity capable of owning property.

State v. Ellis, 368 N.C. 342, 345, 776 S.E.2d 675, 677 (2015) (internal citations and quotation marks omitted).

In *State v. Campbell*, 368 N.C. 83, 772 S.E.2d 440 (2015), our Supreme Court addressed the application of this principle in cases where the owner of the property at issue is a church. The Court held that "alleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a 'company' or 'incorporated,' signifies an entity capable of owning property[.]" *Id.* at 87, 772 S.E.2d at 444 (citation omitted).

In the present case, the indictment issued on 13 October 2014 listed three charges and stated as follows:

> **BREAKING AND OR ENTERING A PLACE OF WORSHIP**
>
> The jurors for the State upon their oath present that on or about the 19th day of February, 2014, in the County named above the defendant named above unlawfully, willfully and feloniously did break and enter a building occupied by Vision Phase III International Outreach Center that is *a place of religious worship*, located at 208 Raleigh Ave., Greenville, NC, with the intent to commit a larceny therein, in violation of G.S. 14-54(A).
>
> **POSSESSION OF BURGLARY TOOLS**
>
> And the jurors for the State upon their oath present that on or about the 19th day of February, 2014, in the County named above the defendant named above unlawfully, willfully and feloniously did without lawful excuse have in the defendant's possession an implement of housebreaking, a wooden handle pry bar and 24" bolt cutters, in violation of G.S. 14-55.

> **INJURY TO PERSONAL PROPERTY**
>
> And the jurors for the State upon their oath present that on or about the 19th day of February, 2014, in the County named above the defendant named above unlawfully and willfully did wantonly injure personal property, a lock on the shed door of storage [sic] building, the property of Vision Phase III International Outreach Center, in violation of G.S. 14-160.

(Emphasis added.)

Thus, the first of the three charges contained in the indictment — the breaking or entering charge — identified Vision as "a place of religious worship[.]" The third charge — injury to personal property of Vision — stated that Defendant "unlawfully and willfully did injure personal property, a lock on the shed door of [a] storage building, the property of Vision Phase III International Outreach Center[.]" Therefore, by identifying Vision as a "place of religious worship" earlier in the indictment and then subsequently listing Vision as the owner of the personal property that Defendant damaged, the indictment comported with *Campbell*.

A converse ruling requiring the State to have expressly identified Vision as a place of public worship in *each* portion of the indictment containing a separate charge would constitute a hypertechnical interpretation of the requirements for indictments that we believe is inconsistent with applicable North Carolina caselaw on this issue. *See In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 280 (2006) ("Our courts have recognized that while an indictment should give a defendant sufficient notice of the charges against him, it should not be subjected to hyper technical scrutiny with respect to form."). Accordingly, the indictment here is properly construed as alleging that Vision — a place of religious worship — was an entity capable of owning property.

B. Fatal Variance Between Indictment and Evidence at Trial

[7] Defendant also argues that there was a fatal variance between the indictment and the evidence at trial as to the ownership of the lock mechanism forming the basis for the charge alleging injury to Vision's personal property. The State asserts — and Defendant concedes — that this issue was not properly preserved because he failed to raise it in the trial court.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion,

stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). "This Court repeatedly has held that a defendant must preserve the right to appeal a fatal variance." *State v. Hill*, __ N.C. App. __, __, 785 S.E.2d 178, 182 (2016).

However, we elect to reach the merits of this argument pursuant to our authority under Rule 2 of the North Carolina Rules of Appellate Procedure. Rule 2 states as follows:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2.

In *State v. Gayton-Barbosa*, 197 N.C. App. 129, 676 S.E.2d 586 (2009), we invoked Rule 2 to review a similar fatal variance argument that had not been adequately preserved for appellate review. We reasoned that "it is difficult to contemplate a more 'manifest injustice' to a convicted defendant than that which would result from sustaining a conviction that lacked adequate evidentiary support, particularly when leaving the error in question unaddressed has double jeopardy implications." *Id.* at 135, 676 S.E.2d at 590. Because this type of alleged error is "sufficiently serious to justify the exercise of our authority under Rule 2[,]" *State v. Campbell*, __ N.C. App. __, __, 777 S.E.2d 525, 530 (2015) (quotation marks and brackets omitted), we elect to exercise our discretion under Rule 2 and review this issue. *See Hill*, __ N.C. App. at __, 785 S.E.2d at 182 (invoking Rule 2 to address merits of defendant's argument regarding fatal variance between indictment and evidence at trial).

[8] Defendant contends that the evidence presented at trial tended to show that the hasp affixed to the Barn door was owned by Sutton — rather than Vision — and that Vision merely owned a padlock securing the hasp. He further argues that although the evidence showed that the hasp was damaged, the evidence did not show that the padlock was injured as a result of the events of 19 February 2014.

At trial, multiple witnesses testified that they noticed the lock on the Barn door had been "busted into," "pried open," or "broken off." Officer Bowen testified regarding his observation of the padlock assembly on the Barn door as follows:

> [OFFICER BOWEN:] . . . . As we were going back to the barn, there's a barn kind of in the center of this fenced-in area that we were at. We noticed that the door was open on this barn. Upon closer inspection of the door, you go up – and it was padlocked. You know, on a padlock usually you have one side that's screwed to the door frame and the other to the door. Well, it appeared that one side of the frame where the lock [sic] had been pried off. So basically you could open the door – the whole padlock assembly had come off with it. So it looked like it had been forced open based on what I could see.

The State also presented evidence from Detective Smith on this subject.

> [PROSECUTOR:] What did you do next?
>
> [DETECTIVE SMITH:] Continued to search around. There was a lock that appeared to be broken and we cleared the [Barn].
>
> [PROSECUTOR:] Well, let me ask you about that. You mentioned a lock; where was the lock?
>
> [DETECTIVE SMITH:] By one of [sic] doors to the [Barn].
>
> . . . .
>
> [PROSECUTOR:] Is this the same [Barn] where the lock appeared to have been broken?
>
> [DETECTIVE SMITH:] Yes, sir.

Pastor William Harper also testified during direct examination regarding this lock.

> [PROSECUTOR:] I'm showing you now what's been marked State's Exhibit 9. Can you identify that?
>
> [PASTOR HARPER:] Yeah, that's the door of the barn that sits on the left as you look at it, and it's a lock that's been broken off.
>
> . . . .
>
> [PROSECUTOR:] Now, when is the last time you had seen the [Barn]?

> [PASTOR HARPER:] The day before; I normally do a normal check through the whole –
>
> [PROSECUTOR:] And how do you normally secure that – or how is it normally secured?
>
> [PASTOR HARPER:] Well, lock and key; it's a lock and key that we use.

Finally, Jonathan Sutton, the owner of Sutton Amusement Company, testified regarding the ownership of the lock on the door of the Barn.

> [PROSECUTOR:] You mentioned the [Barn] that, I think you said, was jimmied or broken in – busted into, I think, is what you said; can you describe that building for me?
>
> [SUTTON:] It's a small storage building on cinder blocks. I would estimate in size maybe, you know, twelve by ten, if even.
>
> [PROSECUTOR:] And what do you keep in there?
>
> [SUTTON:] The church – I allow the church to utilize that [Barn]. I don't know what would have been in that [Barn], the church uses it.
>
> [PROSECUTOR:] Do you normally secure that or does somebody else secure that [Barn]?
>
> [SUTTON:] Typically the church, you know, secures it.

While admittedly the evidence presented at trial regarding the damage to the lock on the door of the Barn was not a model of clarity, viewing the evidence in the light most favorable to the State — as we must — we believe that sufficient evidence was presented to allow the jury to find that Vision owned the lock that secured the Barn door and that this lock was damaged. Thus, we cannot say that a variance existed between the charge alleged in the indictment and the evidence at trial. Accordingly, this argument is overruled.

C. Sufficiency of Evidence as to Defendant's Convictions for Injury to Personal Property

[9] Finally, Defendant contends that his mere presence at the scene of the break-in was insufficient to support his conviction of injury to personal property. Once again, we disagree.

The essential elements of injury to the personal property of another are "(1) that personal property was injured; (2) that the personal property was that of another, *i.e.*, someone other than the person or persons accused; (3) that the injury was inflicted wantonly and wil[l]fully; and (4) that the injury was inflicted by the person or persons accused." *In re Meaut*, 51 N.C. App. 153, 155, 275 S.E.2d 200, 201 (1981) (quotation marks omitted).

As discussed above, the evidence at trial — when viewed in the light most favorable to the State — was that (1) Sutton secured the main gate with a padlock; (2) Vision secured the Barn door with a padlock of its own; (3) officers received a 911 call that an individual was inside the fenced-in area at 1:00 a.m.; (4) Defendant was found by officers apparently attempting to leave the premises by climbing the brick wall; (5) a pry bar was found on the ground next to the Barn and bolt cutters were located on the ground outside the main gate; and (6) broken locks were discovered on the ground next to the main gate and the Barn. Therefore, we reject Defendant's argument that the evidence simply showed his mere presence at the scene. To the contrary, the evidence presented by the State was sufficient to allow the jury to find that he was guilty of injury to the personal property of both Vision and Sutton.

Conclusion

For the reasons stated above, we vacate Defendant's conviction of felony breaking or entering into a place of religious worship under N.C. Gen. Stat. § 14-54.1 and remand for entry of judgment on the lesser-included offense of felony breaking or entering and resentencing. We conclude that Defendant received a fair trial free from error as to his remaining convictions.[2]

NO ERROR IN PART; VACATED IN PART; REMANDED WITH INSTRUCTIONS.

Chief Judge McGEE and Judge BERGER concur.

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2. Defendant also argues in his brief that the trial court improperly added an extra point to his prior record level during sentencing, and the State concedes error on this issue. However, this argument was linked to Defendant's conviction under N.C. Gen. Stat. § 14-54.1. Because we are vacating his conviction for that offense and remanding for resentencing, this argument is moot.

STATE OF NORTH CAROLINA
v.
DANIEL MYLETT, DEFENDANT

No. COA16-816

Filed 18 April 2017

1. Criminal Law—continuance—time to prepare motion to dismiss—bodycam footage destroyed—no Brady violation

The trial court did not abuse its discretion by denying defendant's motion for a continuance in a prosecution for assaulting a government officer. The motion for a continuance was for the purpose of preparing a motion to dismiss based on the destruction of video footage from officers' body cameras. The recordings were erased in accordance with routine policy and had been reviewed by the prosecutor and defendant's original counsel. Defense counsel's decision not to preserve copies could not be the basis of a contention that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). Moreover, defendant did not establish precisely how a continuance would have helped him prepare for trial.

2. Police Officers—assaulting a public officer—general intent crime—spitting at another—hitting officer

The trial court did not err by denying defendant's motion to dismiss a charge of assaulting a government officer where defendant said he spit at another but hit the officer.. In accord with *State v. Page*, 346 N.C. 689 (1997), assault on a government official is a general intent crime and N.C.G.S. § 14-33(c)(4) was satisfied.

Appeal by defendant from judgment entered 31 March 2016 by Judge Alan Z. Thornburg in Watauga County Superior Court. Heard in the Court of Appeals 9 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kevin G. Mahoney, for the State.

Arnold & Smith, PLLC, by Laura M. Cobb, for defendant-appellant.

MURPHY, Judge.

Daniel Mylett ("Defendant") appeals from his conviction for assault on a government officer. On appeal, he contends that the trial court

erred by (1) denying his motion for a continuance; and (2) denying his motions to dismiss. Specifically, he argues that the trial court should have granted his motion for a continuance so that he could prepare a motion to dismiss on the basis that video footage of the assault recorded on officers' body cameras was destroyed prior to trial in violation of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963).

He further asserts that, because he did not intend to assault a government officer, but instead intended to assault civilians standing behind the officer, the charge of assault on a government officer in violation of N.C.G.S. § 14-33(c)(4) (2015) was erroneously submitted to the jury as the State failed to establish the requisite intent element of the offense. After careful review, we reject Defendant's arguments and conclude that he received a fair trial free from error.

Factual Background

At 1:37 a.m. on 29 August 2015, Officer Jason Lolies ("Officer Lolies") and Officer Forrest ("Officer Forrest") with the Boone Police Department responded to a call regarding a male who was bleeding from his head at 200 Misty Lane in Boone, North Carolina. Upon arriving at the Misty Lane address, Officers Lolies and Forrest encountered several hundred individuals, most of whom were college-aged.

Officer Lolies recalled that "[a]s we got to the crest of the hill, the driveway, that's when we heard a commotion and it sounded like some arguments, some screaming, some fighting sort of" coming from a smaller group of approximately 30 individuals. Upon investigation, Officer Lolies observed "people pushing and shoving over top of [Defendant]" who was "laying on the ground." Officer Lolies continued that "[i]t appeared that some of the people were trying to defend [Defendant] and there was obviously people trying to attack him[.]"

The officers moved in to break up the altercation, and, after subduing the combatants, were approached by Defendant's girlfriend, Kathryn Palmer ("Palmer"), who informed them that Defendant was bleeding from his head. Officer Lolies then went over to Defendant and observed that both of Defendant's eyes were bleeding and that he had bruising and a large knot developing over his left eye.

Defendant then jumped up from the ground where he was lying, acted aggressively towards Officer Lolies, and told him "to do [his] motherfucking job." While Defendant was yelling at him, Officer Lolies detected a strong odor of alcohol on his breath. Defendant then explained

to Officer Lolies that the reason he had been beaten was because he had tried to stop Palmer from dancing with another man.

Shortly thereafter, Officer Dennis O'Neal ("Officer O'Neal") arrived on the scene to assist Officers Lolies and Forrest. Officers Lolies and Forrest attempted to question several other individuals on hand, but were unable to do so because "[Defendant] was pretty erratically challenging people to fights. He would call them pussies, just very loud" and "[h]e charged at a couple of people a couple of different times and Officer Forrest, and eventually when Officer O'Neal arrived on the scene they would restrain him to prevent him from doing that." Defendant continued to verbally berate Officers Lolies, Forrest, and O'Neal by "telling [them] as law enforcement officers to do [their] . . . motherfucking jobs."

The officers called for an ambulance for Defendant, and, upon its arrival, Officer O'Neal directed Defendant into the back of the vehicle. Defendant initially complied, but proceeded to exit abruptly from the ambulance. Defendant resumed swearing at the officers and challenging nearby individuals to fight him.

Officer O'Neal positioned himself between Defendant and these individuals and at that point Defendant "attempted to spit at folks that were walking behind, behind [Officer O'Neal's] location, over [his] shoulder." Defendant's spit made contact with the left side of Officer O'Neal's face and shirt. Defendant spat two additional times, despite Officer O'Neal ordering him to stop, again hitting Officer O'Neal in his face and on his shirt.

Officer O'Neal ultimately corralled Defendant back into the ambulance and rode with him to Watauga Medical Center to receive treatment for his injuries. Defendant continued swearing at and verbally berating Officer O'Neal in the ambulance and at one point "stood up in the back of . . . the ambulance, off the gurney, and began punching the interior walls of the ambulance" prompting Officer O'Neal to restrain him until they reached the hospital. Later that day, a warrant was issued and Defendant was arrested for assault on a government officer in connection with his spitting on Officer O'Neal.

Prior to Defendant's district court trial, his original trial counsel received copies of video recordings taken on the officers' body-cams of the events surrounding the 29 August 2015 altercation at 200 Misty Lane. However, counsel opted not to obtain copies or use the footage at trial. After counsel's review, the original recordings were destroyed in accordance with the Boone Police Department's evidence retention schedule.

On 9 November 2015, Defendant was tried before the Honorable Rebecca E. Eggers-Gryder in Watauga County District Court. That same day, Judge Eggers-Gryder found Defendant guilty of assault on a government officer and sentenced him to 60 days imprisonment, suspended sentence, and placed him on 12 months supervised probation. On 12 November 2015, Defendant appealed to superior court for a trial *de novo*.

A jury trial was held in Watauga County Superior Court before the Honorable Alan Z. Thornburg from 29 March 2016 through 31 March 2016. Prior to the jury being empaneled, Defendant's new trial counsel moved for a continuance on the ground that counsel wished to prepare a motion to dismiss since the video recordings of the events of 29 August 2015 taken on the officers' body cameras had been destroyed and were therefore unavailable for use by the defense. After hearing arguments from defense counsel and the State, the trial court ultimately denied the motion. Significantly, no motion was filed in District Court relating to the videos and defense counsel did not move to dismiss on this ground in the four and a half months prior to the trial in Superior Court.[1]

At trial, the State proceeded on a theory of transferred intent as to the assault on an government officer charge. To this end, it elicited testimony from, among other witnesses, Officers Lolies and O'Neal.

Officer O'Neal testified as follows concerning the spitting incident:

> Q. I'm sorry -- but was he just talking loudly and a little bit of spit came out or was he actually projecting spit?
>
> A. He was attempting -- or projected, projecting spit attempting to hit folks that were walking behind me.
>
> Q. And when it hit you was it just a little driplet (sic) or was it a lot of liquid?
>
> A. If you know it was like the, you know, what a sneeze feels like, you know, a sneeze will make you feel the droplets on your face and you can see you got some stuff on your shirt.
>
> Q. And how about the third time, did that hit you?

1. Although appellate counsel for Defendant argued for the first time at oral argument that Defendant's original counsel had subpoenaed the videos, the record is silent as to the issuance of any subpoenas by Defendant at any stage.

> A. Yes, sir, it did, but it was, there wasn't near as much, you know, liquid, or I couldn't feel as much on the third time.
>
> . . . .
>
> Q. And what did you do at that point?
>
> A. I asked him to stop. I said, please stop, you know, I commanded, you know, stop spitting.
>
> Q. And the second time did you hear the sound beforehand?
>
> A. Yes.
>
> Q. All right. And where did you get hit?
>
> A. It would have been right here on my uniform shirt.
>
> Q. Did any of it actually go over your shoulder?
>
> A. Sir, I don't know that.
>
> Q. And the third time you said was it still --
>
> A. Yes.
>
> Q. And was he trying to kind of get around you to spit?
>
> A. Yes, yes he was.

Officer Lolies, in turn, testified as follows concerning the spitting incident:

> Q. So I think I asked you, what happened, did anything draw your attention to Officer O'Neal and the Defendant at some point later, once the ambulance arrived?
>
> A. Yes, sir. I had three people over here, basically detained at this point, but I intended on placing them under arrest when I got the chance. And I was dealing with them, especially the one that ran so much. But I heard Officer O'Neal, who was dealing with [Defendant] at the time, ask the question to the effect of, I don't remember the exact words, but did you just spit on me.
>
> Q. And what did you do when you heard that?
>
> A. I looked over at Officer O'Neal, made sure he was okay, I didn't go over there and assist him or anything, but I just kept my eye on them to watch them to make sure that they were okay. And I continued to deal with these three people here.

> Q. Did you see Officer O'Neal right after he said that do anything?
>
> A. He made a gesture across the top of his uniform.
>
> Q. And what did that gesture appear to you to be?
>
> MR. ISAACS: Objection.
>
> THE COURT: Overruled.
>
> A. It appeared to me that he was wiping something off of his uniform.
>
> Q. Could you tell if anyone else was around Officer O'Neal and the defendant when that incident occurred?
>
> A. There was some other people around, I feel like it may have been his girlfriend and his brother, and there seemed to be two males who were giving this information in support of [Defendant's] statements and sort of his recollection of events, but there was also some people from the opposing party gathered around. And it seemed to me that these people in the background were taunting each other.
>
> Q. And the people that you thought were taunting each other for the opposing party, where were they standing in relation to Officer O'Neal?
>
> A. They were all around. We were intermingled with all these people.

Defendant moved to dismiss the charge of assault on a government officer at the close of the State's evidence and renewed his motion at the close of all the evidence. The trial court denied both motions.

The jury found Defendant guilty of assault on a government officer. The trial court sentenced Defendant to ten days imprisonment to be served over five consecutive weekends and ordered Defendant to pay costs in the amount of $1,657.50. It is from this judgment that Defendant appeals.

Analysis

I. Motion for Continuance

[1] Defendant initially argues on appeal that the trial court erred by denying his motion for a continuance. Specifically, Defendant claims he should have been allowed additional time to file a motion due to the destruction of the officers' body camera video recordings of the events

of 29 August 2015 amounting to a *Brady* violation. We disagree. "A motion for a continuance is generally a matter within the trial court's discretion, and a denial is not error absent an abuse of that discretion. Defendant, therefore, bears the burden of showing that the trial court's ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Carter*, 184 N.C. App. 706, 711, 646 S.E.2d 846, 850 (2007) (internal citations and quotation marks omitted). The trial court did not abuse its discretion.

"In *Brady*, the United States Supreme Court held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. This includes evidence known only to police investigators and not to the prosecutor. The duty to disclose such evidence is applicable even though there has been no request by the accused." *State v. Dorman*, 225 N.C. App. 599, 620, 737 S.E.2d 452, 466 (internal citations, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 366 N.C. 594, 743 S.E.2d 205 (2013).

> To establish a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial. Favorable evidence can be either exculpatory or useful in impeaching the State's evidence. Evidence is considered material if there is a reasonable probability of a different result had the evidence been disclosed. A reasonable probability is a probability sufficient to undermine confidence in the outcome. However, when the evidence is only potentially useful or when no more can be said of the evidence than that it could have been subjected to tests, the results of which might have exonerated the defendant, the State's failure to preserve the evidence does not violate the defendant's constitutional rights unless a defendant can show bad faith on the part of the State.

Id. at 620-21, 737 S.E.2d at 466 (internal citations, quotation marks, and brackets omitted).

In the present case, the record clearly establishes that the recordings at issue were erased in routine conformity with the Boone Police Department's evidence retention schedule. It is undisputed that prior to their destruction, the recordings were reviewed by both Defendant's

original counsel[2] and the prosecutor. Defense counsel's decision not to make or preserve copies of the videos — regardless of counsel's reason for declining to do so — cannot serve as a basis for arguing a *Brady* violation was committed by the State. *See State v. Jennings*, 333 N.C. 579, 604, 430 S.E.2d 188, 200 ("The law is . . . clear, however, that '[a] defendant is not prejudiced . . . by error resulting from his own conduct.' " (quoting N.C.G.S. § 15A-1443(c))), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Consequently, as nothing in the record tends to demonstrate that the Boone Police Department or the State suppressed evidence or otherwise acted in bad faith, Defendant has failed to carry his burden in establishing a due process violation under *Brady*.

In addition to Defendant's inability to demonstrate that a *Brady* violation occurred, it is also worth emphasizing that he has failed to establish precisely how a continuance would have enabled him to better prepare for trial given that it is undisputed that no copies of the videos remain in existence. Therefore, as a functional matter, the granting of a continuance by the trial court would have served no operative purpose. *See State v. Gray*, 234 N.C. App. 197, 201-02, 758 S.E.2d 699, 702-03 (2014) ("To establish that the trial court's failure to give additional time to prepare constituted a constitutional violation, defendant must show how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." (citation and quotation marks omitted)), *disc. review improvidently allowed*, 368 N.C. 324, 776 S.E.2d 681 (2015).

For all of these reasons, the trial court did not err in denying Defendant's motion for a continuance. Defendant's arguments on this issue are meritless.

II. Assault on a Government Officer

[2] Defendant's final argument on appeal is that the trial court erred by denying his motions to dismiss the charge of assault on a government officer. Specifically, Defendant contends that, because the evidence at trial tended to establish that he intended to assault civilians standing behind Officer O'Neal and not Officer O'Neal himself, the State failed to establish the knowledge element of N.C.G.S. § 14-33(c)(4). We disagree.

> The trial court's denial of a motion to dismiss is reviewed *de novo* on appeal. Upon defendant's motion for dismissal,

2. Although the record is vague on this point, it appears that Defendant's original counsel, Shannon Aldous, was replaced as counsel by Kenneth D. Isaacs sometime after Defendant was found guilty in District Court and prior to his trial *de novo* in Superior Court.

> the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

State v. Williams, __ N.C. App. __, __, 784 S.E.2d 232, 233 (citation omitted), *disc. review denied*, __ N.C. __, 792 S.E.2d 503 (2016).

N.C.G.S. § 14-33(c)(4) provides that

> (c) Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she:
>
> . . . .
>
> > (4) Assaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties[.]

"It is well established that this Court's principal aim when interpreting statutes is to effectuate the purpose of the legislature in enacting the statute, and that statutory interpretation properly begins with an examination of the plain words of the statute." *State v. Williams*, 232 N.C. App. 152, 158, 754 S.E.2d 418, 423 (internal citations, quotation marks, and brackets omitted), *appeal dismissed and disc. review denied*, 367 N.C. 784, 766 S.E.2d 846 (2014).

It is fundamental that

> [t]he 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). Moreover, "[w]here . . . the General Assembly includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." *Comstock v. Comstock*, __ N.C. App. __, __, 780 S.E.2d 183, 186 (2015) (citation, quotation marks, and brackets omitted).

Significantly, the Legislature did not choose to include a reference to intent in authoring N.C.G.S. § 14-33(c)(4) despite the fact that it did so in other sections of Article 8, Subchapter III of Chapter 14 of the North Carolina General Statutes concerning criminal assaults. *See*, *e.g.*, N.C.G.S. § 14-32(a) (2015) ("Any person who assaults another person with a deadly weapon with *intent* to kill and inflicts serious injury shall be punished as a Class C felon." (emphasis added)). Nor has this Court specifically delineated a scienter requirement in its discussion of the offense of assault on a government officer. Instead, we have simply stated that "[t]he essential elements of a charge of assault on a government official are: (1) an assault (2) on a government official (3) in the actual or attempted discharge of his duties." *State v. Noel*, 202 N.C. App. 715, 718, 690 S.E.2d 10, 13, *disc. review denied*, 364 N.C. 246, 699 S.E.2d 642 (2010).

Defendant concedes that he did, in fact, commit an assault and that Officer O'Neal was a law enforcement officer discharging his duty. Therefore, we need only address whether assault on a government officer in violation of N.C.G.S. § 14-33(c)(4) is a general intent or, alternatively, a specific intent crime.

Nonetheless, Defendant maintains that, even assuming he knew that Officer O'Neal was a police officer discharging a duty of his office at the time of the assault, the State failed to provide sufficient evidence that he *intended* to assault Officer O'Neal. Essentially, he asserts that all of the evidence tended to show that he intended to assault one or more civilians standing behind Officer O'Neal, and not Officer O'Neal himself, thereby precluding him from being found guilty of the offense of assault on a government officer.

We find our Supreme Court's decision in *State v. Page*, 346 N.C. 689, 488 S.E.2d 225 (1997), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651 (1998), instructive on this point. In *Page*, the defendant was convicted of first-degree murder and assault with a deadly weapon on government officers for firing a high-powered rifle at several officers, one of whom was hit and subsequently died from his gunshot wound. *Id.* at 692-94, 488 S.E.2d at 228. At trial, Page asserted that he was suffering from post-traumatic stress disorder at the time he shot at the officers and requested a jury instruction on diminished capacity in order to attempt to repudiate the knowledge element of N.C.G.S. § 14-34.2. *Id.* at 694, 488

S.E.2d at 229. The trial court declined to provide such an instruction and Page was ultimately sentenced to death. *Id.* at 698, 488 S.E.2d at 231.

On direct appeal to our Supreme Court, Page argued that the jury should have been instructed on diminished capacity in order to negate the knowledge element of N.C.G.S. § 14-34.2. The Court rejected this argument stating the following:

> This Court has held that knowledge that the victim is an officer or employee of the State is an essential element of this offense. *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985).
>
> [Page] argues that the diminished-capacity defense should be available to negate the knowledge element required by *Avery*. This argument is without merit. We allow defendants to assert diminished mental capacity as a defense to a charge of premeditated and deliberate murder because we recognize that some mental conditions may impede a defendant's ability to form a specific intent to kill. *See Shank*, 322 N.C. at 250-51, 367 S.E.2d at 644. *This reasoning is not applicable to the knowledge element of the felony of assault with a deadly weapon on a government officer. Knowledge of the victim's status as a government officer is simply a fact that the State must prove; it is not a state of mind to which the diminished-capacity defense may be applied.* In this case, the State presented evidence tending to prove this fact. The trial court properly instructed the jury that, in order to convict [Page] of these charges, it must find that [Page] "knew or had reasonable grounds to know" that the victims were officers performing official duties. The State's evidence indicated that uniformed police officers and marked police cars were directly in [Page's] line of vision. Several officers testified that defendant shot in their direction. Also, defendant's ex-girlfriend testified that she received a telephone call from [Page] in which he stated that his apartment was surrounded by police officers. This evidence was sufficient to support the jury's conclusion that the knowledge element of assault with a deadly weapon on a government officer was satisfied.
>
> [Page] argues further that the diminished-capacity defense should be available to negate the state of mind required

> for defendant to be convicted of a violation of N.C.G.S. 14-34.2. "In order to return a verdict of guilty of assault with a firearm upon a law enforcement officer in the performance of his duties, the jury is not required to find the defendant possessed any intent beyond the intent to commit the unlawful act, and this will be inferred or presumed from the act itself." *State v. Mayberry*, 38 N.C. App. 509, 513, 248 S.E.2d 402, 405 (1978). *Thus, this felony may be described as a general-intent offense.*

Id. at 699-700, 488 S.E.2d at 232 (emphasis added).

While *Page* concerns an assault with a deadly weapon on a government officer, we find its reasoning to be equally applicable to the offense of assault on a government officer. Indeed, the only substantive difference between N.C.G.S. § 14-33(c)(4) and N.C.G.S. § 14-34.2 is that the latter requires that the assault be committed with a firearm. We therefore hold, in accordance with *Page*, that assault on a government officer is a general intent crime. As such, we are satisfied that when Defendant spat at members of the crowd and Officer O'Neal was struck by Defendant's spit, the requirements of N.C.G.S. § 14-33(c)(4) were satisfied as, for the reasons stated above, the State clearly established — and indeed Defendant conceded at oral argument — that Defendant knew Officer O'Neal was a law enforcement officer and Defendant intended to commit an assault.

Were we to endorse Defendant's argument and construe N.C.G.S. § 14-33(c)(4) as necessitating specific intent — as opposed to general intent — the intrinsic purpose of the statute would necessarily be defeated. Therefore, we expressly hold that the knowledge element of assault on a government officer in violation of N.C.G.S. § 14-33(c)(4) is satisfied whenever a defendant while in the course of assaulting another individual instead assaults an individual he knows, or reasonably should know, is a government officer. Defendant's argument on this issue is consequently dismissed.

Conclusion

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

NO ERROR.

Chief Judge McGEE and Judge DAVIS concur.

STATE v. THORPE

[253 N.C. App. 210 (2017)]

STATE OF NORTH CAROLINA
v.
EDWARD THORPE, Defendant

No. COA16-1008

Filed 18 April 2017

Constitutional Law—right to counsel—prior conviction—clerk's electronic records

The trial court did not err by denying defendant's motion to suppress a prior conviction used for habitual offender status. Defendant contended that the prior conviction was obtained in violation of his right to counsel, but there were no written records of the trial court's order. The presumption of correctness was applied to the clerk's electronic records, which supported the trial court's findings and conclusion that the prior conviction was not obtained in violation of defendant's right to counsel.

Appeal by defendant from judgment entered 9 February 2016 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Mary McCullers Reece, for defendant-appellant.

BERGER, Judge.

Edward Thorpe, a.k.a. Marquis Tayshawn Evans, ("Defendant") pleaded guilty to felony breaking and entering, larceny after breaking and entering, felony possession of stolen goods, two counts of habitual misdemeanor assault, and having attained habitual felon status. Defendant's appeal arises from the trial court's denial of a motion to suppress a prior conviction. Defendant alleges that the trial court erred in denying his motion to suppress because said conviction was obtained in violation of his right to counsel. We disagree.

Factual and Procedural Background

On January 26, 2015, a Wake County Grand Jury indicted Defendant for breaking and entering in violation of N.C. Gen. Stat. § 14-54(a), larceny after breaking and entering in violation of N.C. Gen. Stat. § 14-72(b)(2),

and possession of stolen goods in violation of N.C. Gen. Stat. § 14-71.1. On January 27, 2015, the Grand Jury issued a True Bill of Indictment alleging that Defendant had attained habitual felon status pursuant to N.C. Gen. Stat. § 14-7.1. Subsequently, on July 7, 2015, Defendant was indicted for two counts of assault on a female in violation of N.C. Gen. Stat. § 14-33(c)(2), and one count of habitual misdemeanor assault in violation of N.C. Gen. Stat. § 14-33.2. Indictments for two additional counts of assault on a female and habitual misdemeanor assault were handed down by the Grand Jury on August 4, 2015. An additional habitual felon indictment was issued against Defendant on September 29, 2015.

On February 9, 2016, Defendant pleaded guilty to felony breaking and entering, larceny after breaking and entering, felony possession of stolen goods, two counts of habitual misdemeanor assault, and having attained habitual felon status. These charges were consolidated into one judgment, and Defendant was sentenced to 77 to 105 months in prison.

Prior to the trial court accepting his plea, however, Defendant filed a motion to suppress, pursuant to N.C. Gen. Stat. § 15A-980, relating to an underlying assault inflicting serious injury conviction utilized in the two indictments for habitual misdemeanor assault. Defendant argued that this conviction should be suppressed because it "was obtained in violation of his right to Counsel." Defendant filed an affidavit with his motion to suppress and asserted that, when he pleaded guilty to the charges of assault inflicting serious injury and resisting a public officer in Wake County District Court file number 99 CR 57226, he was not represented by counsel, was indigent, and did not waive his right to counsel. Defendant also alleged that he had other pending charges at the time for which he requested and received court-appointed counsel.

On February 8, 2016, a hearing on the motion to suppress was held. Defendant's only evidence was his own testimony. Defendant testified that when the charge at issue was pending, he was living with his father and brother, was not employed, owned no property, and was therefore indigent.

Defendant also stated that he would not have gone to court without an attorney representing him. Defendant asserted that he had representation for other charges during that time period, but claimed he had no representation on the charge at issue. When asked by his attorney if he would have gone to court without an attorney during that time period, Defendant testified, "absolutely not."

Ms. Tonya Woodlief, Assistant Clerk of Wake County Superior Court, was called by the State to testify. Ms. Woodlief stated that

she has processed and maintained records for the Criminal Division for thirteen years, and, at the time of her testimony, was head of the Criminal Division.

Ms. Woodlief testified that the Clerk's Office keeps records of case events for misdemeanor cases by hand-written notes directly on the shuck.[1] In Wake County, the physical files of misdemeanor criminal records are maintained for five years and then destroyed. The electronic summaries of these records are retained after the physical files are destroyed.

The electronic records kept and maintained by the Clerk showed that Defendant had retained an attorney and had pleaded guilty to the charges of assault inflicting serious injury and resisting a public officer in criminal case file 99 CR 57226. Ms. Woodlief testified that the designation "R" was utilized in the Clerk's Office to reflect that a defendant had retained counsel. In addition, "N/A" was used when the handwritten notes on the shuck were not legible or the attorney's name was unknown to the clerk. The designation "N/A" was never used when a defendant did not have counsel. Ms. Woodlief also testified that the designations "R" and "N/A" appeared in the electronic record for 99 CR 57226, indicating that the name of Defendant's retained attorney was not able to be determined because either the defense attorney neglected to write his or her name on the shuck, or the handwriting was illegible and the name could not be ascertained.

The trial court denied the motion to suppress, making oral findings of fact that even though he was indigent and did not waive his right to counsel, Defendant was represented by counsel in his prior conviction for assault inflicting serious injury. Defendant timely filed notice of appeal.

Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citation omitted). The trial court's "conclusions of law are reviewable *de novo*." *State v. Hensley*, 201 N.C. App. 607, 609, 687 S.E.2d 309, 311 (2010) (citation omitted).

1. A shuck is an envelope that contains documents filed in district court criminal cases.

Analysis

Defendant's motion to suppress was filed pursuant to N.C. Gen. Stat. § 15A-980, which provides:

> (a) A defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State . . . will:
>
> (1) Increase the degree of crime of which the defendant would be guilty; or
>
> (2) Result in a sentence of imprisonment that otherwise would not be imposed; or
>
> (3) Result in a lengthened sentence of imprisonment.
>
> (b) A defendant who has grounds to suppress the use of a conviction in evidence at a trial or other proceeding as set forth in (a) must do so by motion made in accordance with the procedure in this Article. A defendant waives his right to suppress use of a prior conviction if he does not move to suppress it.
>
> (c) When a defendant has moved to suppress use of a prior conviction under the terms of subsection (a), he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel. To prevail, he must prove that at the time of the conviction he was indigent, had no counsel, and had not waived his right to counsel. If the defendant proves that a prior conviction was obtained in violation of his right to counsel, the judge must suppress use of the conviction at trial or in any other proceeding if its use will contravene the provisions of subsection (a).

N.C. Gen. Stat. § 15A-980 (2016). Thus, when seeking to suppress prior convictions pursuant to N.C. Gen. Stat. § 15A-980(c), to prevail a defendant must prove that for the purposes of the adjudication of the prior conviction: "(1) he was indigent, (2) he had no counsel, and (3) he did not waive his right to counsel." *State v. Jordan*, 174 N.C. App. 479, 482, 621 S.E.2d 229, 231 (2005) (citations omitted).

In *State v. Jordan*, the defendant sought to suppress prior convictions pursuant to N.C. Gen. Stat. § 15A-980. He alleged that the convictions used to calculate his prior record level, thereby lengthening his sentence, were obtained in violation of his right to counsel. The

Clerk's records of the prior convictions were destroyed, and the defendant's only evidence was his own testimony that he did not have representation and he could not afford an attorney. This Court held that a trial court's final judgment, such as the defendant's prior convictions, is entitled to a "presumption of regularity" and that the presumption applied to prior convictions challenged under N.C. Gen. Stat. § 15A-980. *Id.* at 484-85, 621 S.E.2d at 233.

> Official actions taken by public officers in North Carolina are accorded the presumption of regularity. Accordingly, the official actions of clerks of court are afforded this presumption of regularity. . . . The presumption is only one of fact and is therefore rebuttable. But in order for the [defendant] to rebut the presumption he must produce 'competent, material and substantial' evidence. . . .

State v. Belton, 169 N.C. App. 350, 356, 610 S.E.2d 283, 287 (2005) (internal citations, parentheticals, and quotation marks omitted).

In the case *sub judice*, the trial court denied Defendant's motion to suppress pursuant to N.C. Gen. Stat. § 15A-980 in open court, providing findings of fact and conclusions of law orally, which are found in the record. The trial court requested the State reduce that order to writing, but no written order appears in the record.

> In determining whether evidence should be suppressed, the trial court shall make findings of fact and conclusions of law which shall be included in the record. A written determination setting forth the findings and conclusions is not necessary, but it is the better practice. . . . Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing.

State v. Bartlett, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (internal citations, parentheticals, and quotation marks omitted). The trial court found that Defendant met his burden of proof that he was indigent and had not waived counsel. However, the trial court also found Defendant had failed to carry his burden of proof that he had no counsel, the second *Jordan* factor and essential for him to prevail. Defendant testified that he would not have proceeded if he did not have counsel. The court specifically found that, "[i]f he says he wouldn't have done something if a condition had not existed and he did that thing, then . . . it's clear that the condition did exist and that is supported by the records of the State . . . ."

The trial court found that the Wake County Clerk of Superior Court's records demonstrated that Defendant had representation for the assault inflicting serious injury conviction. The designations "R" and "N/A" in the electronic record for Defendant's conviction indicated he had retained an attorney whose name was illegible or unknown to the clerk entering the data. Applying the presumption of regularity to the clerk's electronic records, we presume that the information contained in these records to be accurate, and Defendant failed to rebut said presumption with "competent, material and substantial evidence."

The trial court's findings of fact are supported by the competent evidence presented at the suppression hearing and included in the record, and are, thus, conclusively binding on this Court. These findings of fact support the legal conclusion that Defendant's conviction for assault inflicting serious injury was not obtained in violation of his right to counsel and was properly utilized in his indictment for habitual misdemeanor assault.

Conclusion

Based upon a thorough and careful review of the record, transcripts, and briefs, we conclude there was no error in the trial court's denial of Defendant's motion to suppress.

NO ERROR.

Judges CALABRIA and HUNTER, JR. concur.

LEE K. TERRY AND KRISTEN TERRY, INDIVIDUALLY AND AS PARENTS AND GENERAL GUARDIANS FOR KARRYNE TERRY, A MINOR, PLAINTIFFS
v.
THE CHEESECAKE FACTORY RESTAURANTS, INC., DEFENDANT

No. COA16-549

Filed 18 April 2017

1. Appeal and Error—change of venue—interlocutory—substantial right

An order changing venue as a matter of right was interlocutory because it did not dispose of the case, but it was immediately appealable as affecting a substantial right.

2. Venue—chain restaurant—multiple counties

The trial court erred by transferring venue from Durham County to Wake County as a matter of right in a negligence action involving a restaurant that served cheesecake which contained nuts. Defendant, though formed in California, maintained a registered office in N.C. and was thus a domestic corporation, and defendant did business in both counties. Durham County was a proper venue and the trial court erred by changing venue as a matter of right.

Appeal by plaintiffs from order entered 2 March 2016 by Judge Henry W. Hight, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 3 November 2016.

Law Offices of Thomas F. Loflin III, by Thomas F. Loflin III, for plaintiff-appellants.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Kristie Hedrick Farwell, for defendant-appellee.

STROUD, Judge.

Plaintiffs appeal an order transferring venue of their negligence claim from Durham County to Wake County. Because the pleadings and discovery show that defendant maintains a place of business in Durham County, Durham County was *a* proper venue under North Carolina General Statute § 1-83, and the trial court erred by transferring venue as a matter of right. Therefore, we reverse and remand.

I. Background

In March of 2015, plaintiffs filed a complaint in Superior Court, Durham County seeking damages for negligent injury to their minor daughter. The complaint alleged that the plaintiffs "are citizens and residents of North Carolina" but did not mention their county of residence. The complaint alleged that defendant was incorporated in California but is "engaged in commerce within the state of North Carolina under a Certificate of Authority from the Department of the Secretary of State of North Carolina" and "does business with the general public in Durham County, North Carolina, as well as other counties" in North Carolina.

Plaintiffs alleged they ordered "a one-half regular cheesecake and a one-half ultimate red velvet cheesecake" for their daughter's birthday from defendant's restaurant at Crabtree Valley Mall; plaintiff Kristen Terry specifically informed defendant her daughter had a "severe allergy to nuts." Plaintiffs further alleged that the type of cheesecake plaintiff Kristen ordered did not contain nuts, but defendant's employee mistakenly gave plaintiff Kristen "a one-half low carb cheesecake instead of a one-half regular cheesecake[;]" and though the two cheesecakes looked the same, the low carb cheesecake contained nuts. Plaintiffs alleged their daughter became violently ill due to her exposure to nuts and required hospitalization after eating cheesecake from defendant, The Cheesecake Factory Restaurants, Inc. ("Cheesecake Factory").

In April of 2015, defendant filed a motion to dismiss pursuant to Rule 12(b)(3) alleging that Durham County was not a proper venue and thus the complaint should be dismissed or, in the alternative, the case should be transferred to Wake County. Defendant's motion alleged that the plaintiffs' "last known address" was in Cary, North Carolina, and that defendant's registered office is in Wake County, North Carolina.[1] On 2 March 2016, after a hearing on the matter, the trial court denied the motion to dismiss and allowed the request to transfer the case to Wake County. Plaintiffs appeal.

II. Venue

[1] Plaintiffs' only argument on appeal is that "the trial court committed reversible error in granting the defendant's motion to change venue to Wake County pursuant to N.C.R.Civ.P 12(b)(3)." (Original in all caps.) Though plaintiffs appeal from an interlocutory order, because the trial

1. Defendants argue that plaintiffs' residence is in Wake County, although our record does not say. Plaintiffs' brief acknowledges, "it is true that Plaintiffs reside in Wake County[.]"

court found plaintiffs filed their complaint in an improper venue, this affects a substantial right which we will consider. *See Snow v. Yates*, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990) ("When a defendant asserts improper venue in a timely writing, the question of removal is a matter of substantial right, and the court of original venue must consider and determine the motion before it takes any other action. An appeal of an order disposing of such a motion is interlocutory because it does not dispose of the case. However, grant or denial of a motion asserting a statutory right to venue affects a substantial right and is immediately appealable." (citations and quotation marks omitted)).

> According to N.C. Gen. Stat. § 1–82, a civil action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement. As a practical matter, the plaintiff generally gets to make an initial choice as to the venue in which a particular civil action should be litigated. However, a number of statutory provisions authorize efforts to seek a change of venue. First, according to N.C. Gen. Stat. § 1–83:
>
> > If the county designated is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court. The court may change the place of trial in the following cases:
> >
> > (1) When the county designated for that purpose is not the proper one.
> >
> > (2) When the convenience of witnesses and the ends of justice would be promoted by the change.
> >
> > (3) When the judge has, at any time, been interested as party or counsel.
>
> N.C. Gen. Stat. § 1–83. A motion challenging an improper venue or division should be asserted pursuant to N.C. Gen. Stat. § 1A–1, Rule 12(b)(3) and must be advanced within the time limits specified in N.C. Gen. Stat. § 1A–1, Rule 12. It is well settled that a court's decision upon a motion for a change of venue pursuant to G.S. 1–83(2) will not

> be disturbed absent a showing of a manifest abuse of discretion. However, when the venue where the action was filed is not the proper one, and N.C. Gen. Stat. § 1–83(1) is applicable, the trial court does not have discretion, but must upon a timely motion and upon appropriate findings transfer the case to the proper venue.

Carolina Forest Ass'n, Inc. v. White, 198 N.C. App. 1, 9–10, 678 S.E.2d 725, 731–32 (2009) (citations, quotation marks, ellipses, and brackets omitted).

[2] Defendant's motion to dismiss for improper venue was based only upon North Carolina Rule of Civil Procedure 12(b)(3) and sought dismissal or transfer to Wake County solely based upon the residence of the parties. North Carolina General Statute § 1-83 states four bases for a change of venue, two of which are plainly not applicable here as there are no allegations the judge has "been interested as a party or counsel" nor is the action "for divorce[.]" N.C. Gen. Stat. § 1-83(3-4) (2015). Defendant did not allege or argue any grounds for a discretionary change of venue such as "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C. Gen. Stat. § 1-83(2) (2015); *Carolina Forest Ass'n*, 198 N.C. App. at 10; 678 S.E.2d at 732. So although the trial court's order did not state a particular reason for the change of venue, the only ground in the motion before the trial court was that none of the parties were residents of Durham County; this is most appropriately characterized as an argument based on North Carolina General Statute § 1-83(1) because defendant was essentially contending "the county designated . . . is not the proper one" due to no party being a resident as is required pursuant to North Carolina General Statute § 1-82. N.C. Gen. Stat. §§ 1-82; 1-83(1) (2015); *Carolina Forest Ass'n*, 198 N.C. App. at 10; 678 S.E.2d at 732. "A determination of venue under N.C. Gen. Stat. § 1–83(1) is . . . a question of law that we review de novo." *Stern v. Cinoman*, 221 N.C. App. 231, 232, 728 S.E.2d 373, 374 (2012).

Plaintiffs' initial brief argued that defendant is a foreign corporation because it was formed in California, and thus plaintiffs based their argument on North Carolina General Statute § 1-80, entitled "foreign corporations[,]" and case law regarding foreign corporations. *See generally* N.C. Gen. Stat. § 1-80 (2015). But since defendant maintains a registered office in North Carolina and has a certificate of authority from the Secretary of State, defendant is actually a domestic corporation. *See* N.C. Gen. Stat. § 1-79(b) (2015) ("[T]he term 'domestic' when applied to an entity means: (1) An entity formed under the laws of this State, or (2) An entity that (i) is formed under the laws of any jurisdiction other than

this State, and (ii) maintains a registered office in this State pursuant to a certificate of authority from the Secretary of State.")

Defendant argues that " '[w]hen reviewing a decision on a motion to transfer venue, the reviewing court must look to the allegations of the plaintiff's complaint.' *Ford v. Paddock*, 196 N.C. App. 133, 135, 674 S.E.2d 689, 691 (2009)." Defendant's brief at least implies that we may look no further than the complaint, which is incorrect since both this Court and the trial court may consider other verified parts of the record. *See Construction Co. v. McDaniel*, 40 N.C. App. 605, 608, 253 S.E.2d 359, 361 (1979) ("We find that the rule which has been long followed in this jurisdiction still prevails and that the trial court in ruling upon a motion for change of venue is entirely free to either believe or disbelieve affidavits such as those filed by the defendants without regard to whether they have been controverted by evidence introduced by the opposing party."); *see also Kiker v. Winfield*, 234 N.C. App. 363, 365, 759 S.E.2d 372, 373-74 (2014) (considering plaintiff's verified answers to defendant's interrogatories in determining proper venue), *aff'd per curiam*, 368 N.C. 33, 769 S.E.2d 837 (2015). But since most of defendant's arguments are based upon the complaint, we first turn there.

Defendant argues that the complaint does not identify plaintiffs' county of residence, which is true, although defendant asks us to assume that plaintiffs reside in Wake County and plaintiffs' brief admits as much. Defendant also argues that "the Complaint specifically states an actual place of business in Wake County, the restaurant where the alleged tort occurred – Defendant's restaurant at Crabtree Valley Mall." But the complaint actually mentions only the restaurant in Crabtree Valley Mall; it does *not* identify the county of the restaurant or Crabtree Valley Mall. Defendant's brief seems to assume that the court is aware of the location of Crabtree Valley Mall, and indeed we are.

In fact, we will take judicial notice that Crabtree Valley Mall is in Wake County and further that the Cheesecake Factory was operating in Crabtree Valley Mall as of the date of commencement of the action. *See* N.C. Gen. Stat. § 8C–1, Rule 201 (2015) ("(b) Kinds of facts. — A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. (c) When discretionary. — A court may take judicial notice, whether requested or not."). What defendant's brief fails to mention is the fact that there is also a Cheesecake Factory restaurant in Durham County, but we need not take judicial notice of that particular location, since

defendant responded to plaintiffs' request for admissions and admitted that "[t]he Cheesecake Factory Restaurants, Inc. conducts business activities in Durham County, North Carolina at 8030 Renaissance Parkway, Suite 950, and has done so since March 1, 2012."[2] Thus, the answers to the request for admissions establish that defendant was conducting business activities in Durham County at a specific address.

Plaintiffs contend in their reply brief that even if defendant is a domestic corporation, venue is proper in Durham County pursuant to North Carolina General Statute § 1-79 which provides that a domestic corporation is deemed to reside and thus may be sued: "(1) Where the registered or principal office of the corporation, limited partnership, limited liability company, or registered limited liability partnership is located, or (2) Where the corporation, limited partnership, limited liability company, or registered limited liability partnership maintains a place of business[.]" N.C. Gen. Stat. § 1-79(b). Plaintiffs argue that because defendant "maintains a place of business" in Durham County, it is a proper venue. *Id.* It is clear from defendant's answers to the request for admissions that defendant "conducts business activities in Durham County" and that defendant "owns some equipment, fixtures and furnishings located in Durham County[;]" thus, defendant "[m]aintain[s] a place of business" in Durham County. *Id.* As defendant maintains a place of business in Durham County, Durham County was a proper venue for plaintiffs' lawsuit, *see id.*, and thus the trial court erred in changing venue as a matter of right. *See id.*; *see also* N.C. Gen. Stat. § 1-83(1).

III. Conclusion

For the foregoing reasons, we reverse and remand.

REVERSED AND REMANDED.

Judges McCULLOUGH and ZACHARY concur.

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2. We will take judicial notice that this is the street address of the Streets at Southpoint. *See* N.C. Gen. Stat. § 8C–1, Rule 201.

WASCO LLC, PETITIONER
v.
N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES,
DIVISION OF WASTE MANAGEMENT, RESPONDENT

No. COA16-414

Filed 18 April 2017

Environmental Law—industrial contamination—post-closure clean-up—multiple successive owners

In a case involving the determination of who was responsible for the current clean-up of a closed industrial chemical storage site that had changed ownership multiple times, the trial court was correct to look for guidance in federal law when interpreting the term "operator" in the context of the State Hazardous Waste Rules and, specifically, the hazardous waste permit program. An "operator" is the person responsible for, or in charge of the facility subject to regulation; moreover, "operator" includes those parties in charge of or directing post-closure activities under the State Hazardous Waste Program and the federal Resource Conservation and Recovery Act. Petitioner WASCO was the party responsible for and directly involved in the post-closure activities subject to regulation.

Appeal by petitioner from order and judgment entered 23 October 2015 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 6 October 2016.

King & Spalding LLP, by Cory Hohnbaum and Adam G. Sowatzka, pro hac vice, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Hirschman, for respondent-appellee.

McCULLOUGH, Judge.

Petitioner WASCO LLC (WASCO) appeals from the final order and judgment in which the trial court affirmed the administrative law judge's (ALJ) denial of WASCO's motion for continuance and affirmed the ALJ's grant of summary judgment in favor of respondent North Carolina Department of Environment and Natural Resources (the "Department"), Division of Waste Management (the "Division"). For the following reasons, we affirm.

I. Background

This appeal is the result of a petition for a contested case hearing filed by WASCO in the Office of Administrative Hearings on 27 September 2013. In the petition, WASCO sought a declaration that it was not an "operator" of a former textile manufacturing facility located at 850 Warren Wilson Road in Swannanoa, North Carolina (the "Site"), and, therefore, not responsible for remedial cleanup efforts required by federal and state laws governing the management of hazardous wastes. Those laws include portions of the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. §§ 6901-6992, federal regulations, and North Carolina's Hazardous Waste Program (the "State Hazardous Waste Program").

As the United States Supreme Court clearly explained,

> RCRA is a comprehensive environmental statute that empowers [the Environmental Protection Agency (EPA)] to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 USC §§ 6921-6934. (Nonhazardous wastes are regulated much more loosely under Subtitle D, 42 USC §§ 6941-6949.) Under the relevant provisions of Subtitle C, EPA has promulgated standards governing hazardous waste generators and transporters, *see* 42 USC §§ 6922 and 6923, and owners and operators of hazardous waste treatment, storage, and disposal facilities (TSDF's), *see* § 6924. Pursuant to § 6922, EPA has directed hazardous waste generators to comply with handling, recordkeeping, storage, and monitoring requirements, *see* 40 CFR pt 262 (1993). TSDF's, however, are subject to much more stringent regulation than either generators or transporters, including a 4 to 5-year permitting process, *see* 42 USC § 6925; 40 CFR pt 270 (1993); US Environmental Protection Agency Office of Solid Waste and Emergency Response, The Nation's Hazardous Waste Management Program at a Crossroads, The RCRA Implementation Study 49-50 (July 1990), burdensome financial assurance requirements, stringent design and location standards, and, perhaps most onerous of all, responsibility to take corrective action for releases of hazardous substances and to ensure safe closure of each facility, *see* 42 USC § 6924; 40 CFR pt 264 (1993).

City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 331-32, 128 L. Ed. 2d 302, 307-308 (1994).

In lieu of the federal program, RCRA allows states to develop, administer, and enforce their own hazardous waste programs, subject to authorization by EPA. *See* 42 U.S.C. § 6926 (2016). State programs must meet the minimum requirements of RCRA. *Id.* (requiring state programs to be "equivalent" to the federal hazardous waste program). EPA granted North Carolina final authorization to operate the State Hazardous Waste Program in 1984. *See* 49 Fed. Reg. 48694-01 (Dec. 14, 1984).

The State Hazardous Waste Program is administered by the Division's Hazardous Waste Section (the "Section"). *See* 15A N.C. Admin. Code 13A.0101(a) (2016). The State Hazardous Waste Program consists of portions of the North Carolina Solid Waste Management Act (the "State Solid Waste Management Act"), Article 9 of Chapter 130A of the General Statutes, and related state rules and regulations. Specifically, Part 2 of the State Solid Waste Management Act concerns "Solid and Hazardous Waste Management" and requires that rules establishing a complete and integrated regulatory scheme in the area of hazardous waste management be adopted and enforced. *See* N.C. Gen. Stat. § 130A-294(c) (2015). North Carolina's Hazardous Waste Management Rules (the "State Hazardous Waste Rules") are found in Title 15A, Subchapter 13A of the N.C. Administrative Code. The State Hazardous Waste Rules largely incorporate the federal regulations under RCRA by reference.

Pertinent to the present case, the State Hazardous Waste Rules adopt closure and post-closure standards for owners and operators of hazardous waste TSDF's from subpart G of the federal regulations. *See* 15A N.C. Admin. Code 13A.0109(h) (incorporating by reference 40 C.F.R. §§ 264.110 through 264.120). The State Hazardous Waste Rules also implement a hazardous waste permit program, which incorporates much of the federal hazardous waste permit program, with added "Part B" information requirements. *See* 15A N.C. Admin. Code 13A.0113 (incorporating by reference portions of 40 C.F.R. Ch. 1, Subch. I, Pt. 270,).

40 C.F.R. § 270.1(c) is one of those sections of the federal hazardous waste permit program incorporated by reference in 15A N.C. Admin. Code 13A.0113(a). That section provides, in pertinent part, that

> [o]wners and operators of surface impoundments, landfills, land treatment units, and waste pile units that received waste after July 26, 1982, or that certified closure (according to § 265.115 of this chapter) after January 26, 1983, must have post-closure permits, unless they demonstrate

> closure by removal or decontamination as provided under § 270.1(c)(5) and (6), or obtain an enforceable document in lieu of a post-closure permit, as provided under paragraph (c)(7) of this section. If a post-closure permit is required, the permit must address applicable 40 CFR part 264 groundwater monitoring, unsaturated zone monitoring, corrective action, and post-closure care requirements of this chapter.

40 C.F.R. § 270.1(c) (2017). It is WASCO's responsibility to obtain a post-closure permit for the Site that is at issue in the present case.

As mentioned above, the Site is a former textile manufacturing facility located at 850 Warren Wilson Road in Swannanoa, North Carolina. Years before WASCO became involved with the Site, Asheville Dyeing & Finishing (AD&F), a division of Winston Mills, Inc., operated a knitwear business on the Site. During the operation of the knitwear business, underground tanks were used to store virgin and waste perchloroethylene (PCE), a dry cleaning solvent. At some point prior to 1985, PCE leaked from the tanks and contaminated the soil. The storage tanks were excavated by Winston Mills in 1985 and the resulting pits were backfilled with the contaminated soil left in place.

In 1990, Winston Mills and the Section entered into an Administrative Order on Consent that set forth a detailed plan to close the Site. Winston Mills completed the closure plan to close the Site as a landfill in 1992 and the Section accepted certifications of closure in a 1993 letter to Winston Mills.

Winston Mills and its parent corporation, McGregor Corporation, sold the site to Anvil Knitwear, Inc., in 1995. In connection with the sale, Winston Mills provided Anvil Knitwear indemnification rights for "environmental requirements." Culligan International Company (Culligan) co-guaranteed Winston Mills' performance of indemnification for environmental liabilities.

WASCO became involved in 1998 when its predecessor in interest, United States Filter Corporation, acquired stock of Culligan Water Technologies, Inc., which owned Culligan. Thereafter, WASCO provided financial assurances to the Section on behalf of Culligan in the form of a trust fund to the benefit of the Department and an irrevocable standby letter of credit for the account of AD&F.

WASCO divested itself of Culligan in 2004. As part of the sale of Culligan, WASCO agreed to indemnify the buyer as to identified

environmental issues at the Site. At that time, a letter from Culligan to the Section represented that WASCO was assuming Culligan's remediation responsibilities at the Site and directing further communications to WASCO's director of environmental affairs. Subsequent communications between WASCO and the Section show that WASCO did intend to take on those responsibilities and that the Section identified WASCO as the responsible party. Additionally, Part A permit applications signed by WASCO's director of environmental affairs identified WASCO as the operator and WASO continued to pay consultants and take action at the Site.

In 2007, WASCO received a letter from the Section that the Site was included on a list of facilities needing corrective action. A follow-up letter from the Section soon thereafter indicated that additional action was needed to develop a groundwater assessment plan to address the migration of hazardous waste in the groundwater. This expanded the size of the area with which WASCO was dealing to off-site locations. WASCO, its consultant, and the Section continued to work together to address a groundwater plan.

In 2008, Anvil Knitwear sold the property to Dyna-Diggr, LLC. Thereafter, responsibility for compliance with the State Hazardous Waste Program became an issue, with both WASCO and Anvil disclaiming responsibility. WASCO asserted it participated in post-closure actions on a voluntary basis.

In an 16 August 2013 letter, the Section detailed its positions that Dyna-Diggr is liable as an owner and that WASCO is independently liable as an operator. The Section sought cooperation between all parties and suggested it "would be willing to enter into a modified Joint Administrative Order on Consent in Lieu of a Post-Closure Permit pursuant to which the two parties agree to undertake part of the post-closure responsibilities[.]" However, in the alternative, the Section reminded the parties that it "always has the option of issuing a Compliance Order with Administrative Penalty to both parties for violation of 40 CFR 270.1(c) and associated post-closure regulations." This action resulted in WASCO filing the 27 September 2013 petition.

Following the filing of the petition, on 25 September 2014, the Section filed a motion for summary judgment on all claims raised in WASCO's petition. After the ALJ denied WASCO's motion for a continuance regarding the summary judgment motion by order filed 28 October 2014, the ALJ filed his final decision granting the Section's motion for summary judgment on 2 January 2015.

On 2 February 2015, WASCO filed a petition for judicial review (the "PJR") of both orders. After both parties filed briefs regarding the PJR, the matter came on for hearing in Wake County Superior Court on 12 October 2015 before the Honorable G. Bryan Collins, Jr.

On 23 October 2015, the court filed its "Final Order and Judgment on Rule 56(f) Motion and Petition for Judicial Review." The court concluded, "[a]s a matter of law, WASCO is an operator of a landfill for purposes of the State Hazardous Waste Program's post-closure permitting requirement." Therefore, the court affirmed the 2 January 2015 final decision of the ALJ granting summary judgment in favor of the respondent and denied WASCO's PJR. In the decretal portion of the court's order, the court reiterated that "WASCO is an 'operator' for purposes of 40 C.F.R. § 270.1(c) (adopted by reference in 15A [N.C. Admin. Code] 13A.0113(a)) and must comply with all attendant responsibilities and regulatory requirements."

Wasco filed notice of appeal to this Court on 20 November 2015.

II. Discussion

The issue on appeal is whether the trial court erred in entering summary judgment in favor of the Section on the basis that, "[a]s a matter of law, WASCO is an operator of a landfill for purposes of the State Hazardous Waste Program's post-closure permitting requirement." WASCO contends that it is not, and has never been, an operator of any facility at the Site.

Under the Administrative Procedure Act, when a party to a review proceeding in a superior court appeals to the appellate division from the final judgment of the superior court, "[t]he scope of review to be applied by [this Court] . . . is the same as it is for other civil cases." N.C. Gen. Stat. § 150B-52 (2015). "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)).

Citing *In re Appeal of N.C. Sav. & Loan League*, 302 N.C. 458, 276 S.E.2d 404 (1981), WASCO asserts that in our de novo review, the Section's interpretation of the law is entitled to no deference. However, this Court has stated that "an agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language." *Hillian v. N.C. Dep't of Corr.*, 173 N.C. App.

594, 598, 620 S.E.2d 14, 17 (2005). In fact, in *N.C. Sav. & Loan League*, the Court explained as follows,

> [w]hen the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

302 N.C. at 465-66, 276 S.E.2d at 410 (internal citations and quotation marks omitted). Thus, the Section's interpretation is afforded some deference.

"Operator" is defined in various places throughout the State Solid Waste Management Act and the State Hazardous Waste Rules. First, the general definitions in Part 1 of the State Solid Waste Management Act define "operator" to mean "any person, including the owner, who is principally engaged in, and is in charge of, the actual operation, supervision, and maintenance of a solid waste management facility and includes the person in charge of a shift or periods of operation during any part of the day." N.C. Gen. Stat. § 130A-290(a)(21) (2015). This definition applies broadly to the entire State Solid Waste Management Act, including those portions relevant to hazardous waste management. The definition's application to hazardous waste management is evident from the definition provision in the State Hazardous Waste Rules, which provides that both the definition of "operator" in N.C. Gen. Stat. § 130A-290 applies to the State Hazardous Waste Rules, *see* 15A N.C. Admin. Code 13A.0102(a) (providing "[t]he definitions contained in [N.C. Gen. Stat. §] 130A-290 apply to this Subchapter[]"), and that the definition of "operator" in 40 C.F.R. § 260.10, "[o]perator means the person responsible for the overall operation of a facility[,]" is incorporated by reference, *see* 15A N.C. Admin. Code 13A.0102(b). Yet, most specific to the post-closure permit requirement at issue in this case, the State Hazardous Waste Rules concerning the hazardous waste permit program incorporate by reference Subpart A of the federal regulations providing general information about the hazardous waste permit program, *see* 15A N.C. Admin. Code 13A.0113(a), including the definitions in 40 C.F.R. § 270.2, which provides that "[o]wner or operator means the owner or operator

of any facility or activity subject to regulation under RCRA." 40 C.F.R. § 270.2 (2017).

In this case, the court determined WASCO was an "operator" under the two definitions specifically dealing with hazardous waste management adopted from 40 C.F.R. §§ 260.10 and 270.2. The court, however, noted that the result would be the same applying the definition of "operator" in N.C. Gen. Stat. § 130A-290(a)(21). In conclusion number 42, the court explained its analysis of the definitions as follows,

> [b]ased on the federally delegated nature of the State Hazardous Waste Program, the Section's Memorandum of Agreement with the EPA, the fact that the obligation at issue arises under a federal regulation – 40 C.F.R. § 270.1(c) – and not Chapter 130A, and because both parties have identified no state case law on point and have cited to federal law, [the court] concludes it is appropriate here to look to federal case law and administrative EPA documents for guidance.

The federal case law considered by the court included cases analyzing operator liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 to 9675 (CERCLA), which, similar to the State Hazardous Waste Rules, defines "operator" as "any person owning or operating such facility[.]" 42 U.S.C. § 9601(20)(A) (2016). Specifically, the court looked to *United States v. Bestfoods*, 524 U.S. 51, 141 L. Ed. 2d 43 (1998), in which the Court explained that,

> under CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66-67, 141 L. Ed. 2d at 59. The court in the present case then concluded that "[c]onsistent with *Bestfoods* and its progeny, . . . post-closure operatorship is based on an examination of the totality of the circumstances."

On appeal, WASCO's first contention is that the court erred in basing its decision exclusively on CERCLA without considering the elements of the operator definition in N.C. Gen. Stat. § 130A-290(a)(21).

WASCO contends that the definition in N.C. Gen. Stat. § 130A-290(a)(21) sharpened the definition of operator for purposes of the State Solid Waste Management Act and, citing *R.J. Reynolds Tobacco Co. v. N.C. Dep't of Environment & Natural Resources*, 148 N.C. App. 610, 616, 560 S.E.2d 163, 167-68 (looking to the plain meaning of N.C. Gen. Stat. § 130A-290(35) and determining that tobacco scrap, stems, and dust did fall within the definition of "solid waste"), *disc. review denied*, 355 N.C. 493, 564 S.E.2d 44 (2002), contends the definition in N.C. Gen. Stat. § 130A-290(a)(21) is controlling over other definitions to the extent the definitions differ. Thus, WASCO contends to be an operator, it must be "principally engaged in, and is in charge of, the actual operation, supervision, and maintenance of a solid waste management facility[.]" N.C. Gen. Stat. § 130A-290(a)(21).

We are not persuaded by WASCO's arguments that the court is limited to an analysis of the definition of "operator" in N.C. Gen. Stat. § 130A-290(a)(21). Moreover, we note that it is clear the court did not look exclusively to CERCLA, but instead looked to CERCLA only for guidance on how to interpret the definitions of operator in the State Hazardous Waste Rules adopted from the federal regulations. Despite differences in the framework of RCRA and CERCLA, the definitions of "operator" in both acts are similar and CERCLA case law does provide persuasive guidance. Furthermore, and not contested by WASCO on appeal, the court also looked to EPA documents providing guidance on RCRA and concluded that those documents support the conclusion that WASCO was an operator.

We hold the court was correct to look for guidance in federal law while interpreting the term "operator" in the context of the State Hazardous Waste Rules and, specifically, the hazardous waste permit program. Those portions of the State Hazardous Waste Rules deal specifically with the post-closure permit requirement at issue in the present case. *See* 40 C.F.R. § 270.1(c) (incorporated by reference in 15A N.C. Admin. Code 13A.0113(a)). In contrast, the terms of N.C. Gen. Stat. § 130A-290(a)(21) make clear that the definition of operator therein is for an operator of any "solid waste management facility." Although that definition is more detailed than the definitions in the State Hazardous Waste Rules, that definition was intended to apply to the management of all solid wastes, not just the control of hazardous wastes of a facility post-closure.

Nevertheless, although the three definitions of "operator" applicable to the State Hazardous Waste Program differ slightly, the definitions seem to be in accord that, in general terms, an "operator" is the person

responsible for, or in charge of, the facility subject to regulation. In the present case, that facility is the pit that was certified closed as a landfill in 1993.

WASCO's next contention on appeal is that the court erred in holding that WASCO was an operator even though WASCO did not become involved with the Site until after the Site was certified closed by the Section. Citing N.C. Gen. Stat. § 130A-290(a)(2), which defines "closure" to mean "the cessation of operation of a solid waste management facility and the act of securing the facility so that it will pose no significant threat to human health or the environment[,]" WASCO asserts that it is impossible to operate a facility that has ceased operation. Thus, WASCO contends it cannot be an operator of the Site.

WASCO, however, recognizes that both RCRA and the State Hazardous Waste Program impose duties on operators to provide post-closure care, but contends that those duties can only be imposed on those owning and operating the facility before the time that the facility ceases to operate. WASCO asserts that the Section has created the concept of "post-closure operator" for purposes of this case without any basis in the law. Again, we disagree with WASCO's arguments.

As the Section points out, and as we noted above,

> [o]wners and operators of . . . landfills . . . must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under § 270.1(c)(5) and (6), or obtain an enforceable document in lieu of a post-closure permit, as provided under paragraph (c)(7) of this section.

See 40 C.F.R. § 270.1(c) (incorporated by reference in 15A N.C. Admin. Code 13A.0113(a)).

In this case, the pit where the underground storage tanks were located on the Site was not designated a landfill for purposes of the State Hazardous Waste Program until the time that it was closed with hazardous waste in place, after the time the facility ceased to operate. *See* 40 C.F.R. § 265.197(b) (incorporated by reference in 15A N.C. Admin. Code 13A.0110(j)). Thus, there were no "operators" of a landfill when the facility was in operation, as WASCO limits the term. Yet, the hazardous waste permit program clearly applies to operators of landfills and those facilities closed as landfills.

Moreover, although the definition of "closure" cited by WASCO is clear that the closure of a solid waste management facility is the time it

ceases to operate, that definition also makes clear closure includes the act of securing the facility to prevent future harm. Thus, it is not just those parties in charge of the actual operation of a solid waste management facility that are subject to the post-closure permitting requirement.

Guided by the same federal law relied on by the trial court, including *Bestfoods*, its progeny, and EPA documents, we hold "operator," as it is defined in the State Hazardous Waste Rules, includes those parties in charge of directing post-closure activities under the State Hazardous Waste Program and RCRA.

In the present case, the trial court issued detailed findings as to WASCO's involvement at the Site that demonstrate it was the operator for purposes of the post-closure permitting requirement. WASCO does not challenge the factual findings, but instead asserts arguments that those findings do not lead to the conclusion that it is an operator as that term is defined in N.C. Gen. Stat. § 130A-290(a)(2). We are not convinced by WASCO's arguments.

The court's pertinent findings, which this Court has reviewed and determined to be supported by the documentary exhibits, are as follows:

> 15. WASCO became involved with the Facility in a limited capacity following its 1998 acquisition of Culligan Water Technologies, Inc. and its affiliate, Culligan International Company ("Culligan").
>
> 16. At the time WASCO acquired Culligan, Culligan had been performing post-closure operations related to the Facility.
>
> 17. Between 1999 and 2004, Petitioner provided financial assurance to the Section on behalf of Culligan for post-closure care associated with the Facility, including a Trust Agreement and Irrevocable Standby Letter of Credit in 2003.
>
> 18. The Culligan Group, including Culligan, was divested from WASCO in 2004 in a $610-million transaction that included WASCO's agreement to indemnify Culligan's buyer "as to certain matters associated at the Facility as they relate to specific Culligan obligations."
>
> 19. Following the 2004 divestiture, Culligan represented in a letter to the Section that WASCO was "assuming responsibility" for the Facility. The letter indicated

that copies were transmitted to John Coyne, the Director of Environmental Affairs for WASCO.

20. The Section followed-up with Mr. Coyne by email, referencing Culligan's representation that WASCO "is now responsible for RCRA issues" at the Facility, and asking for WASCO to complete a new Part A permit application as the Facility's operator.

21. Mr. Coyne responded that (a) he was "very familiar with this project," (b) he would "attend to the Part A application in the very near future," and (c) WASCO "intend[ed] on keeping the same consultants . . . and doing everything else we can to maintain continuity and keep the project headed in the right direction."

22. An updated Part A permit application was submitted to the Section in December 2004 naming WASCO as operator. Mr. Coyne signed the Part A permit application for WASCO "under penalty of law" as to the truth of its contents.

23. Mr. Coyne signed another updated Part A "under penalty of law" in 2006, which was submitted to the Section and continued to identify WASCO as operator.

24. Rodney Huerter—who had assumed the role of WASCO's Director of Environmental Affairs after Mr. Coyne—signed a third Part A permit application "under penalty of law" in 2008, which was submitted to the Section and which again identified WASCO as the Facility's operator.

25. After the divestiture of Culligan, WASCO continued to provide financial assurance for the Facility under the 2003 Trust Agreement, Standby Trust Fund, and Irrevocable Standby Letter of Credit, which it amended in the Section's favor for inflation 10 times between the divestiture of Culligan and the initiation of the 2013 contested case. WASCO has communicated directly with the Section throughout this time period concerning financial requirements for the Facility.

26. The language of the Trust Agreement identifies WASCO as the "Grantor," and the agreement's purpose to "establish a trust fund . . . for the benefit of

[the Department]." Specifically, the Trust Agreement recites that:

> . . . "DENR" . . . has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available when needed for closure and/or post-closure care of facility. . . .
>
> The Trustee shall make payments from the fund as the Secretary of [the Department] . . . shall direct, in writing, to provide for the payment of the cost of closure and/or post-closure care of facilities covered by this agreement . . . .
>
> "this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Secretary . . ."

27. The Irrevocable Standby Letter of Credit, as amended, is subject to automatic renewal in one-year increments unless cancelled by the bank.

28. The most recent amendment to the Irrevocable Standby Letter of Credit submitted prior to the filing of the contested case is in the amount of $443,769.88.

29. Internal WASCO communications concerning financial assurance reference "the statutory/regulatory requirements relating to one of our environmental legacy sites in Swannanoa, NC."

30. After the divestiture of Culligan, WASCO entered into a Master Consulting Services Agreement with Mineral Springs Environmental, P.C. ("Mineral Springs") for Mineral Springs to perform work at the Facility.

31. A total of 51 invoices from Mineral Springs to WASCO shows that Mineral Springs or its subcontractors performed a variety of post-closure activities at the Facility or related to the Facility, between November 2004 and August 2013, which fell into the following categories:

    - operation and maintenance of an air sparge/soil vapor extraction groundwater remediation system, including use of a subcontractor

for supplies such as air filters, oil filters, oil, and separators;

- groundwater sampling and analysis, including use of laboratory subcontractors;
- preparation of quarterly and semi-annual reports analyzing sampling results;
- project management;
- assessment of two potential sources of contamination at the Facility in addition to the former tank site—specifically, an old dump site and a French drain—including use of an excavation subcontractor and a bush hog subcontractor; and
- payment of utility bills based [on] one meter labeled as "pump" and one meter labeled as "environmental cleanup."

32. Mr. Coyne or Mr. Huerter personally approved payment to Mineral Springs for work in the above categories, and approved payment directly to the utility company for additional bills, totaling $235,984.43.

33. In particular, Mineral Springs submitted 33 reports associated with the invoiced post-closure activities to the Section on WASCO's behalf between February 2005 and May 2013, including 16 groundwater monitoring reports that expressly identified WASCO as the "responsible party for the site."

34. The Section communicated directly with WASCO, or with both WASCO and Mineral Springs, in numerous matters related to environmental compliance, including but not limited to requests for preparation of a work plan for the investigation of the former dump site and French drain, and responses to Mineral Springs's monitoring reports.

35. After Mineral Springs and/or its sub-contractors performed the French drain and dump assessment but before drafting the Assessment Report, Kirk Pollard of Mineral Springs notified Mr. Huerter of preliminary findings concerning the volume and nature of drums

discovered. Mr. Pollard identified liquid in one drum that tested at a pH of 14, which is considered hazardous based on corrosivity. Mr. Pollard expressed concern for health and safety, recommended that Mr. Huerter notify the Section, and expressed his belief that an immediate response and a more thorough evaluation could be necessary. No such concerns are reflected in the final report.

36. Mr. Huerter instructed Mr. Pollard not to remove "any of the drums, containers, or anything else," and asked to conduct an "advanced review" of the dump Assessment Report before its submission to the Section. Mr. Huerter commented on Mr. Pollard's first draft, including by providing two "reviewed and revised blackline document[s]."

37. Additional communications between Mr. Huerter and Mr. Pollard included (a) Mr. Pollard's requests for Mr. Huerter's guidance or authorization on matters related to the Facility, including changes to a Part A form, communications with the property owner, whether groundwater sampling should continue, and whether to advise the Section about the sale of the property; (b) Mr. Pollard's practice of updating Mr. Huerter, copying him on communications with the Section, or forwarding such communications to him; and (c) Mr. Huerter's requests for copies of utility bills to compare with Mineral Springs's invoices, and annual cost projections.

(Citations and footnote omitted).

It is clear that the pit at the Site that was certified closed as a landfill in 1993 is subject to post-closure regulation under the State Hazardous Waste Program and RCRA. Considering the above facts, we hold WASCO was the party responsible for and directly involved in the post-closure activities subject to regulation. Even under the definition of operator in N.C. Gen. Stat. § 130A-290(a)(21), when that definition is viewed through the lens of post-closure regulatory activities at issue in this case, since 2004, WASCO has been the party principally engaged in, or in charge of the post-closure operation, supervision, and maintenance of the Site for purposes of the hazardous waste permit program. WASCO's arguments to the contrary are overruled.

III. Conclusion

For the reasons stated above, we hold WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site. Therefore, we affirm the final order and judgment of the trial court.

AFFIRMED.

Judges STROUD and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 18 April 2016)

ARNOLD v. UNIV. OF N.C. AT CHAPEL HILL No. 16-573	Mecklenburg (15CVS3520)	Affirmed
GILREATH v. CUMBERLAND CTY. BD. OF EDUC. No. 16-927	Cumberland (15CVS8061)	AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.
IN RE A.G. No. 16-1066	Rowan (12JT55)	Affirmed
IN RE M.J. No. 16-957	Alleghany (12JA16) (12JA17)	Affirmed
IN RE R.M. No. 16-746	Cumberland (15JB20)	Vacated and Remanded
JONES v. DEP'T OF PUB. SAFETY No. 16-617	Johnston (15CVS2402)	Affirmed
LOVELACE v. B & R AUTO SERV., INC. No. 16-1045	N.C. Industrial Commission (13-709807)	Affirmed
MANIYA v. NEIGHBORHOOD ASSISTANCE CORP. OF AM. No. 16-706	Mecklenburg (15CVS22003)	Affirmed
ROSSO-SCHNEIDER v. SCHNEIDER No. 16-980	Watauga (14CVD363)	Vacated and Remanded.
STATE v. BARRERA No. 16-1049	Mecklenburg (10CRS257813) (11CRS31992)	Affirmed
STATE v. BOYD No. 16-715	Mecklenburg (14CRS214700-02)	No plain error in part, no prejudicial error in part.
STATE v. CASTRUITA No. 16-1007	Guilford (10CRS24506) (10CRS73782-84)	Affirmed
STATE v. CRAIG No. 16-1027	Stanly (12CRS52496) (15CRS524)	Vacated in Part, No Error in Part

STATE v. HAUGABOOK No. 16-471	New Hanover (12CRS55898) (12CRS56031) (12CRS6990)	No error in part, dismissed in part.
STATE v. HILL No. 16-744	Pender (13CRS51596-98) (15CRS466)	No Error
STATE v. HOEUN No. 16-888	Mecklenburg (12CRS247825-27)	No Error
STATE v. JONES No. 16-797	Mecklenburg (14CRS213365) (14CRS213366) (14CRS26413)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. JONES No. 16-842	Wayne (10CRS52098) (11CRS145) (11CRS147)	No Plain Error in Part; No Error in Part
STATE v. LANE No. 16-764	Forsyth (15CRS57442)	No Error; Dismissed without Prejudice in Part
STATE v. MASSEY No. 16-868	Mecklenburg (15CRS208782) (15CRS208784) (15CRS209678)	No Error
STATE v. McDOUGALD No. 16-574	Guilford (14CRS75083) (14CRS75085)	No Error
STATE v. SIMMONS No. 16-861	Gaston (14CRS63016-17)	NO ERROR IN PART; DISMISSED IN PART; VACATED AND REMANDED IN PART.
STATE v. SMITH No. 16-718	Iredell (14CRS55945) (15CRS3903)	AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.
STATE v. TALBERT No. 16-389	Henderson (14CRS55331) (14CRS55332)	No Error
STATE v. WILLIAMS No. 16-1162	Durham (15CRS3955) (16CRS69)	Affirmed

WALKER v. PHARR No. 16-1029	Wake (16CVD4089) (16CVD4872)	Vacated
WHEELER v. CENT. CAROLINA SCHOLASTIC SPORTS, INC. No. 16-827	Cumberland (15CVS3328)	Affirmed

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