254 N.C. App.—No. 4 Pages 613-853

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 26, 2019

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

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OF
NORTH CAROLINA

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[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]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016.
[9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016.
[11]Retired 31 December 2018. [12]Retired 31 December 2018. [13]Resigned 24 March 2019.

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COURT OF APPEALS

CASES REPORTED

FILED 1 AUGUST 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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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.

CHEATHAM v. TOWN OF TAYLORTOWN

[254 N.C. App. 613 (2017)]

ADAM T. CHEATHAM, SR., PLAINTIFF
v.
TOWN OF TAYLORTOWN, NORTH CAROLINA,
A MUNICIPAL CORPORATION, DEFENDANT

No. COA16-1057

Filed 1 August 2017

1. Cities and Towns—condemnation—subject matter jurisdiction—ordinance—minimum housing standards—failure to exhaust administrative remedies

The trial court did not err in a condemnation case, arising from the investigation of a complaint of sewage standing around the well on plaintiff's property, by allowing defendant town's motion to dismiss based on lack of subject matter jurisdiction for the town's enforcement actions made pursuant to its Minimum Housing Ordinance enacted under N.C.G.S. §§ 160A-441 through 160A-450. Plaintiff property owner failed to exhaust administrative remedies before seeking judicial review.

2. Cities and Towns—condemnation—subject matter jurisdiction—claims prior to enactment of ordinance—minimum housing standards

The trial court erred in a condemnation case, arising from the investigation of a complaint of sewage standing around the well on plaintiff's property, by allowing defendant town's motion to dismiss based on lack of subject matter jurisdiction for plaintiff's claims arising prior to or outside the enforcement of the town's Minimum Housing Ordinance. The trial court improperly determined that all of plaintiff's claims arose from actions taken pursuant to the ordinance.

Appeal by Adam T. Cheatham, Sr. from an order allowing defendant's motion to dismiss entered 18 April 2016 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 3 May 2017.

Adam T. Cheatham, Sr., pro se.

The Law Offices of William C. Morgan, Jr., PLLC, by William Morgan, for defendant-appellee.

MURPHY, Judge.

Adam T. Cheatham, Sr. ("Cheatham") appeals from the trial court's order allowing Town of Taylortown's ("Taylortown") motion to dismiss for lack of subject matter jurisdiction. On appeal, he contends that the trial court erred by granting the motion to dismiss for lack of subject matter jurisdiction because Taylortown's attempts to enforce its minimum housing standards: (1) violated his property rights; (2) obstructed justice; and (3) deprived him of procedural due process. We disagree that the trial court erred to the extent Cheatham's claims arise from enforcement actions made pursuant to Taylortown's Minimum Housing Ordinance ("the Ordinance") because Cheatham failed to exhaust his administrative remedies as to these claims before filing his complaint. However, we agree with Cheatham that the dismissal was not proper as to his claims that arose prior to the adoption of the Ordinance. The trial court incorrectly determined all of Cheatham's claims arose from actions taken pursuant to the Ordinance. We reverse and remand for the trial court to reconsider whether subject matter jurisdiction exists as to Cheatham's claims accruing prior to the Ordinance's adoption.

Background

Sometime in early 2014, Taylortown affixed a "condemned" sign to the home at 128 Burch Drive in Taylortown ("the Property") after finding it to be in deplorable condition. The owner of the Property, Cheatham, claims he removed the sign in March 2014. It is unclear whether this occurred before or after 4 April 2014, when Moore County Building Inspections investigated a complaint that sewage was standing around the Property's well. At the time of the investigation, the Property was unoccupied. As a result of the investigation, the Moore County Health Department's Environmental Section reported that the standing water around the well "appears to be run off water and not sewage." It recommended that the well be abandoned if public water was available, or, if public water was not available, the well be tested before used for human consumption.

On 27 May 2014, Cheatham attended a town meeting to request an explanation as to the condemnation of the Property. That same day, he submitted a letter documenting this request. In response, Taylortown sent him a letter, dated 30 May 2014, notifying Cheatham that his house had been inspected, and, due to the condition of the house and the land, a hearing would be scheduled. The letter further explained Cheatham would be informed of a hearing date by certified mail. Cheatham subsequently filed a lawsuit in Moore County Superior Court against Taylortown.[1] Well over a year after the condemned sign was posted and

1. The record is not clear as to the date Cheatham filed this first suit.

Cheatham was notified that a hearing would be scheduled, Cheatham took a voluntary dismissal in his first case against Taylortown.[2]

After sending the 30 May 2014 letter, Taylortown made no effort to schedule a hearing or condemn the Property. On 19 June 2015, Taylortown adopted the Ordinance pursuant to N.C.G.S. §§ 160A-441 through 160A-450 (2015). Cheatham filed a new complaint on 21 March 2016, which is now before us on appeal.

On 22 March 2016, before Cheatham served Taylortown with the summons and complaint, Taylortown investigated the Property pursuant to the authority and procedures in the Ordinance. On 25 March 2016, once Taylortown received the summons and complaint, it filed a motion to dismiss for lack of subject matter jurisdiction under North Carolina Rule of Civil Procedure 12(b)(1) based on Cheatham's failure to exhaust administrative remedies and under 12(b)(6) for failure to state a claim. In response, Cheatham filed a motion to deny the motion to dismiss, attaching 15 exhibits, including 6 letters that Cheatham maintains he sent to Taylortown about the Property from June 2014 up until after the motion to dismiss was filed in April 2016.

Judge Webb heard Taylortown's motion to dismiss on 11 April 2016. During the hearing, Cheatham "request[ed] that [Taylortown] stop continuing to be reckless, malicious and unlawful condemning the property for a second time, and stop the retaliation against [him] by condemning the property for a second time." Judge Webb granted Taylortown's motion, and ordered the dismissal of the action under Rule 12(b)(1), finding "[Cheatham's] claims arise out of [Taylortown's] attempts to enforce its Minimum Housing Ordinance and that [Cheatham] has fail[ed] to exhaust his administrative remedies, as provided in N.C.G.S. § 160A-446."[3] Cheatham timely appealed the trial court's order.

Analysis

[1] Cheatham argues that the motion to dismiss for lack of subject matter jurisdiction should have been denied because Taylortown's attempts to enforce its minimum housing standards: (1) violate the "Bundle of Rights" given to all property owners under the law of the land, describing these rights as the owner's right to enter, use, sell, lease, or give away the land as he chooses; (2) obstruct justice; and (3) violate procedural due process.

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2. Subsequent to the dismissal, Cheatham made a motion to set aside his voluntary dismissal, which the trial court denied on 10 December 2015.

3. Having dismissed the case in accordance with Rule 12(b)(1), the trial court did not reach Taylortown's 12(b)(6) motion.

We disagree to the extent Taylortown's enforcement efforts were made pursuant to the Ordinance. Cheatham's suit was properly dismissed for failure to exhaust administrative remedies as to any efforts made after 19 June 2015 – the effective date of the Ordinance. However, the trial court incorrectly determined that all of Cheatham's claims arose out of Taylortown's attempts to enforce the Ordinance, which is factually incorrect as Taylortown adopted the Ordinance after alleged wrongs in the complaint took place.

North Carolina Rule of Civil Procedure 12(b)(1) "permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy." *Trivette v. Yount*, 217 N.C. App. 477, 482, 720 S.E.2d 732, 735 (2011). Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction are reviewed by our court de novo, and matters outside the pleadings may be considered. *Id.* at 482, 720 S.E.2d at 735 (citation omitted).

The legislature enacted N.C.G.S § 160A-441 et seq. to ensure "that minimum housing standards would be achieved in the cities and counties of this State." *Harrell v. City of Winston-Salem*, 22 N.C. App. 386, 391, 206 S.E.2d 802, 806 (1974). To do so, section 160A-441 "confers upon cities and counties the power to exercise their police powers by adopting and enforcing ordinances ordering a property owner to repair, close, or demolish dwellings that are determined to be unfit for human habitation and therefore dangerous and injurious to the health and safety of the public." *Newton v. City of Winston-Salem*, 92 N.C. App. 446, 449, 374 S.E.2d 488, 490 (1988). Such city ordinances must contain procedures to provide owners with notice, a hearing, and a reasonable opportunity to bring deficient dwellings into conformity with the code. N.C.G.S. § 160A-443. N.C.G.S. § 160-446 delineates the remedies available in N.C.G.S. § 160A-441 et seq.

Taylortown adopted the Ordinance pursuant to N.C.G.S. §§ 160A-441 through 160A-450, setting out the necessary procedures for the city to follow in minimum housing cases. The procedure set out in the Ordinance and N.C.G.S. §§ 160A-441 through 160A-450 cannot be circumvented; plaintiffs must exhaust the administrative remedies available provided by statute "before recourse may be had to the courts." *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004) (quotation omitted); *Harrell*, 22 N.C. App. at 391-92, 206 S.E.2d at 806 (citations omitted). If administrative remedies specifically provided by statute are not exhausted before alternative recourse is sought through the courts, "the court lacks subject matter jurisdiction and the action must be dismissed." *Justice for Animals, Inc.*, 164 N.C. App. at 369, 595 S.E.2d at 775 (citation omitted).

Under the Ordinance, Cheatham did not exhaust his administrative remedies before seeking judicial review as required by statute. The proper course of action for a person aggrieved under the Ordinance would be to present the case at a minimum housing hearing pursuant to N.C.G.S. § 160A-441 et seq., and then, if he remained unsatisfied, to appeal that decision to the Board as permitted by statute. N.C.G.S. § 160A-446. If his appeal to the Board was unsuccessful, he would then have the ability to seek review in Superior Court by proceedings in the nature of certiorari. *Id.* § 160A-446(e).

Instead of following this procedure, Cheatham ignored N.C.G.S. § 160A-441 et seq. and the Ordinance, attempting to collaterally attack the minimum housing standards enforcement proceedings through this independent action. Thus, as he failed to follow statutory procedure, to the extent his claims arose after 19 June 2015 out of Taylortown's attempts to enforce the Ordinance, it was proper for the trial court to dismiss this action for lack of subject matter jurisdiction. *See Axler v. City of Wilmington*, 25 N.C. App. 110, 111, 212 S.E.2d 510, 511-12 (1975) (dismissing the action because the plaintiff failed to exhaust the administrative remedies available in N.C.G.S. § 160A-446).

[2] However, Cheatham's claims arising prior to the Ordinance's enactment on 19 June 2015 do not arise out of Taylortown's attempts to enforce the Ordinance. Thus, the trial court's determination that Cheatham's "claims arise out of [Taylortown's] attempts to enforce its Minimum Housing Ordinance" is in error. We remand for the trial court to reconsider whether Cheatham's claims arising on or prior to 19 June 2015 may be subject to dismissal under either Rule 12(b)(1) or 12(b)(6) of the North Carolina Rules of Civil Procedure.

Conclusion

For the reasons stated above, the trial court correctly dismissed Cheatham's case for lack of subject matter jurisdiction to the extent the claims involve enforcement actions made after 19 June 2015 pursuant to the Ordinance. However, the trial court incorrectly determined that all of Cheatham's claims were made pursuant to the Ordinance. We remand for further consideration as to enforcement actions occurring on or prior to 19 June 2015, the effective date of the Ordinance.

AFFIRMED IN PART; REMANDED FOR FURTHER CONSIDERATION IN PART.

Judges CALABRIA and DIETZ concur.

FRIDAY INVESTMENTS, LLC, as Successor in Interest to Tisano Realty, Inc., Plaintiff
v.
BALLY TOTAL FITNESS OF THE MID-ATLANTIC, INC. f/k/a Bally Total Fitness of the Southeast, Inc. f/k/a Holiday Health Clubs of the Southeast, Inc., as Successor in Interest to Bally Fitness Corporation; and BALLY TOTAL FITNESS HOLDING CORPORATION, Defendants

No. COA16-950

Filed 1 August 2017

1. Appeal and Error—interlocutory orders and appeals—multiple defendants—multiple claims remaining—Rule 54(b) certification

Plaintiff's appeal from the trial court's interlocutory order granting summary judgment in favor of defendant corporate guarantor on a breach of contract and other claims, arising from the default on a lease of commercial premises, was entitled to immediate appellate review. The order was final regarding some but not all claims against this defendant, and the trial court properly certified the order for immediate appellate review under Rule 54(b).

2. Guaranty—separate contract from lease agreement—summary judgment—consolidation provisions—bankruptcy discharge

The trial court erred in a breach of contract case, arising from the default on a lease of commercial premises, by granting summary judgment in favor of defendant corporate guarantor. The lease and guaranty are two separate and distinct contracts under North Carolina law, and there was a genuine issue of material fact regarding whether the guaranty was "required to be maintained" under the consolidation provisions or was discharged during a 2008-2009 bankruptcy.

Judge ELMORE dissenting.

Appeal by plaintiff from order entered 9 March 2016 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 March 2017.

Horack, Talley, Pharr & Lowndes, P.A., by Keith B. Nichols, and Chadbourne & Parke, LLP, by Samuel S. Kohn, pro hac vice, for plaintiff-appellant.

Burt & Cordes, PLLC, by Stacy C. Cordes, and Knox, Knox, Brotherton & Godfrey, by Lisa Godfrey, for defendant-appellees.

TYSON, Judge.

Friday Investments, LLC, ("Plaintiff") appeals from the trial court's order granting summary judgment in favor of Defendant, Bally Total Fitness Holding Corporation ("Bally Holding"). Genuine issues of material fact exist regarding whether the Guaranty was "required to be maintained" or was discharged in the 2008-2009 Bankruptcy. We reverse the trial court's order granting summary judgment in favor of Bally Holding and remand.

I. Factual Background

This case arises from a lease of commercial premises between Plaintiff, as landlord and successor-in-interest to the original landlord, and Bally of the Mid-Atlantic, as tenant and successor-in-interest to the original tenant. Bally Holding had guaranteed the obligations of the original tenant and of the successors-in-interest thereto. When Bally of the Mid-Atlantic defaulted on its monthly rent obligations, Plaintiff sued to recover damages jointly and severally from Bally of the Mid-Atlantic and Bally Holding.

A. Lease and Guaranty

On or about 14 February 2000, Tower Place Joint Venture, as landlord, and Bally Total Fitness Corporation, as tenant, entered into a written Lease Agreement (the "Lease") for commercial premises located within the Tower Place Festival Shopping Center in Charlotte. As an inducement to Tower Place Joint Venture to enter into the Lease with Bally Total Fitness Corporation, Bally Holding guaranteed the obligations of Bally Total Fitness Corporation. The Guaranty Agreement (the "Guaranty") was executed on or about 10 February 2000. In accordance with the recitals contained in the Lease, the Guaranty is attached to the Lease as "Exhibit C."

Bally Total Fitness Corporation later assigned its interest in the Lease to its subsidiary, Holiday Health Clubs of the Southeast, Inc.

B. 2007 Bankruptcy Proceedings

On 31 July 2007, Bally Holding and its subsidiaries (collectively, the "Bally Companies") filed a petition for Chapter 11 bankruptcy in U.S. Bankruptcy Court (the "2007 Bankruptcy").

In anticipation of the initial bankruptcy, Tisano Realty, Inc., as successor-in-interest to the original landlord Tower Place Joint Venture, and Bally Total Fitness of the Southeast, Inc. ("Bally of the Southeast") f/k/a

Holiday Health Clubs of the Southeast, Inc., as the tenant and successor-in-interest to Bally Total Fitness Corporation, executed an amendment to the Lease (the "First Amendment").

The First Amendment provides for reduced base rent schedules, which would apply in the event of tenant's filing a Chapter 11 bankruptcy petition. The First Amendment also stipulates: "Except as amended hereby, the Lease shall remain in full force and effect; and, as amended hereby, the Lease is affirmed, confirmed and ratified." On 17 September 2007, the bankruptcy court confirmed the Bally Companies' Plan of Reorganization.

C. 2008-2009 Bankruptcy Proceedings

On 3 December 2008, the Bally Companies, including Bally of the Southeast, filed a second petition for Chapter 11 bankruptcy in U.S. Bankruptcy Court for the Southern District of New York (the "2008-2009 Bankruptcy"). The cases were jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure.

On 25 June 2009, after the petition had been filed, Tisano Realty, Inc. and Bally of the Southeast executed another amendment to the Lease (the "Second Amendment"). The Second Amendment contains site plan modifications, signage revisions, and monthly base rent adjustments. Except as modified in the Second Amendment, the Lease and the terms thereof not expressly amended were to continue "in full force and effect."

During the 2008-2009 Bankruptcy proceedings, the Bally Companies jointly moved to assume certain unexpired real property leases pursuant to 11 U.S.C. § 365. By order entered 29 June 2009, the bankruptcy court granted the motion and authorized the Bally Companies to assume the unexpired leases identified in the Assumed Lease Schedule attached to the order (the "Assumption Order"). The Lease before us was included among those listed in the Assumed Lease Schedule.

The Bally Companies also submitted a Joint Plan of Reorganization of the Debtors Under Chapter 11 of the Bankruptcy Code. The Joint Plan of Reorganization was amended during the proceedings (as amended, the "Plan"). Seeking confirmation of the Plan, William G. Fanelli, the acting chief financial officer of the Bally Companies, submitted to the bankruptcy court a declaration in support of confirmation (the "Fanelli Declaration"). The Fanelli Declaration provides an outline of the proposed reorganization and the feasibility thereof. It also offers reasons to consolidate the Bally Companies for distribution purposes, including the following:

> 11. Article IV of the Plan provides that the Plan shall "serve as, and shall be deemed to be, a motion for entry of an order consolidating the [Debtors'] Estates" *solely* for distribution purposes. The Plan explicitly limits the scope and purpose of such consolidation to implementation of the Plan, providing that the consolidation sought shall *not* affect: (i) the legal and corporate structure of the Reorganized Debtors; (ii) guarantees that are required to be maintained post-Effective Date[.] (alteration and emphasis original).
>
> 12. The Debtors propose consolidation of the Consolidated Debtors solely to facilitate distributions under the Plan. The Debtors do not seek to improperly enhance or impair the recoveries of any creditors by way of the consolidation. Indeed, the Debtors are not aware of any creditor actually affected by the consolidation contemplated under the Plan.

The bankruptcy court confirmed the Plan by order entered 19 August 2009 (the "Confirmation Order"). At issue in this case are two sections of the Confirmation Order and the Plan (together, the "Consolidation Provisions"): Paragraph 3 of the Confirmation Order, which reflects Article IV of the Plan, and Paragraph 15 of the Confirmation Order, which reflects Article X of the Plan.

Paragraph 3 of the Confirmation Order approves the consolidation contemplated in Article IV of the Plan. Paragraph 3 provides in pertinent part:

> 3. Consolidation of the Debtors.
>
> (a) As no objections to such consolidation have been filed or served by any party, pursuant to Article IV of the Plan the consolidation of the consolidated Debtors solely for the purpose of implementing the Plan, including for purposes of voting, confirmation and distributions to be made under the Plan is hereby approved. Solely for purposes of implementing the Plan, including without limitation the making of Distributions thereunder, and for no other purposes . . . and (vi) all guarantees of the Debtors of the obligations of any other Debtors shall be deemed eliminated so that any Claim against any Debtor and any guarantee thereof executed by any other Debtor and any joint or

> several liability of any of the Debtors shall be deemed to be one obligation of the consolidated Debtors.
>
> (b) Such consolidation (other than for the purpose of implementing the Plan) shall not affect . . . (ii) guarantees that are required to be maintained post-Effective Date (a) in connection with executory contracts or unexpired leases that were entered into during the Chapter 11 Cases or that have been, or will hereunder be, assumed[.]

Article IV of the Plan provides in pertinent part:

> Solely in connection with Distributions to be made to the holders of Allowed Claims, the Plan is predicated upon, and it is a condition precedent to confirmation of the Plan, that the Court provide in the Confirmation Order for the consolidation of the Debtors' Estates into a single Estate for purposes of this Plan and the Distributions hereunder. . . .
>
> Pursuant to the Confirmation Order . . . (ii) the obligations of each Debtor will be deemed to be the obligation of the consolidated Debtors solely for purposes of this Plan and Distributions hereunder . . . , and (vi) all guarantees of the Debtors of the obligations of any other Debtors shall be deemed eliminated so that any Claim against any Debtor and any guarantee thereof executed by any other Debtor and any joint or several liability of any of the Debtors shall be deemed to be one obligation of the consolidated Debtors.
>
> Notwithstanding the foregoing, such consolidation shall not affect . . . (ii) guarantees that are required to be maintained post-Effective Date (a) in connection with executory contracts or unexpired leases that were entered into during the Chapter 11 Cases or that have been, or will hereunder be, assumed[.]

Paragraph 15 of the Confirmation Order approves the provisions contained in Article X of the Plan, which addresses the assumption and rejection of executory contracts and unexpired leases. Paragraph 15 provides in pertinent part:

> 15. Executory Contracts and Unexpired Leases.
>
> (a) The executory contract and unexpired lease provisions of Article X of the Plan are specifically approved in all

> respects, are incorporated herein in their entirety and are so ordered. The Debtors are authorized to assume, assign and/or reject executory contracts or unexpired leases in accordance with Article X of the Plan. In the event of an inconsistency between the Plan and any executory contract or unexpired lease assumed under the Plan, the provisions of the Plan shall govern.
>
> (b) Pursuant to Article X of the Plan, the Debtors shall be deemed to assume each executory contract and unexpired lease that (i) was not previously assumed, assumed and assigned or rejected by an order of the Court, (ii) was not rejected pursuant to Exhibit A of the Plan, (iii) did not terminate or expire pursuant to its own terms[.]

Article X of the Plan provides in pertinent part:

> To the extent not (i) assumed in the Chapter 11 Cases prior to the Confirmation Date, (ii) rejected in the Chapter 11 Cases prior to the Confirmation Date, or (iii) specifically rejected pursuant to this Plan, each executory contract and unexpired lease that exists between Debtor and any Person is specifically assumed by the Debtor that is a party to such executory contract or unexpired lease as of, and subject to the occurrence of, the Effective Date pursuant to the Plan.

As previously noted, the Bally Companies specifically assumed the Lease before us pursuant to section 365 of the Bankruptcy Code.

D. The Estoppel Certificate

On 29 September 2009, Bally of the Southeast merged into Bally Total Fitness of the Mid-Atlantic, Inc. ("Bally of the Mid-Atlantic"), as tenant under the Lease. In March 2011, Plaintiff purchased the property from Tisano Realty, Inc., becoming the successor-in-interest to the original and subsequent landlords with respect to the Lease.

Before the purchase, Ronald Siegel, an officer of Bally of the Mid-Atlantic, executed an estoppel certificate at Plaintiff's request. Siegel certified the Lease was "in full force and effect" and "guaranteed by Bally Total Fitness Holding Corporation, a Delaware corporation, Guaranty dated February 14, 2000." By its terms, Siegel also acknowledged that the estoppel certificate was made "as an inducement to the Buyer to accept assignment of the Lease from the Landlord and with full knowledge that the Buyer is relying upon the truth thereof."

Siegel returned the signed estoppel certificate to Plaintiff with marked revisions and deletions to several provisions in the document. The last page of the certificate contained the following annotation:

> This Estoppel Letter is being delivered to you on the express condition that the undersigned shall have no liability for any matters set forth herein and that *the only use or purpose of this Estoppel Letter will be to prevent the undersigned from making any statement or claim contrary to any factual matters set forth herein, except to the extent any such contrary matter is otherwise known to you prior to the time of delivery of this Estoppel Letter*. . . . (emphasis supplied).

While Siegel was also an officer of Bally Holding, no changes were made to the Guaranty provision in the certificate.

E. Superior Court Proceedings

On 9 May 2014, Plaintiff filed a complaint and alleged Bally of the Mid-Atlantic had breached the Lease, and Bally Holding had breached the Guaranty, by failing to timely pay monthly rent installments and other past due charges. Plaintiff restated its breach of contract claim against Defendants in its first amended complaint and alleged alternative claims for common law fraud, fraud in the inducement, negligent misrepresentation, and unfair and deceptive trade practices.

Plaintiff moved for summary judgment against Defendants on its breach of contract claim. Bally of the Mid-Atlantic opposed Plaintiff's motion and argued its affirmative defenses raised genuine issues of material fact for trial. Bally Holding also opposed Plaintiff's motion and moved for summary judgment on the grounds that its liability on the Guaranty, if any, was discharged in bankruptcy.

By order entered 29 April 2015, the trial court granted partial summary judgment in favor of Plaintiff, concluding that Bally of the Mid-Atlantic had breached the terms of the Lease. The court reserved for trial the issue of what damages, if any, Plaintiff was entitled to recover from Bally of the Mid-Atlantic. The court allowed the parties to submit additional briefs prior to ruling on whether Bally Holding was liable on the Guaranty.

By order entered 9 March 2016, the court granted summary judgment in favor of Bally Holding on Plaintiff's breach of contract claim. The court characterized the Lease and Guaranty as separate agreements, and

concluded the Lease had been assumed in the 2008-2009 Bankruptcy, but the Guaranty had been discharged by the terms of the Plan, as follows:

> 2. Section 365 of the Bankruptcy Code allows a Debtor to assume or reject executory contracts and leases within certain time constraints and under certain conditions. As noted by the Plaintiff, Bankruptcy Courts have ruled that assumption of a lease or contract generally requires assumption of the contract in its entirety, with both the burdens and the benefits. . . .
>
> 3. On the other hand, a guaranty is not usually viewed as an executory contract that can be assumed or rejected by a Bankruptcy debtor. . . .
>
> . . . .
>
> 5. Ultimately, in determining dischargeability of a debt, the court must first and foremost look to the provisions of the Debtor's confirmed Plan. In this instance, the Plan specifically provided that all Guaranties of the Debtor of the obligation of any other Debtor shall be deemed eliminated except to the extent that they are required to be maintained. There was no indication that this Guaranty was "required to be maintained."
>
> 6. Pursuant to Section 1141 of the Bankruptcy Code, the confirmation of a Chapter 11 Plan discharges the Debtor from any debt arising before the date of confirmation except as otherwise provided in the Plan or in the order confirming the Plan.
>
> 7. Pursuant to Section 524 of the Bankruptcy Code, a discharge operates as an injunction against any action to collect any discharged debt from the Debtor.
>
> 8. In this case, the confirmation of the Debtor's Plan and closing of the case operated to create such discharge and injunction unless there was some contrary provision in the Plan.
>
> . . . .
>
> 10. In light of the foregoing principles of law, this court concludes that, pursuant to provisions of the confirmed 2009 Chapter 11 Plan, the Guaranty of this lease by Bally

> Holding[] was discharged by the Confirmation of the 2009 Chapter 11 Plan and the closing of the Bankruptcy case.
>
> 11. Holding is not equitably estopped under North Carolina law from asserting that the indebtedness under the Guaranty was discharged by the confirmation of the 2009 Chapter 11 Plan.

The trial court certified the interlocutory order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Plaintiff timely appealed.

II. Jurisdiction

[1] This Court has jurisdiction over Plaintiff's appeal from the order granting summary judgment in favor of Bally Holding. When an action involves multiple parties or presents more than one claim for relief, the trial court "may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015); *see DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 667-68 (1998).

Such judgment is subject to immediate appellate review even though it may not "determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *see* N.C. Gen. Stat. § 1A-1, Rule 54(b). If the trial court certifies an order for immediate appeal pursuant to Rule 54(b), "appellate review is mandatory." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (citation omitted). The court "may not, by certification, render its decree immediately appealable if it is not a final judgment." *Id.* (brackets, citations, and internal quotation marks omitted).

The trial court granted summary judgment for Bally Holding as to all claims raised against it in Plaintiff's original complaint and all claims in the first cause of action in Plaintiff's first amended complaint—i.e., Plaintiff's breach of contract claim. The court made no ruling on Plaintiff's alternative causes of action for common law fraud, fraud in the inducement, negligent misrepresentation, and unfair and deceptive trade practices. The order is final regarding one, but fewer than all claims raised by Plaintiff against Bally Holding. The trial court properly certified the order for immediate appellate review under Rule 54(b). We address Plaintiff's appeal on the merits.

III. Issues

[2] Plaintiff argues the trial court erred in granting summary judgment for Bally Holding because (1) the Lease and Guaranty are a single agreement, which was assumed in the 2008-2009 Bankruptcy; (2) even if the Lease and Guaranty are separate agreements, the Guaranty was not and could not have been discharged by the terms of the Consolidation Provisions; and (3) equitable estoppel bars Bally Holding's assertion that the Guaranty was discharged in the 2008-2009 Bankruptcy.

In the alternative, Plaintiff argues genuine issues of material fact exist, which made entry of summary judgment for Bally Holding inappropriate.

IV. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

"[A]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C. App. 600, 604, 676 S.E.2d 79, 83 (2009) (citations and internal quotation marks omitted). A trial court's order granting summary judgment is reviewed *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

V. Lease and Guaranty are Separate Contracts

North Carolina contract law controls the interpretation of the Lease and Guaranty, as required by the choice of law provision contained therein.

This Court has held that a guaranty is:

> "a contract, obligation or liability . . . whereby the promisor, or guarantor, undertakes to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself . . . liable to such payment or performance." *Trust Co. v. Clifton*, 203 N.C. 483, 485, 166 S.E. 334, 335 (1932). The guarantor "makes his own separate contract, . . . and is not bound to do what his principal has contracted to do, except in so far as he has bound himself by his separate contract[.]"

> *Hutchins v. Planters National Bank of Richmond*, 130 N.C. 285, 286, 41 S.E. 487, 487 (1902).

Tripps Rests. of N.C., Inc. v. Showtime Enters., Inc., 164 N.C. App. 389, 391, 595 S.E.2d 765, 767 (2004).

The strict independence of the two separate contracts is "not affected by the fact that both contracts are written on the same paper or instrument or are contemporaneously executed." 38 Am. Jur. 2d *Guaranty* § 4 (1999); *see Tripps Rests. of N.C.*, 164 NC. App. at 391, 595 S.E.2d at 767 ("[B]oth contracts (between creditor and primary obligor and between creditor and guaranty) may be contained in the same instrument." (citing 38 Am. Jur. 2d *Guaranty* § 4).

Although the Guaranty in this case was attached to the Lease as an exhibit, it remains a wholly independent and separate contract under North Carolina law. *See id.* Plaintiff's arguments to the contrary are overruled.

VI. Summary Judgment Analysis

The trial court found the Consolidation Provisions provided "all Guarantees of the Debtor of the obligation of any other Debtor shall be deemed eliminated except to the extent that they are required to be maintained" and that "[t]here was no indication that this Guaranty was 'required to be maintained.' " Pursuant to the Consolidation Provisions, the unexpired Lease at issue in this case was expressly assumed by the debtor-tenant and approved by the bankruptcy court during the Chapter 11 re-organization. However, the language of the Consolidation Provisions and the Second Amendment raises genuine issues of material fact regarding whether the Guaranty was "required to be maintained" or was discharged during the 2008-2009 Bankruptcy.

A. The Consolidation Provisions

Under well-established bankruptcy law, a Chapter 11 re-organization plan is basically a court-approved contract between the debtor and its creditors. *In re WorldCom, Inc.*, 352 B.R. 369, 377 (Bankr. S.D.N.Y. 2006). As a binding contract, a confirmed plan "must be interpreted in accordance with general contract law." *In re Bennett Funding Grp.*, 220 B.R. 743, 758 (Bankr. N.D.N.Y. 1997); *In re WorldCom*, 352 B.R. at 377 ("The Court must interpret the provisions of [a Chapter 11 Plan] . . . a task akin to interpreting a binding contract.").

The Consolidation Provisions are construed under New York contract law, which is similar to North Carolina law on this issue.

> Under New York law, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. When the terms of a written contract are ambiguous, however, a court may turn to evidence outside the four corners of the document to ascertain the intent of the parties. *When the language of a contract is ambiguous and there exists relevant extrinsic evidence of the parties' actual intent, summary judgment is precluded.* Whether or not a writing is ambiguous is a question of law to be resolved by the courts. If a contract is unambiguous on its face, its proper construction is a question of law.

In re Indesco Int'l, Inc., 451 B.R. 274, 282 (Bankr. S.D.N.Y. 2011) (emphasis supplied) (brackets, internal quotation marks, and footnotes omitted).

"Substantive consolidation treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor." *In re Genesis Health Ventures, Inc.*, 402 F.3d 416, 423 (3d Cir. 2005). Whereas, "[d]eemed consolidation has been characterized as 'a pretend consolidation[.]' " 3 Howard J. Steinberg, *Bankruptcy Litigation* § 15:52 (2d ed. 2007 & Supp. 2016) (citing *In re Owens Corning*, 419 F.3d 195, 216 (3d Cir. 2005)).

In a plan of reorganization, multiple debtors or entities may be "deemed consolidated" solely "for purposes of valuing and satisfying creditor claims, voting for or against the [p]lan, and making distributions for allowed claims[.]" *In re Owens Corning*, 419 F.3d at 202. A deemed consolidation streamlines the distribution process, but does not affect the legal structure of the debtors or the rights of claimholders. Steinberg, *supra*, § 15:52; *see In re Genesis Health Ventures*, 402 F.3d at 423-24. Notably, a deemed consolidation may only be used as a shield, and not as a sword. *In re Owens Corning*, 419 F.3d at 216.

Here, Paragraph 3 of the Confirmation Order provides:

> (a) As no objections to such consolidation have been filed or served by any party, pursuant to Article IV of the Plan the consolidation of the consolidated Debtors *solely for the purpose of implementing the Plan*, including for purposes of voting, confirmation and distributions to be made under the Plan is hereby approved. *Solely for purposes of implementing the Plan*, including without

> limitation the making of Distributions thereunder, and for no other purposes . . . and (vi) *all guarantees of the Debtors of the obligations of any other Debtors shall be deemed eliminated so that any Claim against any Debtor and any guarantee thereof executed by any other Debtor and any joint or several liability of any of the Debtors shall be deemed to be one obligation of the consolidated Debtors*. (emphasis supplied).

However, the Confirmation Order further provides:

> (b) Such consolidation (other than for the purpose of implementing the Plan) shall not affect . . . (ii) guarantees that are required to be maintained post-Effective Date (a) in connection with executory contracts or unexpired leases that were entered into during the Chapter 11 Cases or that have been, or will hereunder be, assumed[.]

William Fanelli, the acting chief financial officer of the debtors and debtors in possession, submitted a declaration in support of the proposed plan. The declaration stated:

> 11. . . . The Plan explicitly limits the scope and purpose of such consolidation to implementation of the Plan, providing that the consolidation sought shall not affect: *(i) the legal and corporate structure of the Reorganized Debtors; (ii) guarantees that are required to be maintained post-Effective Date*[.] (emphasis supplied).
>
> 12. The Debtors propose consolidation of the Consolidated Debtors solely to facilitate distributions under the Plan. The Debtors do not seek to improperly enhance or impair the recoveries of any creditors by way of the consolidation. Indeed, the Debtors are not aware of any creditor actually affected by the consolidation contemplated under the Plan.

Since the debtors were consolidated "solely for the purposes of implementing the Plan," it appears the Consolidation Provisions contemplate a "deemed consolidation." Furthermore, the language of the Consolidation Provisions and the Fanelli Declaration demonstrate not all guarantees were discharged during the 2008-2009 Bankruptcy.

Under the language of the Consolidation Provisions, a genuine issue of material fact exists regarding whether the Guaranty was discharged or whether it was "required to be maintained." *See In re Indesco Int'l*,

451 B.R. at 282 ("[W]hen the language of a contract is ambiguous and there exists relevant extrinsic evidence of the parties' actual intent, summary judgment is precluded.").

B. Second Amendment

Contrary to the trial court's holding, the Second Amendment to the Lease raises genuine issues of material fact regarding whether the Guaranty was "required to be maintained."

Defendants argue the Second Amendment demonstrates the Guaranty was not required to be maintained subsequent to the effective date of the Confirmation Plan. Defendants assert the Second Amendment was negotiated between Tisano and Bally of the Southeast, and did not include joinder of Bally Holding as a guarantor. Plaintiff argues under the language of the Guaranty, the Second Amendment did not relieve the obligations of Bally Holding as guarantor to the Lease.

The original Guaranty provided:

> FOR VALUE RECEIVED, and in consideration for, and as an inducement to Tower Place Joint Venture, as Landlord, to enter into a Lease dated as of February 14, 2000 (the "Lease"), for certain premises located within the property commonly known as Tower Place Festival Shopping Center . . . , with Bally Total Fitness Corporation, a Delaware corporation, as Tenant, *the undersigned guarantees the full performance and observance of all the covenants, conditions and agreements contained in the Lease to be performed and observed by Tenant, Tenant's successors and assigns* . . . .
>
> *The undersigned further covenants and agrees that this Guaranty shall remain and continue in full force and effect as to any renewal, modification, or extension of said Lease, provided that notice thereof is duly delivered to the Guarantor as provided in the Lease.* The undersigned further agrees that its liability under this Guaranty shall be primary, and that if any right or action shall accrue to Landlord under the Lease, Landlord may, at Landlord's option, proceed against the undersigned without having commenced an action against or having obtained any judgment against Tenant. . . .
>
> . . . .

> No subletting, assignment, or other transfer of the Lease, or any interest therein, other than as specifically provided herein or in the Lease, shall operate to extend or diminish the liability of the Guarantor under this Guaranty. Whatever reference is made to the liability of Tenant within the Lease, such reference shall be deemed likewise to refer to the Guarantor. *It is further agreed that all of the terms and provisions hereof shall inure to the benefit of the successors and assigns of Landlord, and shall be binding upon the successors and assigns of the undersigned.* (emphasis supplied).

Based upon this language, renewals, modifications, or extensions to the Lease would not affect or release the responsibilities of the guarantor, unless the guarantor did not receive proper notice. The Second Amendment further provides that any terms of the Lease not expressly modified or amended remained unaltered and in full force and effect. At minimum, this language demonstrates a genuine issue of material fact exists regarding whether the Guaranty survived the Second Amendment and, ultimately, whether the Guaranty was "required to be maintained" or was discharged during the 2008-2009 Bankruptcy.

VII. Conclusion

The Lease and Guaranty constitute two separate and distinct contracts under North Carolina law. *See Tripps Rests. of N.C.*, 164 NC. App. at 391, 595 S.E.2d at 767. Based upon our standard of review, summary judgment was inappropriate as genuine issues of material fact exist regarding whether the Guaranty was "required to be maintained" or was discharged during the 2008-2009 Bankruptcy.

The trial court erred by granting summary judgment for Bally Holding. We do not address and express no opinion on damages, including attorney fees, or on Plaintiff's other claims against Defendants.

The trial court's order granting summary judgment in favor of Bally Holding is reversed and this cause is remanded for further proceedings. *It is so ordered.*

REVERSED AND REMANDED.

Judge DIETZ concurs.

Judge ELMORE dissents with separate opinion.

ELMORE, Judge, dissenting.

It is a fundamental principle of bankruptcy law that a debtor-in-possession who assumes an executory contract "assumes the contract *cum onere*," *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531–32, 104 S. Ct. 1188, 1199, 79 L. Ed. 2d 482, 499 (1984) (citation omitted), in its entirety "without any diminution in its obligations or impairment of the rights of the lessor in the present or the future," *In re Texaco Inc.*, 254 B.R. 536, 550 (Bankr. S.D.N.Y. 2000) (footnote omitted). Because the language of the Lease and Guaranty reflects a clear intention of the parties to treat the instruments as component parts of a single executory contract, which had to be assumed in its entirety during the 2008–2009 Bankruptcy, I respectfully dissent.

As the majority properly notes, North Carolina contract law controls the interpretation of the Lease.[1] Our rules of construction require "the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution." *State v. Philip Morris USA Inc.* (*Philip Morris I*), 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (citation omitted). The "intent" of the parties "is derived not from a particular contractual term but from the contract as a whole." *Id.* (citation omitted). The contract must be considered in its entirety without placing undue emphasis on "what the separate parts mean." *Jones v. Casstevens*, 222 N.C. 411, 413–14, 23 S.E.2d 303, 305 (1942); *see also Peirson v. Am. Hardware Mut. Ins. Co.*, 249 N.C. 580, 583, 107 S.E.2d 137, 139 (1959) ("The object of interpretation should not be to find discord in differing clauses, but to harmonize all clauses if possible." (citations omitted)).

If the language of the contract is "plain and unambiguous, there is no room for construction. The contract is to be interpreted as written," *Jones*, 222 N.C. at 413, 23 S.E.2d at 305 (citations omitted), and "enforce[d] . . . as the parties have made it," *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970) (citations omitted). Ambiguity exists "only when, 'in the opinion of the court, the language of the [contract] is fairly and reasonably susceptible to either of the constructions for which the parties contend.' " *State v. Philip Morris USA Inc. (Philip Morris II)*, 363 N.C. 623, 641, 685 S.E.2d 85, 96 (2009) (quoting *Wachovia Bank & Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522); *see also Walton v. City of Raleigh*, 342 N.C. 879,

1. The choice-of-law provision in the Lease provides: "This Lease shall be governed by, and construed in accordance with, the laws of the State in which the Premises are located."

881–82, 467 S.E.2d 410, 412 (1996) ("Parties can differ as to the interpretation of language without its being ambiguous . . . .").

To determine the agreement undertaken, "[a]ll contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together." *Yates v. Brown*, 275 N.C. 634, 640, 170 S.E.2d 477, 482 (1969) (citations omitted); *see also Wiles v. Mullinax*, 275 N.C. 473, 480, 168 S.E.2d 366, 371 (1969) ("Two sheets, attached together as parts of a single communication, must of course, be construed as one document." (citations omitted)); *Carolina Place Joint Venture v. Flamers Charburgers, Inc.*, 145 N.C. App. 696, 699, 551 S.E.2d 569, 571 (2001) (concluding that franchise agreement and guarantee, which was signed as inducement, "were merged into one document, the [f]ranchise [a]greement"). Where a document incorporates another by reference, the latter is construed as part of the former "as if it were set out at length therein." *Booker v. Everhart*, 294 N.C. 146, 152, 240 S.E.2d 360, 363 (1978) (citation omitted). In other words, if "several instruments" are "executed contemporaneously" and "pertain to the same transaction," they "are to be considered as component parts of the understanding between the parties" such that "the whole contract stands or falls together." *Pure Oil Co. of the Carolinas v. Baars*, 224 N.C. 612, 615, 31 S.E.2d 854, 856 (1944) (citations omitted).

If the contract is clear and unambiguous, there is no genuine issue of material fact; rather, construction is a matter of law for the court. *Carolina Place Joint Venture*, 145 N.C. App. at 699, 551 S.E.2d at 571 (citation omitted); *see also Asheville Mall, Inc. v. F.W. Woolworth Co.*, 76 N.C. App. 130, 132, 331 S.E.2d 772, 773–74 (1985) ("When the language of the contract is clear and unambiguous, . . . the court cannot look beyond the terms of the contract to determine the intentions of the parties." (citations omitted)). If the contract is ambiguous, however, its interpretation "is a matter for the jury." *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852 (2001); *see also Whirlpool Corp. v. Dailey Constr., Inc.*, 110 N.C. App. 468, 471, 429 S.E.2d 748, 751 (1993) ("[I]f the terms of the contract are ambiguous then resort to extrinsic evidence is necessary and the question is one for the jury." (citation omitted)).

Applying the foregoing principles, I believe the parties expressed a clear intent to treat the Lease and Guaranty as a single contract. Bally Holding executed the Guaranty contemporaneously with, if not prior to, the Lease as an "inducement" to the lessor. The Guaranty, attached as Exhibit C to the Lease, is explicitly referenced in the recitals: "WHEREAS, the performance of the obligations of Tenant under

this Lease is to be guaranteed by BALLY TOTAL FITNESS HOLDING CORPORATION . . . pursuant to a Guaranty in the form of Exhibit C attached hereto." The Guaranty, likewise, references the Lease and the liability of Bally Holding thereunder: "Whatever reference is made to the liability of Tenant with the Lease, such reference shall be deemed likewise to refer to the Guarantor." In addition to the cross-references contained in the documents, the Lease expressly incorporates the Guaranty. Article 1.1 provides: "[T]he recitals, as well as the exhibits attached to this Lease, are hereby incorporated into this Lease in their entirety."

Because the record plainly reveals that the Lease and Guaranty constitute a single contract, ratified by the First and Second Amendments to Lease, the Guaranty had to be assumed by the terms of the Assumption Order in the 2008–2009 Bankruptcy. Bally Holding could not sever the Lease, electing to avoid its obligations on the Guaranty while leaving the more favorable provisions intact. Such a construction runs counter to the expressed intent of the parties and impairs the rights of plaintiff to secure performance of the Lease obligations from Bally Holding. Our treatment of guaranty agreements should not be so rigid to preclude parties from drafting toward more suitable arrangements.

Contrary to the trial court's conclusion, the language assented to by the parties provides a clear indication that the Guaranty was "required to be maintained" with the assumption of the Lease. Bally Holding remains liable on the Guaranty, which was a component part of the Lease assumed in the 2008–2009 Bankruptcy. I would reverse the trial court's order and remand for entry of summary judgment in favor of plaintiff on its breach of contract claim against Bally Holding raised in the original complaint and in the first cause of action of the first amended complaint.

ELIZABETH HOLLAND, PLAINTIFF
v.
DONNIE HARRISON, IN HIS OFFICIAL CAPACITY AS WAKE COUNTY SHERIFF, OBI UMESI, IN HIS INDIVIDUAL CAPACITY, TONYA MINGGIA, IN HER INDIVIDUAL CAPACITY, AND THE OHIO CASUALTY INSURANCE COMPANY, DEFENDANTS

No. COA16-889

Filed 1 August 2017

1. Appeal and Error—interlocutory orders and appeals—substantial right—possibility of inconsistent verdicts

Plaintiff county jail nurse's appeal in a wrongful termination case from an interlocutory order dismissing her First Amendment claim was entitled to immediate appellate review. A substantial right was affected where a sufficient overlap existed between the remaining wrongful discharge claim and the First Amendment claim, and there existed a possibility of inconsistent verdicts absent an immediate appeal.

2. Tort Claims Act—42 U.S.C. § 1983—free speech—failure to meet burden to show matter of public concern

The trial court did not err in a wrongful termination case by dismissing plaintiff county jail nurse's free speech claim under 42 U.S.C. § 1983 alleging that she was fired because she voiced objections about performing a medical procedure on a patient. Even viewed in the light most favorable to plaintiff, she failed to meet her burden of proof showing that the speech was a matter of public concern where she spoke to her supervisors about a particular medicine for a specific patient, she never alleged a systematic problem with patient care at the workplace, and she never publicly voiced her concerns outside of the employment setting.

Appeal by plaintiff from order entered 13 May 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 9 February 2017.

Hairston Lane, PA, by M. Brad Hill and James E. Hairston Jr., for plaintiff-appellant.

Office of the Wake County Attorney, by Roger A. Askew and Claire H. Duff, and Office of the Wake County Sheriff, by Paul G. Gessner, for defendants-appellees.

DAVIS, Judge.

This case presents the issue of whether a nurse at a county jail has stated a valid First Amendment claim by alleging that she was fired because she voiced objections within the workplace to performing a medical procedure on a patient. Plaintiff Elizabeth Holland appeals from the trial court's order dismissing her free speech claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Because we conclude that Holland's speech did not pertain to a matter of public concern so as to invoke First Amendment protections, we affirm.

Factual and Procedural Background

We have summarized below the allegations in Holland's complaint, which we take as true in reviewing the trial court's Rule 12(b)(6) order. *See Feltman v. City of Wilson*, 238 N.C. App. 246, 247, 767 S.E.2d 615, 617 (2014).

In 2006, Holland began working as a nurse in the Wake County Detention Center. At all relevant times, she was supervised by Nurse Tonya Minggia and Dr. Obi Umesi.

During the week of 6 May 2013, Holland was asked by a Detention Center employee to administer an antibiotic — vancomycin — to a patient through an IV in order to treat the patient's infection. This drug was required to be administered twice daily for a period of six weeks. Based upon her medical experience, Holland believed that vancomycin could not be safely administered through an IV and instead should be delivered with the aid of a pump device. Holland felt that administering the drug through an IV could put the patient's life at risk, potentially expose her to a claim of malpractice, and subject her to the loss of her nursing license.

Holland expressed to Minggia her belief that the Detention Center lacked the proper equipment to safely administer the medicine. In response, Minggia informed Holland that the appropriate equipment to administer the drug would be procured.

As of Friday, 10 May 2013, the pump had not been obtained. Holland reiterated her belief to Minggia that she could not safely administer the drug through an IV, but Minggia nevertheless instructed her to do so. Holland objected that following Minggia's directive would "jeopardize her career and the life of her patient." She also informed Minggia that because of the high patient-to-nurse ratio at the Detention Center, "administering the medication as requested could endanger the health

and safety of the other patients that she was to monitor because she would have to spend the majority of her time administering the medication and could not monitor the other patients to which she was assigned."

Holland contacted the physician's assistant who oversaw the Detention Center's medical facility and relayed her concerns about administering vancomycin through an IV. The physician's assistant told Holland that she had communicated with a nurse outside of the facility who agreed with Holland's position regarding the proper administration of the drug. After Holland's continued refusal to administer vancomycin to the patient through an IV, another nurse at the Detention Center agreed to do so.

Holland was subsequently notified by the on-duty nurse supervisor that she was being removed from her normal assignment in the observation unit of the Detention Center and was instead to report the following Monday for an 11:00 a.m. to 7:00 p.m. shift in the intake unit. Holland objected to this transfer based upon her belief that it was in response to her refusal to administer the vancomycin in an unsafe manner. After receiving an email from Minggia confirming the new assignment, Holland sent an email on 11 May to Minggia, Holland's workers' compensation case manager, and the human resources department stating that she would not report to work in the new position until a medical opinion was provided by her workers' compensation healthcare provider that the new position was consistent with work restrictions previously imposed for Holland after she sustained a work-related injury.

By the end of Sunday, 12 May, Holland had not received any response to her email. She did not report to work the following day but made multiple attempts to contact her case manager and the human resources department of the Sheriff's Office.[1] She eventually reached her case manager, who stated that Holland's 11 May email had been forwarded to the workers' compensation administrator. The case manager agreed with Holland that she should not accept the intake assignment until a medical review was completed.

During a telephone call that afternoon, Minggia informed Holland that she should have reported to work for her new position in the intake unit at 11:00 that morning as directed. When Minggia asked Holland whether she would report to work the next day at 11:00 a.m., Holland responded that she would come to work after a 10:00 a.m. workers' compensation-related

1. The Detention Center is operated by the Wake County Sheriff's Office.

appointment but that she did not know when the appointment would end or whether her restrictions "would preclude her from performing certain duties under the new assignment." At that point, Minggia told Holland she was "no longer an employee of the Sheriff's [Office]" and was being "terminated because she did not show up for work [that morning]."

After her appointment the following day, Holland informed the human resources department that she would, in fact, report to work in the new position, but she was told to stay home and await further communications from the Sheriff's Office. Holland received a letter by hand-delivery later that day stating that her employment was being terminated effective immediately.

On 21 December 2015, Holland filed the present action in Wake County Superior Court against Sheriff Donnie Harrison, in his official capacity; Dr. Umesi, in his individual capacity; Minggia, in her individual capacity; and the Sheriff's Office's insurance carrier, the Ohio Casualty Insurance Company (collectively "Defendants"). In her complaint, Holland asserted (1) state law claims for wrongful discharge in violation of public policy, tortious interference with contract, and violation of her right to due process under the North Carolina Constitution; and (2) federal claims pursuant to 42 U.S.C. § 1983 for violation of her free speech and due process rights under the United States Constitution. In her complaint, Holland alleged that Minggia and Dr. Umesi had intentionally misled the Sheriff regarding the circumstances surrounding her failure to report to work on 13 May 2013 in order to induce him to dismiss Holland. She asserted that, in actuality, the reasons for their recommendation that Holland be dismissed were her objection to administering the vancomycin as well as prior disagreements between her and them about patient care.

On 3 March 2016, Defendants filed a partial motion to dismiss pursuant to Rule 12(b)(6) in which they asserted that Holland had failed to state any valid claims upon which relief could be granted except for her state law wrongful discharge claim. Following a hearing before the Honorable Paul C. Ridgeway on 13 May 2016, the trial court issued an order granting in part and denying in part Defendants' motion. The court dismissed Holland's state and federal constitutional claims but declined to dismiss her claim for tortious interference with contract.[2] Holland filed a timely notice of appeal as to the portion of the trial court's order

2. Because Holland's wrongful discharge claim was not within the scope of Defendants' motion to dismiss, that claim also remains pending.

dismissing her 42 U.S.C. § 1983 claim for violation of her free speech rights under the First Amendment.[3]

Analysis

I. Appellate Jurisdiction

[1] Defendants seek the dismissal of Holland's appeal as interlocutory. Accordingly, we must determine whether we have appellate jurisdiction to hear this appeal. *See Duval v. OM Hospitality, LLC*, 186 N.C. App. 390, 392, 651 S.E.2d 261, 263 (2007) ("[W]hether an appeal is interlocutory presents a jurisdictional issue[.]" (citation and quotation marks 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). Therefore, because the trial court's order decided some, but not all, of Holland's claims, this appeal is interlocutory.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Paradigm Consultants, Ltd. v. Builders Mut. Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013) (citation and quotation marks omitted). The prohibition against interlocutory appeals "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." *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 800, 526 S.E.2d 494, 496 (2000) (citation and brackets omitted).

> However, there are two avenues by which a party may immediately appeal an interlocutory 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.

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3. Holland has not appealed the remaining aspects of the trial court's order.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (internal citations omitted).

The trial court's 13 May 2016 order does not contain a certification under Rule 54(b). Therefore, Holland's appeal is proper only if she can demonstrate a substantial right that would be lost absent an immediate appeal. *See Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) ("The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." (citation omitted)).

Our caselaw makes clear that a substantial right is affected "where a possibility of inconsistent verdicts exists if the case proceeds to trial." *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 627, 727 S.E.2d 311, 314 (2012) (citation and quotation marks omitted).

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

Id. at 627-28, 727 S.E.2d at 314-15 (citation, quotation marks, and brackets omitted); *see also Carcano v. JBSS, LLC*, 200 N.C. App. 162, 168, 684 S.E.2d 41, 47 (2009) ("[S]o long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined." (citation and quotation marks omitted)). "Issues are the 'same' if facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011).

In the present case, we are satisfied that a sufficient overlap exists between Holland's surviving claim for wrongful discharge and her First Amendment claim that was dismissed by the trial court such that there exists a possibility of inconsistent verdicts absent immediate appeal of the trial court's order. Specifically, Holland's complaint alleges that she was discharged because she protested to her supervisors that administering vancomycin through an IV would be dangerous to her patient whereas Defendants assert that she was fired for not reporting to work on 13 May 2013. It is clear that the factual issue regarding the cause of Holland's dismissal would arise in both a trial on the wrongful discharge

claim and a trial on the First Amendment claim given that both claims hinge upon the actual reason for the termination of her employment.

Our consideration of this interlocutory appeal is consistent with this Court's prior caselaw. In *Bowling v. Margaret R. Pardee Mem'l Hosp.*, 79 N.C. App. 815, 635 S.E.2d 624 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 425, 648 S.E.2d 206 (2007), the plaintiff asserted claims for violation of the North Carolina Disabilities Act and for wrongful discharge in violation of public policy. At the heart of both claims was the issue of whether the defendant terminated the plaintiff's employment because of poor performance or because of a health issue. At the motion to dismiss stage, the trial court dismissed the North Carolina Disabilities Act claim but allowed the wrongful discharge claim to go forward, prompting the plaintiff to file an interlocutory appeal. *Id.* at 818, 635 S.E.2d at 627. We concluded that the plaintiff's "North Carolina Disabilities Act claim and his claim for wrongful discharge in violation of public policy . . . unquestionably involve the same facts and circumstances, namely, his termination by [the defendant] Hospital. If we refuse his appeal, two trials and possibly inconsistent verdicts could result." *Id.*; *see also Taylor v. Hospice of Henderson Cnty., Inc.*, 194 N.C. App. 179, 182, 668 S.E.2d 923, 925 (2008) (applying *Bowling* in similar circumstances).

Thus, we are satisfied that we possess jurisdiction to consider the merits of Holland's appeal. *See Carcano*, 200 N.C. App. at 168, 684 S.E.2d at 47 ("Because there are overlapping factual issues, inconsistent verdicts could result. We hold, thus, that . . . plaintiffs' appeal is properly before us.").

II. Dismissal of First Amendment Claim

[2] As noted above, Holland's sole argument on appeal is that the trial court erred in granting Defendants' motion to dismiss her free speech claim under 42 U.S.C. § 1983.

> The standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Feltman, 238 N.C. App. at 251, 767 S.E.2d at 619 (citation omitted).

"Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citation omitted).

Section 1983 provides a private right of action against anyone who, acting under color of state law, causes the "deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983. In order to state a § 1983 claim alleging a wrongful discharge or demotion in violation of the First Amendment, a public employee must allege facts showing that (1) "the speech complained of qualified as protected speech or activity"; and (2) "such protected speech or activity was the 'motivating' or 'but for' cause for his discharge or demotion." *McLaughlin v. Bailey*, 240 N.C. App. 159, 172, 771 S.E.2d 570, 580 (2015) (citation and quotation marks omitted), *aff'd per curiam*, 368 N.C. 618, 781 S.E.2d 23 (2016).

In order to establish that the employee engaged in protected speech, she must show that "(i) the speech pertained to a matter of public concern and (ii) the public concern outweighed the governmental interest in efficient operations." *Hawkins v. State*, 117 N.C. App. 615, 625-26, 453 S.E.2d 233, 239 (1995) (citation and quotation marks omitted). The determination of whether speech is protected under the First Amendment is a question of law. *Id.* at 626, 453 S.E.2d at 239.

Defendants contend that even taking Holland's factual allegations as true, she has failed to establish that her speech related to a matter of public concern. A "matter of public concern" is one that "relates to any matter of political, social, or other concern to the community." *Id.* (citation and quotation marks omitted). "The reviewing court must examine the employee's speech in light of the content, form, and context of a given statement, as revealed by the whole record[,] to determine whether it is a matter of public concern." *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 419, 417 S.E.2d 277, 283 (1992) (citation, quotation marks, and alterations omitted).

> The test is whether the employee was speaking as a citizen about matters of public concern, or as an employee on matters of personal interest. Moreover, complaints about conditions of employment or internal office affairs generally concern an employee's self-interest rather than

> public concern, even though a governmental office may be involved[.]

Evans v. Cowan, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175-76 (1999) (internal citation omitted).

As a general proposition, courts are more likely to conclude that speech involves a matter of public concern when the speech is directed at an audience wider than one's immediate supervisors. *See*, *e.g.*, *Durham v. Jones*, 737 F.3d 291, 300 (4th Cir. 2013) (noting that plaintiff "did not keep the written materials internal, but instead sent them to a broad audience" including public officials and media outlets); *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1104 (9th Cir. 2011) ("Although not dispositive, a small or limited audience weighs against a claim of protected speech." (citation, quotation marks, and brackets omitted)).

Evans is instructive on this point. In *Evans*, the plaintiff was hired by the University of North Carolina at Chapel Hill's Student Health Services ("SHS") to help run the AfterHours Program ("AfterHours"), which provided health services to students outside of normal business hours. *Evans*, 132 N.C. App. at 2, 510 S.E.2d at 171-72. During several internal task force meetings related to the operation of AfterHours, the plaintiff made numerous suggestions for improvements to the program, including the cost-saving measure of hiring full-time nurse practitioners (rather than contracting with outside physicians) and the development of a comprehensive alcohol policy that would address students' alcohol-related health problems. *Id.* at 2-3, 510 S.E.2d at 172. She also expressed concern over the fact that a particular SHS volunteer consultant "was a non-employee acting in a medical capacity at a state institution." *Id.* at 3, 510 S.E.2d at 172. In addition, she voiced her disapproval of SHS's plan to allow physicians who were part of a fellowship program to supervise nurse practitioners, a policy she felt violated a state regulation governing the supervision of nurse practitioners. *Id.* She was subsequently discharged from her employment with SHS. *Id.* at 4, 510 S.E.2d at 173.

The plaintiff filed a lawsuit in which she alleged that SHS had retaliated against her in violation of her free speech rights, and the claim was dismissed by the trial court. *Id.* at 5, 510 S.E.2d at 173. On appeal, we affirmed the trial court's dismissal of the claim because the plaintiff's statements "related to internal policies and office administration of SHS and did not rise to the level of public concern." *Id.* at 10, 510 S.E.2d at 176. Notably, we observed that "no evidence in the record indicates plaintiff ever voiced her concerns publicly outside the employment setting, which would tend to indicate a public concern." *Id.*

Evans underscores the relevance to this inquiry of the context and form of the speech at issue. The *content* of the communications made by the plaintiff in *Evans* arguably touched upon matters of public concern — *i.e.*, the cost-effectiveness of a healthcare program at a publicly-funded university, the program's ability to help students deal with alcohol problems, and the program's compliance with regulations concerning the oversight of nurses. However, the internal nature of her complaints militated against a conclusion that they involved matters of public concern such that free speech protections would attach.

Conversely, *Lenzer v. Flaherty*, 106 N.C. App. 496, 418 S.E.2d 276, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992), provides an example of a case in which we held that a public employee's speech dealt with a matter of public concern where the employee raised the issue of wrongdoing in her workplace to parties outside of her direct employment setting. In that case, the plaintiff — a physician's assistant employed by the State's Alcohol Rehabilitation Center ("ARC") — complained to the State Bureau of Investigation ("SBI") and the State Department of Human Resources ("DHR") that ARC was not adequately investigating instances of suspected sexual abuse of patients by ARC personnel. *Id.* at 501, 418 S.E.2d at 279. After the plaintiff was dismissed from her employment, she filed a lawsuit alleging that her free speech rights had been violated because she was discharged in retaliation for having reported ARC's mishandling of suspected patient abuse to the SBI and the DHR. The trial court granted the defendants' motion for summary judgment and dismissed this claim. *Id.* at 505, 418 S.E.2d at 281.

In reversing the trial court's dismissal of the plaintiff's free speech claim, we rejected the notion that the "plaintiff was speaking out for personal reasons unrelated to a matter of public concern when she questioned the vigor of investigations into possible mistreatment of patients at the ARC." *Id.* at 507, 418 S.E.2d at 283. We noted that "the ARC administration, knowing of an incident of sexual misconduct . . . , sought to keep that information from going beyond the ARC." *Id.* Thus, the fact that the plaintiff raised concerns outside of ARC about its handling of instances of sexual abuse (particularly in the face of ARC's attempt to keep such information from being made public) was relevant to our conclusion that her speech addressed a matter of public concern. *Id.* at 508, 418 S.E.2d at 283.

Warren v. New Hanover County Board of Education, 104 N.C. App. 522, 410 S.E.2d 232 (1991), provides another example of the significance of the context in which the speech at issue is conveyed to

others. In *Warren*, the plaintiff was a public school teacher who also served as the president of the New Hanover County affiliate of the North Carolina Association of Educators ("NCAE"). The plaintiff had historically received "very positive evaluations of his teaching performance" and had twice been selected as "Teacher of the Year." *Id.* at 524, 410 S.E.2d at 233. However, after publicizing the results of an NCAE survey that showed New Hanover County's public school teachers to be dissatisfied with a merit pay pilot program, the plaintiff received unfavorable performance evaluations and was denied a promotion. He sued the New Hanover County Board of Education, alleging that it had denied him the promotion in retaliation for his protected speech. *Id.*

In concluding that the plaintiff's speech involved a matter of public concern, we highlighted the fact that the plaintiff had "addressed the Board about the survey results at a public school board meeting." *Id.* at 526, 410 S.E.2d at 234. Thus, the plaintiff's act of publicly communicating the results of the teacher pay survey to the body tasked with overseeing school policy supported our determination that his speech pertained to a matter of public concern.

Guided by the cases discussed above, we conclude that in the present case the trial court did not err in dismissing Holland's § 1983 claim. Holland voiced within the workplace a disagreement with her supervisors regarding the appropriate method for administering a particular medicine to a specific patient. She has not pled facts alleging a systemic problem with patient care at the Detention Center or asserting that she "ever voiced her concerns publicly outside the employment setting, which would tend to indicate a public concern." *Evans*, 132 N.C. App. at 10, 510 S.E.2d at 176. Rather, the speech at issue here involved an internal dispute as to the proper way for Holland to perform her job duties that were largely focused on the treatment of a single patient.

Nothing in our holding, however, should be construed as diminishing the importance of patient safety in public medical facilities. In appropriate circumstances, a public employee's speech about the mistreatment of such patients could certainly rise to the level of public concern so as to invoke the First Amendment. However, even taking Holland's allegations in the light most favorable to her, we are unable to conclude that her speech under the specific circumstances alleged in her complaint involved a matter of public concern.

Accordingly, Holland has failed to state a free speech claim under 42 U.S.C. § 1983. Therefore, the trial court's dismissal of this claim was proper.

Conclusion

For the reasons stated above, we affirm the trial court's 13 May 2016 order.

AFFIRMED.

Chief Judge McGEE and Judge MURPHY concur.

IN THE MATTER OF C.M.P., C.Q.M.P., J.A.C.

No. COA16-1230

Filed 1 August 2017

1. Termination of Parental Rights—motion for continuance—unexplained absence of parent at hearing—no showing of actual prejudice

The trial court did not abuse its discretion in a termination of parental rights case by denying respondent mother's motion for a continuance based on her unexplained absence at the termination hearing. Respondent failed to preserve the issue of whether the denial of the motion violated her due process right to effective assistance of counsel by failing to raise it at trial. Further, there was no showing of actual prejudice where respondent's counsel, who represented her for three years in this matter, fully participated in the hearing and did not indicate she needed more time to prepare.

2. Termination of Parental Rights—grounds—neglect—domestic violence—unstable housing and employment—improper supervision

The trial court did not err in a termination of parental rights case by concluding grounds existed to terminate respondent mother's parental rights based on neglect under N.C.G.S. § 7B-1111(a)(1) for domestic violence issues, unstable housing and employment, and improper supervision. The trial court's findings supported the conclusion that there was a high probability of the repetition of neglect if the children were returned to respondent's care. Since one ground existed to terminate respondent's parental rights, other grounds did not need to be addressed.

Judge MURPHY concurring in a separate opinion.

IN RE C.M.P.

[254 N.C. App. 647 (2017)]

Appeal by respondent-mother from order entered 7 September 2016 by Judge David H. Strickland in Mecklenburg County District Court. Heard in the Court of Appeals 11 July 2017.

Senior Associate Attorney Keith S. Smith, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

J. Thomas Diepenbrock for respondent-appellant mother.

BRYANT, Judge.

Where the trial court did not err in denying respondent's motion for a continuance or in concluding grounds existed to terminate respondent's parental rights, we affirm.

Respondent is the mother of C.M.P. ("Charlene"), C.Q.M.P. ("Charles"), and J.A.C. ("Jackson"),[1] and Mr. P. is the father of Charlene and Charles. Respondent and Mr. P have a history with the Mecklenburg County Department of Social Services, Youth and Family Services ("YFS") dating back to 2011 due to issues of domestic violence and inappropriate discipline. YFS most recently became involved with the family on 13 March 2013, when it received a referral alleging that a domestic violence incident occurred between respondent and Mr. P., wherein respondent's C-section stitches were torn during the incident. Mr. P. was charged with assault on a female. After the incident, respondent and the children briefly stayed with the maternal grandmother before moving into the paternal grandmother's home with Mr. P. and Mr. P.'s seventeen-year-old sister.

On 17 June 2013, YFS received a referral alleging suspected sexual abuse of then three-month-old Charlene. A medical examination revealed that the child's genital and rectal area had been subjected to trauma and that her hymen was not intact, but the source of the injuries could not be determined. At the time of the injury, two male cousins aged thirteen and fourteen years old were visiting at the home and had unsupervised contact with Charlene. However, no one on the paternal side of the family believed the cousins could have been the source of the injuries.

1. Pseudonyms are used to protect the juveniles' privacy and for ease of reading. N.C. R. App. P. 3.1(b) (2017).

Respondent entered into a safety plan in which she agreed to return to the home of the maternal grandmother and also agreed there would be constant "eye/sight" supervision of the children at all times by the maternal grandmother. Because there was also a history of domestic violence between the maternal grandmother and respondent, they also agreed not to engage in any violence in the presence of the children. YFS transferred the case to family intervention on 8 July 2013.

On 15 July 2013, YFS received a referral alleging that a domestic violence incident had occurred between respondent and the maternal grandmother wherein respondent assaulted the maternal grandmother by pushing her hand in the grandmother's face. YFS also received information that respondent threw a rock through the grandmother's storm door shattering the glass. The children were present during both incidents. Respondent was cited for damage to property and violating a domestic violence protective order ("DVPO") the maternal grandmother had taken out against respondent based on a "history of assaultive behavior" beginning in 2008. The maternal grandmother stated that she was overwhelmed by taking care of the children and that she could only provide care through 16 July 2013.

On 17 July 2013, YFS filed a juvenile petition alleging that the children were abused, neglected, and dependent, and took the children into nonsecure custody. The children were placed with a maternal cousin on 31 July 2013 and have remained in that placement for the duration of the case.

A hearing was held on the juvenile petition on 18 September 2013. Respondent stipulated to the allegations in the petition, and the trial court entered an order adjudicating the children neglected and dependent as to respondent.[2] The trial court ordered respondent to comply with her case plan which required her to participate in a parenting course and demonstrate the skills learned, obtain and maintain adequate employment, obtain and maintain safe and stable housing, and complete a domestic violence assessment at NOVA, a domestic violence education and services provider, and follow all recommendations.

Respondent initially engaged in her case plan by completing a parenting class, completing an assessment with NOVA, and obtaining employment. However, on 28 September 2014, respondent and Mr. P. engaged in

2. Mr. P. had not been served at the time of the hearing and the trial court held adjudication as to him in abeyance. Charlene and Charles were adjudicated neglected and dependent as to Mr. P. on 2 December 2013.

a domestic violence incident resulting in their arrests. Respondent lost her job due to her arrest, and she was allowed only supervised visitation with the children.

A permanency planning review hearing was held on 2 December 2014, and the trial court found that respondent was incarcerated due to charges of armed robbery and conspiracy to commit armed robbery. She had been arrested on 29 November 2014 and was still incarcerated at the time of the 2 December 2014 hearing. The court suspended her visitation while she was incarcerated.

Another permanency planning review hearing was held on 12 May 2015, and the trial court found that respondent had not visited with the children since December 2014, despite the fact that suspension of visitation had been lifted upon her release from jail.[3] The trial court also found that respondent was living with the maternal grandmother, and was employed. The court further found that respondent "ha[d] not yet shown that she can parent her children" and "was advised that she [would] need to have perfect compliance during [the] upcoming review period." Respondent was awarded two hours of supervised visitation a week but was ordered to complete two clean drug tests before she could exercise her visitation. The trial court continued the permanent plan (first imposed on 30 December 2013) as reunification with respondent.

On 15 April 2015, respondent was arrested again for injury to real property and injury to personal property. On 15 July 2015, respondent tested positive for cocaine. A subsequent drug screen on 22 July 2015 came back positive for cocaine and alcohol. Respondent denied using cocaine. Respondent also had an unauthorized, unsupervised four-day visit with the children in July 2015. She reentered substance abuse treatment, but had other subsequent drug screens which were positive for cocaine on 10 and 17 September 2015. She subsequently completed the substance abuse program in March 2016.

In March 2016, respondent and Mr. P. engaged in another domestic violence incident, after which they both were charged with assault and respondent obtained a DVPO against Mr. P. On 24 June 2016, YFS filed a petition to terminate respondent's parental rights on the grounds of neglect, failure to make reasonable progress, failure to pay reasonable

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3. The record indicates that respondent was able to have one supervised visit with the children on Christmas Day at the maternal grandmother's home upon her release from jail, but as of the week before the hearing on 12 May 2015, the children had no other visits with respondent after December 2014.

cost of care, and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2), (3), (6) (2015).

After a seventh permanency planning review hearing held 22 July 2016, the trial court found that respondent had been discharged from NOVA due to excessive absences, had another new job, had a pending hit and run charge, and had been arrested for assault after the March 2016 domestic violence incident with Mr. P.

The hearing on the petition to terminate respondent's parental rights was held on 25 August 2016. At the start of the hearing, respondent's counsel moved to continue because respondent was not present and counsel had "expected her to be [t]here." The trial court denied the motion and went forward with the hearing. A social worker testified that respondent had not made sufficient progress on her case plan to show she would be able to successfully and appropriately parent her children in that she did not have stable housing, had not completed the NOVA domestic violence program, and her employment had been inconsistent over time. The social worker also testified that respondent was inconsistent with her visits with the children and had not seen them in the month prior to the hearing despite being allowed to have weekly visitation. The social worker further testified respondent had a history of making progress on her case plan but then regressing. The trial court entered an order on 7 September 2016 terminating respondent's parental rights to all three children on the grounds of neglect, failure to make reasonable progress, and dependency. Respondent appeals.

On appeal, respondent contends the trial court erred by (I) summarily denying respondent's motion to continue, and (II) concluding grounds existed for terminating respondent's parental rights.

I

[1] Respondent first argues the trial court erred in summarily denying her motion to continue based on her unexplained absence at the termination hearing. Respondent contends the court's decision deprived her of her right to effective assistance of counsel. We disagree.

The standard for granting a motion to continue is set out in N.C. Gen. Stat. § 7B-803, which provides in relevant part as follows:

> The court may, for good cause, continue the hearing for as long as is reasonably required to receive additional evidence, reports, or assessments that the court has requested,

> or other information needed in the best interests of the juvenile and to allow for a reasonable time for the parties to conduct expeditious discovery. Otherwise, continuances shall be granted only in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.

N.C. Gen. Stat. § 7B-803 (2015).

"A trial court's decision regarding a motion to continue is discretionary and will not be disturbed on appeal absent a showing of abuse of discretion. Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation." *In re J.B.*, 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005) (citations omitted). "However, if 'a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal.' " *In re D.Q.W.*, 167 N.C. App. 38, 40–41, 604 S.E.2d 675, 677 (2004) (quoting *State v. Jones*, 342 N.C. 523, 530–31, 467 S.E.2d 12, 17 (1996)).

Respondent argues that the trial court's denial of her motion to continue implicates her due process right to effective assistance of counsel, including the right of a client and counsel to have adequate time to prepare a defense, and thus the issue presents a question of law which is fully reviewable on appeal. Respondent, however, presents this constitutional argument for the first time on appeal.

To determine whether a failure to grant a continuance implicates constitutional rights, the reasons presented for the requested continuance are of particular importance. *Id.* at 42, 604 S.E.2d at 677. In the instant case, respondent's counsel raised only one ground to support the motion to continue at the hearing: that respondent was absent from the hearing. As previously noted, respondent raises for the first time on appeal the issues of effective assistance of counsel and adequate time to prepare a defense. "In order to preserve a question 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) (2017). Therefore, respondent failed to preserve the issue of whether the denial of the motion violated her constitutional right to effective assistance of counsel.

Further, this Court has held that a parent's due process rights are not violated when parental rights are terminated at a hearing at which the parent is not present. *See In re Murphy*, 105 N.C. App. 651, 658, 414

S.E.2d 396, 400 (1992). Thus, respondent's motion to continue was not based on a constitutional right, and we review the trial court's denial of the motion for abuse of discretion. *See In re D.W.*, 202 N.C. App. 624, 627, 693 S.E.2d 357, 359 (2010) (reviewing the denial of the absent respondent mother's motion to continue based on her right to be present at the hearing for abuse of discretion).

After denying respondent's motion to continue, the trial court conducted a full hearing on the petition, heard testimony from several witnesses, and respondent's counsel was given full opportunity to cross-examine each witness. Indeed, respondent's counsel fully participated in the hearing by frequently objecting to testimony she deemed inadmissible, cross-examining witnesses, and presenting a closing argument on respondent's behalf. A court reporter also prepared a stenographic transcript of the hearing.

"When . . . a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail on appeal." *Murphy*, 105 N.C. App. at 658, 414 S.E.2d at 400 (citing *In re Barkley*, 61 N.C. App. 267, 270, 300 S.E.2d 713, 715–16 (1983)). Respondent argues she was prejudiced by the denial of the motion because her presence at the hearing was essential for her attorney to present an adequate defense, and that she was not able to testify regarding her case plan progress and rebut evidence presented by YFS.

Here, respondent was served with a summons and a copy of the petition on 4 July 2016 and does not argue that she lacked notice of the hearing. Respondent's attorney informed the court that she had spoken with respondent by telephone a few days prior to the hearing and that counsel expected her to be in court that day. Counsel had been representing respondent in this matter for three years, throughout the entirety of the case starting in 2013, and at no time did she make the argument that she needed additional time to prepare for the hearing. Thus, "[w]e see no possibility that respondent was unfairly surprised or that her ability to contest the petition to terminate was prejudiced." *In re Mitchell*, 148 N.C. App. 483, 487, 559 S.E.2d 237, 240 (citations omitted), *rev'd on other grounds*, 356 N.C. 288, 570 S.E.2d 212 (2002). Further, the record does not disclose any attempt by respondent to contact the court or her counsel to inform them of any issue preventing her attendance at the hearing, and she has not provided any reason for her absence. "Courts cannot permit parties to disregard the prompt administration of judicial

matters. To hold otherwise would let parties determine for themselves when they wish to resolve judicial matters." *Id.* at 488, 559 S.E.2d at 241. Therefore, we hold the trial court did not abuse its discretion in denying respondent's motion for a continuance.

II

[2] Respondent next argues the trial court erred in concluding that grounds existed to terminate her parental rights. Specifically, respondent contends the trial court erred when it concluded respondent neglected the juveniles, willfully left the juveniles in a placement outside the home, and is incapable of proper care and supervision of the juveniles. We disagree.

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Shepard*, 162 N.C. App. 215, 221–22, 591 S.E.2d 1, 6 (2004) (quoting *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984)). "If the trial court's findings of fact 'are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary.' " *In re S.C.R.*, 198 N.C. App. 525, 531, 679 S.E.2d 905, 909 (2009) (quoting *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988)). Unchallenged findings of fact "are conclusive on appeal and binding on this Court." *Id.* at 532, 679 S.E.2d at 909 (citation omitted). We review the trial court's conclusions of law *de novo*. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008).

Pursuant to N.C. Gen Stat. § 7B-1111(a)(1), "[t]he trial court may terminate the parental rights to a child upon a finding that the parent has neglected the child." *In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 427 (2003) (citing N.C.G.S. § 7B-1111(a)(1)). A neglected juvenile is defined, in relevant part, as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2015).

"A finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citation omitted). However, when, as here, the children have been removed from their parent's custody such that it would be impossible to show that the children are currently being neglected by their parent, "a prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the

ground of neglect." *In re Ballard*, 311 N.C. 708, 713–14, 319 S.E.2d 227, 231 (1984). If a prior adjudication of neglect is considered, "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* at 715, 319 S.E.2d at 232 (citation omitted). Thus, where

> there is no evidence of neglect at the time of the termination proceeding . . . parental rights may nonetheless be terminated if there is a showing of a past adjudication of neglect and the trial court finds by clear and convincing evidence a probability of repetition of neglect if the juvenile were returned to [his or] her parents.

In re Reyes, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (citing *Ballard*, 311 N.C. at 716, 319 S.E.2d at 232).

> That a parent provides love and affection to a child does not prevent a finding of neglect. Neglect exists where the parent has failed in the past to meet the child's physical and economic needs and it appears that the parent will not, or cannot, correct those inadequate conditions within a reasonable time.

In re J.H.K., 215 N.C. App. 364, 369, 715 S.E.2d 563, 567 (2011) (citations omitted). A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect. *See In re D.M.W.*, 173 N.C. App. 679, 688–89, 619 S.E.2d 910, 917 (2005) (Hunter, J., dissenting) ("[R]espondent needed to successfully treat her substance abuse and domestic violence issues, demonstrate appropriate parenting skills, and maintain a stable, appropriate home. Respondent provided little evidence that she has achieved any of these objectives."), *rev'd for reasons stated in dissenting opinion*, 360 N.C. 583, 635 S.E.2d 50 (2006).

Here, the trial court made the following relevant findings of fact.

> 6. The issues which caused DSS/YFS to remove these three juveniles included, among other things, [respondent's] and [Mr. P.'s] domestic violence history; unstable housing and employment as well as the parents' inappropriate supervision of the juveniles. The family's CPS[4] history was also significant. Specifically, there were three prior referrals with this family. First, on January 18, 2011, it was alleged that while [respondent] was living with the

4. *See infra* note 5.

maternal grandmother, some of the children appeared to have unexplained bruising. Second, on May 9, 2012, it was alleged that [respondent] and children had unstable housing, there was domestic violence between [respondent] and [Mr. P.], and the parenting/supervision of the children was inappropriate. Third, on March 13, 2013, there was additional domestic violence between [respondent] and [Mr. P.] where [respondent] was holding [Charles] at the time who was also reportedly injured.

7. The Court conducted an adjudicatory hearing on September 18, 2013, but the adjudication for [Mr. P.] was held in abeyance until December 2, 2013 because he had not been served with the underlying juvenile petition and summons as of the September hearing. The juveniles were all eventually adjudicated neglected and dependent. Respondent mother was present at both the September and December hearings. [Mr. P.] was present during the December hearing only.

. . . .

9. As part of her case plan, the respondent mother was required to complete parenting education, obtain and maintain safe and stable housing and employment, and complete domestic violence education (through NOVA). The expectation with the completion of the classes was that the lessons would be internalized such that there would be a behavioral change, and that the completion of classes was not just a "checklist."

. . . .

12. There was a domestic violence incident on September 28, 2014 which resulted in both respondent mother and [Mr. P.] being arrested.

13. As of the first Permanency Planning Review (PPR) Hearing on December 2, 2014, [respondent] was incarcerated due to charges of armed robbery and conspiracy to commit armed robbery. As of this hearing, [respondent] was working at Time Warner Cable arena (arena), living with the maternal grandmother and, as noted above, had completed her parenting classes. . . .

14. As of the second PPR Hearing on March 24, 2015, [respondent] was attending NOVA classes and was employed but no longer at the arena. [Respondent] had identified a possible residence, but it needed some repair work before she or the juveniles could live there. [Respondent] was also addressing her substance abuse problems with Anuvia and with FIRST Level 2 drug court. . . .

15. As of the third PPR Hearing on May 12, 2015, [respondent] was working at a new job (at Saddle Creek Cleaning), she was looking for new housing, she was inconsistently attending NOVA and weekly therapy, and had been unsuccessfully discharged from Anuvia. The Court noted during this hearing that [respondent] has not demonstrated an ability to parent her children and would need to show perfect compliance during the upcoming review period. . . .

16. As of the fourth PPR Hearing on August 25, 2015, [respondent] had provided multiple positive drug screens and had started a new drug treatment program (SACOT—substance abuse comprehensive outpatient treatment), she had a new job at a hotel and at Bank of America stadium, she had still not completed NOVA and had a four-day unauthorized, unsupervised visit with the juveniles. . . .

17. As of the seventh PPR Hearing on July 22, 2016, [respondent] had been clean and sober for several months (including the completion of an in-patient substance abuse program in early 2016 and the submission of multiple clean drug screens), she had a new job at Mercy Hospital, but had been discharged from NOVA due to excessive absences. She has never completed a domestic violence program. [Respondent] was struggling to pay the NOVA fees, but [she] had been employed for some time and was living with maternal grandmother. [Respondent] also has a pending Hit and Run charge and has been arrested twice recently for assault. The alleged victim is [Mr. P.] [Mr. P.] was arrested in June 2016 for assault as well. The respondent mother is the alleged victim of his assault charge. . . .

. . . .

22. The Court's frustration with [respondent] is that she clearly loves her children. The children also love her.

> However, [respondent] is inconsistent with her attendance at visitation. Additionally, because of her lack of case plan progress, she has never been able to put herself in a position to consistently have unsupervised visitation. Indeed, [respondent] (three years into this case) still only has two hours of weekly supervised visitation. When visits do occur between [respondent] and the juveniles, they generally go well—she brings snacks, games and other activities and sometimes clothing. Regarding her attendance at visitation, between Christmas 2014 and mid-March 2015, [respondent] did not visit with the children. Moreover, earlier in 2016, [respondent] attended five consecutive visits all of which went well, had visits on June 2 and 23, 2016 and one visit in July, but between that July 2016 visit and this hearing [on 25 August 2016], she missed four consecutive visits. Additionally, [respondent's] housing remains unstable. She was ineligible for the Family Unification Program (a government-supported housing assistance program) because of her criminal background. While [respondent] has consistently had employment throughout the history of this case, she has failed to maintain employment at one location for an extended period of time. She repeatedly loses her job and has to obtain new employment. [Respondent's] absence from this TPR hearing, despite actual notice, is also noteworthy. *It is apt to say that she will take one step forward followed by two steps back.* [Respondent] has still not demonstrated an ability to care for her children due to issues of domestic violence, housing, and stability.

(Emphasis added).

Respondent challenges Findings of Fact Nos. 6 and 22 as not being supported by clear and convincing evidence. First, respondent challenges the portion of Finding of Fact No. 6 which states that "[t]he issues which caused DSS/YFS to remove these three juveniles included, among other things, [respondent's] and [Mr. P.'s] domestic violence history; unstable housing and employment as well as the parents' inappropriate supervision of the juveniles." Respondent contends that this finding is "misleading" because although there had been domestic violence incidents between respondent and Mr. P., it was other events occurring after that time which led to YFS filing the petition, including suspected sexual abuse of Charlene, incidents of domestic violence between respondent

and her mother, and the maternal grandmother's inability to care for the children after 16 July 2013. Respondent contends that neither YFS's petition, nor the adjudication portion of the adjudication and disposition order, identified housing or employment as reasons leading to the removal of the children from their parents' care.

Contrary to respondent's assertion, domestic violence between respondent and Mr. P. was a factor for YFS becoming involved in the case and for the removal of the children from respondent's care. The juvenile petition included an allegation that YFS received a referral alleging domestic violence between respondent and Mr. P., that respondent was treated at the hospital, and that Mr. P. was charged with assault on a female. The petition also included respondent's history with Child Protective Services ("CPS")[5] due to issues of inappropriate discipline and domestic violence with Mr. P. Respondent stipulated to these findings in the initial adjudication order.

Additionally, the trial court specifically found in the adjudication and disposition order that the "problems which led to the adjudication and must be resolved to achieve reunification and/or otherwise conclude this case . . . include but are not necessarily limited to housing and employment stability." Finally, at the hearing, the social worker testified regarding respondent's CPS history and that the issues that needed to be addressed were domestic violence and unstable housing and employment. This is clear and convincing evidence to support Finding of Fact No. 6.

Respondent also challenges the portion of Finding of Fact No. 22 which states that her housing remains unstable. Respondent contends that she is living with the maternal grandmother and there are no findings that this arrangement was unstable. However, in a prior YFS report, incorporated by reference into the 30 December 2013 review order, YFS stated that respondent "does not have stable housing and is residing with her mother." Respondent was also not allowed to have unsupervised visits at the maternal grandmother's home due to their history of domestic violence. At the termination hearing, the social worker testified that respondent had not secured her own housing throughout the case and continued to reside with the maternal grandmother. Indeed, the social worker testified that respondent "doesn't have stable housing." This is clear and convincing evidence that respondent had not obtained stable housing and supports Finding of Fact No. 22.

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5. CPS is a division of the Mecklenburg County Department of Social Services ("DSS") separate from YFS.

Finally, respondent challenges the portion of the trial court's Conclusion of Law No. 6 that "[t]here is a high probability of the repetition of neglect and all respondent parents have acted inconsistently with their protected constitutional rights." Respondent contends this conclusion is inconsistent with the trial court's findings throughout the underlying case, and it is not supported by the findings in the termination of parental rights order.

The trial court's findings support the conclusion that there is a high probability of the repetition of neglect if the children are returned to respondent's care. We first note that the trial court found in Finding of Fact No. 24 that "[d]ue to . . . [respondent's] ongoing struggles . . . all three juveniles remain in foster care and there is a high probability of the repetition of neglect." Respondent does not specifically challenge this finding and it is therefore binding on appeal. *See S.C.R.*, 198 N.C. App. at 531, 679 S.E.2d at 909.

The children were removed from the parents' care due to issues of domestic violence, unstable housing and employment, and improper supervision. During the three years the children have been in custody, respondent never addressed the domestic violence issues by completing an assessment at NOVA. Indeed, shortly before YFS filed the petition to terminate her parental rights, respondent was involved in another domestic violence incident with Mr. P. and was arrested on assault charges related to that incident.

Although respondent was employed during a majority of the time the children were in custody, her employment was unstable as she failed to maintain employment at any one job for an extended period of time. The findings show that respondent had at least six different jobs during the three year period, and had a history of losing her job and obtaining new employment. Respondent also continued to live with her mother, the maternal grandmother, and never obtained independent housing. Thus, the trial court's findings show that respondent had not addressed the issues which led to the children being adjudicated neglected, and those findings support the court's conclusion that there is a high probability of repetition of neglect if the children are returned to respondent's care.

Respondent also challenges the portion of the trial court's Conclusion of Law No. 6 stating that the parents acted inconsistently with their constitutionally protected rights. However, this conclusion is not necessary to terminate parental rights based on neglect. *See* N.C.G.S. § 7B-1111(a)(1); N.C.G.S. § 7B-101(15). Having determined that the trial court's termination of respondent's parental rights based on neglect is fully supported by the record, we need not review additional grounds for termination.

See Humphrey, 156 N.C. App. at 540, 577 S.E.2d at 426 ("A finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. 7B-1111 is sufficient to support a termination." (citation omitted)). Accordingly, the order of the trial court is

AFFIRMED.

Judges HUNTER, JR. concurs.

Judge MURPHY concurs in a separate opinion.

MURPHY, Judge, concurring.

The Majority found no error in the trial court's conclusion that it had a ground to terminate Respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) (2015). I concur. I write separately to emphasize that I concur *only* because Finding of Fact 24 was unchallenged by Respondent and, thus, is binding on our Court. *See In re S.C.R.*, 198 N.C. App. 525, 532, 679 S.E.2d 905, 909 (2009) (explaining that unchallenged findings of fact are binding on appeal).

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM MELVIN R. CLAYTON AND JACKIE B. CLAYTON, IN THE ORIGINAL AMOUNT OF $165,000.00 AND DATED JUNE 13, 2008 AND RECORDED ON JUNE 18, 2008 IN BOOK 2083 AT PAGE 506, HENDERSON COUNTY REGISTRY
TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA16-960

Filed 1 August 2017

1. Mortgages and Deeds of Trust—promissory note—reverse mortgage—power-of-sale foreclosure proceedings—relaxed evidentiary rules

The trial court did not err by authorizing petitioner bank to foreclose under a power-of-sale provision contained within a deed of trust even though the bank never formally proffered a deed of trust and note into evidence. The relaxed evidentiary rules for power-of-sale foreclosure proceedings permitted the trial court to accept the bank's binder of documents, which included the deed of trust and note, as competent evidence to consider whether the bank satisfied its burden of proof pursuant to N.C.G.S. § 45-21.16.

2. Mortgages and Deeds of Trust—deed of trust—nonjudicial foreclosure power of sale—surviving borrower—acceleration provision—reverse mortgage

The trial court did not err by authorizing a nonjudicial foreclosure under power of sale even though respondent widower spouse alleged that petitioner bank failed to prove it had a right to foreclose under a deed of trust as required by N.C.G.S. § 45-21.16(d)(iii). Respondent was not a "surviving borrower" as contemplated by the acceleration provision in a reverse mortgage agreement despite signing the deed of trust as a borrower. The "borrower" was the obligor of the note and loan agreement, which decedent spouse signed alone, and respondent was also statutorily ineligible to qualify as a reverse-mortgage borrower based on her age.

Appeal by respondent from order entered 17 March 2016 by Judge William H. Coward in Henderson County Superior Court. Heard in the Court of Appeals 5 April 2017.

Womble Carlyle Sandridge & Rice, LLP, by B. Chad Ewing, for petitioner-appellee.

Pisgah Legal Services, by William J. Whalen; and Adams, Hendon, Carson, Crow & Saenger, P.A., by Matthew S. Roberson, for respondent-appellant.

ELMORE, Judge.

Ms. Jackie B. Clayton (respondent), a widowed spouse of a homeowner who entered into a reverse-mortgage agreement with Wells Fargo (petitioner), appeals an order authorizing Wells Fargo to foreclose under a power-of-sale provision contained within the deed of trust on the property that secured her late husband's promissory note. The deed of trust and the note contained provisions empowering Wells Fargo to accelerate the maturity of the note's debt upon a borrower's death, provided the property did not remain the principal residence of a "surviving borrower," and to exercise its contractual foreclosure right in the event of default in payment. Although respondent was not listed as a borrower to the promissory note her husband executed, she and her husband both signed the deed of trust securing the note as a "borrower."

After respondent's husband's death, Wells Fargo accelerated the maturity of the note, and then sought to foreclose on the property due to default in payment by initiating the instant nonjudicial foreclosure

proceeding. The clerk of superior court dismissed the case on the basis that Wells Fargo had no right to foreclose because respondent signed as a borrower to the deed of trust, and the property remained her principal residence. Wells Fargo appealed to the superior court, which concluded that respondent's husband "was the only borrower for this loan per the terms of the Note and Deed of Trust" and thus entered an order authorizing foreclosure. Respondent appealed this order.

On appeal, respondent argues the superior court erred by authorizing foreclosure because (1) Wells Fargo never formally proffered any evidence at the hearing from which its order arose, thereby rendering the order void for want of competent evidence; and (2) Wells Fargo had no right under the deed of trust to accelerate the maturity of the note, and thus no right to foreclose due to any resulting default, since respondent signed the deed of trust as a borrower, and the property remained her principal residence.

Because evidentiary rules are relaxed in nonjudicial power-of-sale foreclosure proceedings, we hold Wells Fargo's binder of relevant documents it supplied during the hearing, in conjunction with the parties' stipulations, provided sufficient competent evidence to support the superior court's foreclosure order. Additionally, although respondent signed the deed of trust as a borrower, a proper interpretation of its terms and her husband's simultaneously executed note and loan agreement, in conjunction with respondent's statutory ineligibility to qualify as a reverse-mortgage borrower, excludes respondent as a "surviving borrower" as contemplated by the deed of trust's acceleration provision. We thus hold the superior court properly authorized the foreclosure sale of the property and affirm its order.

I. Background

On 13 June 2008, respondent's husband, Melvin Clayton, executed a home equity conversion note (Note), commonly known as a reverse mortgage, with Wells Fargo in the principal amount of $110,000.00, and up to a maximum amount of $165,000.00. That same day, to secure Melvin's obligation to Wells Fargo under the Note, Melvin and respondent executed an adjustable rate home equity conversion deed of trust (Deed of Trust), which was recorded with the Henderson County Register of Deeds on 18 June 2008. The Note and Deed of Trust contained acceleration provisions empowering Wells Fargo to demand immediate payment of the debt under the Note when "[a] Borrower dies and the Property is not the principal residence of at least one surviving Borrower." Although respondent was not old enough to qualify

as a reverse-mortgage borrower and was thus not a party to the Note, respondent signed the Deed of Trust as a borrower. After Mr. Clayton's death on 6 December 2013, Wells Fargo accelerated the maturity of the debt, and respondent continued to live on the property.

On 30 April 2014, Trustee Services of Carolina, LLC, acting as substitute trustee under the Deed of Trust, initiated this nonjudicial foreclosure proceeding pursuant to N.C. Gen. Stat. § 45-21.16(d) based on the power-of-sale provision in the Deed of Trust due to failure to make payments under the Note. After a 9 June 2015 hearing before the Clerk of Henderson County Superior Court, the clerk dismissed the power-of-sale foreclosure proceeding, concluding that Wells Fargo failed to prove it had a right to foreclose under the terms of the Deed of Trust because respondent signed the instrument as a borrower and the property remained her principle residence, thereby prohibiting Wells Fargo from accelerating the maturity of the Note. Wells Fargo appealed to superior court. After a 13 July 2015 hearing, the superior court entered an order on 17 March 2016 authorizing the foreclosure sale. The superior court concluded that Melvin was the sole borrower under the Note and the Deed of Trust, thereby permitting Wells Fargo to accelerate the debt, and that the power-of-sale provision of the Deed of Trust gave Wells Fargo the right to foreclose on the property upon default of payment on the Note. Respondent appeals.

II. Analysis

On appeal, respondent contends the superior court erred by authorizing the nonjudicial foreclosure under power of sale because (1) Wells Fargo never presented evidence at the *de novo* hearing before the superior court, thereby rendering the order void for want of competent evidence; and (2) Wells Fargo had no right to foreclose under the Deed of Trust because its terms prohibited the acceleration of the maturity of the Note so long as the property remained respondent's principal residence. We disagree.

A. Standard of Review

> When an appellate court reviews the decision of a trial court sitting without a jury, findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.

In re Bass, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (citations and quotation marks omitted).

B. Sufficiency of Evidence

[1] As an initial matter, we reject respondent's contention that the superior court's order should be reversed because Wells Fargo never formally proffered the Deed of Trust and the Note or any other relevant documents into evidence at the hearing.

N.C. Gen. Stat. § 45-21.16(d) (2015) requires that before a clerk of superior court may authorize a nonjudicial power-of-sale foreclosure, the creditor must establish the following six findings:

> (i) a valid debt, (ii) default, (iii) the right to foreclose, (iv) notice, and (v) "home loan" classification and applicable pre-foreclosure notice, and (vi) that the sale is not barred by the debtor's military service.

In re Lucks, ___ N.C. ___, ___, 794 S.E.2d 501, 505 (2016) (interpreting N.C. Gen. Stat. § 45-21.16(d)). "If the clerk's order is appealed to superior court, that court's *de novo* hearing is limited to making a determination on the same issues as the clerk of court." *In re David A. Simpson, P.C.*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011).

Because "[n]on-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding," *In re Lucks*, ___ N.C. at ___, 794 S.E.2d at 504 (citing *In re Foreclosure of Michael Weinman Assocs. Gen. P'ship*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993)), "the evidentiary requirements under non-judicial foreclosure proceedings are relaxed," *id.* at ___, 794 S.E.2d at 507. Significantly here, "[t]he evidentiary rules are the same when the trial court conducts a de novo hearing on an appeal from the clerk's decision." *Id.* at ___, 794 S.E.2d at 505. In the context of a superior court's *de novo* hearing on nonjudicial foreclosure under power of sale, " '[t]he competency, admissibility, and sufficiency of the evidence is a matter for the [trial] court to determine.' " *Id.* at ___, 794 S.E.2d at 506 (quoting *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940)).

Here, the transcript of the superior court hearing reveals that Wells Fargo gave the judge a binder of the documents it provided to the clerk at the prior hearing, which contained, *inter alia*, the Note and Deed of Trust, and the parties referred to these documents throughout the proceeding. Because the evidentiary rules are relaxed in power-of-sale foreclosure proceedings, the superior court was permitted to accept this binder of documents as competent evidence to consider whether Wells

Fargo satisfied its burden of proving the six statutorily required findings, despite Wells Fargo never formally introducing or admitting these documents into evidence.

Additionally, the transcript reveals that the parties stipulated to the existence of five of the six statutorily required findings: a debt that Wells Fargo held, a default, and notice, *see* N.C. Gen. Stat. § 45-21.16(d)(i)–(iii), and that two of the three remaining subsections were inapplicable because this was a reverse mortgage and neither party served in the military, *see id.* § 45-21.16(d)(v)–(vi). "[S]tipulations are judicial admissions and are therefore binding in every sense, . . . relieving the other party of the necessity of producing evidence to establish an admitted fact." *Thomas v. Poole*, 54 N.C. App. 239, 241, 282 S.E.2d 515, 517 (1981). The superior court thus had authority to find the existence of those five stipulated criteria based upon the parties' stipulations alone. *See*, *e.g.*, *In re Burgess*, 47 N.C. App. 599, 603–04, 267 S.E.2d 915, 918 ("The parties' stipulations that Gastonia is the owner and holder of a duly executed note and deed of trust and that there was some amount outstanding on that debt amply supports the court's finding under G.S. 45-21.16(d)(i)."), *appeal dismissed*, 301 N.C. 90 (1980). Indeed, as respondent concedes in her brief, "the only issue in contention between the parties [was] whether . . . Wells Fargo was entitled to foreclose under the terms of the . . . Deed of Trust, as required under N.C. Gen. Stat. § 45-21.16(d)(iii)."

Accordingly, based on the binder of relevant documents and the parties' stipulations, the court was supplied evidence from which it could determine whether Wells Fargo proved the existence of the six statutorily required criteria before authorizing the nonjudicial power-of-sale foreclosure. We thus reject respondent's challenge.

C. Right to Foreclose under Deed of Trust

[2] Respondent's main contention is that the superior court erred by authorizing the nonjudicial foreclosure under power of sale because Wells Fargo failed to prove it had a right to foreclose under the Deed of Trust as required by N.C. Gen. Stat. § 45-21.16(d)(iii) (requiring proof of a right to foreclose under security instrument). We disagree.

"The right to foreclose exists 'if there is competent evidence that the terms of the deed of trust permit the exercise of the power of sale under the circumstances of the particular case.' " *In re Michael Weinman Assocs. Gen. P'ship*, 103 N.C. App. 756, 759, 407 S.E.2d 288, 290 (1991) (quoting *In re Burgess*, 47 N.C. App. at 603, 267 S.E.2d at 918), *aff'd*, 333 N.C. 221, 424 S.E.2d 385 (1993). Here, the Deed of Trust contained the following power-of-sale foreclosure provision:

> Foreclosure Procedure. If Lender requires immediate payment in full under Paragraph 9, Lender may invoke the power of sale and any other remedies permitted by applicable law.

Paragraph 9 contains the challenged acceleration provision and empowered Wells Fargo to accelerate the maturity of the Note and demand payment in full if "[a] Borrower dies and the Property is not the principal residence of at least one surviving Borrower."

Based on this acceleration provision, respondent contends that although she was not a borrower to the Note, because she signed the Deed of Trust as a borrower, she is a "surviving [b]orrower." Thus, Wells Fargo was barred from accelerating the debt and, consequently, foreclosing on the property so long as it remained her principal residence. Wells Fargo concedes that both Melvin and respondent signed the Deed of Trust as a borrower but asserts that other language contained within the Deed of Trust, as well as the Note and loan agreement simultaneously executed by Melvin alone, in conjunction with respondent's statutory ineligibility to be a reverse-mortgage borrower, makes clear that respondent, a non-borrower to the reverse mortgage, was not intended to be a "surviving [b]orrower" as contemplated by the acceleration provision. We agree.

Because a power of sale is a contractual arrangement, we interpret power-of-sale provisions of a deed of trust under ordinary rules of contract interpretation. *In re Sutton Investments, Inc.*, 46 N.C. App. 654, 659, 266 S.E.2d 686, 688–89, *disc. review denied*, *appeal dismissed*, 301 N.C. 90 (1980). When interpreting contracts, " 'all contemporaneously executed written instruments between the parties, relating to the subject matter of the contract, are to be construed together in determining what was undertaken.' " *In re Hall*, 210 N.C. App. 409, 416, 708 S.E.2d 174, 178–79 (2011) (quoting *Self-Help Ventures Fund v. Custom Finish*, 199 N.C. App. 743, 747, 682 S.E.2d 746, 749 (2009)). " 'Thus, where a note and a deed of trust are executed simultaneously and each contains references to the other, the documents are to be considered as one instrument and are to be read and construed as such to determine the intent of the parties.' " *Id.* at 416, 708 S.E.2d at 178–79 (quoting *In re Foreclosure of Sutton Investments*, 46 N.C. App. at 659, 266 S.E.2d at 689). We review issues of contract interpretation *de novo*. *Price & Price Mech. of N.C., Inc. v. Milken Corp.*, 191 N.C. App. 177, 179, 661 S.E.2d 775, 777 (2008). Here, the Deed of Trust, the Note, and the loan agreement underlying the Note, were given to the superior court for consideration. Because these documents were executed simultaneously and reference each other, we

interpret these documents together to determine whether respondent was a "surviving borrower" as contemplated by the acceleration provision of the Deed of Trust.

Under the Note and the loan agreement, Melvin was the only contemplated borrower to the reverse-mortgage agreement, as he alone executed these documents and was obligated under them. The Note defined "borrower" as each person who signed the Note, which only Melvin signed. Under its terms, Melvin, and not respondent, agreed to repay any advances made by Wells Fargo. The Note contained a similar acceleration provision and empowered Wells Fargo to "require immediate payment in full . . . if (I) A Borrower dies and the property is not the principal residence of at least one surviving Borrower."

The Note references the loan agreement, which Melvin signed as the sole borrower, and which evidences again that Melvin alone had the right to receive the advanced funds and the obligation to repay those funds. The loan agreement defines the Note as follows: "[T]he promissory note *signed by Borrower* together with this Loan Agreement and given to Lender to evidence *Borrower's* promises to repay . . . Loan Advances by Lender." (Emphasis added.) Additionally, the loan agreement defines "Principal Residence" as "the dwelling where the *Borrower* maintains his or her permanent place of abode." (Emphasis added.) This indicates that the "principal residence" contemplated by the agreement was that of a borrower to the Note, not a non-borrower to the Note. Respondent neither executed, signed, nor was identified as a borrower to the Note or loan agreement.

Turning to the Deed of Trust, although both Melvin and respondent signed this security instrument as a borrower, its other provisions that reference and describe "borrower" indicate that Melvin was the only borrower actually contemplated by the reverse-mortgage agreement. For instance, its first paragraph provides: "Borrower has agreed to repay to Lender amounts which Lender is obligated to advance, including future advances, under the terms of the [loan agreement]." It provides further that "[t]his agreement to repay is evidenced by Borrower's Note dated the same date as this Security Instrument." As the sole obligor under the Note and loan agreement, these provisions make clear that Melvin was the only "surviving borrower" contemplated by the Deed of Trust's acceleration provision. Additionally, that respondent was not old enough to qualify as a reverse-mortgage borrower when Melvin executed the reverse-mortgage agreement with Wells Fargo, *see* N.C. Gen. Stat. § 53-257(2) (2015) (defining a "borrower" as one "62 years of age

or older"), further supports the interpretation that respondent was not intended to be a "surviving borrower" under the acceleration provision.

Accordingly, that Melvin was the only borrower under the Note and loan agreement, that the Deed of Trust's descriptions of "borrower" indicate that term was intended to refer only to the obligor of the reverse-mortgage agreement, and that respondent was statutory ineligible to qualify as a reverse-mortgage borrower, yield the inevitable conclusion that respondent was not intended to be a "surviving borrower" as contemplated by the acceleration provision, despite her having signed the Deed of Trust as a borrower.

Therefore, we hold that the Deed of Trust empowered Wells Fargo to accelerate the maturity of the Note upon Melvin's death and, consequently, to foreclose on the property due to default in payment. We thus hold the superior court properly authorized the nonjudicial foreclosure under a power of sale and affirm its order.

III. Conclusion

Although Wells Fargo never formally introduced evidence at the *de novo* hearing before the superior court, its delivery of the binder it presented to the clerk, which contained all the relevant documents it intended to use to prove its power-of-sale foreclosure right, in conjunction with the parties' stipulations, provided sufficient evidence from which the superior court could properly determine whether Wells Fargo satisfied its burden of proving the six statutorily required criteria before authorizing the nonjudicial foreclosure sale of the property.

Additionally, although respondent signed the Deed of Trust as a borrower, when considering its other provisions describing "borrower" as the obligor of the Note and loan agreement, the terms of the Note and loan agreement that Melvin alone signed as a borrower, and respondent's statutory ineligibility to qualify as a reverse-mortgage borrower, it is readily apparent that Melvin was the only "surviving borrower" contemplated by the Deed of Trust's acceleration provision. Respondent's signature on the Deed of Trust had no bearing on Wells Fargo's contractual right to accelerate the debt upon Melvin's death and to foreclose upon default of payment under the terms of the contract it executed with Melvin. Accordingly, we hold the trial court properly authorized the foreclosure sale and affirm its order.

AFFIRMED.

Judges INMAN and BERGER concur.

IN THE MATTER OF N.X.A.
AND
IN THE MATTER OF B.R.S.A-D. AND D.S.K.A-D.

No. COA17-95

Filed 1 August 2017

1. Jurisdiction—subject matter jurisdiction—termination of parental rights—verification of petitions—state agent acquainted with facts

The trial court had subject matter jurisdiction in a termination of parental rights case even though respondent parents contended that the affidavits filed by the Department of Social Services' attorney lacked the requisite verification of personal knowledge where all three petitions used the language "upon information and belief." The attorney, acting as a State agent, was acquainted with the facts of the case, and thus his verification was effective under N.C.G.S. § 1A-1, Rule 11(d).

2. Termination of Parental Rights—grounds—failure to pay reasonable portion of care

The trial court did not err in a termination of parental rights case by concluding that grounds existed under N.C.G.S. § 7B-1111(a)(3) to terminate respondent mother's parental rights based on her failure to pay a reasonable portion for the care of the minor children while in the custody of the Department of Health and Human Services. The mother paid nothing despite evidence of income from her work as a housekeeper and the fact that she claimed the children on her tax refunds. Since one ground existed to terminate respondent's parental rights, other grounds did not need to be addressed.

Appeal by respondents from orders entered 26 October 2016 by Judge David V. Byrd in Wilkes County District Court. Heard in the Court of Appeals 6 June 2017.

Erika L. Hamby, for petitioner-appellee Wilkes County Department of Social Services.

K&L Gates LLP, by appellate guardian ad litem attorney advocate Hillary Dawe, for petitioner-appellee guardian ad litem.

Mark L. Hayes, for respondent-appellant mother.

Richard Croutharmel, for respondent-appellant father.

CALABRIA, Judge.

Where the verification of petitions alleging neglect and dependency was made by a State agent acquainted with the facts of the case, it was sufficient to grant jurisdiction to the trial court. Where the trial court found that mother had the resources to pay some amount towards the care of the minor children greater than she in fact paid, the trial court did not err in terminating mother's parental rights for failure to provide care and support. Where one ground exists to terminate mother's parental rights, we need not address mother's arguments with respect to other grounds.

I. Factual and Procedural Background

On 10 April 2014, Paul W. Freeman ("Freeman"), an attorney, filed juvenile petitions on behalf of the Wilkes County Department of Social Services ("DSS"). These petitions alleged that N.X.A., B.R.S.A-D., and D.S.K.A-D. (collectively, "the minor children") were neglected and dependent juveniles. The petitions named J.A. ("mother") as mother of all three juveniles, and J.D. ("father") as father of B.R.S.A-D. and D.S.K.A-D. In support of the contention that each of the minor children was neglected, the petitions alleged the following language:

> Upon Information and Belief, on the above date, the Mother of the child was arrested for one or more violations of the Controlled Substances laws. A Methamphetamine Lab (or parts for same) was/were found in (or around) the home occupied by the child, his siblings and Mother. This poses a significant risk to the child should he be returned to the home, and has posed a substantial risk prior to discovery. The Wilkes County Department of Social Services has been involved with this family for many years dealing with problems of parental substance abuse and improper care/supervision of children.

All three petitions contain the identical language. All three are also verified by Freeman, in a verification section containing the following language:

> Being first duly sworn, I say that I have read this Petition and that the same is true to my own knowledge, except as to those things alleged upon information and belief, and as to those, I believe it to be true.

These petitions were ultimately heard by the District Court of Wilkes County, and in an adjudication and disposition order dated 18 July 2014, the court ordered that the minor children be placed in the custody of DSS. The matter proceeded for two years, and on 12 January 2016, DSS filed verified petitions to terminate mother's and father's parental rights with respect to the minor children. On 26 October 2016, the trial court entered orders on the petitions to terminate parental rights, in which the trial court ordered that those rights be terminated.

Father gave timely notice of appeal. We grant mother's petition for writ of certiorari.

II. Subject Matter Jurisdiction

In mother's first argument, and father's sole argument, mother and father (collectively, "respondents") contend that the trial court lacked subject matter jurisdiction to terminate their parental rights. We disagree.

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Analysis

[1] Respondents contend that the affidavits filed by DSS lacked the requisite verification to grant jurisdiction to the trial court.

Our General Statutes provide that:

> All reports concerning a juvenile alleged to be abused, neglected, or dependent shall be referred to the director of the department of social services for screening. Thereafter, if it is determined by the director that a report should be filed as a petition, the petition shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing.

N.C. Gen. Stat. § 7B-403(a) (2015). Our Supreme Court has held that "verification of a juvenile petition is no mere ministerial or procedural act[,]" but rather "is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other." *In re T.R.P.*, 360 N.C. 588, 591, 636 S.E.2d 787, 790-91 (2006).

In *T.R.P.*, Wilkes County Department of Social Services, the same DSS as in the instant case, filed a petition alleging that T.R.P. was a neglected juvenile. Although it was notarized, the petition "was neither signed nor verified by the Director of WCDSS or any authorized representative thereof." *Id.* at 589, 636 S.E.2d at 789. On appeal, our Supreme Court noted that, "given the magnitude of the interests at stake in juvenile cases and the potentially devastating consequences of any errors, the General Assembly's requirement of a verified petition is a reasonable method of assuring that our courts exercise their power only when an identifiable government actor 'vouches' for the validity of the allegations in such a freighted action." *Id.* at 592, 636 S.E.2d at 791. The Court emphasized that "[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." *Id.* at 593, 636 S.E.2d at 792. The Court concluded that the trial court's jurisdiction was void *ab initio*, and that "the absence of jurisdiction ab initio logically implies that the matter reverts to the status quo ante." *Id.* at 597, 636 S.E.2d at 794. However, the Court also noted that "because dismissal of this case has no res judicata effect, and recognizing that the circumstances affecting the best interest of T.R.P. may well have changed while this case has been in litigation, we note that any party, including WCDSS, can file a new petition in this matter." *Id.*

Pursuant to Rule 11 of the North Carolina Rules of Civil Procedure, "[i]n any case in which verification of a pleading shall be required by these rules or by statute, it shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true." N.C.R. Civ. P. 11(b). An agent of a party may verify a pleading as well, provided, in relevant part, that "all the material allegations of the pleadings are true to his personal knowledge[.]" N.C.R. Civ. P. 11(c)(2)(a). The agent must also provide reasons that the affidavit is not made by the party directly. N.C.R. Civ. P. 11(c)(2)(b).

The importance of a verification being made upon personal knowledge, and not merely upon "information and belief," is a longstanding truism in North Carolina law. *See e.g. State ex rel. Peebles v. Foote*, 83 N.C. 102, 106 (1880) (holding that "a verification upon information and belief will not answer unless it gives the sources of information"). This Court has emphasized this, holding that "a verifying attorney . . . must state in an affidavit that the material allegations of the pleadings are true to his personal knowledge, and the reasons the affidavit is not made

by the party." *Gaskill v. State ex rel. Cobey*, 109 N.C. App. 656, 659, 428 S.E.2d 474, 476 (1993).

In the instant case, respondents contend that the verification of the initial petitions was not effective to serve as an affidavit. Specifically, respondents note the use of the language "Upon Information and Belief," present in all three petitions. Certainly, that language does not demonstrate personal knowledge by Freeman, but rather that he has been informed and believes the facts alleged to be true.

Respondents overlook a key detail, however. There is an additional provision of Rule 11 which applies to corporations and state officers. Specifically, "when the State or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts." N.C.R. Civ. P. 11(d). Our Supreme Court has held that, with respect to certain issues, such as the provision of foster care, "the County Director of Social Services is the agent of the Social Services Commission[.]" *Vaughn v. N.C. Dep't of Human Res.*, 296 N.C. 683, 690, 252 S.E.2d 792, 797 (1979). Indeed, our General Statutes provide that the director of a county Department of Social Services has the duty "[t]o act as agent of the Social Services Commission and Department of Health and Human Services in relation to work required by the Social Services Commission and Department of Health and Human Services in the county[.]" N.C. Gen. Stat. § 108A-14(a)(5) (2015).

In the instant case, DSS was implementing the statutory provisions of the Juvenile Code, Chapter 7B of the General Statutes. DSS was giving effect to State law, for purposes defined by the State, as directed by the State agencies which oversee such laws. DSS was therefore acting as an agent of the North Carolina Department of Health and Human Services, a State agency.

As a State agent, DSS, and by extension, its representative Freeman, was not subject to Rule 11(b), governing verification of pleadings by a party, or Rule 11(c), governing verification by agent or attorney, but rather was subject to Rule 11(d), governing verification by the State. This determination is further reinforced by practicality. Many case workers, investigators, and representatives are employed by local Departments of Social Services, and it is not feasible to assume that any one should have complete personal knowledge of a given case; rather, it can be assumed that any one verifying an affidavit does so having reviewed the case materials compiled by the myriad DSS agents and employees assigned to the case, and is thus "acquainted with the facts" as required by Rule 11(d).

In addition, the director of the Department of Social Services has a statutory duty to investigate any reports of abuse, neglect, or dependency of a juvenile and to take appropriate action, including filing a petition to "invoke the jurisdiction of the court for the protection of the juvenile or juveniles." N.C. Gen. Stat. § 7B-302(c) (2015). A person who reports suspected abuse, neglect, or dependency – presumably a person with "personal knowledge" of the facts – has the right to remain anonymous. *See* N.C. Gen. Stat. § 7B-301(a) (2015) ("[r]efusal of the person making the report to give a name shall not preclude the department's assessment"). And that person who has personal knowledge of facts of abuse, neglect, or dependency has no authority to verify a petition, since that person is not authorized to file a petition under N.C. Gen. Stat. § 7B-401.1, which states that "*Only* 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." N.C. Gen. Stat. § 7B-401.1(a) (2015) (emphasis added). Were we to accept respondents' argument, it would be impossible for directors of Departments of Social Services to carry out their statutory duties to file verified petitions invoking the jurisdiction of the court unless a director or the director's authorized representative personally witnessed the events giving rise to the filing of the petition.

We hold that Freeman, acting as a State agent, was acquainted with the facts of the case, and that therefore his verification was effective pursuant to Rule 11(d) to grant jurisdiction to the trial court.

III. Termination of Parental Rights

In her second, third, and fourth arguments, mother challenges the grounds upon which the trial court terminated her parental rights. We disagree.

A. Standard of Review

"The standard for review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754, 758 (1984).

"After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2015). "We review the trial court's decision to terminate parental rights for abuse of discretion." *In re Anderson*, 151 N.C. App. 94, 98, 564 S.E.2d 599, 602 (2002).

B. Analysis

[2] Mother challenges the various bases upon which the trial court terminated her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a) (2015). Specifically, mother challenges the trial court's determinations pursuant to N.C. Gen. Stat. §§ 7B-1111(a)(1) (parental neglect), (a)(2) (failure to correct circumstances which led to the removal of juveniles), and (a)(3) (failure to provide support for the juveniles).

With respect to the trial court's determination of mother's failure to provide support for the juveniles, N.C. Gen. Stat. § 7B-1111(a)(3) provides that the court may terminate parental rights where:

> The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3). It is undisputed that the minor children were in the care of DSS for six months prior to the filing of the petition. Mother contends, however, that the trial court failed to make necessary findings as to her ability to pay "a reasonable portion of the cost of care[.]"

Our Supreme Court has held that "[a] finding that a parent has ability to pay support is essential to termination for nonsupport[.]" *In re Ballard*, 311 N.C. 708, 716-17, 319 S.E.2d 227, 233 (1984). However, this Court has further clarified that "there is no requirement that the trial court make a finding as to what specific amount of support would have constituted a 'reasonable portion' under the circumstances[,]" and therefore that the only requirement is "that the trial court make specific findings that a parent was able to pay some amount greater than the amount the parent, in fact, paid during the relevant time period." *In re Huff*, 140 N.C. App. 288, 293, 536 S.E.2d 838, 842 (2000).

In the instant case, at the termination hearing, mother testified that she generated income from a house-cleaning business from June of 2015 to January of 2016. She testified that her annual income was between ten and thirteen thousand dollars. Further, the trial court found that mother "claimed her minor children as dependents for tax purposes while they were in the custody of [DSS], receiving a significant tax refund amounting

to thousands of dollars for the year 2015." This finding, unchallenged by mother, is presumed supported by competent evidence and binding upon this Court. *See In re J.K.C.*, 218 N.C. App. 22, 26, 721 S.E.2d 264, 268 (2012) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Despite this evidence of income and tax refunds, the trial court found that mother "paid no child support prior to the filing of the petition in this matter." Based upon these findings, the trial court found that mother "willfully failed to pay a reasonable portion for the cost and care for the minor children for a period of six (6) months preceding the filing of the Petition[.]"

Upon review, we hold that the trial court's findings make clear that mother was able to pay some amount greater than the amount she did in fact pay, which was nothing. As such, we hold that the trial court did not err in terminating mother's parental rights on the ground of a failure to pay a reasonable portion for the care of the minor children while in the custody of DSS.

Because we hold that the findings of fact supported grounds for termination of parental rights under one subdivision of N.C. Gen. Stat. § 7B-1111(a), we need not address mother's remaining arguments. *See Huff*, 140 N.C. App. at 293, 536 S.E.2d at 842.

NO ERROR.

Judges BRYANT and STROUD concur.

IN RE R.S.

[254 N.C. App. 678 (2017)]

IN THE MATTER OF R.S., A.S., C.S.

No. COA17-270

Filed 1 August 2017

Child Abuse, Dependency, and Neglect—child abuse—child neglect—serious unexplained injuries—sole caretakers

The trial court did not err by adjudicating an infant as abused and neglected, and leaving the infant in a safety placement with his maternal grandmother, where respondent parents were the sole caretakers and the infant suffered serious and unexplained injuries by other than accidental means. There was no merit to the father's claim that the trial court's adjudication of abuse amounted to an improper shifting of the burden of proof to respondents.

Appeal by respondent-father from orders entered 23 September and 4 October 2016 by Judge Susan M. Dotson-Smith in Buncombe County District Court. Heard in the Court of Appeals 11 July 2017.

Hanna Frost Honeycutt for petitioner-appellee Buncombe County Department of Health and Human Services.

Amanda Armstrong for guardian ad litem.

Peter Wood for respondent-appellant father.

MURPHY, Judge.

Respondent-father ("Floyd")[1] appeals from the trial court's order adjudicating his son "Ryan," an abused and neglected juvenile and from the resulting dispositional order leaving Ryan in a safety placement with his maternal grandmother. By order entered 5 April 2017, this Court allowed Respondent-mother's ("Emily") motion to withdraw her appeal. We now affirm the orders of the trial court.

Background

Ryan was born prematurely in late September 2015. After leaving the hospital on 1 October 2015, he lived with Floyd and Emily (collectively "Respondents") and Emily's two older children, "April," born in

1. We adopt pseudonyms to protect the juveniles' identities.

March 2008 and "Chris," born February 2010. April and Chris share a biological father, "Mr. A."

On 22 October 2015, Buncombe County Department of Health and Human Services ("BCDHHS") received a Child Protective Services ("CPS") report that Ryan, then approximately four weeks old, was admitted to Mission Hospital emergency room with a torn lingual frenulum, the tissue connecting the tongue to the floor of the mouth. Ryan was also diagnosed with failure to thrive, weighing less than he did at birth.

Dr. Cynthia H. Brown, a pediatrician and child abuse expert, examined Ryan and spoke to Respondents at the hospital. Though confirming they were Ryan's only caretakers, Respondents disclaimed any knowledge of the cause of Ryan's injury and stated that Emily first noticed a dark scab under his tongue the day before his admission. Because Ryan's lingual frenulum tear would have resulted in significant bleeding, Dr. Brown found it unusual that Respondents did not notice his injury. She further noted that "significant force" would be have been required to cause the injury. A skeletal survey and abdominal ultrasound performed on Ryan were negative for additional trauma. Dr. Brown recommended repeating the skeletal survey after two weeks. Ryan was discharged from the hospital on 25 October 2015, having showed consistent weight gain during his stay.

On 29 October 2015, Respondents brought Ryan to Dr. William L. Chambers, "to evaluate the infant to see if the injury under the tongue could have been self-inflicted." Dr. Chambers advised Respondents it would not be possible for Ryan to have caused the tear in his frenulum. Dr. Chambers scheduled a follow-up appointment for Ryan, which Emily later cancelled.

BCDHHS received a second CPS report on 9 November 2015 after Ryan's second skeletal survey revealed three healing fractures on his 11th and 12th ribs and a healing fracture on his right tibia. Dr. Burdette Sleight, an expert in pediatric radiology, concluded that the fractures were approximately three weeks old on 9 November 2015 and thus were present when Ryan was admitted to the hospital with the torn frenulum on 22 October 2015. Subsequent calcification had made the fractures more conspicuous on the x-ray at the time of the follow-up survey. Respondents were again unable to explain Ryan's injuries. They refused to allow additional diagnostic tests recommended by Dr. Brown to check Ryan for brain damage or other injuries.

On 23 November 2015, BCDHHS filed a juvenile petition alleging that Ryan was abused and neglected. After a three-day hearing in July

2016, the trial court entered an order adjudicating Ryan abused and neglected on 23 September 2016.[2] The trial court conducted a separate dispositional hearing on 18 August 2016 and entered its initial disposition on 4 October 2016. The trial court left Ryan in Respondents' custody but sanctioned the child's continued placement with the maternal grandmother. The trial court ordered Floyd to submit to a parenting capacity evaluation and attend a parenting course approved by BCDHHS.

On appeal, Floyd claims the trial court erred by basing its adjudication of abuse on Respondents' failure to provide an innocent explanation for Ryan's injuries. He contends the trial court improperly shifted the burden of proof from BCDHHS to the Respondent-parents, in violation of N.C.G.S. § 7B-805 (2015). Floyd argues that "[a] parent is not required to present evidence that shows he or she did not abuse a child."

Analysis

We review an adjudication of abuse, neglect, or dependency under N.C.G. S. § 7B-807 (2015) to determine whether the trial court's findings are supported by "clear and convincing competent evidence" and whether the findings, in turn, support the trial court's conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Uncontested findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). 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).

"Abused juvenile" is defined, *inter alia*, as one whose parent or caretaker "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means." N.C.G.S. § 7B-101(1) (2015). The determination that a child meets the statutory definition of an abused juvenile is a conclusion of law. *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999); *In re Hughes*, 74 N.C. App. 751, 759-60, 330 S.E.2d 213, 219 (1985).

The trial court made detailed findings of fact regarding the nature and causes of Ryan's injuries, based on the expert testimony of Drs. Chambers, Sleight, and Brown.[3] Among these findings are the following:

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2. The trial court also adjudicated April and Chris neglected. However, Emily has withdrawn her appeal in this cause, and Mr. A. did not appeal. Therefore, April and Chris' cases are not before us for review.

3. Respondents adduced the expert testimony of Dr. John Kelly, a family physician whom respondents chose as Ryan's primary care doctor beginning on 15 November 2015.

19. The injury to [Ryan]'s lingual frenulum would have been a very painful injury and would have resulted in a significant amount of bleeding . . . The Respondent parents' statement that they did not observe any substantial bleeding or pain associated with [Ryan]'s torn frenulum is not credible.

. . . .

23. The injury to [Ryan]'s frenulum would have taken a lot of force to cause, and could not have been caused by [Ryan]. The injury to [Ryan]'s frenulum was caused by some object being inserted into [his] mouth with considerable force. There is no medical condition that would have caused [his] frenulum to tear spontaneously. [Respondents] failed to provide an explanation for [Ryan]'s torn frenulum.

24. The injury to [Ryan]'s lingual frenulum was inflicted.

. . . .

31. [Ryan]'s rib fractures are consistent with injuries caused by squeezing forcibly. Significant force was applied to cause [his] rib fractures. This would have been painful for [Ryan]. [Ryan]'s rib fractures are inflicted injuries.

32. The November 9, 2015 skeletal survey also revealed a healing corner fracture on [Ryan]'s tibia. Based on the stage of healing, the tibia fracture was approximately three weeks old.

33. Moderate to significant force would have been required to cause the corner fracture to [Ryan]'s tibia. The injury would have been painful initially . . . . The corner fracture was caused by violent shaking or grabbing and jerking. Normal handling of [Ryan] would not have caused the corner fracture to [Ryan]'s tibia. The corner fracture is an inflicted injury.

34. [Ryan]'s bone scan did not reveal any issues with bone density, and it is unlikely that an underlying medical

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The trial court found that "[t]he testimony of Dr. Chambers, Dr. Sleight and Dr. Brown was more credible and consistent than Dr. Kelly's testimony about the non-accidental nature of [Ryan]'s injuries, and the failure to thrive."

> condition, such as osteogenesis imperfecta, contributed to [his] injuries.
>
> 35. . . . [Respondents] had no reasonable explanation of causation for [Ryan]'s broken bones.
>
> . . . .
>
> 47. [Respondents] delayed meetings between the social worker and the [older] children, delayed and limited medical tests, and appear to have omitted information.
>
> 48. [Respondents] still have not provided explanations for [Ryan]'s numerous, serious injuries.
>
> 49. A torn lingual frenulum, rib fractures and tibia fracture are all serious injuries. These serious injuries occurred by other than accidental means.
>
> 50. [Ryan] could not have caused the injuries to his frenulum, ribs or tibia . . .
>
> 51. [Ryan]'s injuries are consistent with child abuse in a pre-mobile infant.
>
> 52. These serious injuries occurred while [Respondents] were the only caretakers for [Ryan].
>
> 53. [Respondents] are jointly and individually responsible for [Ryan]'s injuries.
>
> . . . .
>
> 58. [Ryan] has been subjected to abuse . . . by [Respondents] . . . , who are adults who regularly live in the home.

As Floyd does not contest the evidentiary support for any of the trial court's findings of fact, they are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

The trial court found Ryan sustained a torn lingual frenulum and multiple bone fractures, all of which are "serious injuries" and were "inflicted" upon the infant child "by other than accidental means." It further found that Respondents are adults who live in the home and are responsible for his injuries. These findings support a conclusion that Ryan is abused under N.C.G.S. § 7B-101(1). *In re Y.Y.E.T.*, 205 N.C. App. 120, 128-29, 695 S.E.2d 517, 522-23, *disc. review denied*, 364 N.C. 434, 703 S.E.2d 150 (2010); *Hughes*, 74 N.C. App. 751, 758-59, 330 S.E.2d 213, 218 (1985).

We find no merit to Floyd's claim that the trial court's adjudication of abuse amounts to an improper shifting of the burden of proof to Respondents. The circumstances surrounding Ryan's injuries, as proved by BCDHHS and recounted in the trial court's findings, support a reasonable inference that Ryan sustained his injuries at the hands of Respondents, his only caretakers. Where "different inference[s] may be drawn from the evidence, [the trial court] alone determines which inferences to draw and which to reject." *Hughes*, 74 N.C. App. at 759, 330 S.E.2d at 218. Moreover, "[a]s the child's sole care providers, it necessarily follows that Respondents were jointly and individually responsible for the child's injury. Whether each Respondent directly caused the injury by inflicting the abuse or indirectly caused the injury by failing to prevent it, each Respondent is responsible." *Y.Y.E.T.*, 205 N.C. App. at 129, 695 S.E.2d at 522-23. Here, following the holding in *Y.Y.E.T.*, Ryan's parents were the sole caretakers of a pre-mobile infant who suffered serious, yet unexplained injuries, and the trial court's finding that the parents were responsible for those injuries was entirely appropriate.

Further, Floyd's claims that this case is comparable to *In re J.A.M.*, ___ N.C. App. ___, 795 S.E.2d 262 (2016) come from an incorrect reading of that case and its holdings. *In re J.A.M.* speaks to a very different set of facts, in which the child was removed from the home and then adjudicated based on past domestic violence without any evidence of ongoing domestic violence. In this case, there are clearly, as found by the trial court and recorded above, findings of current and ongoing domestic violence.

Conclusion

As the trial court properly concluded that Ryan was an abused individual and that the parents were responsible for those injuries, we affirm the court's orders.

AFFIRMED.

Judges Bryant and Hunter, Jr. concur.

KYLE v. FELFEL

[254 N.C. App. 684 (2017)]

JASON KYLE, PLAINTIFF
v.
HELMI L. FELFEL AND LAURA C. FELFEL, DEFENDANTS

No. COA16-1318

Filed 1 August 2017

1. Contracts—breach of contract—lease and option to purchase agreement—house swap—motion for judgment notwithstanding verdict—consideration—promissory note—statute of frauds

The trial court erred in a breach of contract case arising from a lease and option to purchase agreement for a possible house swap by denying defendant married couple's motion for judgment notwithstanding the verdict where the option contained in a 2010 lease document could not serve as the consideration necessary to support a promissory note. The lease document violated the statute of frauds under N.C.G.S. § 22-2 since plaintiff individual did not sign it.

2. Contracts—breach of contract—lease and option to purchase agreement—house swap—motion for judgment notwithstanding verdict—retroactive consideration—promissory note

The trial court erred in a breach of contract case arising from a lease and option to purchase agreement for a possible house swap by denying defendant married couple's motion for judgment notwithstanding the verdict where the option contained in a 2011 amended lease document could not serve as retroactive consideration for a promissory note. The note stated on its face that the consideration for its execution was the option granted in the 2010 lease agreement, and the note did not cross-reference the 2011 lease.

3. Estoppel—quasi-estoppel—promissory note—must be raised before trial—unfair benefit from taking inconsistent positions

The trial court did not err in a breach of contract case arising from a lease and option to purchase agreement for a possible house swap by concluding plaintiff individual waived his argument that the doctrine of quasi-estoppel prohibited defendant married couple from denying the validity of a promissory note where plaintiff did not raise quasi-estoppel before trial. Even assuming arguendo that the issue was not waived, quasi-estoppel did not apply under the facts of this case where there was no showing of an unfair benefit from taking inconsistent positions.

KYLE v. FELFEL

[254 N.C. App. 684 (2017)]

Appeal by defendants from order entered 26 July 2016 by Judge Yvonne M. Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 May 2017.

Redding Jones, PLLC, by Joseph R. Pellington and David G. Redding, for plaintiff-appellee.

Hull & Chandler, P.A., by Nathan M. Hull and Andrew S. Brendle, for defendants-appellants.

DAVIS, Judge.

This case requires us to consider whether a promissory note is unenforceable where a failure to abide by the statute of frauds invalidated the consideration intended to support the note. Defendants Helmi L. Felfel and Laura C. Felfel (the "Felfels") appeal from the trial court's order denying their motion for judgment notwithstanding the verdict following a jury verdict finding that the Felfels breached their obligations under the note. Because we conclude that the promissory note was unenforceable for lack of consideration, we reverse.

Factual and Procedural Background

In 2007, the Felfels were living in their home on Bay Harbour Road in Mooresville, North Carolina (the "Bay Harbour Property"). At the time, Plaintiff Jason Kyle owned a home on Jetton Road in Cornelius, North Carolina (the "Jetton Property"). At some point during that year, the Felfels and Kyle were introduced to each other through a mutual friend. The Felfels and Kyle ultimately engaged in discussions about a possible "house swap." The Felfels wanted to sell the Bay Harbour Property and move to the Jetton Property so that Mr. Felfel could live closer to his place of employment. Kyle wished to sell the Jetton Property and live elsewhere.

They decided to structure a transaction whereby the Felfels would rent the Jetton Property for five years and Kyle would rent the Bay Harbour Property. As part of this agreement, the Felfels were to give Kyle a promissory note in the amount of $200,000 that was intended to serve as partial consideration for their receipt of an option to purchase the Jetton Property at the end of the lease period.

Based upon the parties' agreement, the Felfels moved into the Jetton Property in 2008. In 2010, the parties sought to memorialize their agreement through the execution of two written instruments: (1) a document

titled "Amended and Restated Lease Agreement" (hereinafter the "2010 Lease Document"); and (2) a promissory note dated 1 February 2010 (hereinafter the "Note") executed by the Felfels in Kyle's favor.

The 2010 Lease Document provided the terms of the Felfels' rental of the Jetton Property and contained a provision stating that the lease would run from 1 January 2010 until 30 November 2014. The 2010 Lease Document also contained the following language in paragraph 21 purporting to grant an option (hereinafter the "2010 Option") giving the Felfels the right to purchase the Jetton Property during the lease period:

> 21. OPTION TO PURCHASE. [The Felfels] shall have an Option . . . to purchase the [Jetton Property] during the term of this lease including any extensions or renewals hereof. If [the Felfels] fail[ ] to exercise this option in the manner described, then the Option shall automatically cease and be of no further force and effect.

It is undisputed that the 2010 Lease Document was signed by the Felfels on 1 February 2010 — the same date that they signed the Note — as evidenced by a copy of the document entered into evidence at trial. However, no copy of the 2010 Lease Document bearing *Kyle's* signature was ever produced during discovery or at trial.

The Note, which was in the amount of $200,000 and carried a nine percent interest rate, was secured by a deed of trust to the Bay Harbour Property. The Note stated that it was "[d]ue and payable upon the earlier of (i) an Event of Default under the Lease by [the Felfels], (ii) the termination of the Lease, or (iii) November 30, 2014." The Note also contained the following provision:

> This Note is being given as partial consideration for the undersigned's receipt from Jason Kyle of an option to purchase that certain property located at . . . Jetton Road, Cornelius, North Carolina *pursuant to the terms of that certain Amended and Restated Lease Agreement between the parties of even date herewith*[.]

(Emphasis added.) The Note was signed by both of the Felfels on 1 February 2010.[1]

In 2011, the parties entered into a new instrument — also entitled "Amended and Restated Lease Agreement" (hereinafter the "2011

1. The Note was not signed by Kyle.

Lease") — that adjusted the amount of monthly rent the Felfels were to pay Kyle for the Jetton Property and extended the lease term to 31 May 2015. The 2011 Lease also stated, in pertinent part, the following:

> [Kyle] previously granted to [the Felfels] an option to purchase the [Jetton Property] under Paragraph 21 of the Original Lease. *Said purchase option is hereby terminated and replaced in full with the following Option* . . . hereby granted to [the Felfels] to purchase the [Jetton Property] during the term of this Lease, including any extensions or renewals hereof. *The Option is being given in consideration of [the Felfels'] agreement to enter into this Lease*. If [the Felfels] fail[ ] to exercise this option in the manner described, then the Option shall automatically cease and be of no further force and effect.

(Emphasis added.)

Thus, the 2011 Lease contained a new option (hereinafter the "2011 Option"). A copy of the 2011 Lease entered into evidence at trial shows that it was signed by the Felfels on 10 January 2011 and by Kyle on 15 February 2011. Thus, unlike the 2010 Lease Document, the 2011 Lease was signed by both Kyle and the Felfels.

After occupying the Jetton Property and making their monthly rental payments during the lease period, the Felfels vacated the Jetton Property when the 2011 Lease term ended on 31 May 2015. At no point did the Felfels ever attempt to exercise their option to purchase the Jetton Property.

Despite Kyle's demand that the Felfels pay the sums due under the Note, they refused to do so. On 26 August 2015, Kyle filed the present lawsuit in Mecklenburg County Superior Court in which he alleged as his sole cause of action that the Felfels had breached the Note when they failed to pay him the $200,000, plus interest, upon his demand for payment. In both their initial answer and their amended answer, the Felfels asserted the defense that the Note was unenforceable for lack of consideration.

A jury trial was held before the Honorable Yvonne M. Evans beginning on 27 June 2016. Both at the close of Kyle's evidence and at the close of all of the evidence, the Felfels moved for a directed verdict. Both motions were denied by the trial court. The jury entered a verdict in Kyle's favor, answering the following questions in the affirmative: (1) "Did Mr. Kyle and the Felfels enter into a contract?"; and (2) "Did the

Felfels breach the contract by failing to pay Mr. Kyle the amount owed?" The jury determined that Kyle was entitled to recover $250,000 in damages from the Felfels. The trial court entered judgment upon the verdict on 1 July 2016.

On 7 July 2016, the Felfels filed a motion for judgment notwithstanding the verdict ("JNOV") in which they asserted, among other grounds, that Kyle had failed to offer any evidence at trial showing that he provided legally sufficient consideration in exchange for the Felfels' execution of the Note. After holding a hearing on 20 July 2016, the trial court entered an order denying the JNOV motion on 26 July 2016. The Felfels filed a timely notice of appeal from that order.

Analysis

The Felfels argue on appeal that the trial court erred in denying their motion for JNOV given that the Note was unenforceable for lack of consideration. This assertion is premised upon their contention that the 2010 Lease Document (which contained the 2010 Option that purported to be the consideration for the Note) violated the statute of frauds because it was not signed by Kyle. The Felfels contend that this failure to comply with the statute of frauds, in turn, means that the 2010 Option was illusory in that it could not have been legally enforced by them against Kyle. Accordingly, the Felfels reason, consideration for the Note was never actually given by Kyle and thus the Note is unenforceable.

Kyle, conversely, asserts that either the 2010 Option or the 2011 Option did, in fact, serve as the necessary consideration for the Note. Alternatively, he argues that the doctrine of quasi-estoppel precludes the Felfels from contesting the validity of the Note.

In order to survive a JNOV motion,

> the non-movant must present more than a scintilla of evidence to support its claim. While a scintilla is very slight evidence, the non-movant's evidence must still do more than raise a suspicion, conjecture, guess, surmise, or speculation as to the pertinent facts in order to justify its submission to the jury. The trial court must construe the evidence in the light most favorable to the non-movant and resolve all evidentiary conflicts in the non-movant's favor.

Morris v. Scenera Research, LLC, 368 N.C. 857, 861, 788 S.E.2d 154, 157-58 (2016) (internal citations and quotation marks omitted). We review the trial court's ruling on a JNOV motion *de novo*. *Id.*

I. Lack of Consideration

In order to recover on a promissory note, "the party seeking relief must show execution, delivery, consideration, demand, and nonpayment." *Kane Plaza Assocs. v. Chadwick*, 126 N.C. App. 661, 664, 486 S.E.2d 465, 467 (1997) (citation omitted). At issue here is whether Kyle provided consideration, which "consists of any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee." *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 590, 619 S.E.2d 577, 581 (2005) (citation and quotation marks omitted), *disc. review denied*, 360 N.C. 290, 627 S.E.2d 621 (2006).

Kyle asserts that the option to purchase the Jetton Property was the consideration that the Felfels received in exchange for executing the Note.[2] Therefore, in order to prove that consideration existed to support the Note, Kyle was required to establish either that (1) the 2010 Option contained in the 2010 Lease Document — which was executed contemporaneously with the Note — was a legally enforceable agreement; or (2) the 2011 Option contained in the 2011 Lease served as retroactive consideration for the Note. We address each issue in turn.

A. 2010 Option as Consideration for the Note

[1] The Felfels contended in the trial court, and maintain in this appeal, that the option contained in the 2010 Lease Document could not serve as the consideration necessary to support the Note because the 2010 Lease Document violated the statute of frauds in that it was not signed by Kyle. North Carolina's statute of frauds states as follows:

> All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them . . . and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, 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.

N.C. Gen. Stat. § 22-2 (2015). It is well established that the "statute of frauds . . . is applicable to option contracts for the purchase of property[.]" *Craig v. Kessing*, 36 N.C. App. 389, 392, 244 S.E.2d 721, 723 (1978), *aff'd*, 297 N.C. 32, 253 S.E.2d 264 (1979).

2. Indeed, neither Paragraph 21 of the 2010 Lease Document nor the Note itself indicate that anything other than the 2010 Option was to serve as consideration for the Felfels' execution of the Note.

With regard to documents required by the statute of frauds to be in writing, the only admissible evidence to establish the agreement — including the fact that it was signed — is the writing itself. *See Jamerson v. Logan*, 228 N.C. 540, 544, 46 S.E.2d 561, 564 (1948) ("A contract which the law requires to be in writing can be proved only by the writing itself, not as the *best*, but as the *only admissible evidence of its existence*." (citation and quotation marks omitted)).

Here, it is undisputed that the 2010 Lease Document purported to contain both an agreement for the Felfels to lease the Jetton Property for a period exceeding three years and an option for them to purchase that property. Therefore, the 2010 Lease Document (including the 2010 Option contained therein) was subject to the statute of frauds. Because neither party introduced a version of the 2010 Lease Document that had been signed by Kyle, the statute of frauds would have barred any attempt by the Felfels to enforce the 2010 Option against Kyle. Accordingly, because the 2010 Option was unenforceable against Kyle, it cannot serve as consideration for the Note. *See McLamb*, 173 N.C. App. at 591, 619 S.E.2d at 581 ("[O]ur courts have held that consideration which may be withdrawn on a whim is illusory consideration which is insufficient to support a contract."); *see also Milner Airco, Inc. of Charlotte, N.C. v. Morris*, 111 N.C. App. 866, 870, 433 S.E.2d 811, 814 (1993) (holding contract unenforceable for lack of consideration because "while reciting consideration, [the contract] does not bind the employer to any promise").

B. 2011 Lease as Consideration for the Note

[2] Kyle also argues, in the alternative, that even if the 2010 Lease Document — standing alone — did not serve as consideration for the Note, consideration was provided retroactively by the 2011 Lease, which both referenced the 2010 Option and purported to grant the Felfels a new option. We reject this argument for several reasons.

First, the Note clearly stated on its face that the consideration for its execution was the option granted *in the 2010 Lease Document*: "This Note is being given as partial consideration for the [Felfels'] receipt from Jason Kyle of an option to purchase [the Jetton Property] pursuant to the terms of that certain Amended and Restated Lease Agreement between the parties *of even date herewith*[.]" (Emphasis added.) The phrase "even date" means "the same date." Black's Law Dictionary 635 (9th ed. 2009). Thus, it is clear that the option being referenced in the Note was the one contained in the 2010 Lease Document as that was the "Amended and Restated Lease Agreement" signed by the Felfels on the same date as the Note — *not* the 2011 Lease signed a year later. This fact is fatal to Kyle's argument. *See, e.g., In re Head Grading Co., Inc.*, 353 B.R. 122, 123-24

(Bankr. E.D.N.C. 2006) (applying North Carolina law to invalidate deed of trust secured by "Promissory Note of even date herewith" because promissory note was executed on later date than deed of trust).

Second, we are not persuaded by Kyle's contention that because multiple writings may in some circumstances be construed together to satisfy the statute of frauds, we should hold that in this case "the [2011] Lease, with its internal references to the 2010 Lease [Document] and the Note, is sufficient to comply with the statute of frauds." The cases Kyle cites in support of this argument stand merely for the proposition that an agreement comprising separate, cross-referenced writings does not necessarily violate the statute of frauds simply because the documents are not physically attached. *See*, *e.g.*, *Fuller v. Southland Corp.*, 57 N.C. App. 1, 7, 290 S.E.2d 754, 758 ("[T]he writings need not be physically connected if they contain internal reference to other writings[,]" and "unconnected writings must contain a reference to the other writings, not merely a reference to the same subject matter." (emphasis omitted)), *disc. review denied*, 306 N.C. 556, 294 S.E.2d 223 (1982); *Mezzanotte v. Freeland*, 20 N.C. App. 11, 16, 200 S.E.2d 410, 414 (1973) (explaining that "[t]he papers need not be physically attached if they are connected by internal reference" and holding that document referenced within sales agreement and delivered contemporaneously with that agreement constituted part of the "writing" for purposes of statute of frauds), *disc. review denied*, 284 N.C. 616, 201 S.E.2d 689 (1974).

Here, however, the Note did not cross-reference the 2011 Lease.[3] Rather, the Note only cross-referenced the "Amended and Restated Lease Agreement between the parties of even date herewith" — that is, the 2010 Lease Document.[4] Accordingly, the Note is unenforceable for lack of consideration.

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3. The lack of such a cross-reference is logical given that the 2011 Lease was not executed until approximately one year after the Note was signed.

4. We are also unpersuaded by Kyle's citation to *Millikan v. Simmons*, 244 N.C. 195, 93 S.E.2d 59 (1956). We are not presented with a situation, as occurred in *Millikan*, where an agreement was entered verbally on a certain date, memorialized and signed on a later date, and properly construed as having been in effect on the earlier of the two dates. *See id.* at 199-200, 93 S.E.2d at 62-63 ("It is not necessary . . . that a writing be signed at the time a contract is made. The writing is not the contract; it is the party's admission that the contract was made. It is sufficient if subsequent to the contract a memorandum thereof is reduced to writing and signed by the party to be charged. The extension agreement, if made on the 13th and reduced to writing and signed on the 15th, would be enforceable between the parties as of the 13th." (internal citation and quotation marks omitted)). Here, the 2011 Lease was *not* simply the memorialization of an earlier verbal agreement; rather, it was a *separate* agreement made a year after the Note and the 2010 Lease Document were executed.

II. Quasi-Estoppel

[3] Kyle's fallback argument is that the doctrine of quasi-estoppel prohibits the Felfels from denying the validity of the Note. "Under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 18, 591 S.E.2d 870, 881-82 (2004) (citation and quotation marks omitted). "[T]he essential purpose of quasi-estoppel is to prevent a party from benefitting by taking two clearly inconsistent positions." *Id.* at 18-19, 591 S.E.2d at 882 (citation, quotation marks, and ellipsis omitted). Quasi-estoppel "rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result. Equity serves to moderate the unjust results that would follow from the unbending application of common law rules and statutes." *Brooks v. Hackney*, 329 N.C. 166, 173, 404 S.E.2d 854, 859 (1991) (internal citation and quotation marks omitted).

Because the Felfels accepted benefits in connection with the Note, Kyle asserts, they should be estopped from taking the inconsistent position of denying the Note's validity. However, Kyle did not assert this doctrine at any time prior to the beginning of trial. Rather, his counsel raised the general doctrine of estoppel for the first time while arguing in favor of the denial of the Felfels' motion for a directed verdict at the close of evidence at trial. Kyle's attorney did not specifically refer to *quasi*-estoppel until the JNOV stage of the proceeding.[5]

In *Parkersmith Properties v. Johnson*, 136 N.C. App. 626, 525 S.E.2d 491 (2000), we stated the following in assessing the timeliness of the plaintiff's attempt to invoke quasi-estoppel:

> Defendants argue Plaintiff cannot raise the issue of estoppel on appeal because Plaintiff did not allege a theory of estoppel in its complaint. Plaintiff did, however, assert a theory of estoppel in its motion in opposition to summary judgment. Because estoppel is an affirmative defense and Defendants had notice of the defense prior to the summary judgment hearing, Plaintiff properly raised the theory of estoppel and the issue is, therefore, properly before this Court.

Id. at 632 n.3, 525 S.E.2d at 495 n.3.

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5. We note that the applicability of the quasi-estoppel doctrine was never expressly ruled upon by the trial court.

However, Kyle has failed to point us to any legal authority standing for the proposition that quasi-estoppel may be raised as an alternative theory of recovery for the first time after a trial has begun — much less at the directed verdict or JNOV stages. Moreover, there is no valid justification for Kyle's delay in raising this issue given that the Felfels asserted the defense of lack of consideration in their answer. Notably, it was *Kyle's* burden in this lawsuit to prove that the Note was an enforceable agreement. The doctrine of quasi-estoppel constituted a discrete theory of recovery in this case — i.e., that this equitable doctrine allowed enforcement of the Note despite the absence of consideration. Therefore, we deem this theory of recovery to have been waived.

We note that our Supreme Court has held that the closely-related doctrine of equitable estoppel may present a jury question. *See Creech v. Melnik*, 347 N.C. 520, 528, 495 S.E.2d 907, 913 (1998) ("[W]here the evidence raises a permissible inference that the elements of equitable estoppel are present, but where other inferences may be drawn from contrary evidence, estoppel is a *question of fact for the jury*, upon proper instructions from the trial court." (emphasis added)). Although *Creech* dealt with equitable estoppel rather than quasi-estoppel, the Supreme Court has characterized quasi-estoppel as a "branch of equitable estoppel," *Whitacre*, 358 N.C. at 18, 591 S.E.2d at 881, and we see no distinction between the two doctrines for purposes of this issue. *Creech* is, therefore, consistent with the proposition that a party seeking to rely upon a theory of quasi-estoppel must invoke the doctrine in advance of trial.

Moreover, even assuming *arguendo* that Kyle had not waived this issue, quasi-estoppel would not apply under the facts of this case. The 2010 Option (which is the primary benefit Kyle claims the Felfels received in exchange for executing the Note) was only in effect for approximately one year. It was superseded by the 2011 Option contained in the 2011 Lease. By the express terms of the 2011 Lease, the payment of rent by the Felfels during the lease period served as consideration for the 2011 Option.

We do not believe that the facts of this case are sufficient to invoke the doctrine of quasi-estoppel, which is designed to "prevent a party from benefitting by taking two clearly inconsistent positions." *Id.* at 18-19, 591 S.E.2d at 882 (citation and quotation marks omitted). Kyle has failed to show that the Felfels unfairly benefited from taking inconsistent positions as they never attempted to exercise the 2010 Option (or, for that matter, the 2011 Option). In short, this case simply does not cry out for the need to "moderate . . . unjust results that would follow from

the unbending application of common law rules and statutes." *Brooks*, 329 N.C. at 173, 404 S.E.2d at 859.

Accordingly, because the Note failed for lack of consideration and the doctrine of quasi-estoppel is inapplicable, the Felfels were entitled to JNOV. Therefore, the trial court erred in denying their JNOV motion.

Conclusion

For the reasons stated above, we reverse the trial court's 26 July 2016 order and remand for entry of judgment consistent with this opinion.

REVERSED AND REMANDED.

Judges BRYANT and STROUD concur.

MARTIN LEONARD, Plaintiff
v.
RONALD BELL, M.D., Individually, PHILLIP STOVER, M.D., Individually, Defendants

No. COA17-130

Filed 1 August 2017

1. Appeal and Error—interlocutory orders and appeals—public officer immunity—personal jurisdiction—substantial right

Defendant doctors' appeal in a medical malpractice case from an interlocutory order denying their motions to dismiss based on public official immunity was immediately appealable under N.C.G.S. § 1-277(b). Immunity presents a question of personal jurisdiction and thus affects a substantial right.

2. Immunity—public official immunity—physicians providing health services to inmates—positions not created by statute

The trial court did not err in a medical malpractice case by denying defendant doctors' motions to dismiss based on assertions of public official immunity. Although defendants were employed by the Department of Public Safety (DPS) to help fulfill the State's duty to provide health services to inmates, DPS's decision to employ its own physicians in the Division of Adult Correction did not mean that those physicians held positions created by statute so as to be considered a public official. Further, although not dispositive, neither defendant took an oath of office to be considered a public official.

Appeal by defendants from order entered 25 October 2016 by Judge Tanya T. Wallace in Cumberland County Superior Court. Heard in the Court of Appeals 7 June 2017.

Knott & Boyle, PLLC, by W. Ellis Boyle and Benjamin Van Steinburgh, for plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Joshua D. Neighbors, Luke Sbarra, and M. Duane Jones, for defendant-appellant Ronald Bell, M.D.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Charles G. Whitehead and Special Deputy Attorney General Amar Majmundar, for defendant-appellant Phillip Stover, M.D.

ARROWOOD, Judge.

Defendants Ronald Bell, M.D. ("Dr. Bell"), and Phillip Stover, M.D. ("Dr. Stover"), appeal the denial of their motions to dismiss based on grounds of public official immunity. For the following reasons, we affirm.

I. Background

Martin Leonard ("plaintiff") initiated this case against defendants in their individual capacities with the filing of summonses and a complaint on 5 May 2016. In the complaint, plaintiff asserts negligence claims against Dr. Bell and Dr. Stover, both physicians employed by the Department of Public Safety ("DPS"), albeit in different capacities. Those claims are based on allegations that Dr. Bell and Dr. Stover failed to meet the requisite standard of care for physicians while treating plaintiff, who at all relevant times was incarcerated in the Division of Adult Correction (the "DAC").

Specifically, plaintiff alleges that he began experiencing severe back pain in late October 2012 and submitted the first of many requests for medical care. Over the next ten months, plaintiff was repeatedly evaluated in the DAC system by nurses, physician assistants, and Dr. Bell in response to plaintiff's complaints of increasing back pain and other attendant symptoms. Dr. Bell personally evaluated plaintiff nine times and, at the time of the seventh evaluation in June 2013, submitted a request for an MRI to the Utilization Review Board (the "Review Board"). Dr. Stover, a member of the Review Board, denied Dr. Bell's request for an MRI and instead recommended four weeks of physical therapy. Plaintiff continued to submit requests for medical care as his

condition worsened. Upon further evaluations by a nurse and a physician assistant in August 2013, the physician assistant sent plaintiff to Columbus Regional Health Emergency Department for treatment. Physicians at Columbus Regional performed an x-ray and an MRI. Those tests revealed plaintiff was suffering from an erosion of bone in the L4 and L3 vertebra and a spinal infection. Plaintiff asserts Dr. Bell's failure to adequately evaluate and treat his condition, and Dr. Stover's refusal of requested treatment, amounts to medical malpractice.

In response to the complaint, Dr. Bell filed a motion to dismiss pursuant to Rule 12(b)(6) on 13 July 2016. Among the grounds asserted for dismissal, Dr. Bell claimed he was entitled to "public official immunity for all acts and omissions alleged against him[.]" Likewise, on 19 July 2016, Dr. Stover filed a motion to dismiss pursuant to Rule 12(b)(1), (2), and (6). Defendants' motions were heard during the 3 October 2016 session of Cumberland County Superior Court before the Honorable Tanya T. Wallace. On 25 October 2016, the court denied defendants' motions to dismiss.

Dr. Stover filed notice of appeal from the 25 October 2016 order on 18 November 2016. Dr. Bell filed notice of appeal from the 25 October 2016 order on 21 November 2016.

II. Discussion

On appeal, both Dr. Bell and Dr. Stover contend the trial court erred in denying their motions to dismiss. Specifically, Dr. Bell argues the trial court erred in denying his Rule 12(b)(6) motion for failure to state a claim because he is entitled to public official immunity. Dr. Stover similarly argues the trial court erred in denying his Rule 12(b)(2) and (6) motions for lack of personal jurisdiction and failure to state a claim because he is entitled to public official immunity.

A. Interlocutory Nature of Appeals

[1] At the outset, we note that defendants' appeals are interlocutory because the trial court's denial of their motions to dismiss did not dispose of the case. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("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."). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Immediate appeal is available, however, from an interlocutory order that affects a

substantial right. N.C. Gen. Stat. §§ 1-277(a) (2015) and 7A-27(b)(3)(a) (2015). "Orders 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); *see also Can Am South, LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (acknowledging the longstanding rule that the denial of a motion to dismiss based on immunity pursuant to Rule 12(b)(6) affects a substantial right and is immediately appealable under N.C. Gen. Stat. § 1-277(a)), *disc. review denied*, 367 N.C. 791, 766 S.E.2d 624 (2014). "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.' " *Farrell v. Transylvania Cnty. Bd. of Educ.*, 175 N.C. App. 689, 694, 625 S.E.2d 128, 133 (2006) (quoting *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)). Consequently, we address defendants' interlocutory appeals from the denials of their Rule 12(b)(6) motions to dismiss.

Immediate appeal is also available from an adverse ruling as to personal jurisdiction. N.C. Gen. Stat. § 1-277(b). This Court has consistently held that immunity presents a question of personal jurisdiction and, therefore, denial of a Rule 12(b)(2) motion premised on immunity is immediately appealable under N.C. Gen. Stat. § 1-277(b). *Can Am South*, 234 N.C. App. at 124, 759 S.E.2d at 308. Thus, review of Dr. Stover's interlocutory appeal is proper on this additional ground.

B. Standard of Review

The standard of review for an appeal from a denial of a Rule 12(b)(6) motion is well settled.

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

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

When this Court reviews the denial of a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, "[w]e must review the record to determine whether there is evidence to support the trial court's determination that exercising its jurisdiction would be appropriate." *Martinez v. Univ. of North Carolina*, 223 N.C. App. 428, 430-31, 741 S.E.2d 330, 332 (2012).

C. Public Official Immunity

[2] Each defendant contends the trial court erred in denying his motion to dismiss because each defendant is entitled to public official immunity. "Public official immunity precludes suits against public officials in their individual capacities and protects them from liability '[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]' " *Fullwood v. Barnes*, __ N.C. App. __, __, 792 S.E.2d 545, 550 (2016) (quoting *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citation omitted)). Our Supreme Court has explained that "[p]ublic officials receive immunity because it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be personally liable for acts or omissions involved in exercising their discretion." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (citations and quotation marks omitted).

In the present case, all parties agree that there were no allegations that defendants acted outside the scope of their authority or that defendants acted with malice or corruption. The sole question on appeal is whether defendants qualify as public officials entitled to immunity from suit in their individual capacities.

"Under the doctrine of public official immunity, '[w]hen a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officials in determining negligence liability.' " *Farrell*, 175 N.C. App. at 695, 625 S.E.2d at 133 (quoting *Hare v. Butler*, 99 N.C. App. 693, 699-700, 394 S.E.2d 231, 236 (1990) (citations omitted)).

> It is settled in this jurisdiction that 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. An employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury.

Isenhour, 350 N.C. at 609-10, 517 S.E.2d at 127 (citations 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) (*Murray v. Cnty. of Person*, 191 N.C. App. 575, 579-80, 664 S.E.2d 58, 61 (2008) (internal quotations and citations omitted)); *see also Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127 (recognizing the same "basic distinctions between a public official and a public employee").

Defendants each maintain that they have been delegated and carry out the DAC's constitutional and statutory duty to provide health services to inmates. They further maintain that they exercise a portion of the sovereign power and substantial discretion in fulfilling that duty. Thus, defendants argue that they are public officials and not public employees. We disagree.

Defendants fail to point to any constitutional or statutory provisions creating their respective positions; and we have found no such authority. Instead, defendants contend they satisfy the first prong in the public official analysis because they have been delegated the DAC's duty to provide health services to inmates.

This Court has stated that "[a] position is considered 'created by statute' when 'the officer's position ha[s] a clear statutory basis *or the officer ha[s] been delegated a statutory duty by a person or organization created by statute*' or the Constitution." *Baker v. Smith*, 224 N.C. App. 423, 428, 737 S.E.2d 144, 148 (2012) (emphasis in original) (quoting *Fraley*, 217 N.C. App. at 627, 720 S.E.2d at 696 (citation and quotation marks omitted)). Thus, in *Baker*, this Court concluded that the position of assistant jailer was "created by statute" for purposes of public official immunity even though there was not an explicit statutory basis for the position. *Id.* at 428-30, 737 S.E.2d at 148-49. The Court reasoned that,

> N.C. Gen. Stat. § 162-22 establishes that sheriffs have the duty to operate the jail and the power to "appoint[] the keeper thereof." N.C. Gen. Stat. § 162-22 (2011). . . .

> Regardless of whether we read § 162-22 to include assistant jailers, that statute establishes the duty of the sheriff to operate the jail. N.C. Gen. Stat. § 162-24 permits a sheriff to "appoint a deputy *or employ others to assist him in performing his official duties*." N.C. Gen. Stat. § 162-24 (2011) (emphasis added). Read together with § 162-22, it is clear that the legislature intended to permit the sheriff to "employ others"—plural—to help perform his official duties, including his duty to take "care and custody of the jail." N.C. Gen. Stat. § 162-22.
>
> That statutory duty defines the role of an assistant jailer. Assistant jailers are "charged with the care, custody, and maintenance of prisoners." *State v. Shepherd*, 156 N.C. App. 603, 607, 577 S.E.2d 341, 344 (2003). The same article that vests the sheriff and chief jailer with their powers also vests them with the authority to appoint subordinates, such as assistant jailers. *See* N.C. Gen. Stat. § 162-24. Our legislature, in a different article, described detention officers, i.e. jailers, as "[a] person, who through the special trust and confidence of the sheriff, has been appointed as a detention officer by the sheriff." N.C. Gen. Stat. § 17E-2 (2011). Indeed, the jail cannot operate without "custodial personnel" to "supervise" and "maintain safe custody and control" of the prisoners. N.C. Gen. Stat. § 153-224(a) (2011) ("No person may be confined in a local confinement facility unless custodial personnel are present and available to provide continuous supervision in order that custody will be secure . . .") *Thus, assistant jailers are delegated the statutory duty to take care of the jail and the detainees therein by the sheriff-a position created by our Constitution*. N.C. Const. art. VII, § 2.

Id. at 429-30, 737 S.E.2d at 148-49 (footnote omitted) (emphasis added). Other cases have similarly held that positions with no explicit statutory basis are nonetheless "created by statute" when there is statutory authorization for the delegation of a duty. *See, e.g.*, *Cherry v. Harris*, 110 N.C. App. 478, 480-81, 429 S.E.2d 771, 772-73 (1993) (a forensic pathologist who conducted an autopsy and prepared reports in response to an official request by a county medical examiner satisfied the first element of the public official analysis because the medical examiner, a position created by statute, had the statutory authority pursuant to N.C. Gen. Stat. § 130A-389(a) to order that an autopsy be performed by

a competent pathologist designated by the Chief Medical Examiner, and the forensic pathologist had been so designated).

Defendants rely on *Baker* and contend the result in the present case should be no different because the DAC is statutorily created and they have been delegated the DAC's constitutional and statutory duty to provide health services to inmates.

Defendants correctly point out that the DAC is statutorily created. The relevant statute provides that "[t]here is hereby created and established a division to be known as the Division of Adult Correction of the Department of Public Safety with the organization, powers, and duties hereafter defined in the Executive Organization Act of 1973." N.C. Gen. Stat. § 143B-700 (2015). The immediately following statute adds that "[i]t shall be the duty of the [DAC] to provide the necessary custody, supervision, and treatment to control and rehabilitate criminal offenders . . . ." N.C. Gen. Stat. § 143B-701 (2015). Defendants also correctly point out that the duties of the DAC include the duty to provide health services to inmates. Specifically, our general statutes provide that "[t]he general policies, rules and regulations of the [DAC] shall prescribe standards for health services to prisoners, which shall include preventive, diagnostic, and therapeutic measures on both an outpatient and a hospital basis, for all types of patients." N.C. Gen. Stat. § 148-19(a) (2015). The duty to provide health services to inmates also has a constitutional basis, as recognized in *West v. Atkins*, 487 U.S. 42, 54-55, 101 L. Ed. 2d 40, 53 (1988) (explaining that "the State has a constitutional obligation, under the Eight Amendment, to provide adequate medical care to those whom it has incarcerated[]" because "[i]t is only those physicians authorized by the State to whom [an] inmate may turn[]"), and *Medley v. N.C. Dep't of Correction*, 330 N.C. 837, 842, 412 S.E.2d 654, 658 (1992) (citing *West* while acknowledging that "[i]n addition to common-law and statutory duties to provide adequate medical care for inmates, the state also bears this responsibility under our state Constitution and the federal Constitution[]").

West and *Medley* are only relevant in this case to establish that the DAC has a duty to provide health services to inmates. Otherwise, both cases hold that the State cannot escape liability by delegating that constitutional duty. In *West*, the Supreme Court explained that a physician who is under contract with the State to provide medical services to inmates acts "under color of state law" while providing those services for purposes of asserting an action under 42 U.S.C. § 1983. *West*, 487 U.S. at 54, 101 L. Ed. 2d at 53. Thus, the physician's "conduct is fairly attributable to the State." *Id.* In *Medley*, the Court explained "that the duty to provide adequate medical care to inmates, imposed by the state and federal

Constitutions, and recognized in state statute and caselaw, is such a fundamental and paramount obligation of the state that the state cannot absolve itself of responsibility by delegating it to another." *Medley*, 330 N.C. at 844, 412 S.E.2d at 659. Thus, the North Carolina Department of Correction could not avoid liability by contracting a physician to fulfill its duty because the physician "is as a matter of law an agent for purposes of applying the doctrine of *respondeat superior*." *Id.* at 845, 412 S.E.2d at 659. However, neither *West* nor *Medley* stands for the proposition that a physician fulfilling the DAC's duty to provide health services to inmates was immune from suit in their individual capacity. Any argument that defendants cannot be sued in their individual capacities based on the holdings of *West* or *Medley* is erroneous and misplaced.

Based on the above, we agree with defendants that the DAC is statutorily created and that the DAC has a duty to provide health services to inmates. We, however, find the present case distinguishable from *Baker* and other cases that hold a position is created by statute when there has been a delegation of a statutory duty by a person or organization created by statute or the constitution. In each of those cases, the Court points directly to a statute that authorizes a constitutionally or statutorily created person or organization to delegate its statutory duty to another individual. In *Baker*, that statute was N.C. Gen. Stat. § 162-24, which "permits a sheriff to 'appoint a deputy or employ others to assist him in performing his official duties.' " 224 N.C. App. at 429, 737 S.E.2d at 148 (quoting N.C. Gen. Stat. § 162-24) (emphasis omitted). In *Cherry*, that statute is N.C. Gen. Stat. § 130A-389(a), which allows a county medical examiner to order an autopsy to be performed by a pathologist. 110 N.C. App. at 481, 429 S.E.2d at 773. Even in *Chastain v. Arndt*, __ N.C. App. __, __ S.E.2d __ (18 April 2017) (COA 16-1151) (holding a Basic Law Enforcement Training ("BLET") firearms instructor was a public official entitled to immunity), a recent decision that both defendants cite in reply to plaintiff's arguments, this Court, in support of its finding that "[the defendant], in his role as a BLET firearms instructor, was delegated a statutory duty by a person or organization created by statute[,]" points to statutory authority that establishes the North Carolina Criminal Justice Education and Training Standards Commission (the "Commission") and shows that its duty to train officers is to be delegated to instructors. *Id.* at __, __ S.Ed.2d at __. As this Court summarized in *Chastain*, those provisions involving instructors provide as follows:

> The Commission . . . 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 (7).

Id.

In the present case, defendants contend the DAC has delegated to them its duty to provide health services to inmates. Yet, defendants fail to point to any statutory provisions similar to those in *Baker*, *Cherry*, or *Chastain* contemplating the delegation of the DAC's duty, or contemplating that the DAC will hire its own physicians. Instead, defendants cite the following portions of N.C. Gen. Stat. § 148-19:

> (a) . . . The [DAC] shall seek the cooperation of public and private agencies, institutions, officials and individuals in the development of adequate health services to prisoners.
>
> . . . .
>
> (c) Each prisoner committed to the [DAC] shall receive a physical and mental examination by a health care professional authorized by the North Carolina Medical Board to perform such examinations as soon as practicable after admission and before being assigned to work. . . .

Neither of those portions of N.C. Gen. Stat. § 148-19, however, indicate that the legislature intended for DAC to hire its own physicians. The cited portion of subsection (a) is broad and shows only that the legislature left it to DAC to develop adequate health services; it does not provide any indication how health services would be provided. Subsection (c) is similarly broad, requiring an initial evaluation by an authorized health care professional, but no further indication as to how the DAC was to provide that health care professional. There are many ways the DAC could fulfill its duty to provide health services to inmates. In fact, subsection (b) contemplates that the Secretary of Public Safety may request personnel employed by the Department of Health and Human Services or other State agencies to be detailed to the DAC for purposes of providing health services. N.C. Gen. Stat. § 148-19(b). DPS's decision to employ its own physicians appears to be a policy decision.

In deciding defendants are not public officials entitled to immunity, we find additional guidance in this Court's decision in *Farrell v. Transylvania Cnty. Bd. Of Educ.*, 199 N.C. App. 173, 682 S.E.2d 224 (2009). In *Farrell*, the Court addressed whether a special needs teacher in the public school system was entitled to public official immunity from claims related to the physical and emotional abuse of the plaintiffs' son. *Id.* at 174, 682 S.E.2d at 226. In concluding that the teacher was not a public official, the Court distinguished the teacher's case from *Kitchin v. Halifax Cnty.*, 192 N.C. App. 559, 665 S.E.2d 760 (2008), *disc. rev. denied.*, 363 N.C. 127, 673 S.E.2d 135 (2009) (holding that an animal control officer was a public official because the position is created by statute), *Hobbs v. N.C. Dep't of Human Res.*, 135 N.C. App. 412, 520 S.E.2d 595 (1999) (holding that department of social services staff members who were acting for and representing the director of social services were public officials because the director, a public official, had the statutory authority to delegate to staff members authority to act as his representative), and *Price v. Davis*, 132 N.C. App. 556, 512 S.E.2d 783 (1999) (without discussing the *Isenhour* criteria, holding that a correctional sergeant and an assistant superintendent at a correctional facility were public officials), stating that "the party being sued [in those cases] was either employed in a position created by statute, or delegated a statutory duty by a person or organization created by statute." *Farrell*, 199 N.C. App. at 179, 682 S.E.2d at 229. In contrast, the Court in *Farrell* noted that although N.C. Gen. Stat. § 115C-307 defines the duties of teachers and N.C. Gen. Stat. § 115C-325 governs the system of employment for public school teachers, neither of those statutes create the position of teacher. *Id.* at 177, 682 S.Ed.2d at 228. Thus, despite the explicit constitutional guarantee of the right to a free public education, *see Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997), the State's constitutional duty to guard and maintain that right, *see* N.C. Const. art. 1, § 15, and statutes providing for the hiring of teachers, defining the duties of teaches, and governing the system of employment for teaches, *see* N.C. Gen. Stat. §§ 115C-299, -307, and -325, teachers that are employed to fulfill the State's duty are not public officials entitled to immunity.

Similarly, although defendants are employed by DPS to help fulfill the State's duty to provide health services to inmates, DPS's decision to employ its own physicians in the DAC does not mean that those physicians hold positions created by statute to be considered a public official. To hold otherwise would open the flood gates so that any physician providing health services to an inmate in the DAC, whether or not the physician was directly employed by DPS, or any DPS employees providing services relating to the care and wellbeing of inmates for that matter,

even those providing the food services, would be considered to hold positions created by statute so as to satisfy the first prong of the public official analysis. We reject such an analysis that vastly expands the scope of public official immunity to those employees. Although Dr. Bell and Dr. Stover were both physicians employed by DPS to provide health services to inmates in the DAC, their positions were not created by statute. Therefore, like the teacher in *Farrell*, they are not public officials for purposes of public official immunity.

Regarding the second and third prongs in the public official analysis, defendants contend that because they fulfill the DAC's duty to provide health services to inmates, their jobs necessarily involve the power of the sovereign and the exercise of discretion. Because we hold that defendants' positions are not created by statute, we need not address the remaining elements to reach the conclusion that defendants are not public officials entitled to immunity. We, however, take this opportunity to note that there is nothing uniquely sovereign about the health services provided by defendants to plaintiff in this case, except that plaintiff was an inmate in the DAC. Furthermore, all physicians exercise discretion in the evaluation and treatment of patients. The discretion exercised by defendants in providing health services to plaintiff in this case is no different than the discretion exercised by physicians treating patients outside of the DAC system.

Finally, while not dispositive to our analysis, we note that neither of these defendants took an oath of office as is often required to be considered a public official. *See Baker*, 224 N.C. App. at 433, 737 S.E.2d at 151.

III. Conclusion

For the foregoing reasons, we affirm the trial court's decision to deny defendants' motions to dismiss based on assertions of public official immunity.

AFFIRMED.

Judges ELMORE and DIETZ concur.

MITCHELL, BREWER, RICHARDSON, ADAMS, BURGE & BOUGHMAN; GLENN B. ADAMS; HAROLD L. BOUGHMAN, JR. AND VICKIE L. BURGE, PLAINTIFFS
v.
COY E. BREWER, JR., RONNIE A. MITCHELL, WILLIAM O. RICHARDSON, AND CHARLES BRITTAIN, DEFENDANTS[1]

No. COA16-1122

Filed 1 August 2017

1. Appeal and Error—preservation of issues—waiver—failure to object—dissolution of law firm

Although defendants contended the trial court erred in an action involving an accounting and distribution for the dissolution of a law firm by adopting an appointed referee's report, defendants waived their right to have a jury decide the scope and manner of the referee's duties by failing to object to the compulsory reference order, the scope of the reference order, and the procedures employed by the referee. A referee has significant discretion, and neither N.C.G.S. § 1A-1, Rule 53 nor the reference order required the referee to conduct the accounting process in the manner defendants argued was required.

2. Attorneys—accounting and distribution—dissolution of law firm—professional limited liability corporation—judicial dissolution

The trial court did not err in an action involving an accounting and distribution for the dissolution of a law firm by granting summary judgment in favor of plaintiffs on defendants' counterclaims that incorrectly assumed the professional limited liability corporation (PLLC) remained an ongoing entity. A judicial dissolution was necessary where there was a deadlock between the PLLC members, and any confusion on the status of the PLLC was eliminated by the decision in *Mitchell I*. Further, an extensive analysis of the values of contingent fee cases that had been received before dissolution, but resolved afterward, were contained in the appointed referee's report.

Appeal by defendants from orders entered 26 February 2013, 18 September 2015, and 19 February 2016 by Judge John R. Jolly, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 2 May 2017.

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1. Richardson and Brittain have settled their disputes with Plaintiffs and are not parties to this appeal.

Everett Gaskins Hancock LLP, by E.D. Gaskins, Jr., James M. Hash and Fiona K. Steer, for plaintiffs-appellees.

Ronnie M. Mitchell and Coy E. Brewer, Jr., pro se, for defendants-appellants.

DAVIS, Judge.

This appeal involves a number of issues surrounding the break-up of the Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC law firm. Upon remand of the case following our resolution of the parties' initial appeal, the trial court dissolved the law firm and appointed a referee to conduct an accounting and distribution. Ronnie M. Mitchell[2] and Coy E. Brewer, Jr. (collectively "Defendants") now appeal from the trial court's orders appointing a referee, adopting the report of the referee, and granting the motion for summary judgment of Glenn B. Adams, Harold L. Boughman, Jr., and Vickie L. Burge (collectively "Plaintiffs") as to Defendants' remaining counterclaims. We affirm each of the trial court's orders.

Factual and Procedural Background

The full factual background relating to the break-up of the firm is set out in our prior opinion. *See Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC v. Brewer*, 209 N.C. App. 369, 705 S.E.2d 757 (hereinafter "*Mitchell I*"), *disc. review denied*, 365 N.C. 188, 707 S.E.2d 243 (2011). Accordingly, we only discuss below those facts relevant to the present appeal.

This lawsuit arose out of a dispute between the members of the Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC law firm, which resulted in the firm breaking up in the summer of 2005.[3] Plaintiffs subsequently formed a new firm called Adams, Burge & Boughman, PLLC ("AB&B"), while Brewer, Mitchell, William O. Richardson, and Charles Brittain continued to practice law together as Mitchell, Brewer, Richardson. In the aftermath of the break-up, numerous disagreements

2. The complaint and the captions of the trial court's orders incorrectly identify Mitchell as "Ronnie *A*. Mitchell" rather than "Ronnie *M*. Mitchell."

3. For purposes of clarity, in this opinion we refer to the firm that existed at the time of dissolution — Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC — as "the PLLC."

arose between the parties regarding the ownership of certain PLLC assets — including future profits from unresolved contingent fee cases brought into the PLLC before the break-up.

On 5 July 2006, Plaintiffs filed the present lawsuit in Cumberland County Superior Court against Brewer, Mitchell, Richardson, and Brittain in which they asserted claims for (1) an accounting to the PLLC; (2) an accounting to Plaintiffs; (3) a "liquidating distribution"; (4) constructive fraud and breach of fiduciary duty; and (5) unfair and deceptive trade practices. In connection with these claims, Plaintiffs sought a judicial dissolution and winding up of the PLLC. Plaintiffs asserted these claims both individually and derivatively on behalf of the PLLC. Plaintiffs subsequently amended their complaint on 1 August 2006, 23 May 2007, and 17 February 2009.

The lawsuit was designated a complex business case pursuant to N.C. Gen. Stat. § 7A-45.4 and assigned to the Honorable John R. Jolly, Jr. of the North Carolina Business Court. On 1 November 2006, Defendants moved to dismiss Plaintiffs' complaint, and the trial court denied the motion by order entered on 8 May 2007. Defendants subsequently filed an answer on 13 June 2007, raising multiple defenses and asserting the following counterclaims: (1) a request for a declaratory judgment that Plaintiffs "voluntarily and unilaterally withdrew" from the PLLC; (2) a declaratory judgment that Plaintiffs were equitably estopped from denying that they had agreed to a dissolution of the PLLC pursuant to the terms of a memorandum drafted by Brewer; (3) breach of fiduciary duty in connection with Plaintiffs' misuse of PLLC assets, failure to meet financial obligations of the PLLC, and failure to account for fees generated through PLLC business; (4) conversion and misappropriation of PLLC assets; (5) unjust enrichment for failure to account to the PLLC; (6) a request for imposition of a constructive trust, equitable lien, or resulting trust; (7) breach of fiduciary duty in connection with "the defense of [a] malpractice action[;]" (8) unjust enrichment in connection with "the defense of [a] malpractice action[;]" (9) breach of fiduciary duty based on *ultra vires* acts; and (10) a request for a statutory distribution of assets.

On 9 January 2008, the parties each filed motions for partial summary judgment. Plaintiffs' motion requested judicial dissolution of the PLLC and dismissal of Defendants' counterclaims that were "predicated on the proposition that no such dissolution occurred." Defendants' motion requested an order declaring that Plaintiffs had "withdrawn" from the PLLC as opposed to there having been a dissolution of the firm. On 15 August 2008, Defendants filed a second motion for summary judgment

as to all of Plaintiffs' claims on the grounds that the PLLC lacked standing to bring this action on its own behalf and the individual plaintiffs lacked standing to bring this action derivatively on behalf of the PLLC.

The trial court issued an order on 31 March 2009 ruling, in part, that Plaintiffs were equitably estopped from denying that they had withdrawn from the PLLC. Therefore, the court held, all of the parties' claims would be evaluated in the context of a withdrawal by Plaintiffs from the PLLC rather than a dissolution of the PLLC. *Mitchell I*, 209 N.C. App. at 375-76, 705 S.E.2d at 762-63. All of the parties appealed to this Court from the trial court's order.

In *Mitchell I*, we affirmed in part the trial court's order, reversed in part, and remanded for further proceedings. With respect to the issue of standing, we held that Plaintiffs possessed standing under N.C. Gen. Stat. § 57C-8-01(a) to assert derivative claims on behalf of the PLLC. *Id.* at 382-87, 705 S.E.2d at 767-70. We further ruled that because "withdrawal pursuant to N.C. Gen. Stat. § 57C-5-06 was not available as a remedy at law for the parties[,]" the dismissal of Defendants' counterclaims premised upon an alleged withdrawal by Plaintiffs was proper. *Id.* at 390, 705 S.E.2d at 772. We also held that pursuant to N.C. Gen. Stat. § 57C-6-02 dissolution of the PLLC was necessary because there was a deadlock in its management. *Id.* at 390-91, 705 S.E.2d at 772.[4]

With respect to dissolution and the need for a liquidation and distribution, we explained as follows:

> Here, since 14 June 2005, there has been a deadlock between the PLLC members as a result of their disagreement regarding division of profits derived from pending contingent fee cases when three members of the PLLC left the PLLC, and plaintiffs and defendants began practicing separate and apart beginning on 1 July 2005. Although there were communications between plaintiffs and defendants addressing the assets of the PLLC, none resolved this deadlock. Because the three plaintiffs were no longer

4. We also rejected Defendants' allegation in Counterclaim Two that a memorandum drafted by Brewer (the "Brewer Memorandum") and provided to Plaintiffs on 8 July 2005 set forth the terms governing a dissolution of the PLLC. The Brewer Memorandum had sought to lay out the terms that would apply to the PLLC's break-up, including the distribution of certain PLLC assets and the handling of PLLC liabilities. In *Mitchell I*, we determined that Counterclaim Two failed because, among other reasons, there was no "indication that the plaintiffs expressly assented to the terms as proposed by defendants" in the Brewer Memorandum. *Id.* at 386, 705 S.E.2d at 769 (quotation marks omitted).

> willing to practice with defendants, the PLLC could "no longer be conducted to the advantage of the members generally[.]" *See* [N.C. Gen. Stat. § 57C-6-02]. Liquidation of the PLLC's assets "is reasonably necessary for the protection of the rights or interests of the complaining member[s]" as the PLLC's members have been unable to reach any agreement regarding profits from the disputed pending contingent fee cases. *See id.* Also, there is evidence that profits made by defendants since the deadlock from one of the disputed contingent fee cases were not distributed to the members or accounted for by defendants. Therefore, there is a potential that the PLLC's assets are being misapplied. Accordingly, plaintiffs have forecast facts which would permit judicial dissolution pursuant to N.C. Gen. Stat. § 57C-6-02. As defendants had "a full and complete remedy at law[,]" the business court erred in not applying this legal remedy and instead applying the principles of equity to resolve the issues arising from this breakup.

Id.

Thus, we determined that "because the business court improperly applied equitable estoppel in this situation, it abused its discretion by not ordering judicial dissolution of the PLLC." *Id.* at 392, 705 S.E.2d at 773. We then concluded as follows:

> Accordingly, we reverse the business court's judgment granting partial summary judgment in favor of defendants on the basis of equitable estoppel and remand to the business court for [the] granting of summary judgment in favor of plaintiffs on the issue of judicial dissolution pursuant [to] N.C. Gen. Stat. § 57C-6-02, for a decree of dissolution, and directing the winding up of the PLLC pursuant to N.C. Gen. Stat. § 57C-6-02.3 (2007). Given this ruling, plaintiffs' derivative claims for an accounting to the PLLC (claim one), an accounting to plaintiffs (claim two), and a demand of liquidating distribution (claim three), as well as defendants' counterclaim for a demand for statutory distribution of assets (counterclaim ten), will be addressed by the business court in its directing the winding up of the PLLC.

Id. at 393, 705 S.E.2d at 773. Finally, we reversed the trial court's dismissal of Plaintiffs' Claims Four and Five and Defendants' Counterclaims

Three through Six and Nine on the ground that the trial court had dismissed those claims based upon its incorrect determination that a withdrawal had occurred. *Id.* at 393, 705 S.E.2d at 773-74.

Upon remand, the trial court held a hearing on 17 August 2012 in order to consider the parties' arguments regarding the potential appointment of a referee to oversee accounting and distribution issues in connection with the dissolution of the PLLC. Prior to the hearing, the parties submitted briefs setting forth their respective positions regarding the appointment of a referee and the methodology that should be employed in valuing disputed contingent fee engagements.

On 26 February 2013, the trial court issued an "Opinion and Order Dissolving Company and Appointing Special Master" (the "Reference Order").[5] In this order, the court entered a decree of dissolution retroactively dissolving the PLLC as of 1 July 2005 (the "Dissolution Date"). The trial court noted that "[t]he parties agree that a dissolution of the [PLLC] is required, as well as an accounting and distribution of its assets" but that "[t]he parties dispute various aspects of the financial and accounting records of the [PLLC] and the amounts owed by and to the respective parties." The court observed that "[a] primary point of contention between the parties is the appropriate accounting method for profits derived from the contingent-fee engagements that the [PLLC] entered into prior to dissolution but were resolved post-dissolution by Defendants ('Contingent Fee Engagements')." The court stated that

> [t]he difficulty in liquidating contingent-fee engagements by conventional means leads inevitably to the conclusion that the only way in which they may be converted to value following dissolution is by pursuing them to resolution. Further, it is unrealistic to suppose that all former members will collaborate in order to resolve contingent-fee engagements following dissolution. As is often the case in a law-firm setting, only a few of the members, perhaps only one, will have been involved personally in the engagement prior to dissolution and possess an adequate familiarity with the client and the subject matter of the litigation to proceed with representation following dissolution. Therefore, the task of pursuing such engagements following dissolution is likely to fall to those members

5. The parties and the trial court use the terms "referee" and "special master" interchangeably. For the sake of consistency, we will use the term "referee" as that is the term used in Rule 53 of the North Carolina Rules of Civil Procedure.

> who pursued the engagements prior to dissolution, usually at the affirmative direction of the client. Practically, this means that following dissolution an individual member or members will pursue the engagements using individual effort and skill without collaboration with former members.

The trial court then concluded that

> the appropriate measure of the value of the Contingent Fee Engagements to the [PLLC] is the reasonable value of the services provided by or in behalf of the [PLLC] up to the date of dissolution. Under the present circumstances, the best means by which to measure the reasonable value of pre-dissolution services is to determine (a) the total attorney hours ("Time") expended on a particular Contingent Fee Engagement, both prior to and after dissolution, (b) the percentage of Time that was expended prior to dissolution and (c) the net profit ultimately realized from the Contingent Fee Engagement. The reasonable asset value to the [PLLC] of each such matter would be determined by the percentage of pre-dissolution Time expended relative to the net profit ultimately realized on that matter. As an example, if a total of 100 attorney hours were expended on a particular Contingent Fee Engagement and 50 of those hours were performed prior to dissolution, the net fee ultimately received by Defendants should be shared 50/50 with Plaintiffs. This method, as opposed to others, best accounts for the risk borne by the [PLLC] in initially taking on the Contingent Fee Engagements and also reflects the parties' expectations at the time they entered into the Contingent Fee Engagements.
>
> The court therefore will direct the winding up of the [PLLC] in accordance with the findings and conclusions above. In doing so, the court observes that the reasoning relative to liquidation and sharing between the [PLLC] and Defendants of ultimate profits from Contingent Fee Engagements ordinarily also would hold true for any professional engagements ("Other Engagements") initially undertaken by the [PLLC] but completed and billed for post-dissolution by Defendants. This Opinion and Order is intended to encompass such Other Engagements.

(Footnote omitted.)

The trial court proceeded to determine that the appointment of a referee "to conduct an accounting of the [PLLC] as to the Contingent Fee Engagements and any Other Engagements . . . will be in the best interest of the parties." Accordingly, the trial court ordered as follows:

> [31] The [PLLC] is DISSOLVED, pursuant to G.S. 57C-6-02. The dissolution of the [PLLC] shall be effective as of July 1, 2005 ("Dissolution Date").
>
> [32] The court appoints Craig A. Adams, CPA, as Special Master, pursuant to Rule 53. . . .
>
> [33] In undertaking and performing this engagement, the Special Master is authorized to engage the professional services of other members of his accounting firm, at their customary and usual hourly rates, as he reasonably determines are needed.
>
> [34] The Special Master shall take an account of the [PLLC] and the Defendants, consistent with the provisions of this Opinion and Order, and shall:
>
> (a) Take control of and secure the financial records, or appropriate copies thereof, of the [PLLC];
>
> (b) Secure the financial records, or appropriate copies thereof, of the Defendants, as they relate to the Contingent Fee Engagements or any Other Engagements;
>
> (c) Assess the state of the financial records of the [PLLC];
>
> (d) Assess the state of the financial records of the Defendants as they relate to the Contingent Fee Engagements or any Other Engagements;
>
> (e) Direct and assist in the preparation of financial statements that state the financial condition of the [PLLC] with reasonable accuracy;
>
> (f) Investigate and report to the court the nature and extent of the outstanding assets and liabilities of the [PLLC];
>
> (g) If there are [PLLC] assets subject to distribution under G.S. 57C-6-05, determine and recommend

> to the court the amount in which those assets should be distributed to the [PLLC] using generally accepted accounting principles and the protocols established in this Opinion and Order;
>
> (h) With regard to any [PLLC] assets available for distribution, determine and recommend to the court the manner and proportions of such distributions to the various members of the [PLLC] as of the date of dissolution; and
>
> (i) The [PLLC] shall submit to the Special Master records of all attorney billable hours expended prior to the Dissolution Date on any matter pending as of the Dissolution Date. This record shall indicate the number of total billable hours attributable to the Contingent Fee Engagements or any Other Engagements. Defendants shall submit to the Special Master a record of all attorney hours expended on the Contingent Fee Engagements or any Other Engagements.
>
> [35] All parties to this civil action shall cooperate fully with the Special Master in the performance of his duties.
>
> [36] The Special Master shall report his finding to the court as soon as practicable and may request from the parties or the court any further information, authority, direction or actions he might need from the court or parties in order to perform the duties reflected in this Opinion and Order.
>
> . . . .
>
> [38] All parties to this civil action are directed to cooperate with the Special Master and provide any and all financial information and records he might request.
>
> [39] During [the] pendency of this civil action or unless otherwise ordered, all parties are directed not to destroy, remove, alter or obscure any of the financial or otherwise relevant records of the [PLLC].

None of the parties filed objections to the Reference Order or to the appointment of the Referee as provided for therein. The trial court subsequently issued an order on 14 June 2013 providing additional specificity regarding the materials that the parties were required to make

available to the Referee. During the course of the accounting process, the Referee conducted *ex parte* interviews with the parties in order to better understand the records that had been submitted to him. On 24 October 2014, after the Referee had completed his report but before it was filed with the trial court, the parties were allowed to depose Sarah Armstrong — senior manager for the Referee's accounting firm and the report's principal author — regarding the accounting process and methodology that had been used.

The Referee subsequently filed his report (the "Referee's Report") with the trial court on 13 February 2015. The report had "three primary areas of focus: profit allocation percentages; restoration of negative capital accounts; and allocation of contingent fees." After explaining its determinations with respect to each of these issues, the Referee ultimately concluded that Defendants owed a total of $358,000 to Plaintiffs — specifically, $109,000 to Adams, $96,000 to Boughman, and $153,000 to Burge.

On 13 March 2015, Brewer, Mitchell, and Brittain filed "Exceptions and Objections Regarding Report of Special Master." Among other things, they argued that the trial court's prior orders related to the Referee "did not and do not clearly define the methodology to be employed and the scope of the responsibilities and powers of the appointed referee or special master." They also requested that certain findings in the Referee's Report be submitted to a jury.

Plaintiffs subsequently filed a motion requesting that the trial court adopt the Referee's Report. Following a hearing on 8 May 2015, the trial court issued its "Opinion, Order and Judgment" (the "Adoption Order") on 18 September 2015 granting Plaintiffs' motion to adopt the Referee's Report and rejecting the objections raised by Brewer, Mitchell, and Brittain.[6]

In the Adoption Order, the trial court determined that by failing to object at the time the Reference Order was issued, Defendants had waived their right to (1) demand a jury trial on contested issues addressed in the Reference Order; and (2) argue that the Reference Order failed to clearly define the methodology to be employed by the Referee and the scope of his responsibilities and powers. The court also rejected Defendants' various exceptions to the substantive findings of the report.

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6. By the time the Adoption Order was filed, only Mitchell and Brewer remained as defendants.

The trial court ultimately concluded that "the Referee's Report complies with the Reference Order, is supported by competent evidence and that the conclusions reached in the Referee's Report are supported by the facts found." Accordingly, the trial court adopted the Referee's Report "in its entirety as constituting the findings and conclusions of the court" and entered judgments against Defendants in the amount of $102,578 each.

The trial court then explained that its ruling did "not constitute a final disposition of this civil action, as there remain unresolved claims and counterclaims." The court therefore ordered the parties to file by 12 October 2015 any dispositive motions related to those unresolved claims — namely, Plaintiffs' Claims Four and Five and Defendants' Counterclaims Three through Nine.

On that date, Plaintiffs filed a motion for summary judgment as to Defendants' remaining counterclaims. In support of this motion, Plaintiffs relied upon our decision in *Mitchell I* as well as the trial court's Adoption Order and the Referee's Report. Defendants submitted affidavits from Mitchell and Brewer in opposition to Plaintiffs' motion and also filed a cross-motion for summary judgment as to Plaintiffs' claims for fraud and breach of fiduciary duty (Claim Four) and unfair and deceptive trade practices (Claim Five). On 9 December 2015, Plaintiffs voluntarily dismissed Claims Four and Five, thereby mooting Defendants' summary judgment motion.

On 19 February 2016, the trial court issued an "Order and Opinion" (the "Final Order") granting Plaintiffs' motion for summary judgment and dismissing all of Defendants' remaining counterclaims. Defendants filed a timely notice of appeal to this Court as to the Reference Order, the Adoption Order, and the Final Order.

Analysis

Defendants' arguments on appeal fall into two main categories: (1) challenges related to the appointment of the Referee, the accounting process utilized by the Referee, and the trial court's adoption of the Referee's Report; and (2) challenges to the trial court's entry of summary judgment in Plaintiffs' favor on Defendants' Counterclaims Three through Six and Nine.[7] We address each set of arguments in turn.[8]

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7. Defendants do not appeal the trial court's dismissal of Counterclaims Seven and Eight, which the court dismissed because Defendants' brief in opposition to Plaintiffs' motion for summary judgment neither addressed them nor pointed to evidence that would create a genuine issue of material fact as to them.

8. Defendants do not raise on appeal any of the substantive exceptions that they asserted below to the findings in the Referee's Report. Accordingly, those exceptions are

I. Issues Related to Referee's Report

[1] In addition to challenging the initial decision to appoint a referee, Defendants also argue on appeal that the trial court "failed to define clearly the methodology to be employed and the scope of the responsibilities and powers of the appointed referee . . . or the means for consideration of the issues in the case." Relatedly, they challenge the manner in which the Referee conducted the accounting, including his decisions not to place interviewees under oath or to compile transcripts of their interviews as well as his use of *ex parte* communications with the various parties.

In order to assess these arguments, we begin with an overview of the procedure by which a trial court may refer matters to a referee. Pursuant to Rule 53 of the North Carolina Rules of Civil Procedure, "(1) upon consent of the parties, (2) upon application of one of the parties, or (3) upon its own motion, a trial court may order that a referee determine issues of fact raised by the pleadings and evidence." *Rushing v. Aldridge*, 214 N.C. App. 23, 24, 713 S.E.2d 566, 568 (2011) (citation omitted). If one of the parties does not consent, the court may order a reference in the following instances:

> a. Where the trial of an issue requires the examination of a long or complicated account; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.
>
> b. Where the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.
>
> c. Where the case involves a complicated question of boundary, or requires a personal view of the premises.
>
> d. Where a question of fact arises outside the pleadings, upon motion or otherwise, at any stage of the action.

N.C. R. Civ. P. 53(a)(2).

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waived. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 79, 772 S.E.2d 93, 96 (2015) ("[U]nder Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, where a party fails to assert a claim in its principal brief, it abandons that issue . . . .").

A trial court's decision to order a "compulsory reference in an action which the court has authority to refer is a matter within the sound discretion of the court." *Dockery v. Hocutt*, 357 N.C. 210, 215, 581 S.E.2d 431, 434 (2003). When a reference is made, "[t]he duty and powers of the referee are not inherent but are determined by the order of the judge." *Godwin v. Clark, Godwin, Harris & Li, P.A.*, 40 N.C. App. 710, 713, 253 S.E.2d 598, 601 (citation omitted), *appeal dismissed*, 297 N.C. 698, 259 S.E.2d 295 (1979).

After gathering the relevant facts, "[t]he referee shall prepare a report upon the matters submitted to him by the order of reference and shall include therein his decision on all matters so submitted." N.C. R. Civ. P. 53(g)(1). After hearing any exceptions to the referee's report lodged by the parties, the court "may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions." N.C. R. Civ. P. 53(g)(2).

If a reference is compulsory, a party may preserve its right to a jury trial on issues decided by the referee by taking each of the following steps:

> a. Objecting to the order of compulsory reference *at the time it is made*, and
>
> b. By filing specific exceptions to particular findings of fact made by the referee within 30 days after the referee files his report with the clerk of the court in which the action is pending, and
>
> c. By formulating appropriate issues based upon the exceptions taken and demanding a jury trial upon such issues. Such issues shall be tendered at the same time the exceptions to the referee's report are filed. If there is a trial by jury upon any issue referred, the trial shall be only upon the evidence taken before the referee.

N.C. R. Civ. P. 53(b)(2) (emphasis added). If these requirements are satisfied, "[t]he objecting party will then be entitled to a jury trial on the specified issues unless the evidence presented to the referee would entitle one of the parties to a directed verdict." *Rushing*, 214 N.C. App. at 26, 713 S.E.2d at 569 (citation omitted).

As an initial matter, Defendants have not preserved their right to have a jury decide any matters determined by the Referee as they failed to "[o]bject[ ] to the order of compulsory reference at the time it [was]

made[.]"[9] N.C. R. Civ. P. 53(b)(2)(a); *see also Gaynor v. Melvin*, 155 N.C. App. 618, 621, 573 S.E.2d 763, 765 (2002) ("In order to preserve the right to a jury trial where a compulsory reference has been ordered, a party must, among other things, object to the order of reference at the time it is made.").

Our decision in *Godwin* is instructive in addressing Defendants' arguments — both procedurally and substantively. In *Godwin*, the plaintiff contended on appeal that "the trial court and referee did not comply with the terms of Rule 53 in that [the] referee did not conduct hearings, examine witnesses under oath, admit exhibits into evidence, prepare a record, make definite findings of fact and conduct an audit before making the valuation." *Godwin*, 40 N.C. App. at 713-14, 253 S.E.2d at 601. This Court rejected these contentions on several grounds. With regard to the plaintiff's substantive arguments, we held that "[n]one of these procedures are required under the statute" and noted that "[t]he trial court order did not require any of these procedures." *Id.* at 714, 253 S.E.2d at 601.

With regard to the issue of whether the plaintiff had properly preserved its right to challenge the procedures set forth in the reference order, we stated that "[a]t the time the order for a compulsory reference was entered, plaintiff did not object to the contents of the order. Plaintiff cannot now complain." *Id.* Similarly, we noted that "[d]uring the proceedings before the referee, plaintiff did not object at any time to the procedures used." *Id.*

Here, we similarly reject as untimely Defendants' challenges to the scope of the Reference Order or the manner in which the Referee carried out his duties. At no point during the two years between the issuance of the Reference Order and the filing of the Referee's Report did Defendants formally object to the scope of the Reference Order or the process by which the Referee was conducting the accounting. The first time Defendants raised any such objections on the record was on 13 March 2015 in their Exceptions and Objections Regarding Report of Special Master.

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9. Defendants point to a footnote contained in Mitchell's 15 August 2012 submission to the trial court — over six months *before* the 26 February 2013 Reference Order was issued — stating that he did "not desire or consent to the entry of an order of reference . . . ." We do not believe, however, that this preliminary objection to the potential appointment of a referee satisfied Rule 53 as it was not raised *at the time the reference was made* as required by Rule 53(b)(2)(a).

It is important to note that Defendants do not contend that they were unaware of how the Referee was conducting the accounting while the process was ongoing. Nevertheless, they waited until *after* the Referee's Report was issued to object to the procedures utilized by the Referee.[10] Accordingly, Defendants' challenges to the scope of the Reference Order and the procedures employed by the Referee have been waived.

Moreover, Defendants' arguments fail substantively as well. Our holding in *Godwin* demonstrates that Rule 53 provides few hard-and-fast rules governing the manner in which an accounting must be conducted as well as the fact that trial courts possess broad discretion in determining how a referee is to fulfill his duties:

> Plaintiff maintains that the trial court and referee did not comply with the terms of Rule 53 in that [the] referee did not conduct hearings, examine witnesses under oath, admit exhibits into evidence, prepare a record, make definite findings of fact and conduct an audit before making the valuation. *None of these procedures are required under the statute. The trial court order did not require any of these procedures.*

Godwin, 40 N.C. App. at 713-14, 253 S.E.2d at 601 (emphasis added).

Moreover, Rule 53 provides that a referee conducting an accounting has significant discretion regarding how he obtains financial information:

> When matters of accounting are in issue before the referee, he may prescribe the form in which the accounts shall be submitted . . . . [U]pon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts of specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

N.C. R. Civ. P. 53(f)(2).[11]

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10. In addition, we observe that some of Defendants' specific arguments on appeal — such as those relating to the Referee's use of *ex parte* communications and the lack of interview transcripts — were not even raised in their Exceptions and Objections Regarding Report of Special Master.

11. Indeed, Defendants acknowledge in their brief that "Rule 53 does not always require that the referee conduct a hearing, examine witnesses, receive evidence, or make findings of fact unless the order of reference so directs[.]"

We are not persuaded by Defendants' citation to *Synco, Inc. v. Headen*, 47 N.C. App. 109, 266 S.E.2d 715, *disc. review denied*, 301 N.C. 238, 283 S.E.2d 135 (1980), to support their argument that the Referee's failure to require sworn testimony and produce transcripts of his interviews was improper. In *Synco*, the trial court appointed a referee to resolve a lawsuit involving a large number of individual transactions between the parties related to repairs made to several apartment complexes. *Id.* at 112, 266 S.E.2d at 717. The referee engaged the services of a court reporter who recorded nine days of witness testimony before the referee. However, transcripts of the testimony were never actually prepared and entered into the record. After the referee issued his report, the defendants filed an exception regarding the lack of transcripts. *Id.* at 114, 266 S.E.2d at 718.

On appeal, the defendants argued that the trial court had erred in adopting the referee's report without the production of transcripts. In our decision, we cited Rule 53(f)(3), which provides that "[t]he testimony of all witnesses must be reduced to writing by the referee, or by someone acting under his direction and shall be filed in the cause and constitute a part of the record." *Id.* at 113, 266 S.E.2d at 718. We noted that "[t]he transcript requirement of Rule 53 may, however, be waived by agreement of the parties." *Id.* at 114, 266 S.E.2d at 718. We then held that because the defendants had raised the transcript issue in their exceptions to the referee's report, the issue was preserved. We therefore reversed on this ground. *Id.* at 113-14, 266 S.E.2d at 718.

Synco is distinguishable on its face. That case involved nine days of testimony before a referee that the parties and the trial court fully expected to be transcribed, yet no transcripts were ever provided by the court reporter. *Id.* at 113, 266 S.E.2d at 717. Here, conversely, the trial court did not direct — and the parties did not expressly request — that the Referee take sworn testimony from witnesses. Thus, the Referee possessed the authority to conduct the accounting process in the manner he believed would be most efficient.

In short, neither Rule 53 nor the Reference Order mandated that the Referee conduct the accounting process in the manner that Defendants are now arguing was required. Accordingly, for all of the reasons set out above, we are unable to conclude that Defendants have demonstrated legal error with regard to the trial court's appointment of the Referee, the court's articulation of the scope of the Referee's duties, the manner in which the Referee carried out those duties, or the trial court's adoption of the Referee's Report. Therefore, we affirm both the Reference Order and the Adoption Order.

II. Entry of Summary Judgment as to Defendants' Counterclaims

[2] Defendants' final argument is that the trial court erred in granting summary judgment in favor of Plaintiffs on Counterclaims Three through Six and Nine. "On an appeal from an order granting summary judgment, this Court reviews the trial court's decision *de novo*. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014) (internal citations and quotation marks omitted).

It is well established that "[t]he moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (internal citations omitted). We have held that "[a]n issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *In re Alessandrini*, 239 N.C. App. 313, 315, 769 S.E.2d 214, 216 (2015) (citation omitted).

We agree with the trial court that Counterclaims Three through Six and Nine fail as a matter of law. Defendants' answer contained the following prefatory language introducing these counterclaims:

> If it is determined that the individual Plaintiffs did not withdraw [from] the [PLLC] and there was no dissolution upon the terms set forth in the July 8, 2005 Memorandum, *then there has been no dissolution of the [PLLC]* because none of the requirement[s] in G.S. § 57C-6-01 have been met. *In the event the individual Plaintiffs are still members of the [PLLC]*, then Defendant alleges the following claims in the alternative[.]

(Emphasis added.)

Similarly, Counterclaims Three through Six and Nine each individually asserted that "[i]f it is determined that the individual Plaintiffs have not withdrawn from the [PLLC], *the individual Plaintiffs are still members of the [PLLC]* and still owe a fiduciary duty to the [PLLC] and to the Defendants . . . ." (Emphasis added.)

Thus, each of the counterclaims at issue in this appeal were — by their express terms — premised upon the incorrect proposition that dissolution of the PLLC was not required and that the PLLC, therefore, remained an ongoing entity.[12] Critically, none of these counterclaims were based upon the correct theory — that a judicial dissolution was necessary because of the deadlock between the PLLC's members. This mistaken assumption that the PLLC remained in existence was further reflected in the substantive allegations contained within each of these counterclaims.

Counterclaim Three ("Breach of Fiduciary Duty") alleged that

> [t]he individual Plaintiffs have breached their fiduciary duties to the [PLLC] and to the Defendants by, among other things, failing to meet their financial obligations to the [PLLC] through payment of a portion of the [PLLC]'s expenses and liabilities, failing to account for the legal fees they have generated on legal matters after they ceased practicing law with the [PLLC], and failing to pay to the [PLLC] and/or to the Defendants a share of such legal fees.

Counterclaim Four ("Conversion/Misappropriation of Firm Assets") asserted that

> [t]he individual Plaintiffs have wrongfully converted and/or misappropriated assets of the [PLLC] by, among other things, failing to pay to the [PLLC] or to the Defendants their share of the [PLLC]'s expenses or liabilities and by failing to pay to the [PLLC] or to the Defendants a portion of the legal fees the individual Plaintiffs and/or AB&B generated from legal matters after they ceased practicing law with the [PLLC].

Counterclaim Five ("Unjust Enrichment") alleged that

> [t]he individual Plaintiffs and/or AB&B have been unjustly enriched by failing to pay their share of the [PLLC]'s expenses and liabilities and by failing to pay to the [PLLC] or to the Defendants a portion of the legal fees the individual Plaintiffs and/or [sic] generated on legal matters

12. The only counterclaim that was premised upon a dissolution theory was Counterclaim Two, which was based upon the notion that the PLLC had dissolved *in accordance with the terms of the Brewer Memorandum*. As discussed above, however, *Mitchell I* foreclosed Defendants' reliance upon that theory.

> after the individual Plaintiffs[ ] ceased practicing law with the [PLLC].

Counterclaim Six ("Constructive Trust, Equitable Lien, and/or Resulting Trust") asserted that

> Defendants and the [PLLC] are entitled to a constructive trust, an equitable lien, and/or a resulting trust upon any and all fees, deposits, or property acquired by the individual [Plaintiffs] and/or AB&B for the individual Plaintiffs' share of the [PLLC]'s expenses and liabilities and for Defendants' share of the legal fees the individual Plaintiffs generated from legal matters after they ceased practicing law with the [PLLC].

Finally, Counterclaim Nine (Breach of Fiduciary Duty/*Ultra Vires* Act) alleged that

> [a]fter the individual [Plaintiffs] withdrew from the [PLLC], they filed a legal action against the Defendants without making any reasonable inquiry or investigation to determine whether the [PLLC] had dissolved, whether Defendants and/or the [PLLC] had commingled assets or whether there was any factual basis for their legal claims.
>
> 121. Had the individual Plaintiffs conducted such a reasonably [sic] inquiry or investigation, they would have determined the [PLLC] has not dissolved, that there had been no commingling of [PLLC] assets, and that there was no basis for individual Plaintiffs['] legal claims against Defendants.

Accordingly, it is clear that Counterclaims Three through Six and Nine were premised upon neither a withdrawal *nor* a dissolution having occurred. Rather, the essence of these counterclaims was that Plaintiffs were required to pay their share of the PLLC's ongoing debts and liabilities based upon their continuing status as members of the PLLC and to account for legal fees received by them since their dispute with Defendants had occurred. However, such a legal theory is inconsistent with our ruling in *Mitchell I* in which we held that a judicial dissolution was necessary. In accordance with our decision, the trial court ordered that the PLLC be dissolved as of 1 July 2005.

Thus, any confusion that may have existed between the parties as to the status of the PLLC was eliminated by our decision in *Mitchell I*.

Nevertheless, Defendants failed to amend their counterclaims in the aftermath of *Mitchell I* to reflect the reality that the PLLC had been judicially dissolved and to reframe their claims for relief accordingly.[13]

Moreover, it is important to note that despite the above-referenced defects with respect to Counterclaims Three through Six and Nine, Defendants nevertheless had a full and fair opportunity during the accounting process to seek all sums that they claimed they were owed and to raise any issues that they felt needed to be addressed in the accounting. Additionally, the Referee's Report largely encompassed the matters raised in these counterclaims, including the accounting of legal fees connected to matters that had originated with the PLLC but were later resolved by the various parties after the break-up.

The Referee's Report focused on three primary areas: "[1] profit allocation percentages; [2] restoration of negative capital accounts; and [3] allocation of contingent fees[,]" which it rightly determined were "the most relevant and significant financial components of a settlement between the Parties." With respect to this last category — which has been the principal source of disagreement over the course of this litigation — the report contained an extensive analysis of the values of contingent fee cases that had been received before dissolution but resolved afterward. Significantly, this analysis encompassed cases that were resolved following the break-up by both Defendants and Plaintiffs.

Thus, the Referee's Report contained a thorough and detailed accounting in connection with the dissolution of the PLLC. The Defendants had an opportunity prior to the completion of the accounting to request that the Referee consider additional financial matters related to the PLLC, but they did not do so. Moreover, Defendants have not challenged on appeal the substance of the Referee's Report. Therefore, any issues concerning the validity of the Referee's substantive findings are not before us.

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13. Nor does the fact that *Mitchell I* reversed the trial court's dismissal of Counterclaims Three through Six and Nine mean that those claims are currently viable. Our ruling in *Mitchell I* on this issue was based upon the fact that the trial court had improperly dismissed those counterclaims pursuant to its legally incorrect ruling that a withdrawal had occurred based upon principles of equitable estoppel. We therefore reversed the trial court's dismissal of these counterclaims because of this error of law. The issue of whether Counterclaims Three through Six and Nine — as pled — would survive a subsequent order of dissolution by the trial court was not before us.

Conclusion

For the reasons stated above, we affirm the trial court's orders of 26 February 2013, 18 September 2015, and 19 February 2016.

AFFIRMED.

Judges BRYANT and STROUD concur.

NASH HOSPITALS, INC., Plaintiff
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., Defendant

No. COA16-532

Filed 1 August 2017

1. Liens—medical liens—insurance company—failure to retain funds

The trial court did not err by granting summary judgment in favor of a lienholder where an insurance company violated the North Carolina medical lien statutes under N.C.G.S. § 44-50 by failing to retain funds subjected to medical liens under N.C.G.S. § 44-49 where it issued a multi-party check to a personal injury claimant and two medical providers for the total settlement amount instead of a check solely payable to a hospital to satisfy its lien.

2. Unfair Trade Practices—insurance company—failure to pay directly to lienholder

The trial court did not err by granting summary judgment in favor of a lienholder where an insurance company committed an unfair or deceptive trade practice by failing to pay directly to the lienholder its pro rata share of funds for several months despite repeated demands.

Appeal by Defendant from an order entered 15 February 2016 by Judge Cy Grant in Nash County Superior Court. Heard in the Court of Appeals 15 November 2016.

Creech Law Firm, P.A., by J. Christopher Dunn, for Plaintiff-Appellee.

Butler Snow LLP, by Scott Lewis and Pamela R. Lawrence, for Defendant-Appellant.

INMAN, Judge.

This appeal arises from a $757 hospital bill. It concerns an insurance company's payment of a total settlement directly to a *pro se* personal injury claimant by check made payable jointly to the claimant and two of her medical providers, each of which held valid liens on the settlement funds. We affirm the trial court's ruling, in granting summary judgment for a lienholder, that the insurance company violated the North Carolina medical lien statutes by failing to retain funds subject to medical liens and committed an unfair or deceptive trade practice by failing to pay directly to the lienholder its *pro rata* share of funds for several months despite repeated demands. Because the trial court miscalculated the statutory amount required to satisfy the lien, however, we vacate that portion of the judgment and remand for entry of judgment in an amount consistent with the statute and this opinion.

State Farm Mutual Automobile Insurance Company ("Defendant") appeals from an order granting summary judgment in favor of Nash Hospitals, Inc. ("Plaintiff" or "Nash Hospitals") and denying Defendant's motion for summary judgment. Defendant argues that its issuance to a *pro se* personal injury claimant of a check for a total settlement—without retaining funds owed to medical lienholders—did not violate N.C. Gen. Stat. §§ 44-50 and 44-50.1 because the check was made payable jointly to the claimant and the lienholders. Defendant also argues that the trial court erred in concluding that Defendant committed an unfair or deceptive trade practice, in part because Nash Hospitals suffered no injury as a result of Defendant's issuance of the multi-party check to the claimant. After careful review, we affirm the trial court's order in part and vacate and remand the trial court's order in part.

Facts and Procedural Background

The undisputed facts are as follows:

On 9 April 2013, Jessica Whitaker ("Whitaker") was injured in an automobile accident caused by Defendant's insured, Christopher Helton ("Helton").

Whitaker incurred $2,272 in medical expenses following the accident. The majority of these expenses—$1,515—was for treatment at Rocky Mount Chiropractic ("Rocky Mount"); the remaining $757 was for treatment at Nash Hospitals.

On 10 May 2013, counsel for Nash Hospitals sent Defendant a notice of medical lien pursuant to N.C. Gen. Stat. §§ 44-49 and 44-50. A month later, Rocky Mount sent a similar notice of medical lien to Defendant.

Defendant evaluated Whitaker's claims and questioned whether all Whitaker's medical treatment was related to the accident. Defendant negotiated with Whitaker and reached a settlement on 28 October 2013 for $1,943. The settlement amount was insufficient to satisfy the medical liens in full.

On 10 December 2013, Defendant received Whitaker's signed release for the settlement and sent her a check for $1,943, made payable to Whitaker, Nash Hospitals, and Rocky Mount. Whitaker did not present the settlement check to Nash Hospitals, nor did Defendant notify Nash Hospitals of the settlement.

In February 2014, an employee of Nash Hospitals contacted Defendant regarding Whitaker's claim and Nash Hospitals' lien. Defendant's representative disclosed that it had reached a settlement with Whitaker and had delivered to her a check payable to Whitaker, Nash Hospitals, and Rocky Mount. Defendant's representative said the multi-party check protected Nash Hospitals' lien and told Nash Hospitals' employee to contact Whitaker.

On 13 March 2014, counsel for Nash Hospitals sent a letter to Defendant asserting that Defendant's issuance of the multi-party check violated North Carolina law, noting that N.C. Gen. Stat. § 44-50 "specifically requires the liability insurer to retain out of any recovery, *before any disbursements*, a sufficient sum to pay lien holders." (emphasis in original). The letter also asserted that "by issuing a check that can't be cashed by the patient, State Farm is forcing the patient to obtain an attorney and incur unnecessary expense." Defendant did not respond.

In April 2014, Nash Hospitals made a third unsuccessful attempt to collect on its lien from Defendant.

On 25 August 2014, Nash Hospitals filed a verified complaint against Defendant alleging violations of N.C. Gen. Stat. §§ 44-49 and 44-50 and alleging that Defendant engaged in an unfair or deceptive trade practice. On 19 September 2014, Defendant asked Whitaker to return the uncashed multi-party check, and on 17 November 2014, Defendant issued a check payable solely to Nash Hospitals for $757, the total amount of Nash Hospitals' lien. Nash Hospitals did not agree to accept the payment as satisfaction of the lawsuit or the underlying lien. Both parties then filed motions for summary judgment.

On 15 February 2016, the trial court issued an order granting Nash Hospitals' motion for summary judgment and denying Defendant's motion for summary judgment. The trial court found damages in the full amount of the lien—$757—and awarded Nash Hospitals treble damages pursuant to N.C. Gen. Stat. § 75-16 for a total award of $2,271. Defendant timely filed notice of appeal.

Analysis

I. Standard of Review

The standard of review for an appeal from summary judgment is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). Summary 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.' " *Id.* at 573, 669 S.E.2d at 576 (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "Evidence properly considered on a motion for summary judgment 'includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file[,] . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken.' " *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 8, 472 S.E.2d 358, 362 (1996) (alteration in original) (quoting *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971)).

The material facts are undisputed. Therefore, we examine the applicable law to determine whether either party was entitled to judgment as a matter of law.

II. Violation of N.C. Gen. Stat. §§ 44-50 and 44-50.1

[1] Once Defendant received proper notice of Nash Hospitals' lien and agreed to a negotiated settlement with Whitaker, Nash Hospitals was entitled—under North Carolina's medical lien statutes—to receive payment from Defendant for a *pro rata* portion of its unpaid bill before Defendant disbursed funds to Whitaker. Defendant argues that the statutes do not prohibit an insurance company from issuing a check payable jointly to a claimant and her medical lienholders in lieu of directly paying the lienholders, and that its issuance of the multi-party check did not amount to a disbursement of funds. For the reasons explained below, we disagree.

Chapter 44, Article 9 of the General Statutes contains a series of statutes enacted by the General Assembly to help medical providers recover payment for services rendered to patients who later collect compensation for medical treatment resulting from a personal injury incident. N.C. Gen. Stat. § 44-49 creates a lien "upon any sums recovered as damages for personal injury in any civil action in this State."[1] Section 44-50 provides, *inter alia*,

> A lien as provided under [N.C. Gen. Stat. §] 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the injuries, whether in litigation or otherwise. . . . *Before their disbursement*, any person that receives those funds *shall retain* out of any recovery or any compensation so received *a sufficient amount to pay the just and bona fide claims* for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services, after having received notice of those claims.

N.C. Gen. Stat. § 44-50 (2015) (emphasis added). Section 44-50 further dictates that "[t]he lien provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of damages recovered." *Id.* If the total liens are in excess of fifty percent of the recovery, fifty percent of the recovery will be distributed on a *pro rata* basis to valid lienholders while the remaining recovery is disbursed to the claimant. N.C. Gen. Stat. § 44-50.1. By enacting the retention requirement in Section 44-50 and the *pro rata* distribution structure in Section 44-50.1—the General Assembly removed the guesswork and negotiation process surrounding liens created under Section 44-49, furthering the statute's intent of protecting hospitals and medical providers.

Our Court has held that the "obvious intent of [N.C. Gen. Stat. §§ 44-49 and 44-50] is to protect hospitals that provide medical services to an injured person who may not be able to pay but who may later receive compensation for such injuries which includes the cost of the medical services provided." *Smith*, 157 N.C. App. at 602, 580 S.E.2d at 50 (internal quotation marks and citation omitted). *Smith* held that "[u]pon consideration of both the language and purpose of the statutes . . . a lien against the settlement proceeds received by a *pro se* injured

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1. N.C. Gen. Stat. § 44-49 applies to settlement agreements between insurance companies and victims of personal injury incidents. *See Smith v. State Farm Mut. Auto. Ins. Co.*, 157 N.C. App. 596, 602, 580 S.E.2d 46, 50 (2003), r*ev'd per curiam on other grounds by* 358 N.C. 725, 599 S.E.2d 905 (2004) (internal quotation marks and citation omitted).

party arises by operation of law, and is perfected when the insurer has 'received notice' of the 'just and bona fide claims' of the medical service provider." *Id.* at 602-03, 580 S.E.2d at 51.

Defendant concedes that N.C. Gen. Stat. § 44-50 requires insurance companies to retain sufficient funds to pay valid liens before disbursing settlement funds directly to a claimant. *See Charlotte-Mecklenburg Hosp. v. First of Ga. Ins. Co.*, 340 N.C. 88, 90-91, 455 S.E.2d 655, 657 (1995) ("If the plaintiff under [N.C. Gen. Stat.] § 44-50 is to have a lien '[s]uch . . . as provided for in [N.C. Gen. Stat.] § 44-49' the lien should attach before the insurance company makes its payments and when the parties agree upon a settlement.") (second alteration in original). But Defendant contends that by issuing a multi-party check that could not be cashed without Nash Hospitals' authorization, it did not "disburse" any funds, and therefore did not violate Section 44-50.

N.C. Gen. Stat. §§ 44-49 *et seq.* do not expressly define a disbursement of funds or specify acceptable methods of payment to comply with the statutory provisions. *Charlotte-Mecklenburg* and *Smith* each concerned an insurance company's issuance of a check payable only to the claimant. *Charlotte-Mecklenburg Hosp.*, 340 N.C. at 90-91, 455 S.E.2d at 657; *Smith*, 157 N.C. App. at 602, 580 S.E.2d at 50. Therefore, we are presented with an issue of first impression. The overall statutory language, other relevant statutes, and controlling appellate decisions interpreting the General Assembly's intent persuade us that an insurance company's failure to retain, for payment directly to medical lienholders, their share of proceeds from a settlement with a *pro se* claimant violates these statutes.

Our Court has held that "[b]ecause sections 44-49 and 44-50 'provide rather extraordinary remedies in derogation of the common law . . . they must be strictly construed.' " *N.C. Baptist Hosps., Inc. v. Crowson*, 155 N.C. App. 746, 749, 573 S.E.2d 922, 924 (2003) (quoting *Ellington v. Bradford*, 242 N.C. 159, 162, 86 S.E.2d 925, 927 (1955)). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 576 (1974) (citation omitted). "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted).

Our General Statutes define a "check" as "(i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a

cashier's check or teller's check." N.C. Gen. Stat. § 25-3-104(f) (2015). A "draft" is a negotiable instrument that orders the payment of funds. N.C. Gen. Stat. § 25-3-104(c). A negotiable instrument is "an unconditional promise or *order to pay a fixed amount of money*[.]" N.C. Gen. Stat. § 25-3-104(a) (emphasis added). Regardless to whom a check is addressed, it is by definition a draft, which is by definition a negotiable instrument. *See* N.C. Gen. Stat. §§ 25-3-104(e)-(f). The underlying principle behind this definition is that upon issuing a check, the drafter is relinquishing control over the funds to be drafted.

Here, Defendant lost control over the funds, as evidenced by its need to retrieve the check prior to re-disbursing funds directly to Nash Hospitals, at the time it issued the check to Whitaker. While Defendant argues that the check did not become negotiable until the parties to whom it was addressed reached an agreement regarding the distribution of funds, there were no additional actions necessary for Defendant to take before the funds could be withdrawn. The risks that Whitaker, or any *pro se* claimant who has received a settlement check, would shortcut the process by obtaining forged signatures for the lienholders or would, like Whitaker, simply not seek to negotiate the check, leaving the valid liens unenforced, are the consequences beyond the control of a settlement payor that the medical lien statutes were intended to avoid. We are satisfied that Defendant's effective loss of control over the funds amounted to a disbursement for the purposes of N.C. Gen. Stat. § 44-50.

An insurance company can hardly protect the interests of medical lienholders—which is the undisputed intent of the statutes—by relying on a *pro se* claimant to notify them of a multi-party check in an amount insufficient to cover the liens. Without the advice of counsel,[2] a *pro se* claimant has little incentive to notify the lienholders of the settlement or to seek their cooperation to cash the check. If the multi-party check is never cashed and the lienholders do not make a demand as Nash Hospitals did here, the insurance company ultimately avoids its settlement obligation.

The settlement between Defendant and Whitaker resulted in insufficient funds to cover the valid liens in full, and Defendant, as a result, had a duty to retain sufficient funds—not to exceed fifty percent of the settlement—to satisfy those liens and to distribute those funds to

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2. Counsel would have advised Whitaker that N.C. Gen. Stat. § 44-50 limits the recovery of medical lienholders to a *pro rata* share of no more than fifty percent of a personal injury claimant's recovery. There is no indication in the record that Whitaker was aware of this limitation on Plaintiff's lien.

the lienholders on a *pro rata* basis prior to disbursing the remaining funds to Whitaker. N.C. Gen. Stat. §§ 44-50 and 44-50.1. By issuing the multi-party check for the total settlement amount rather than issuing a check solely payable to Nash Hospitals to satisfy its lien, Defendant violated N.C. Gen. Stat. § 44-50's provision requiring the retention of funds sufficient to satisfy Nash Hospitals' lien created under N.C. Gen. Stat. § 44-49, for which Defendant had proper notice. Accordingly, the trial court did not err in granting Nash Hospitals' motion for summary judgment and denying Defendant's motion for summary judgment for violation of N.C. Gen. Stat. §§ 44-50 and 44-50.1.

III. Unfair or Deceptive Trade Practices

[2] Defendant next argues that the trial court erred by granting Nash Hospitals' motion for summary judgment and denying Defendant's motion for summary judgment on Nash Hospitals' unfair or deceptive trade practice claim. Defendant asserts that: (1) this dispute does not arise out of an insurance contract, (2) the undisputed facts did not establish that Defendant engaged in "immoral, unscrupulous, or deceptive conduct," and (3) the undisputed facts did not establish that an actual injury to Nash Hospitals proximately resulted from the alleged unfair or deceptive conduct. We disagree.

" '[U]nder [N.C. Gen. Stat.] § 75-1.1, it is a question for the jury as to whether [the defendants] committed the alleged acts, and then it is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice.' " *Richardson v. Bank of America, N.A.*, 182 N.C. App. 531, 540, 643 S.E.2d 410, 416 (2007) (first alteration in original) (quoting *United Lab., Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988) (citation omitted)). To succeed on an unfair or deceptive trade practice claim, a plaintiff must show: "(1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711 (citation omitted).

1. Privity To Bring Suit

As an initial matter, Defendant argues that Nash Hospitals is unable to bring an unfair or deceptive trade practice claim because this suit does not involve a dispute over an insurance contract. We disagree.

In *Wilson v. Wilson*, 121 N.C. App. 662, 665, 468 S.E.2d 495, 497 (1996), this Court held that "North Carolina does not recognize a cause of action for third-party claimants against the insurance company of

an adverse party based on unfair and deceptive trade practices under [N.C. Gen. Stat.] § 75-1.1." The *Wilson* holding arose out of an instance in which the "plaintiff [was] neither an insured nor in privity with the insurer." *Id.* at 665, 468 S.E.2d at 497. The Court reasoned that "allowing such third-party suits against insurers would encourage unwarranted settlement demands, since [the] plaintiffs would be able to threaten a claim for an alleged violation of [N.C. Gen. Stat.] § 58-63.15 in an attempt to extract a settlement offer." *Id.* at 666, 468 S.E.2d at 498.

Our Courts have defined "privity" as "a [d]erivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest." *Murray*, 123 N.C. App. at 15, 472 S.E.2d at 366 (alteration in original) (internal quotation marks and citations omitted). Additionally, "[o]ur case law establishes that ' "[i]f the third party is an intended beneficiary, the law implies privity of contract." ' " *Id.* at 15, 472 S.E.2d at 366 (quoting *Coastal Leasing Corp. v. O'Neal*, 103 N.C. App. 230, 236, 405 S.E.2d 208, 212 (1991) (quoting *Johnson v. Wall*, 38 N.C. App. 406, 410, 248 S.E.2d 571, 574 (1978))).

In the context of insurance disputes following an incident resulting in a personal injury judgment or settlement agreement, "[t]he injured party in an automobile accident [becomes] an intended third-party beneficiary to the insurance contract between insurer and the tortfeasor/insured party." *Murray*, 123 N.C. App. at 15, 472 S.E.2d at 366 (citations omitted). Once a claimant and an insurance company enter into a settlement agreement, they are therefore in privity. And by enacting N.C. Gen. Stat. §§ 44-49 *et seq.*, the General Assembly expanded the scope of privity to hospitals and medical service providers. As discussed *supra*, the purpose of N.C. Gen. Stat. §§ 44-49 *et seq.* is to protect hospitals and other health care providers that provide medical services to injured persons who may be unable to pay at the time the services are rendered, but who may later receive compensation for their injuries. *Smith*, 157 N.C. App. at 602, 580 S.E.2d at 50. As a result, Nash Hospitals' privity became effective the moment Defendant received notice from Nash Hospitals of its assertion of a valid lien pursuant to N.C. Gen. Stat. § 44-49 and reached a settlement agreement with Whitaker.

This conclusion is further supported by the Supreme Court's decision in *Smith v. State Farm Mut. Auto. Ins. Co.* 358 N.C. at 725, 599 S.E.2d at 905. The Supreme Court, by adopting the reasoning in the dissent, overruled this Court's determination in *Smith* that the medical provider had failed to perfect its lien under N.C. Gen. Stat. § 44-49, but it did not overrule the underlying rationale that once a lien is perfected, an insurance company is required to first pay the medical providers before

disbursing the remaining funds directly to a *pro se* personal injury claimant. *Id.* at 725, 599 S.E.2d at 905; *Smith*, 157 N.C. App. at 606, 580 S.E.2d at 52-53 (Levinson, J. dissenting).

The claim we are reviewing arises from Defendant's post-settlement conduct, *i.e.*, at a time when Nash Hospitals and Defendant were in privity as a result of N.C. Gen. Stat. §§ 44-49 and 44-50. For this reason, the holding in *Wilson* is inapposite.

Defendant was on notice following the *Smith* decisions of its duty to settle valid Section 44-49 liens before disbursing funds directly to a *pro se* claimant. Nash Hospitals provided Defendant with the required documentation that "(1) constitutes a valid assignment of rights signed by the injured; or (2) contains unambiguous language that the medical provider is asserting a lien under the provisions of [N.C. Gen. Stat.] §§ 44-49 and 44-50, or language asserting an interest in or claim to settlement proceeds." *Smith*, 157 N.C. App. at 608, 580 S.E.2d at 54 (Levinson, J., dissenting). Accordingly, we hold Nash Hospitals was in privity with Defendant and is permitted to assert a claim for unfair or deceptive trade practices under N.C. Gen. Stat. § 75-1.1.

2. Unfair or Deceptive Act

Whether Defendant's violation of N.C. Gen. Stat. §§ 44-49 and 44-50 and refusal to pay Nash Hospitals' lien before disbursing settlement funds to a *pro se* claimant amounts to an unfair or deceptive act is an issue of first impression. It requires a determination of whether: (a) the alleged acts occurred, and (b) the acts are unfair or deceptive pursuant to N.C. Gen. Stat. § 75-1.1.

a. Occurrence of the Alleged Acts

Defendant challenges the trial court's recitation of Undisputed Facts numbers 7 and 10 as being unsupported by the evidence.

The trial court's Undisputed Fact number 7 states:

> Defendant has a general business practice of issuing multi-party checks in lieu of retaining funds to pay valid medical lien holders and said practice is authorized by its internal written policies and procedures provided to all claim representatives.

The trial court may have surmised this Undisputed Fact based on Defendant's counsel's argument that the payment to Whitaker was consistent with "the way it has routinely been done with other hospitals and other chiropractors" and that "the three parties agree of [sic] who's

going to get what." Defendant correctly notes that the arguments of counsel are not a proper substitute for evidence necessary to support a motion for summary judgment. *Strickland v. Doe*, 156 N.C. App. 292, 297, 577 S.E.2d 124, 129 (2003) ("The trial court may also consider arguments of counsel as long as the arguments are not considered as facts or evidence.") (citations omitted).[3] But the challenged Undisputed Fact is immaterial, and accordingly any error in this regard is not a ground for reversal. *See Faucette v. 6303 Carmel Rd., LLC*, __ N.C. App. __, __, 775 S.E.2d 316, 324 (2015).

Even an isolated occurrence can constitute an unfair business practice, so long as the occurrence falls within the definition of "commerce" provided by N.C. Gen. Stat. § 75-1.1. *Id.* at __, 775 S.E.2d at 324 (affirming the trial court's final judgment that the defendants were liable for an unfair or deceptive trade practice by "[w]ithholding money owed from an insurance carrier's settlement payment in order to force the rightful recipient of those funds to resolve other, unrelated business disputes . . ."). It is undisputed that Defendant issued the multi-party check to Whitaker in December 2013 without retaining funds required to satisfy Nash Hospitals' lien and then failed to tender payment to satisfy the lien until November 2014—nearly a year after settling Whitaker's claim and several months after Nash Hospitals' repeated demands for payment went unanswered, resulting in the commencement of this action. Whether Defendant's conduct is a "general business practice" is irrelevant to whether Defendant engaged in an unfair or deceptive trade practice regarding its actions with this plaintiff. Accordingly, we hold Defendant's argument as to the trial court's Undisputed Fact number 7 without merit.

The trial court's Undisputed Fact number 10 states:

> Defendant repeatedly refused to reissue a check payable solely to Plaintiff despite Plaintiff's assertion N.C. Gen. Stat. §§ 44-50 and 50.1 required Defendant to do so.

A review of the record indicates that there was sufficient evidence to support this Undisputed Fact. Nash Hospitals presented letters it sent to Defendant requesting payment of the lien, admissions by Defendant of receipt of those letters, and Defendant's admission of its failure to respond to Nash Hospitals' requests. Moreover, whether Defendant

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3. Defendant's assertion in its brief before this Court that it issued a multi-party check to Whitaker in "direct response" to the *Charlotte-Mecklenburg* and *Smith* decisions also suggests a general business practice, but the existence of a general practice is not material to our analysis.

"refused" to satisfy Nash Hospitals' lien for several months or simply ignored its demand for payment for several months, or even in "good faith" believed that it was not required to satisfy the lien also is not dispositive. As discussed *infra*, good faith is not a defense to a claim of unfair or deceptive trade practices. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). We therefore reject Defendant's argument.

b. Unfairness and Deceptiveness of the Acts

"A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711 (citations omitted). "[U]nfairness" is broader than and includes the concept of "deception." *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 279 S.E.2d 1 (1981).

"The term 'unfair' has been interpreted by our Courts as meaning a practice which offends established public policy, and which can be characterized by one or more of the following terms: 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' " *Murray*, 123 N.C. App. at 9, 472 S.E.2d at 362 (quoting *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C. App. 295, 301, 435 S.E.2d 537, 542 (1994)). "[T]he fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and actual effects on others." *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 400, 248 S.E.2d 739, 744 (1978), *disc. rev. denied*, 296 N.C. 411, 251 S.E.2d 469 (1979).

When "an insurance company engages in conduct manifesting an inequitable assertion of power or position, that conduct constitutes an unfair trade practice." *Murray*, 123 N.C. App. at 9, 472 S.E.2d at 362 (citing *Johnson v. Beverly-Hanks & Assocs., Inc.*, 328 N.C. 202, 208, 400 S.E.2d 38, 42 (1991)); *see also Pittman v. Hyatt Coin & Gun, Inc.*, 224 N.C. App. 326, 329, 735 S.E.2d 856, 858 (2012) (" 'A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.' ") (quoting *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 264, 266 S.E.2d 610, 622 (1980) (citations omitted), *overruled in part on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988)). Our Supreme Court has held that because ordinarily "unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public." *Marshall*, 302 N.C. at 548,

276 S.E.2d at 403 (holding that "good faith is not a defense to an alleged violation of [N.C. Gen. Stat. §] 75-1.1").

Defendant's failure to notify the medical lienholders of its settlement, and Defendant's direction of Nash Hospitals for months to seek its recovery from Whitaker were not only unfair, but also deceptive. A trade practice is deceptive if it has the capacity or tendency to deceive. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 404 (citation omitted). If Nash Hospitals had contacted Whitaker and obtained her cooperation, it still could not satisfy its lien without also contacting Rocky Mount and obtaining its cooperation.

Defendant's unfair and deceptive conduct arose out of its violation of N.C. Gen. Stat. §§ 44-50 and 44-50.1 and its repeated failure to settle a medical provider's valid lien upon request. It is undisputed that Defendant issued a multi-party check to Whitaker as purported resolution of her liability claim and for Nash Hospitals' medical lien without Nash Hospitals' knowledge or consent. Defendant also repeatedly failed to settle the medical lienholder's lien upon request and refused to reissue a check made payable solely to the lienholder prior to the commencement of this action. Defendant's failure to protect Nash Hospitals' valid lien by retaining the requisite funds before disbursing the remaining settlement payment to Whitaker defeated the purpose of N.C. Gen. Stat. §§ 44-50 and 44-50.1. This conduct violated the established public policy of North Carolina's medical lien statutes and amounted to an inequitable assertion of Defendant's power as an insurer, which effectively deprived Nash Hospitals, as well as Rocky Mount and Whitaker, of the funds to which each was entitled by law. We hold that this conduct amounts to an unfair or deceptive trade practice, but note that our holding does not establish violations of N.C. Gen. Stat. § 44-49 *et. seq.* as *per se* unfair or deceptive trade practices. It is the culmination of Defendant's violation and its failure to cure the violation absent litigation that support the trial court's ruling, which we affirm.

3. In or Affecting Commerce

We are satisfied that the activity in question here falls within the definition of "commerce" pursuant to N.C. Gen. Stat. § 75-1.1(b) (2015)—"all business activities, however denominated, but [not including] professional services rendered by a member of a learned profession." We note that "[o]ur courts have repeatedly defined the insurance business as affecting commerce, when an insurer provides insurance to a consumer purchasing a policy." *Murray*, 123 N.C. App. at 10, 472 S.E.2d at 363 (citing *Pearce v. Am. Def. Life Ins. Co.*, 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986)).

4. Proximate Injury

In addition to showing that a defendant's conduct is unfair or deceptive and affecting commerce, "a plaintiff must have 'suffered actual injury as a proximate result of defendant's deceptive [conduct].' " *Ellis v. N. Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990) (quoting *Pearce*, 316 N.C. at 471, 343 S.E.2d at 180).

Here, Defendant's failure to withhold funds subject to valid medical liens, including Nash Hospitals' lien, prior to its disbursement of funds to Whitaker resulted in an actual injury to Nash Hospitals. Nash Hospitals was entitled to a *pro rata* share of fifty percent of the settlement proceeds, as directed by N.C. Gen. Stat. §§ 44-50 and 44-50.1, *before* any funds were disbursed to Whitaker. Defendant's failure to retain funds delayed Nash Hospitals' recovery of funds to which it was legally entitled. That delay constitutes injury. Accordingly, we hold that the trial court did not err in concluding that Defendant committed an unfair trade practice pursuant to N.C. Gen. Stat. § 75-1.1.

IV. Damages

Defendant correctly argues that because the fifty percent of the settlement proceeds subject to medical liens was insufficient to satisfy the liens of Nash Hospitals and Rocky Mount, Nash Hospitals' lien was enforceable for no more than its *pro rata* share of lien funds, which amounted to $323.69.

In *N.C. Baptist Hosps. Inc. v. Crowson*, 155 N.C. App. 746, 748, 573 S.E.2d 922, 923 (2003), this Court held that "sections 44-49 and 44-50 do not require a *pro rata* disbursement of funds" to valid medical lienholders when there was insufficient funds to compensate all the lienholders. The dispute in *Baptist Hospitals* arose after an attorney disbursed funds from the settlement of a personal injury incident in favor of two medical lienholders to the detriment of the third. *Id.* at 747, 573 S.E.2d at 922-23. However, the General Assembly subsequently amended Article 9 of Chapter 44 of the General Statutes to include the following provision entitled "Accounting of disbursements; attorney's fees to enforce lien rights" which states, *inter alia*:

> (a) Notwithstanding any confidentiality agreement entered into between the injured person and the payor of proceeds as settlement of compensation for injuries, upon the lienholder's written request and the lienholder's written agreement to be bound by any confidentiality agreements regarding the contents of the accounting, *any person*

> *distributing funds to a lienholder under this Article in an amount less than the amount claimed by that lienholder shall provide to that lienholder a certification with sufficient information to demonstrate that the distribution was pro rata and consistent with this Article.*

2003 N.C. Sess. Laws ch. 309, § 1; N.C. Gen. Stat. § 44-50.1 (emphasis added). We interpret this amendment as superseding this Court's holding in *Baptist Hospitals* and requiring a *pro rata* distribution to lienholders in the event that fifty percent of a judgment or settlement amount is insufficient to satisfy all valid medical liens created under N.C. Gen. Stat. §§ 44-49.

Black's Law Dictionary defines *pro rata* as "[p]roportionately; according to an exact rate, measure, or interest." *Black's Law Dictionary* 1415 (10th ed. 2014). A proper determination of *pro rata* distributions under N.C. Gen. Stat. §§ 44-50 and 44-50.1 can be calculated with the following formula:[4]

$$Pro\ Rata\ Share\ for\ Lien\ A = \left(\frac{Lien\ A}{(Lien\ A + Lien\ B)}\right) \times \left(\begin{matrix} 50\%\ of \\ Total\ Settlement\ Amount \end{matrix}\right)$$

Here, we can calculate the proper *pro rata* distribution share for Nash Hospitals by first identifying the lien amounts and the total settlement amount. Nash Hospitals' lien was for $757. Rocky Mount's lien was for $1,515. The total settlement agreement was $1,943. Inserting these values in the formula calculates Nash Hospitals' *pro rata* share to be $323.69.

$$\frac{(\$757)}{(\$757 + \$1515)} \times (50\% \times \$1943) = \$323.69$$

When trebled based on the trial court's judgment that Defendant engaged in an unfair or deceptive trade practice, the total damages to which Nash Hospitals is entitled is $971.07. N.C. Gen. Stat. § 75-16. Accordingly, the trial court's calculation of damages awarded to Nash Hospitals was in error. Because the correct calculation is dictated by the undisputed facts and applicable statute, we vacate the trial court's damage award in the summary judgment order and remand for entry of summary judgment in favor of Nash Hospitals for $971.07.

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4. This equation applies to cases involving two valid liens—Lien A and Lien B. But the same formula may be used for any number of liens. The denominator is the aggregate value of all liens.

Conclusion

For the foregoing reasons, we hold that the trial court did not err in granting summary judgment in favor of Nash Hospitals on its claims pursuant to N.C. Gen. Stat. §§ 44-50 and 44-50.1 and the unfair or deceptive trade practices statutes. Defendant's actions were offensive to public policy—impairing the contractual rights of a *pro se* claimant and her medical providers—and amounted to an inequitable assertion of power. We vacate the portion of the order awarding damages and remand for an award consistent with this opinion. Accordingly, we affirm in part and vacate and remand in part the trial court's order.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges CALABRIA and ZACHARY concur.

PLUM PROPERTIES, LLC, Plaintiff
v.
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., SABAHETA SELAK, MATEJ SELAK aka Matek Selak, DELISA L. SPARKS aka Delisa L. Thompson aka Delisa L. Tucker, JEREMY TUCKER, Defendants

No. COA16-1078

Filed 1 August 2017

Declaratory Judgments—homeowners insurance coverage—minors vandalizing and breaking into properties—intentional acts not covered

In a declaratory judgment action seeking damages from defendant parents' homeowners insurance policies arising from the underlying claim that defendant minors vandalized and broke into plaintiff company's properties, the trial court did not err by granting defendant insurance company's motion for summary judgment. The damages were excluded from the insurance policies where coverage did not protect against the intentional destructive acts of the children and did not qualify as an "occurrence" since the damage was not accidental.

Appeal by plaintiff from order entered 14 June 2016 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 5 April 2017.

Gregory A. Wendling for plaintiff-appellant.

Pinto Coates Kyre & Bowers, PLLC, by Deborah J. Bowers, for defendant-appellee.

BERGER, Judge.

Plum Properties, LLC ("Plaintiff") appeals the June 14, 2016 order granting Defendants' motion for summary judgment on Plaintiff's declaratory judgment action. Plaintiff argues that summary judgment was improper because there remain genuine issues of material fact concerning ambiguities in insurance policies issued by North Carolina Farm Bureau Mutual Insurance Company, Inc. ("Defendant Insurance Company"; insurance company and its insureds, collectively, "Defendants") that may entitle Plaintiff to relief. We disagree.

Factual & Procedural Background

This declaratory judgment action arose from an underlying claim brought by Plaintiff against Defendants, including M. Selak and J. Tucker (collectively "minor insureds"), for allegedly vandalizing and breaking into properties owned by Plaintiff.

During the late night and early morning hours between November 5 and 21, 2010, Plaintiff claims that the minor insureds vandalized four houses on Orville Drive in High Point, North Carolina ("Properties") which are owned or managed by Plaintiff. The vandalism allegedly occurred on three separate occasions, causing approximately $58,000.00 in damages. In addition to the claims made against the minor insureds for "intentionally, willfully and maliciously" damaging and destroying the Properties, Plaintiff also brought claims against Sabaheta Selak, the mother of M. Selak, and Delisa Sparks, the mother of J. Tucker (collectively "parent insureds"), for negligence and negligent supervision of their minor children.

The parent insureds have homeowners' insurance policies issued through Defendant Insurance Company ("Policies") that were in effect for the period during which the damage occurred. The Policies, for each parent insured, contain the same relevant provisions for purposes of determining whether coverage exists for the damage caused by the minor insureds.

Section II(A) of the Policies controls the extent of coverage for personal liability claims brought against persons insured under the Policies. Section II(A) covers, in relevant part, all claims "brought against an

'insured' for damages because of . . . 'property damage' caused by an 'occurrence'." The definitions section of the Policies defines "insured" to include relatives of the policy holder who reside in the policy holder's household. "Occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" which results in property damage. Where Section II(A) applies, the Policies will pay up to the Policies' respective liability limits for any damages for which an insured is legally liable.

The Policies also contain specific exclusion clauses to the personal liability coverage. Under Section II(E), coverage of Section II(A) is excluded where the property damage that occurs "is intended or may be reasonably expected to result from the intentional acts or omissions or criminal acts or omissions of one or more 'insured' persons." This exclusion applies regardless of whether the insured is charged with or convicted of a crime.

On July 29, 2015, Plaintiff brought this declaratory judgment action against Defendant Insurance Company seeking a declaration that the alleged damages arising out of the underlying claim are covered under the Policies issued by Defendant Insurance Company. Defendant Insurance Company filed motions for dismissal and summary judgment on February 11, 2016.

In an order filed June 14, 2016, the trial court granted Defendant Insurance Company's motion for summary judgment on the declaratory judgment action concluding that the damages sustained by Plaintiff were excluded from the insurance coverage of the Policies. It is from this order that Plaintiff timely appeals.

Analysis

Summary judgment exists to eliminate the need for a trial "when the only questions involved are questions of law." *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987) (citations omitted). Under Rule 56 of the North Carolina Rules of Civil Procedure, "summary judgment . . . is . . . based on two underlying questions of law," *Id.* (citations omitted), and may be granted when: (1) there are no genuine issues of material fact and (2) any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). Alleged errors in the application of law are subject to *de novo* review on appeal. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). "On appeal, review of summary judgment is . . . limited to whether the trial court's conclusions as to these [two] questions of law were correct ones." *Ellis*, 319 N.C. at 415, 355 S.E.2d at 481.

An issue is deemed " 'genuine' if it can be proven by substantial evidence[,] and a fact is 'material' " where it constitutes or establishes a material element of the claim. *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citation omitted). In determining that there are no genuine issues of material fact, "[i]t is not the trial court's role to resolve conflicts in the evidence." *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 413, 618 S.E.2d 858, 862 (2005) (citation omitted). Rather, the court's role is only to determine whether such issues exist. *Id.* (citation omitted). Furthermore, in considering whether a genuine issue of material fact exists, "the court must view the evidence in the light most favorable to the nonmovant." *Id.* at 410, 618 S.E.2d at 858, 860-61 (citation omitted).

The North Carolina Supreme Court instructed in *Harleysville Mut. In. Co. v. Buzz Off Insect Shield, L.L.C.* that when the language of an insurance policy and the contents of a complaint are undisputed, we review *de novo* whether the insurer has a duty to defend its insured against the complaint's allegations. 364 N.C. 1, 6, 692 S.E.2d 605, 610 (2010). To make this determination, our courts apply the "comparison test" which requires that the insured's policy and the complaint be read side-by-side to determine whether the events alleged are covered or excluded by the policy. *Id.* In applying this test, "the question is not whether some interpretation of the facts as alleged could possibly bring the injury within the coverage provided by the insurance policy"; but rather, "assuming the facts as alleged to be true, whether the insurance policy covers that injury." *Id.* at 364 N.C. at 7, 692 S.E.2d at 611.

Where an insurance policy's language is clear and unambiguous, our courts will enforce the policy as written. *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95 (2000). When interpreting the language of a policy, non-technical words are given their ordinary meaning unless the evidence shows that the parties intended the words to have a specific technical meaning. *Id.* at 532-33, 530 S.E.2d at 95. Ambiguous policy language, by comparison, is subject to judicial construction. *Id.* at 532, 530 S.E.2d at 95.

However, our courts "must enforce the [policy] as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the [policy] and impose liability upon the [insurance] company which it did not assume and for which the policyholder did not pay." *Wachovia Bank and Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). When interpreting provisions of an insurance policy, provisions that extend coverage are to be construed liberally to "provide coverage, whenever possible by reasonable

construction." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986).

In the Policies at issue here, personal liability coverage extended to cover claims brought against an insured for property damage resulting from an "occurrence." An occurrence is described by the Polices as "an accident." Our Supreme Court has previously interpreted what constitutes an occurrence within the context of a insurance policy issued by Defendant Insurance Company containing the same operational definition of "occurrence" as is contained within the Policies. *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 694, 340 S.E.2d 374, 379 (1986). Based on the nontechnical definition of "accident," the Court described an "occurrence" as being limited to events that are not "expected or intended from the point of view of the insured." *Id.* at 696, 340 S.E.2d at 380. While acknowledging that "it is possible to perceive ambiguity" in determining the type of events that constitute an accident, the Court noted that under a commonsense reading of the language "it strains logic to do so." *Id.* at 695, 340 S.E.2d at 379. Accordingly, where the potentially damaging effects of an insured's intentional actions can be anticipated by the insured, there is no "occurrence." *Id.*, 340 S.E.2d at 380.

In the present case, Plaintiff contends that summary judgment was improper because there is ambiguity in the Policies' language as to what constitutes an occurrence. Relying largely on the deposition of Phillip Todd Childers, a Claims Director for Defendant Insurance Company, Plaintiff argues that because there are "occasions when there are shades of gray" in determining whether an event should qualify as an occurrence, that there is a genuine issue of material fact as to whether the damage caused by the minor insureds should be covered under the Policies.

As noted above in *Harleysville Mutual Insurance*, the question properly raised by the trial court is not whether some interpretation of the facts could possibly bring Plaintiff's injury within the coverage of the Policies but whether the facts, as alleged in the complaint and taken as true, are enough to bring the injury within the Policies' coverage. It strains logic to conjure ambiguity into the Policies' language as applied to the facts at hand. The damages arising from the alleged vandalism of the Properties by the minor insureds do not qualify as unexpected or unintended from the viewpoint of the minor insureds. *See American Mfrs. Mut. Ins. Co. v. Morgan*, 147 N.C. App. 438, 442, 556 S.E.2d 25, 28 (2001) (holding that intentional actions that are reasonably certain to result in injury will not qualify as an accident for purposes of insurance coverage).

Plaintiff further contends that summary judgment was improper because the parent insureds, who themselves are alleged of negligence and negligent supervision in the underlying case, did not intend that the minor insureds vandalize the Properties. Thus, the vandalism should qualify as an occurrence as applied to the parent insureds. But this attenuation of the nexus between Plaintiff's injury and the mechanism causing the damage is not sufficient to create a genuine issue of material fact as to whether intentional destructive actions qualify as an occurrence covered by the Policies. Section II(A) of the Policies cannot be read to cover intentional damage knowingly caused by insureds, which severally would not qualify as an occurrence, merely because the damages inflicted were not intended by other insureds covered by the Policies. The parent insureds neither purchased, nor did Defendant Insurance Company provide, coverage to protect against the intentional destructive acts of their children. Therefore, the actions that caused Plaintiff's damages did not fall within the coverage of the Policies.

While coverage clauses, such as Section II(A), are interpreted broadly, exclusionary clauses, such as Section II(E), are construed narrowly against the insurer in favor of coverage for the insured. *State Capital Ins. Co.*, 318 N.C. at 543-44, 350 S.E.2d at 71. However, as previously noted, where no ambiguity exists, an insurance policy must be enforced as written. *Mizell*, 138 N.C. App. at 532, 530 S.E.2d at 95.

In the present Policies, Section II(E) specifically excludes from coverage any property damage that "is intended or may be reasonably expected to result from the intentional acts or omissions . . . of one or more 'insured' persons." Thus, even if Section II(A) included insurance coverage for the minor insureds' alleged acts of vandalism resulting from the negligence or negligent supervision of the parent insureds, summary judgment would again be proper because Section II(E) excludes coverage for damages that occur as the reasonably expected result of an insureds' intentional acts.

As children of policyholders residing in the policyholders' households, both M. Selak and J. Tucker qualify as insured persons covered by the Policies. Accordingly, because the alleged damage to Plaintiff's Properties occurred due to these minor insureds' intentional, willful, and malicious acts, the damage is excluded from coverage under the Policies by Section II(E).

Under the Policies, the intentional acts by the minor insureds that allegedly damaged Plaintiff's properties do not qualify as an 'occurrence' because the damage was not accidental, and are, therefore, not

covered by the Policies' personal liability coverage. Furthermore, intentional acts of the minor insureds are specifically excluded from coverage by Section II(E) of the Policies. Accordingly, the damages allegedly caused by the minor insureds were not covered by the parent insureds' Defendant Insurance Company Policies.

Conclusion

The language of the Policies issued by Defendant Insurance Company both intentionally omitted and specifically excluded liability coverage for damages caused by the intentional, malicious acts of the insureds. Thus, there were no genuine issues of material fact and the trial court did not err in granting Defendants' motion for summary judgment because Defendants were entitled to judgment as a matter of law. We therefore affirm the trial court's determination that Plaintiff's damages, allegedly caused by the actions of the insureds, are not covered by the Defendant Insurance Company Policies issued to the individual Defendants.

AFFIRMED.

Judges ELMORE and INMAN concur.

MOLLY SCHWARZ, Plaintiff
v.
ST. JUDE MEDICAL, INC., ST. JUDE MEDICAL S.C., INC., DUKE UNIVERSITY, DUKE UNIVERSITY HEALTH SYSTEM, INC., ERIC DELISSIO, TED COLE, and THOMAS J. WEBER, JR., Defendants

No. COA16-1307

Filed 1 August 2017

1. Appeal and Error—interlocutory orders and appeals—substantial right—avoiding two trials on same facts—improper venue—venue selection clause dispute

Plaintiff at-will employee's appeal in a wrongful discharge case from an interlocutory order granting a motion to dismiss some but not all claims was entitled to immediate appellate review where plaintiff showed the order affected substantial rights including avoiding two trials on the same facts and also alleged improper venue based upon a jurisdiction or venue selection clause dispute.

2. Jurisdiction—forum selection clause—Minnesota—wrongful discharge—at-will employee—employment agreement

The trial court did not err in a wrongful discharge case by concluding plaintiff at-will employee's tort claims were subject to the forum-selection clause in the parties' employment agreement where the clause was broadly worded to encompass all actions or proceedings and reflected an intention to litigate claims in Minnesota.

3. Venue—motion to dismiss—employment contract—Minnesota forum-selection clause—last act necessary

The trial court erred in a wrongful discharge case by granting the St. Jude defendants' motion to dismiss for improper venue where the parties' employment contract was entered into in North Carolina, thus making the Minnesota forum-selection clause in the agreement void and unenforceable under N.C.G.S. § 22B-3. The last act necessary to the formation of the agreement was plaintiff's signature and delivery in North Carolina, and not the company agent's signature in Texas.

Judge ARROWOOD concurring by separate opinion.

Appeal by plaintiff from order entered 21 September 2016 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 June 2017.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy III, for plaintiff-appellant.

Parker Poe Adams & Bernstein LLP, by Keith M. Weddington, and Dorsey & Whitney LLP, by Meghan Des Lauriers, for defendant-appellees St. Jude Medical, Inc. and St. Jude Medical S.C., Inc.

ELMORE, Judge.

The Mecklenburg County Superior Court dismissed plaintiff's complaint against her former employer, St. Jude Medical S.C., Inc., and its parent company, St. Jude Medical, Inc., because the forum-selection clause in the employment agreement designates Ramsey County, Minnesota, as the exclusive venue to litigate plaintiff's claims. Pursuant to N.C. Gen. Stat. § 22B-3 (2015), "any provision in a contract entered into in North Carolina that requires the prosecution of any action . . . that arises from the contract to be instituted or heard in another state is against public

policy and is void and unenforceable." Because the employment agreement was "entered into in North Carolina," not Texas as the trial court concluded, the forum-selection clause is void and unenforceable under N.C. Gen. Stat. § 22B-3. Reversed.

I. Background

Plaintiff Molly Schwarz is a resident of Mecklenburg County. Defendants St. Jude Medical and St. Jude Medical S.C. are Minnesota corporations doing business in Mecklenburg County. St. Jude Medical S.C. has its principal office in Austin, Texas.

Plaintiff was employed as a clinical specialist with St. Jude Medical S.C. from 2004 to 2009. St. Jude Medical S.C. employs a sales team that sells medical devices to hospitals, clinics, and other medical providers. In her role, plaintiff supported the sales representatives and their provider accounts, including Duke University and Duke University Health Systems, Inc. (collectively, Duke), where Dr. Thomas J. Weber Jr. was employed.

After her first term of employment ended, plaintiff re-applied for the same position. On 27 August 2012, she executed an at-will employment agreement with St. Jude Medical S.C. and began working. The agreement addresses standard employment issues including duties, compensation, and termination. It also contains the following choice-of-law and forum-selection provisions:

> Governing Law. This Agreement will be governed by the laws of the state of Minnesota without giving effect to the principles of conflict of laws of any jurisdiction.
>
> Exclusive Jurisdiction. All actions or proceedings relating to this Agreement will be tried and litigated only in the Minnesota State or Federal Courts located in Ramsey County, Minnesota. Employee submits to the exclusive jurisdiction of these courts for the purpose of any such action or proceeding, and this submission cannot be revoked. Employee understands that Employee is surrendering the right to bring litigation against SJMSC outside the State of Minnesota.

Plaintiff signed the agreement in North Carolina and faxed it to a representative of St. Jude Medical S.C. in Austin, Texas, where, on 13 September 2012, Keith Boettiger executed the agreement on behalf of St. Jude Medical S.C. By its terms, the agreement was effective as of 4 September 2012.

Plaintiff's sales team worked primarily with Duke. In July 2014, plaintiff reported to management that Dr. Weber was involved in an extramarital affair with one of plaintiff's co-workers. When Ted Cole, a manager for St. Jude Medical S.C., spoke with Dr. Weber about the allegations, Dr. Weber was "irate." He told Cole that plaintiff was in his clinic "talking to his staff members around patients" about his personal life. Dr. Weber demanded a letter of apology and informed Cole that plaintiff was no longer welcome in the Duke-Raleigh system, which comprised more than 85 percent of St. Jude Medical S.C.'s Raleigh territory.

Seven months later, on Friday, 27 February 2015, Cole received an e-mail from a patient who reported feeling "very uncomfortable" during an appointment with plaintiff. The patient complained that plaintiff read the film backwards, exposed the patient to unnecessary radiation, and several times during three visits she was "loud," "argumentative," and asked "the same questions over and over again." Cole forwarded the e-mail to his manager, Eric Delissio, who in turn sent the e-mail to human resources. Plaintiff was terminated the following Monday.

Plaintiff filed a complaint in Mecklenburg County Superior Court alleging claims of wrongful discharge from employment in violation of public policy and libel against St. Jude Medical and St. Jude Medical S.C.; tortious interference with contractual rights and libel against Cole and Delissio; and tortious interference with contractual rights against Duke and Dr. Weber.

St. Jude Medical and St. Jude Medical S.C. (collectively, the St. Jude defendants) moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure.[1] The St. Jude defendants argued that venue in Mecklenburg County was improper because the forum-selection clause in the employment agreement provides that all claims related to the agreement must be litigated in the state or federal courts located in Ramsey County, Minnesota. Although out-of-state forum-selection clauses are void and unenforceable in North Carolina, *see* N.C. Gen. Stat. § 22B-3, the St. Jude defendants averred that the contract was not formed in this State.

The trial court granted the St. Jude defendants' motion to dismiss for improper venue. The court concluded that the agreement was formed in Texas, rather than North Carolina, because Boettiger's signature was the "the last essential act." As such, N.C. Gen. Stat. § 22B-3 did not apply and the forum-selection clause was valid, reasonable, and enforceable.

1. The St. Jude defendants also moved to dismiss plaintiff's wrongful discharge and libel claims pursuant to Rule 12(b)(6).

The court also concluded that requiring plaintiff to prosecute her claims in Minnesota "is not seriously inconvenient" and would not effectively deprive her of her day in court. Plaintiff timely appeals.

II. Discussion

A. Jurisdiction

[1] We first address whether plaintiff has vested jurisdiction in this Court to review her appeal on the merits. "An order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order." *Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001). "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) (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders or judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). An appeal may be taken only from those "judgments and orders as are designated by the statute regulating the right of appeal." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381; *see, e.g.*, N.C. Gen. Stat. § 1-277 (2015); *id.* § 1A-1, Rule 54(b); *id.* § 7A-27(b).

Plaintiff appeals from an interlocutory order dismissing her claims against the St. Jude defendants while allowing her other claims to move forward against defendants Cole, Delissio, Duke, and Dr. Weber. While the order was "a final judgment as to one or more but fewer than all of the claims or parties," N.C. Gen. Stat. § 1A-1, Rule 54(b), the trial court did not certify the order for immediate appellate review. By virtue of the substantial right doctrine, however, plaintiff has provided an alternative basis to appeal the interlocutory order.

First, as plaintiff correctly notes, "our case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566 n.1, 566 S.E.2d 160, 161 n.1 (2002) (citations omitted), *quoted in Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 641, 574 S.E.2d 31, 33 (2002); *see also US Chem. Storage, LLC v. Berto Constr., Inc.*, No. COA16-628, slip op. at 5 (N.C. Ct. App. May 2, 2017) ("[T]he validity of a forum selection clause constitutes a substantial right." (citing *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 776, 501 S.E.2d 353, 355 (1998))). Prior decisions have applied this principle to review the denial of a motion to dismiss for improper venue.

See, *e.g.*, *Hickox v. R&G Grp. Int'l*, *Inc.*, 161 N.C. App. 510, 511, 588 S.E.2d 566, 567 (2003) ("Although a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right." (citation omitted)). The same substantial right is implicated by the court's partial dismissal in this case because an "order denying a party the right to have the case heard in the proper court would work an injury to the aggrieved party which could not be corrected if no appeal was allowed before the final judgment." *DesMarais v. Dimmette*, 70 N.C. App. 134, 136, 318 S.E.2d 887, 889 (1984).

Second, "[a] party has a substantial right to avoid two trials on the same facts in different forums where the results would conflict." *Clements v. Clements ex rel. Craige*, 219 N.C. App. 581, 585, 725 S.E.2d 373, 376 (2012) (citing *Hamby v. Profile Prods.*, *L.L.C.*, 361 N.C. 630, 639, 652 S.E.2d 231, 237 (2007)), *quoted in Callanan v. Walsh*, 228 N.C. App. 18, 21, 743 S.E.2d 686, 689 (2013). Plaintiff's claims against defendants arise out of the same set of factual circumstances surrounding her termination. The libel claim against Cole and Delissio is pending in Mecklenburg County Superior Court but the libel claim against the St. Jude defendants, alleged on the theory of *respondeat superior*, was dismissed for improper venue. Dismissing the appeal and allowing plaintiff to prosecute the same claims in different forums "creat[es] the possibility of inconsistent verdicts." *Estate of Harvey v. Kore-Kut*, *Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006). Because plaintiff has shown that the interlocutory order affects a substantial right that would be jeopardized absent review prior to a final judgment on the merits, *Goldston*, 326 N.C. at 726, 392 S.E.2d at 736, we have jurisdiction over plaintiff's appeal.

B. Dismissal for Improper Venue

1. Claims "Relating to" the Employment Agreement

[2] Plaintiff first argues that the trial court erred in dismissing the complaint under Rule 12(b)(3) because her tort claims against the St. Jude defendants are not "related to" the employment agreement and are not subject to the forum-selection clause.

Under our choice-of-law principles, "the interpretation of a contract is governed by the law of the place where the contract was made." *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). But if "parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract,

such a contractual provision will be given effect." *Id.*; *see, e.g.*, *Tohato, Inc. v. Pinewild Mgmt., Inc.*, 128 N.C. App. 386, 390, 496 S.E.2d 800, 803 (1998) (applying Texas law to determine enforceability of arbitration clause where choice-of law provision stipulated contract "shall be governed by and construed under the laws of the State of Texas"). By virtue of the choice-of law provision in the agreement, this issue involves the application of Minnesota law.

Whether a forum-selection clause applies to a plaintiff's claim is a question of law, reviewed by the Minnesota courts *de novo*. *Alpha Sys. Integration, Inc. v. Silicon Graphics, Inc.*, 646 N.W.2d 904, 907 (Minn. Ct. App. 2002) (citation omitted). "Whether tort claims are to be governed by forum selection provisions depends upon the intention of the parties reflected in the wording of particular clauses and the facts of each case." *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 693 (8th Cir. 1997) (citation omitted) (internal quotation marks omitted), *cited with approval in Alpha Sys. Integration, Inc.*, 646 N.W.2d at 907, 908 (examining language of contract to determine whether forum-selection clause applied to claims arising out of agreement).

The forum-selection clause at issue is broadly worded to encompass "all actions or proceedings *relating to*" the agreement. (Emphasis added.) "Relating to" implies merely "some connection or relation." Webster's New World College Dictionary 1225 (5th ed. 2014). While plaintiff's claims may sound in tort, they still have "some connection" to the employment agreement. Plaintiff's wrongful discharge claim directly implicates the employer-employee relationship created by the agreement. The same can be said of the libel claim, in which plaintiff alleged that "to instigate the termination of plaintiff from St. Jude Medical S.C.," Cole and Delissio published "false and defamatory statements" implying plaintiff was incompetent. As additional evidence of its breadth, the clause provides: "Employee understands that Employee is surrendering the right to bring litigation against SJMSC outside the state of Minnesota." Such language indicates that *all* claims by an employee against the employer are subject to the forum-selection clause whether in contract, tort, or otherwise. Because the clause reflects an intention to litigate plaintiff's claims in Minnesota, the trial court did not err in finding implicitly that the claims are subject to the forum-selection clause.

2. Forum-Selection Clause

[3] Next, plaintiff argues that the forum-selection clause is void and unenforceable pursuant to N.C. Gen. Stat. § 22B-3, which provides in relevant part:

> Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action . . . that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable.

N.C. Gen. Stat. § 22B-3 (2015). Plaintiff maintains that the employment agreement was "entered into in North Carolina" because her signature was the last act necessary to the formation of the contract. She contends, therefore, that the forum-selection clause is void and enforceable as a matter of law, and that venue in Mecklenburg County was proper.

As previously noted, plaintiff and the St. Jude defendants agreed that the contract "will be governed by the laws of the state of Minnesota." Nevertheless, our courts have not honored choice-of-law provisions in contracts when

> "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of applicable law in the absence of an effective choice of law by the parties."

Cable Tel Servs., Inc., 154 N.C. App. at 643, 574 S.E.2d at 34 (quoting Restatement (Second) of Conflict of Laws § 187 (1971), *cited with approval in Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980), *and Torres v. McClain*, 140 N.C. App. 238, 241, 535 S.E.2d 623, 625 (2000)). Because the application of Minnesota law would be contrary to a fundamental policy of this state, which has a materially greater interest in determining the validity of the forum-selection clause, we apply North Carolina law to decide the place of contract formation. *See Szymczyk v. Signs Now Corp.*, 168 N.C. App. 182, 186, 606 S.E.2d 728, 732 (2005) (applying North Carolina law in reviewing place of contract formation to resolve validity of out-of-state forum-selection clause).

As a "determination requiring the . . . application of legal principles," *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted), the place of contract formation is a conclusion of law, reviewed *de novo* on appeal, *see, e.g.*, *Goldman v. Parkland of Dallas, Inc.*, 277 N.C. 223, 227, 176 S.E.2d 784, 787 (1970).

"The essence of any contract is the mutual assent of both parties to the terms of the agreement . . . ." *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980) (citing *Pike v. Wachovia Bank & Trust Co.*,

274 N.C. 1, 161 S.E.2d 453 (1968)); *see also* Restatement (Second) of Contracts § 17 (1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange . . . ."); *id.* § 3 ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

Mutual assent of the parties "is operative only to the extent that it is manifested." Restatement (Second) of Contracts § 18 cmt. a. The manifestation of mutual assent "requires that each party either make a promise or begin or render a performance," *id.* § 18, and "is normally accomplished through the mechanism of offer and acceptance," *Snyder*, 300 N.C. at 218, 266 S.E.2d at 602; *see also Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985) ("[A]ssent . . . requires an offer and acceptance in the exact terms."); *T.C. May Co. v. Menzies Shoe Co.*, 184 N.C. 150, 152, 113 S.E. 593, 593 (1922) ("[T]he mutual assent of the parties . . . generally results from an offer on the one side and acceptance on the other."). As the Restatement instructs:

> Ordinarily one party, by making an offer, assents in advance; the other, upon learning of the offer, assents by accepting it and thereby forms the contract. The offer may be communicated directly or through an agent; but information received by one party that another is willing to enter into a bargain is not necessarily an offer. The test is whether the offer is so made as to justify the accepting party in a belief that the offer is made to him.

Restatement (Second) of Contracts § 23 cmt. a; *see also T.C. May Co.*, 184 N.C. at 152, 113 S.E. at 593–94 ("The offer . . . is a mere proposal to enter into the agreement, . . . but when it is communicated, and shows an intent to assume liability, and is understood and accepted by the party to whom it is made, it becomes at once equally binding upon the promisor and the promisee."); 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 4:3 (4th ed. 2007) ("[I]t is typically the case that one making an offer assents in advance to the proposed bargain, after which all that is required to complete the mutual assent necessary is the assent of the offeree." (footnote omitted)).

The manifestation of mutual assent is judged by an objective standard:

> The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from the language employed by them. The undisclosed intention is immaterial in the absence of mistake, fraud, and the like,

> and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject, as mental assent to the promises in a contract is not essential. . . . The question whether a contract has been made must be determined from a consideration of the expressed intention of the parties—that is, from a consideration of their words and acts. . . . [T]he test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

Howell v. Smith, 258 N.C. 150, 153, 128 S.E.2d 144, 146 (1962) (citations omitted) (internal quotation marks omitted); *see also* Restatement (Second) of Contracts § 2 cmt. b ("The phrase 'manifestation of intention' adopts an external or objective standard for interpreting conduct . . . . A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct."); Williston & Lord, *supra*, § 4:1 ("In the formation of contracts, however, it was long ago settled that secret, subjective intent is immaterial, so that mutual assent is to be judged only by overt acts and words rather than by the hidden, subjective or secret intention of the parties."); *id.* § 4:2 ("As long as the conduct of a party is volitional and that party knows or reasonably ought to know that the other party might reasonably infer from the conduct an assent to contract, such conduct will amount to a manifestation of assent.").

"Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 785 (1986); *see also Thomas v. Overland Exp., Inc.*, 101 N.C. App. 90, 97, 398 S.E.2d 921, 926 (1990) (noting that our courts employ the "last act" test to determine where a contract was made) (citing *Fast v. Gulley*, 271 N.C. 208, 155 S.E.2d 507 (1967)).

The last act necessary to contract formation usually occurs at the place of acceptance. In *Goldman*, the defendant, a Texas corporation with its principal office in Dallas, sent the plaintiff, a North Carolina

resident, a letter detailing the terms of a proposed employment contract. 277 N.C. at 225–26, 176 S.E.2d at 786. Upon receipt, the plaintiff signed the contract in Greensboro and mailed it to the defendant in Dallas. *Id.* at 226, 176 S.E.2d at 786. Our Supreme Court determined that the contract was made in North Carolina: "The letter . . . constituted an offer. The final act necessary to make it a binding agreement was its acceptance, which was done by the plaintiff by signing it in Greensboro . . . and there depositing it in the United States mail properly addressed to defendant." *Id.* at 226–27, 176 S.E.2d at 787.

Relying on *Goldman*, our Supreme Court reached a similar conclusion in *Tom Togs*, 318 N.C. at 365, 348 S.E.2d at 785. The defendant, a clothing distributor incorporated in New Jersey with its principal place of business in New York City, submitted to the plaintiff, a clothing manufacturer in North Carolina, a purchase order for shirts. *Id.* at 362–63, 348 S.E.2d at 784. The plaintiff accepted the order "by sending the shirts to defendant within the time specified." *Id.* at 363, 348 S.E.2d at 784. Resolving the jurisdictional issue in a subsequent breach of contract claim, filed by the plaintiff in Wake County Superior Court, the Supreme Court concluded that the contract was "made in this State" because the plaintiff's acceptance in North Carolina was the "last act necessary" to form a binding contract. *Id.* at 365, 348 S.E.2d at 785.

In some instances, a contract may not be formed until the offeror manifests assent through a counter-signature. In *Parson v. Oasis Legal Finance, LLC*, 214 N.C. App. 125, 715 S.E.2d 240 (2011), the plaintiff entered into an agreement with the defendant for an advance of funds to pay the plaintiff's legal fees. *Id.* at 126, 715 S.E.2d at 241. The plaintiff completed a funding application and faxed it to the defendant. *Id.* at 130, 715 S.E.2d at 243. On the same day, the defendant faxed the plaintiff an unsigned draft agreement for a $3,000 advance. *Id.* Notably, the agreement asked how the plaintiff would like to receive his requested amount, i.e., "by check or as requested by the purchaser," and included a release allowing the defendant to receive a copy of the plaintiff's credit report. *Id.* at 130, 715 S.E.2d at 244. The plaintiff signed the agreement and faxed it back to the defendant. *Id.* Upon receipt, the defendant's representative signed the agreement in Illinois and then mailed the plaintiff a check for $2,972. *Id.* Under the circumstances, the Court concluded: "The last act essential to . . . affirming the mutual assent of both parties to the terms of the agreement was the signing of the agreement by [the defendant's] representative." *Id.* Because the defendant's representative signed the agreement in Illinois, the Court determined that the contract was made in Illinois. *Id.* at 130–31, 715 S.E.2d at 244 (citing

Bundy v. Comm. Credit Co., 200 N.C. 511, 157 S.E. 860 (1931); *Szymczyk*, 168 N.C. App. at 187, 606 S.E.2d at 733).

Other decisions have distinguished between acts which are necessary to form a binding obligation and those which are merely administrative. In *Murray v. Ahlstrom Industrial Holdings, Inc.*, 131 N.C. App. 294, 506 S.E.2d 724 (1998), this Court determined that the defendant made an offer of employment when it telephoned the plaintiff at his home in North Carolina. *Id.* at 296–97, 506 S.E.2d at 726. Upon the plaintiff's acceptance, the defendant informed him that he "was hired and that he should report to work in Corinth, Mississippi immediately." *Id.* at 297, 506 S.E.2d at 726. Despite the incomplete employment paperwork, the Court concluded:

> At this point the contract for employment was complete. Relying upon this employment contract, plaintiff packed up his family and moved to Mississippi for the duration of the project. Although the paperwork filled out by plaintiff was required before he could begin work, this seems to be, and in fact was admitted by [the defendant] to be, mostly administrative. The paperwork appears to be more of a consummation of the employment relationship than the "last act" required to make it a binding obligation.

Id. at 297, 506 S.E.2d at 726–27 (citing *Warren v. Dixon & Christopher Co.*, 252 N.C. 534, 114 S.E.2d 250 (1960)). Because the plaintiff's acceptance was the last act necessary to form a binding obligation, the Court concluded that the contract was made in North Carolina. *Id.* at 297, 506 S.E.2d at 727; *cf. Szymczyk*, 168 N.C. App. at 187, 606 S.E.2d at 733 (concluding that franchise agreement was made in Florida because once terms were discussed with the defendant's representatives and form agreement was signed by the plaintiffs in North Carolina, agreement was returned to Florida where it was signed by the defendant's president).

Analogizing to *Goldman* and *Tom Togs*, we agree with plaintiff that the contract in this case was made in North Carolina. By presenting the employment agreement to plaintiff on her first day at work, St. Jude Medical S.C. undeniably signaled a willingness to enter into a bargain, offering plaintiff employment under the terms set forth in the agreement. *See* Restatement (Second) of Contracts § 24 ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."). In contrast to *Parson*, where the plaintiff had to sign a release of his credit report and indicate on the draft agreement

his desired method to receive funds, here plaintiff was only required to sign the proposed agreement. There were no terms left to negotiate. *Cf.* Restatement (Second) of Contracts § 33 ("The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance."). Because plaintiff did not propose amended or additional terms, her signature and delivery constituted acceptance.

Defendant maintains that its blank signature line on the last page of the agreement is evidence that plaintiff's acceptance would not conclude the deal; the agreement required further assent by defendant. Based on the language in the agreement and the conduct of the parties, however, defendant's signature was merely a "consummation of the employment relationship," as the Court concluded in *Murray*, 131 N.C. App. at 297, 506 S.E.2d at 727, instead of the last act necessary to form a binding agreement. The agreement contains no clause similar to the one in *Bundy*, 200 N.C. at 513, 157 S.E. at 862, which provided: "This agreement shall not become effective until accepted by its duly authorized officers of [the defendant] at Baltimore, Md." The fact that plaintiff worked for nearly two weeks before Boettiger signed the agreement, moreover, indicates that defendant intended to be bound when plaintiff reported to work and executed the agreement. Defendant's manifestation of assent is found in its proposal of the agreement to plaintiff which, upon acceptance, became binding upon both parties. On these facts, we conclude that the contract was made in North Carolina and the forum-selection clause is void and unenforceable under N.C. Gen. Stat. § 22B-3.

III. Conclusion

The trial court erred in dismissing plaintiff's claims against the St. Jude defendants pursuant to Rule 12(b)(3) of the North Carolina Rules of Civil Procedure. The last act necessary to the formation of the employment agreement was plaintiff's signature and delivery in North Carolina rather than Boettiger's signature in Texas, which can be more aptly described as a "consummation of the employment relationship." Because the contract was "entered into in North Carolina," the Minnesota forum-selection clause is void and unenforceable pursuant to N.C. Gen. Stat. § 22B-3. We reverse the court's order dismissing plaintiff's claims against the St. Jude defendants for improper venue.

REVERSED.

Judge DILLON concurs.

Judge ARROWOOD concurs by separate opinion.

ARROWOOD, Judge, concurring by separate opinion.

I concur in the majority opinion that the Minnesota forum-selection clause is void and unenforceable pursuant to N.C. Gen. Stat. § 22B-3 because the contract was entered into in North Carolina, and therefore, that the trial court's order dismissing plaintiff's complaint must be reversed. However, I reach that result by a somewhat different analysis. I believe that the contract was entered into in North Carolina for the following reasons: When defendant made its offer of employment to plaintiff, the proposed Employment Agreement contained the following language:

> C. Modification Prior to Full Execution. No modifications may be made to the terms of this Agreement prior to the full execution of the Agreement without the prior approval of an authorized representative of SJMSC.

The Employment Agreement also provided that:

> TO WITNESS THEIR AGREEMENT THE PARTIES HAVE SIGNED BELOW AS OF THE FIRST DAY WRITTEN ABOVE.

The "first day written above" was designated as 4 September 2012.

"The question whether a contract has been made must be determined from a consideration of the expressed intention of the parties – that is from a consideration of their words and acts." *Normile v. Miller*, 313 N.C. 98, 107, 326 S.E.2d 11, 17 (1985) (citation omitted). Here, it is undisputed that plaintiff failed to challenge any terms of the Employment Agreement or propose any additional terms. In addition, there does not appear to be any dispute in the record that plaintiff commenced work on the date set forth in the Agreement and that the parties operated under the terms of the proposed Employment Agreement for more than a week prior to the signing of the Employment Agreement by defendant's representative. The outward expressions of both plaintiff and defendant demonstrated that a mutual agreement had been established as of 4 September 2012. In conclusion, I believe that the non-negotiable language of the Employment Agreement, when combined with the Agreement's effective date language and the actions of both parties, shows that the contract was formed no later than when plaintiff commenced work and that the last act necessary for formation of the contract occurred in North Carolina.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION; DUKE ENERGY CAROLINAS, LLC; DUKE ENERGY PROGRESS, LLC; SOUTHERN ALLIANCE FOR CLEAN ENERGY, APPELLEES

v.

NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION, APPELLANT

No. COA16-1067

Filed 1 August 2017

Utilities—declaratory ruling—topping cycle combined heat and power system—energy efficiency

The Utilities Commission erred by issuing a declaratory ruling that a topping cycle combined heat and power system (CHP) did not constitute an energy efficiency measure under N.C.G.S. § 62-133.8(a)(4), except to the extent that the waste heat component was used and met the definition of an energy efficiency measure. The Commission misread the plain language of N.C.G.S. § 62-133.8 and found an ambiguity where none existed. Further, the statute includes the entire topping cycle CHP system and not just their individual components.

Appeal by appellants from order entered 6 June 2016 by the North Carolina Utilities Commission. Heard in the Court of Appeals 3 May 2017.

Staff Attorney David T. Drooz, for Appellee Public Staff – North Carolina Utilities Commission.

Troutman Sanders, LLP, by Brian L. Franklin and Molly McIntosh Jagannathan, for Appellee Duke Energy Carolinas, LLC.

Nadia L. Luhr and Gudrun Thompson, for Appellant North Carolina Sustainable Energy Association and Appellee Southern Alliance for Clean Energy.

Peter H. Ledford, for Appellant North Carolina Sustainable Energy Association.

MURPHY, Judge.

Appellant North Carolina Sustainable Energy Association ("NCSEA") appeals from a ruling from the North Carolina Utilities Commission (the

"Commission") that "a topping cycle CHP system does not constitute an energy efficiency measure under [N.C.G.S. §] 62-133.8(a)(4), except to the extent that the . . . waste heat component is used and meets the definition of [an] energy efficiency measure in [N.C.G.S. §] 62-133.8(a)(4)." We disagree and hold that, for the purposes of classifying a topping cycle CHP as an energy efficiency measure, N.C.G.S. § 62-133.8(a)(4) (2015) is unambiguous. A plain reading of the statute at issue includes the entire topping cycle CHP system.

I. Background

Combined heat and power ("CHP") systems generate both electricity and useable thermal energy in contrast to conventional power generation in which electricity is purchased from a central power plant, which is less efficient. Conventional power generation based on amount of fuel used to produce electricity and useful thermal energy is 45 % to 50% efficient, while CHP systems are typically 60% to 80% efficient.

Topping cycle CHP systems burn fuel to generate electricity, and then some of the resulting waste heat is recovered and used as thermal energy. As of 7 August 2013, there were 62 topping cycle CHP systems in North Carolina.

On 1 June 2015, NCSEA filed a Request for Declaratory Ruling asking the Commission to issue a declaratory ruling that:

> A new topping cycle combined heat and power . . . system-including such a system that uses non-renewable energy resources-that both (a) produces electricity or useful, measureable thermal or mechanical energy at a retail electric customer's facility and (b) results in less energy being used to perform the same function or provide the same level of service at the retail electric customer's facility constitutes an "energy efficiency measure" for purposes of [N.C.G.S] § 62-133.9 and Commission Rule R8-67.

It also asked that, "if deemed necessary or helpful," the Commission issue a complementary declaratory ruling that:

> It is inconsistent with the clear and unambiguous language of the [N.C.G.S] §§ 62-133.8 and 62-133.9 to recognize *only* the heat recovery component of a new topping cycle CHP system as an "energy efficiency measure."

After hearing comments from NCSEA, Appellees Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively "Duke"),

and Appellee Public Staff – North Carolina Utilities Commission (the "Public Staff"), the Commission issued its Order, stating:

> 1. That a topping cycle CHP system does not constitute an energy efficiency measure under [N.C.G.S. §] 62-133.8(a)(4), except to the extent that the secondary component, the waste heat component is used and meets the definition of energy efficiency measure in [N.C.G.S. §] 62-133.8(a)(4); and
>
> 2. That the Commission has jurisdiction under its rulemaking authority to determine and clarify this issue.

NCSEA filed a timely Notice of Appeal and Exceptions.

II. Analysis

A. Standard of Review

The case before us is one of statutory interpretation, and is thus a question of law to be reviewed de novo. *Dare Cty. Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997). Agencies must give effect to the intent of the legislature when "the legislature unambiguously expressed its intent in the statute." *Charlotte-Mecklenburg Hosp. Auth. v. N.C. HHS*, 201 N.C. App. 70, 73, 685 S.E.2d 562, 565 (2009). Courts will not defer to an agency's interpretation when that interpretation is in direct conflict with the clear intent and purpose of the legislature's act. *High Rock Lake Partners, LLC v. N.C. Dept. of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012).

Appellees argue that the Commission should receive deference as to the interpretation of N.C.G.S. § 62-133.8(a) because it is a highly technical matter and the law is vague. However, the statute is in fact quite clear in its definition of an energy efficient measure, which includes "energy produced from a combined heat and power *system*," N.C.G.S. § 62-133.8(a)(4) (emphasis added), and is further defined as "a *system* that uses waste heat to produce electricity or useful, measureable thermal or mechanical energy at a retail customer's facility," N.C.G.S. § 62-133.8(a)(1) (emphasis added).

B. Plain Language

The Commission interpreted the language of N.C.G.S. § 62-133.8(a)(1) and (a)(4) to mean that only the waste heat recovery component of a topping cycle system constitutes an energy efficient measure under the statute, rather than the system as a whole. In doing so, the Commission was in error as it went against the plain language of the statute.

N.C.G.S. § 62-133.8(a)(1) defines a "combined heat and power *system*" as "a system that uses waste heat to produce electricity or useful, measureable thermal or mechanical energy at a retail electric customer's facility." (Emphasis added). N.C.G.S. § 62-133.8(a)(4) then defines an "energy efficient measure" as "an equipment, physical or program change implemented after January 1, 2007 that results in less energy used to perform the same function." An "energy efficient measure" includes "energy produced from a combined heat and power *system* that uses nonrenewable energy resources". N.C.G.S. § 62-133.8(a)(4) (emphasis added)

A statute that is clear and unambiguous must be given its "plain and definite meaning." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978) (citing *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)); *see also State ex rel. Utils Comm'n v. Env't Def. Fund*, 214 N.C. App. 364, 366, 716 S.E.2d 370, 372 (2011). The statutory language of N.C.G.S. § 62-133.8(a)(1) is clear and unambiguous. A plain reading of the statute shows that it is the CHP system as a whole that is the energy efficient measure. An energy efficient measure includes not only the waste heat recovery part of a CHP system, but rather the system in its entirety. The Commission, however, found that "for the purposes of being deemed an energy efficient measure, the electricity or useful, measurable thermal or mechanical energy must be produced from waste heat." This limitation cannot be found anywhere in N.C.G.S. § 62-133.8.

The Commission's argument ignores the fact that the legislature plainly states that an " 'Energy efficiency measure' includes, but is not limited to, energy produced from a combined heat and power system that uses nonrenewable energy resources." N.C.G.S. § 62-133.8(a)(4). It is a CHP system that is noted by the law, not just the waste heat component of the system. If the legislature had intended only for the waste heat component of a CHP system to qualify as an energy efficiency measure, it was within the power of the legislature to write N.C.G.S. § 62-133.8(a)(4) in that way, but that is not the law as written by our General Assembly.

Furthermore, this Court cannot "delete words used or insert words not used" in a statute. *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). By interpreting "energy efficient measure" to include only the waste heat component of a topping cycle CHP system instead of the system as a whole, the language of N.C.G.S. § 62-133.8(a)(4) is rendered unnecessary and creates surplusage.

III. Conclusion

The Commission has misread the plain language of N.C.G.S. § 62-133.8 and has found an ambiguity where none exists. N.C.G.S. § 62-133.8

governs the treatment of CHP systems, and not just their individual components, as energy efficient measures. Accordingly, we reverse the decision of the Commission.

REVERSED.

Judges CALABRIA and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CHARLES MACK ANDERSON, JR.

No. COA16-767

Filed 1 August 2017

1. Sexual Offenders—sex offender on premises of daycare—sufficiency of evidence—parking lot shared by other businesses

The trial court erred by denying defendant's motion to dismiss the charge of being a sex offender on the premises of a daycare where the evidence was insufficient to prove that defendant's presence as a sex offender in the parking lot shared by a daycare and other businesses was a location governed by N.C.G.S. § 14-208.18(a)(1).

2. Appeal and Error—writ of certiorari—plea agreement—unconstitutionally overbroad statute

The Court of Appeals exercised its inherent power under N.C. R. App. P. 2 and granted defendant's writ of certiorari to address the validity and enforceability of a plea agreement. Defendant's sentence was imposed partially based on violation of N.C.G.S. § 14-208.18(a)(2). which had been held unconstitutionally overbroad by the Fourth Circuit.

3. Sexual Offenders—sex offender on premises of daycare—plea agreement—statute ruled unconstitutional—direct appeal pending

A sex offender's conviction following a guilty plea to unlawfully being within 300 feet of a daycare was vacated where a Fourth Circuit opinion ruled N.C.G.S. § 14-208.18(a)(2) was unconstitutional while defendant's direct appeal was pending and where the State offered no contrary argument.

4. Criminal Law—plea agreement—portion vacated—remaining convictions set aside

After a sex offender's guilty plea for unlawfully being within 300 feet of a daycare was vacated, the entire plea agreement was set aside and the remaining convictions for failure to report a new address and three counts of obtaining habitual felon status were set aside and remanded to the trial court.

Appeal by defendant from judgments entered 3 February 2016 by Judge Marvin P. Pope Jr. in Graham County Superior Court. Heard in the Court of Appeals 7 March 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Lauren Tally Earnhardt, for the State.

Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

BRYANT, Judge.

Where the evidence was insufficient to prove that defendant's presence as a sex offender in the parking lot shared by a daycare and other businesses was a location governed by N.C.G.S. § 14-208.18(a)(1), the trial court erred by denying defendant's motion to dismiss, and we reverse the judgment of the trial court as to the conviction in file no. 14 CRS 50721. Where the Fourth Circuit has ruled that subsection (a)(2) of N.C.G.S. § 14-208.18 is unconstitutionally overbroad in violation of the First Amendment, and the State asserts no argument to the contrary, we adopt the analysis of the Fourth Circuit's ruling and vacate defendant's conviction in file no. 14 CRS 50703. Where one conviction is reversed and another vacated, the essential and fundamental terms of defendant's plea agreement have become "unfulfillable," and we set aside the entire plea agreement and remand.

In June 2006, defendant Charles Mack Anderson Jr. pled guilty to the felony offense of lewd and lascivious molestation and was placed on sex offender probation. When defendant relocated to Graham County, he registered with the Graham County Sheriff's Department on 25 October 2014 pursuant to the North Carolina Sex Offender and Public Protection Registration Programs codified within Chapter 14 of our General Statutes. When registering, defendant signed an acknowledgment that persons registered under the act were prohibited from the

> premises of any place intended primarily for the use, care, or supervision of minors, including . . . child care centers, nurseries and playgrounds; . . . [and] [w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors . . . .

On 19 December 2014, Danny Millsaps, Sheriff of Graham County, was on routine patrol on Patton Street, which ran behind the Eagle Knob Learning Center, a daycare supervising approximately fifty-five children, from newborns to five-year-olds. At "the first residence behind the learning center," Sheriff Millsaps observed defendant outside chopping wood. By searching a police database, Sheriff Millsaps determined that defendant was a registered sex offender in visual and "close" proximity to a child care center. Sheriff Millsaps then informed defendant that he could not be at the residence due to its proximity to the child care center (hereinafter "daycare"). That afternoon, a law enforcement officer standing in the yard of the Patton Street residence observed two or three children playing on the daycare playground.

During the evening of 28 December 2014, a Sunday, Sergeant Cody George was on routine patrol on southbound Highway 129, passing in front of the Eagle Knob daycare center, when he observed defendant's green SUV in the parking lot. Sergeant George testified that he was familiar with defendant, having seen him some eight to ten times before, and was familiar with defendant's SUV. Sergeant George recognized defendant as the driver and testified that defendant was approximately seventy-five feet from the daycare. On cross-examination at trial, Sergeant George acknowledged that the daycare was not open when he observed defendant in the parking lot, and that the other businesses adjacent to the daycare in the shopping mall, a tax preparation service and a hair salon, were also closed at the time. Sergeant George testified he believed a stand-alone restaurant, which also shared the parking lot, was closed on Sundays as well. When Sergeant George determined that defendant was prohibited from being on the premises of the daycare at all times and not just during business hours, he obtained a warrant for defendant's arrest.

On 23 March 2015, a grand jury convened in Graham County Superior Court indicted defendant for being a sex offender unlawfully within 300 feet of a location intended primarily for the use, care, or supervision of minors (file no. 14 CRS 50703 (for being a sex offender within

300 feet of a daycare)),[1] and for being a sex offender unlawfully on premises intended primarily for the use, care, or supervision of minors (14 CRS 50721 (for being a sex offender on the premises of a daycare)).[2] On 1 September 2015, defendant was indicted for failure to report a new address as required by the Sex Offender Registry Programs statutes, N.C. Gen. Stat. §§ 14-208.5 *et seq.* (15 CRS 50072), and three counts of attaining habitual felon status (15 CRS 250–52). The matter came on to be heard before a jury in Graham County Superior Court during the 11 January 2016 criminal session, the Honorable Marvin P. Pope, Jr., Judge presiding. The State proceeded to trial by jury only on the charge under file no. 14 CRS 50721, being a sex offender on the premises of a daycare. The remaining charges were held in abeyance.

At trial, defendant moved to dismiss the charge, arguing that the parking lot in which defendant was observed was shared by the daycare, a tax preparation service, and a hair salon, and that the State had failed to present evidence that the parking lot was a part of the daycare or that defendant was knowingly on the property of the daycare. Specifically, defendant argued that the State "failed to produce any evidence at all of . . . defendant *actually being on the premises* of [the] day care." (Emphasis added). Defendant also argued that the State did not "produce[] any witness or define[] in any way that that parking lot was part of that premises of that day care, when that's a shared parking lot with the tax place, the haircutting place, the diner, the day care . . . ." The trial court denied defendant's motion. The jury returned a verdict of guilty.

After the jury verdict, the State was allowed, without objection, to amend the indictment against defendant charging failure to report a new address as a sex offender (15 CRS 50072). Defendant then pled guilty to the remaining charges: being a sex offender within 300 feet of a daycare (14 CRS 50703); failure to report a new address as a sex offender (15 CRS 50072); and three counts of attaining habitual felon status (15 CRS 250–52).

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1. For ease of reading and to distinguish the primary offenses, we hereinafter refer to 14 CRS 50703 as "being a sex offender within 300 feet of a daycare" and 14 CRS 50721 as "being a sex offender on the premises of a daycare." We use the term "daycare" as the only location or premises "intended primarily for the use, care, or supervision of minors" in the instant case is, in fact, a child daycare center.

2. The indictments in file nos. 14 CRS 50703 and 50721 each described the indicted offense as "in violation of 14-208.18[(a)]," but neither indictment listed under which *subsection*—(1), (2), or (3)—of G.S. § 14-208.18(a) defendant was specifically indicted. However, because the indictment in file no. 14 CRS 50721 tracks the language of subsection (1) and the indictment in file no. 14 CRS 50703 tracks the language of subsection (2), it can be presumed that the indictments were related to those respective subsections.

In accordance with the jury verdict and guilty pleas, the trial court entered two judgments—one on the charge of being a sex offender on the premises of a daycare, combined with one count of attaining habitual felon status; and a second judgment on the charges of being a sex offender within 300 feet of a daycare, failure to report a new address, and two counts of attaining habitual felon status. For each judgment, defendant was sentenced to concurrent terms of 84 to 113 months. Defendant appealed from the judgment entered following the jury verdict on the charge of being a sex offender on the premises of a daycare (14 CRS 50721).

On appeal, defendant challenges his conviction for being a sex offender on the premises of a daycare and petitions this Court for a writ of certiorari to review the remaining convictions to which defendant pled guilty.

I. Appeal of Right—Conviction for Violation of N.C. Gen. Stat. § 14-208.18(a)(1)

[1] Defendant first argues the trial court erred in failing to grant his motion to dismiss the charge of being on the premises of a daycare (14 CRS 50721), in violation of N.C.G.S. § 14-208.18(a)(1) (2015). More specifically, defendant contends the State failed to present sufficient evidence that the parking lot shared by adjacent businesses was part of the premises of the daycare and thus, failed to establish the crime charged in the indictment. We agree.

"We review denial of a motion to dismiss criminal charges *de novo*, to determine 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." *State v. Spruill*, 237 N.C. App. 383, 385, 765 S.E.2d 84, 86 (2014) (quoting *State v. Mobley*, 206 N.C. App. 285, 291, 696 S.E.2d 862, 866 (2010)). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *State v. Trogdon*, 216 N.C. App. 15, 25, 715 S.E.2d 635, 642 (2011) (citation omitted). "We must consider evidence in a light most favorable to the State and give the State the benefit of every reasonable inference from the evidence." *Mobley*, 206 N.C. App. at 291, 696 S.E.2d at 866 (citing *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001)).

Pursuant to North Carolina General Statutes, section 14-208.18(a),

> [i]t shall be unlawful for any person required to register under [the Sex Offender and Public Registration Programs],

if the offense requiring registration is described in subsection (c) of this section, to knowingly be at any of the following locations:

(1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to . . . child care centers, nurseries, and playgrounds.

(2) Within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (1) of this subsection that are located in malls, shopping centers, or other property open to the general public.

(3) At any place where minors gather for regularly scheduled educational, recreational, or social programs.

N.C. Gen. Stat. § 14-208.18(a)(1)–(3) (2011), *amended* by N.C. Sess. Laws 2016-102, § 2, eff. Sept. 1, 2016.[3]

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3. The current (2016) version of N.C.G.S. § 14-208.18 amended subsection (3) and added a subsection (4) to read as follows:

> (3) At any place where minors frequently congregate, including, but not limited to, libraries, arcades, amusement parks, recreation parks, and swimming pools, when minors are present.
>
> (4) On the State Fairgrounds during the period of time each year that the State Fair is conducted, on the Western North Carolina Agricultural Center grounds during the period of time each year that the North Carolina Mountain State Fair is conducted, and on any other fairgrounds during the period of time that an agricultural fair is being conducted.

N.C.G.S. § 14-208.18(a)(3)–(4) (2016).

The Session Laws provided that the 2016 amendments would be repealed and the original 2011 statute would go back into effect if the orders of the United States District Court for the Middle District of North Carolina finding subsections (a)(2) and (a)(3) unconstitutional were stayed or overturned by a higher court on appeal). N.C. Sess. Laws 2016-102, § 2, eff. Sept. 1, 2016; *see Does v. Cooper*, 148 F. Supp. 3d 477, 496–97 (M.D.N.C. 2015) (hereinafter *Doe I*) (holding N.C.G.S. § 14-208.18(a)(3) unconstitutionally vague and permanently enjoining its enforcement); *Does v. Cooper*, 1:13CV711, 2016 WL 1629282, at **12–13 (M.D.N.C. Apr. 22, 2016) (hereinafter *Doe II*) (holding N.C.G.S. § 14-208.18(a)(2) unconstitutionally overbroad in violation of the First Amendment and enjoining defendants from enforcing N.C.G.S. § 14-208.18(a)(2) against the plaintiffs "and all other persons similarly situated").

Defendant argues that because section 14-208.18(a)(1) is violated only by a sex offender's trespass on the premises of a place intended primarily for the use, care, or supervision of minors, the State failed to meet its burden of proof where the evidence showed only that defendant was in the parking lot of a strip mall containing a daycare and other businesses not intended primarily for the use, care, or supervision of minors. The crux of defendant's challenge regards the meaning of the word "premises" within section 14-208.18(a)(1), specifically whether the shared parking lot of a daycare center, adjoining businesses, and a stand-alone restaurant constitutes the "premises" of the daycare center.

"Statutory interpretation properly begins with an examination of the plain words of the statute." *State v. Braxton*, 183 N.C. App. 36, 41, 643 S.E.2d 637, 641 (2007) (quoting *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). "In interpreting statutory language, 'it is presumed the General Assembly intended the words to have the meaning they have in ordinary speech.' " *Id.* (quoting *Nelson v. Battle Forest Friends Meeting*, 335 N.C. 133, 136, 436 S.E.2d 122, 124 (1993)). "When the plain meaning of a word is unambiguous, a court is to go no further in interpreting the statute than its ordinary meaning." *Id.* (citation omitted). "But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Id.* at 41–42, 643 S.E.2d at 641 (quoting *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136–37 (1990)); *see State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) ("The paramount objective of statutory interpretation is to give effect to the intent of the legislature." (quoting *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559–60, 589 S.E.2d 179, 180–81 (2003)).

To begin, the term "premises" as used in N.C.G.S. § 14-208.18 is not defined in the statute or in N.C.G.S. § 14-208.6, which defines various terms as used in N.C.G.S. Chapter 14, Article 27A governing the Sex Offender Registration Program generally. *See* N.C.G.S. §§ 14-208.5 *et seq.* *Black's Law Dictionary* provides the following definition, among others: "A house or building, along with its grounds; esp., the buildings and land that a shop, restaurant, company, etc. uses <smoking is not allowed on these premises>." *Premises*, Black's Law Dictionary (10th ed. 2014).

On 30 November 2016, the United States Court of Appeals for the Fourth Circuit decided *Doe v. Cooper*, 842 F.3d 833 (4th Cir. 2016) (hereinafter *Doe III*), affirming the judgment of the district court, which "permanently enjoined enforcement of section 14-208.18(a)(2) and section 14-208.18(a)(3)." *Id.* at 838; *see infra* Section III–VI (discussing the application of the Fourth Circuit's decision in *Doe III* to defendant Anderson's conviction under section 14-208.18(a)(2)).

However, *Doe I* (in which the U.S. District Court for the Middle District of North Carolina determined, *inter alia*, that subsection (a)(1) was not unconstitutionally vague, *id.* at 492[4]), offers an illuminating comparison of subsections (a)(1) and (a)(2), *see Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984) ("It is, of course, a fundamental canon of statutory construction that statutes which are *in pari materia*, *i.e.*, which relate or are applicable to the same matter or subject, . . . must be construed together in order to ascertain legislative intent." (citations omitted)), particularly regarding "premises":

> All three subsections of § 14-208.18(a) relate to defining the restricted zones and therefore should be construed together as part of a single legislative framework. In this way, the first two subsections can be read as covering single-use properties (subsection (a)(1)) and mixed-use properties (subsection (a)(2)). . . .
>
> Specifically, subsection (a)(1) covers single-use or *stand-alone* facilities which are intended primarily for the use, care, or supervision of minors. The best examples are those included in the statute itself: "schools, children's museums, child care centers, nurseries, and playgrounds." N.C. Gen. Stat. § 14-208.18(a)(1). The entire grounds ("premises") upon which these specific facilities ("place") are located are off-limits under subsection (a)(1). In other words, for example, a restricted sex offender is prohibited from not only a school building itself, *but also the parking lot of the school* or a storage shed outside the school, *so long as those areas are on the school premises*.

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4. *Doe I* determined that subsection (a)(2) was not unconstitutionally vague but left open for determination at trial whether (a)(2) was unconstitutionally overbroad. *See id.* at 481, 492, 505 ("[S]ubsections (a)(1) and (a)(2) provide sufficient notice to those subject to the law regarding where they are prohibited to go. The existence of a few marginal cases where the precise reach of the law is unclear does not make subsections (a)(1) and (a)(2) vague."); *see also Doe III*, 842 F.3d at 842 n.4 ("The State's appeal of the district court's final judgment came after briefing on its earlier interlocutory appeal regarding subsection (a)(3) was completed. The State's two appeals were consolidated for purposes of this proceeding, with the issue of subsection (a)(2)'s overbreadth addressed through supplemental briefing."). However, the memorandum opinion and order issued about four months later, *Doe II*, held that subsection (a)(2) is unconstitutionally overbroad in violation of the First Amendment, leaving subsection (a)(1) (the only remaining subsection), intact. 2016 WL 1629282, at *12. Thus, even though subsection (a)(2) has been determined to be unconstitutionally overbroad, the analysis and comparison as laid out in *Doe I* between subsections (a)(1) and (a)(2) is highly illustrative in terms of defendant's argument on appeal of his conviction for violating subsection (a)(1).

In the ordinary case, restricted sex offenders will not have a legitimate reason for being in these locations.

In contrast, subsection (a)(2) is focused on mixed-use facilities and locations intended primarily for the use, care, or supervision of minors when the location is not on property that is primarily intended for the use, care, or supervision of minors. In the ordinary case, restricted sex offenders may have very legitimate reasons for being on properties that include smaller portions dedicated to minors. Such reasons might include shopping, eating, exercising, attending religious services, or any other of the myriad activities in which humans engage. By drawing this distinction and including the 300-foot buffer zone, the General Assembly addressed the competing interests of allowing restricted sex offenders to go to locations where they have reason to be and keeping restricted sex offenders away from locations dedicated to minors. Restricted sex offenders are therefore permitted to go on premises that may have portions dedicated to the use, care, or supervision of minors, but they can only go on those parts of the premises which are at least 300 feet away from those portions dedicated to minors.

. . . .

In summary, subsection (a)(1) applies where the *place and premises* in question are *both* primarily intended for the use, care, or supervision of minors. Restricted sex offenders are barred from the *entire premises* under subsection (a)(1). However, subsection (a)(2) applies where the premises in question is *not* intended primarily for the use, care, or supervision of minors, *but a portion of that premises* (the "place") is intended primarily for the use, care, or supervision of minors. *Restricted sex offenders can go onto the premises, but they cannot go within 300 feet of the portion of the property intended primarily for the use, care, or supervision of minors* (*i.e.*, the "place").

Because subsection (a)(2) includes the 300-foot buffer zone but subsection (a)(1) does not, a restricted sex offender needs to be able to distinguish between (a)(1) and (a)(2) locations. Otherwise, the sex offender might believe that he or she is properly within 300 feet of an

> (a)(1) location (which is permitted) when in fact he or she is impermissibly within an (a)(2) 300-foot buffer zone. *Though there will be marginal cases where the distinction will be difficult to make*, most instances will clearly fall within the ambit of either (a)(1) or (a)(2). Subsection (a)(2) also clarifies that "places" which are on "premises" which constitute a "mall[ ], shopping center[ ], or other property open to the public" will be considered (a)(2) places with their corresponding 300-foot buffer zone.

Doe I, 148 F. Supp. at 488–90 (alterations in original) (emphasis added) (footnote omitted).

We must acknowledge that "*ordinarily*, this Court is not bound by the [rulings] of the United States Circuit Courts" nor the rulings of other federal courts. *Haynes v. State*, 16 N.C. App. 407, 410, 192 S.E.2d 95, 97 (1972) (Mallard, C.J., concurring); *see also Hyman v. Efficiency, Inc.*, 167 N.C. App. 134, 137, 605 S.E.2d 254, 257 (2004) ("We are not bound by decisions of the Federal circuit courts *other than those of the United States Court of Appeals for the Fourth Circuit arising from North Carolina law*." (emphasis added) (citing *Haynes*, 16 N.C. App. at 409–10, 192 S.E.2d at 97)). However, in this instance, where the North Carolina federal courts—district and appellate—have spoken directly on the issue at hand (determining a North Carolina statute unconstitutional), and our own State legislature has acknowledged the effect of the federal court rulings on this statute, *see supra* note 3, we will herein adopt the Fourth Circuit ruling and be guided by the analysis of the lower federal courts on this important issue. *See Shepard v. Ocwen Fed. Bank, FSB*, 172 N.C. App. 475, 479, 617 S.E.2d 61, 64 (2005) ("Although we are not bound by federal case law, we may find their analysis and holdings persuasive.").

In the instant case, the evidence at trial tended to show that Eagle Knob daycare is located in a strip mall of various businesses. Next door to the daycare, on the right, is a hair salon, and next to the hair salon is a tax preparation business. All three businesses share a single building as well as a common parking lot. There is also a restaurant in a separate, freestanding building that shares the same parking lot. While parents use the parking lot to drop off and pick up their children, none of the parking spaces in the lot are specifically reserved or marked as intended for the daycare. The daycare, including the playground area to the side of the building, is surrounded by a chain-link fence, with some privacy screening attached.

On Sunday, 28 December 2014, two officers were on patrol around lunchtime when they drove by Eagle Knob, which was closed at the time. As they drove by, they saw a green SUV slow almost to a stop in the parking lot about seventy-five feet from the daycare and let out a female passenger. The SUV then proceeded through the parking lot past the daycare and exited the parking lot. One of the officers recognized defendant as the driver of the SUV based on a distinctive tattoo on the right side of his neck and the blond highlights in his hair. The officers did not immediately arrest defendant, but rather conducted research first to determine whether defendant was allowed to be where he was within the vicinity of the daycare, and subsequently took out a warrant and arrested him.

Though this is arguably one of those "marginal cases where the distinction [is] difficult to make," *see Doe I*, 148 F. Supp. 3d at 490, based on this evidence, we believe defendant "[was] *properly* within 300 feet of an (a)(1) location (which is permitted [as there is no buffer zone]) when in fact he . . . [was also] impermissibly within an (a)(2) 300-foot buffer zone," *see id.* at 489–90 (emphasis added), when he stopped his car in the parking lot shared by the daycare and other businesses, about seventy-five feet away from the daycare, and allowed a female passenger to exit his vehicle. In other words, the evidence at trial was insufficient to prove that defendant was in violation of *subsection (a)(1)* of N.C. Gen. Stat. § 14-208.18, which states that a defendant must knowingly be "*[o]n the premises* of any place intended primarily for the use, care, or supervision of minors . . . ." *Id.* § 14-208.18(a)(1). Instead, the evidence shows only that—before the subsection was deemed unconstitutionally overbroad, *see Doe II*, 2016 WL 1629282, at *12—defendant would have been in violation of subsection (a)(2) of N.C. Gen. Stat. § 14-208, which "applie[d] where the premises in question is *not* intended primarily for the use, care, or supervision of minors, but a portion of that premises (the "place") is intended primarily for the use, care, or supervision of minors[.]" *Doe I*, 148 F. Supp. at 489 (emphasis added). As noted in *Doe I*, "(a)(1) applies where the place and premises in question are both primarily intended for the use, care, or supervision of minors" and serves to restrict sex offenders from the *entire* premises. *See id.* In this case, the shared parking lot is located on premises that are not intended primarily for the use, care, or supervision of minors. Therefore, we conclude that a parking lot shared with other businesses (especially with no designation(s) that certain spaces "belong" to a particular business) cannot constitute "premises" as set forth in subsection (a)(1) of the statute.

Accordingly, where the evidence was insufficient to prove that defendant's presence as a sex offender in the parking lot shared by the daycare and other businesses was a location governed by N.C.G.S. § 14-208(a)(1), the trial court erred by denying defendant's motion to dismiss, and we reverse the judgment of the trial court as to his conviction in 14 CRS 50721.

II. Petition for Writ of Certiorari

[2] The remaining issues in defendant's brief and petition of writ of certiorari address the validity and enforceability of defendant's plea agreement. We first review defendant's petition for writ of certiorari.

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21(a)(1) (2017). However, "Appellate Rule 21 does not address guilty pleas . . . . It does not provide a procedural avenue for a party to seek appellate review by certiorari of an issue pertaining to the entry of a guilty plea." *State v. Biddix*, ___ N.C. App. ___, ___, 780 S.E.2d 863, 870 (2015).

Under Appellate Rule 2, our appellate courts have the discretion to suspend the Rules of Appellate Procedure to prevent manifest injustice to a party. N.C. R. App. P. 2; *Biddix*, ___ N.C. App. at ___, 780 S.E.2d at 868. Furthermore, this court may invoke Rule 2 "either 'upon application of a party' or upon its own initiative.' " *Biddix*, ___ N.C. App. at ___, 780 S.E.2d at 868 (quoting *Bailey v. North Carolina*, 353 N.C. 142, 157, 540 S.E.2d 313, 323 (2000)). "This Court has previously recognized the Court may implement Appellate Rule 2 to suspend Rule 21 and grant certiorari, where the three grounds listed in Appellate Rule 21 to issue the writ do not apply." *Id.*; *see also State v. Campbell*, ___ N.C. ___, ___, ___ S.E.2d ___, ___, No. 252PA14-2, 2017 WL 2492588, at *3 (2017) (reversing and remanding because this Court failed to conduct "an *independent determination* of whether the *specific circumstances* of defendant's case warranted invocation of Rule 2" (emphasis added)) ("In simple terms, precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare

case meriting suspension of our appellate rules is always a discretionary determination to be made on a case by case basis." (citations omitted)).

In the instant case, "an independent determination of . . . the specific circumstances of defendant's case" reveals that this case is one of the rare " 'instances' appropriate for Rule 2 review" in that defendant's "substantial rights are . . . affected." *See id.* at ___, ___ S.E.2d at ___, 2017 WL 2492588, at *3 (quoting *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)). Here, a federal district court and a federal appeals court have both determined that subsection (a)(2) of N.C.G.S. § 14-208.18, under which defendant pled guilty, is unconstitutionally overbroad in violation of the First Amendment. *See Doe III*, 842 F.3d at 838; *Doe II*, 2016 WL 1629282, at *12. The State has not sought further appellate review of these decisions and, in this case, has offered no argument contrary to these decisions. As a result of defendant's guilty plea for, *inter alia*, violating subsection (a)(2) of N.C.G.S. § 14-208.18, defendant was sentenced to 84 to 113 months imprisonment. Because that sentence was imposed, in part, for defendant's violation of a statute which has been held unconstitutionally overbroad, in order to "prevent manifest injustice to a party," N.C. R. App. P. 2, we recognize "the discretion inherent in the 'residual power of our appellate courts[,]' " *Campbell*, ___ N.C. at ___, ___ S.E.2d at ___, 2017 WL 2492588, at *3 (quoting *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999)), and hereby invoke Rule 2 to suspend the requirements of Rule 21 and issue the writ of certiorari to reach the merits of defendant's remaining arguments.

As a further threshold matter, we also address the State's "Motion to Strike Issues II–VI Raised in Defendant's Brief," filed 16 November 2016, and subsequent "Motion to File Substitute Brief and Substitute Response to Petition for Writ of Certiorari," filed 6 March 2017. In the State's substitute brief, the State acknowledges the Fourth Circuit's opinion in *Doe III*, which affirmed the judgment of the lower court, holding N.C. Gen. Stat. § 14-208.18(a)(2) "unconstitutionally overbroad in violation of the First Amendment." *Doe II*, 2016 WL 1629282, at *12, *aff'd by Doe III*, 842 F.3d at 838, 847–48. Accordingly, we deny the State's Motion to Strike Issues II–VI, and grant the State's Motion to File Substitute Brief and Substitute Response to Petition for Writ of Certiorari.

Having granted defendant's petition for writ of certiorari, we now review the following issues raised by defendant: (III) whether defendant's conviction following his guilty plea to unlawfully being within

300 feet of a daycare can be vacated due to a federal court ruling the statute (N.C.G.S. § 14-208.18(a)(2)) unconstitutional, *see Doe III*, 842 F.3d at 838, 847–48; *Doe II*, 2016 WL 1629282, at *12; (IV) whether the indictment in 14 CRS 50703 was insufficient; (V) whether the factual basis for defendant's plea in 14 CRS 50703 was insufficient; (VI) whether the court erred in allowing the State to amend the indictment in 15 CRS 50072 for unlawful failure to report a new address within three business days; and (VII) whether judgment on all of defendant's guilty pleas is to be vacated should any one conviction be reversed.

III–VI

[3] Defendant contends his conviction following his guilty plea to unlawfully being within 300 feet of a daycare must be vacated due to the Fourth Circuit's opinion ruling N.C. Gen. Stat. § 14-208.18(a)(2) unconstitutional. *See Doe III*, 842 F.3d at 838, 847–48. We agree and thus vacate defendant's subsection (a)(2) conviction in file no. 14 CRS 50703.

In *Doe II*, the federal district court concluded as follows:

> Subsection (a)(2) punishes a wide range of First Amendment activity for a significant number of individuals compared to the statute's plainly legitimate sweep. . . . [T]he plainly legitimate sweep consists of subsection (a)(2)'s application to minor-victim offenders. . . . [5] Subsection (a)(2) greatly interferes with restricted sex offenders' ability to be present at public parks, libraries, movie theaters, and houses of worship, among other places associated with significant First Amendment activity. Furthermore, restricted sex offenders may be unable to enter some governmental buildings at all . . . because they lie inside (a)(2) buffer zones.
>
> . . . .

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5. Regarding the statute's "plainly legitimate sweep," the court in *Doe II* began its analysis as follows:

> The fact that subsection (a)(2) is not narrowly tailored with respect to adult-victim offenders, however, does not end the analysis. Before the Court can hold subsection (a)(2) to be unconstitutionally overbroad, it must determine if subsection (a)(2) punishes a substantial amount of protected free speech, judged in relation to the statute's *plainly legitimate sweep*. For the reasons discussed below, the Court concludes that subsection (a)(2) is unconstitutionally overbroad.

2016 WL 1692982, at *11 (emphasis added) (citation omitted).

> Here . . . restricted sex offenders are prohibited from even being present at a wide variety of places closely associated with First Amendment activities. Hence, while the law is not specifically addressed to speech, its reach is so vast as to encompass a wide range of First Amendment activity . . . . Mem. Op. & Order [Doc. #71], at 15–16 ("[R]estricted sex offenders may have very legitimate reasons for being on properties that include smaller portions dedicated to minors. Such reasons might include shopping, eating, exercising, attending religious services, or any of the other myriad activities in which humans engage."). Therefore, holding subsection (a)(2) to be overbroad in this instance, even though the law is not specifically targeted at speech, is still appropriate.
>
> For the foregoing reasons, the Court holds that N.C. Gen. Stat. § 14-208.18(a)(2) is unconstitutionally overbroad in violation of the First Amendment.

2016 WL 1629282, at *11–12 (internal citations omitted). In affirming the federal district court opinion, the Fourth Circuit noted as follows:

> Subsection (a)(2) burdens the First Amendment rights of all restricted sex offenders "by inhibiting the[ir] ability . . . to go to a wide variety of places associated with First Amendment activity." For example, subsection (a)(2) potentially impedes the ability of restricted sex offenders to access public streets, parks, and other public facilities.
>
> . . . .
>
> While all parties agree North Carolina has a substantial interest in protecting minors from sexual crimes, it was incumbent upon the State to prove subsection (a)(2) was appropriately tailored to further that interest.

Doe III, 842 F.3d at 845, 847 (alteration in original) (citations omitted).

In the instant case, defendant was indicted and pled guilty in 14 CRS 50703 to violating N.C.G.S. § 14-208.18(a)(2), which prohibits certain persons from being within 300 feet a location intended primarily for the use, care, or supervision of minors, when such places are located in malls, shopping centers, and other properties open to the general public. Accordingly, where defendant was indicted and convicted based on a statute deemed to be "unconstitutionally overbroad in violation of the

First Amendment," *Doe II*, 2016 WL 1629282, at *12, *aff'd by Doe III*, 842 F.3d at 838, 847–48, while his direct appeal was pending, and where the State offers no contrary argument, we adopt the Fourth Circuit's analysis and ruling, and we vacate defendant's conviction for violating N.C.G.S. § 14-208.18 (a)(2). As a result, we need not address defendant's remaining arguments IV–VI regarding the sufficiency of the indictment and the factual basis for his plea in 14 CRS 50703 and the challenge to the amendment of the indictment in 15 CRS 50072.

VII

[4] Defendant argues that judgment on all of his guilty pleas should be vacated should any one conviction be reversed. Specifically, defendant contends that because the plea agreement between defendant and the State expressly contemplated a complete disposition of all pending substantive charges against defendant, should any of those convictions be vacated or reversed, then "essential and fundamental terms of the plea agreement" will become "unfulfillable." We agree.

If "essential and fundamental terms of the plea agreement [are] unfulfillable," then "[t]he entire plea agreement must be set aside[.]" *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting), *rev'd for reasons stated in the dissenting opinion*, 366 N.C. 327, 734 S.E.2d 571 (2012) (per curiam); *see State v. Myers*, 238 N.C. App. 133, 139–40, 766 S.E.2d 690, 694 (2014) (citing *Rico*, 218 N.C. App. at 109, 110, 720 S.E.2d at 801, 802) (setting aside the defendant's plea agreement where the defendant successfully challenged the factual bases for aggravating factors as set out in his plea agreement).

In the instant case, defendant pled guilty based on a negotiated plea arrangement to being a sex offender unlawfully within 300 feet of a daycare (14 CRS 50703, *see* Section III–VI, *supra*), failure to report a new address pursuant to N.C.G.S. § 14-208.11 (15 CRS 50072), and three counts of attaining habitual felon status (15 CRS 250–52), after the jury convicted him of being a sex offender on the premises of a daycare (14 CRS 50721).

Having determined that defendant's guilty plea with regard to violating N.C.G.S. § 14-208.18(a)(2) (14 CRS 50703) must be vacated, it is apparent that the "essential and fundamental terms of the plea agreement" have become "unfulfillable." *See Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809 (Steelman, J., dissenting). Accordingly, the entire plea agreement must be set aside.

The conviction in 14 CRS 50721 is reversed, and the conviction in 14 CRS 50703 is vacated. The remaining convictions entered pursuant to the plea agreement—failure to report a new address (15 CRS 50072), and three counts of obtaining habitual felon status (15 CRS 250–52) are set aside and remanded to the trial court for further proceedings.

VACATED IN PART; REVERSED IN PART; AND REMANDED.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA
v.
JAMES EDWARD ARRINGTON

No. COA16-761

Filed 1 August 2017

1. Appeal and Error—writ of certiorari

The Court of Appeals exercised its discretion in an assault case and granted defendant's petition for writ of certiorari as to the merits of his appeal.

2. Criminal Law—plea agreement—invalid stipulation of law

The trial court erred in an assault case by accepting defendant's plea agreement based upon an invalid stipulation of law that resulted in an incorrect calculation of his prior record level. Defendant's stipulation went beyond a factual admission and stipulated to the treatment of an old conviction, which required a legal analysis.

Judge BERGER dissenting.

Appeal by defendant from judgment entered 14 September 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 26 January 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Tracy Nayer, for the State.

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

DAVIS, Judge.

This case requires us to revisit the question of which types of issues may be the subject of a valid stipulation by a defendant in connection with a plea agreement. James Edward Arrington ("Defendant") appeals from his convictions for assault with a deadly weapon inflicting serious injury, felony failure to appear, and attaining the status of a habitual felon. Because we conclude that the trial court improperly accepted Defendant's stipulation as to an issue of law, we vacate its judgment and remand for further proceedings.

Factual and Procedural Background

On 5 May 2014, Defendant was indicted for assault with a deadly weapon inflicting serious injury and attaining the status of a habitual felon. On 3 November 2014, he was also charged with felony failure to appear in connection with that assault charge. He was subsequently charged on 3 August 2015 with an additional count of attaining the status of a habitual felon.

Defendant and the State entered into a plea agreement whereby it was agreed that (1) he would plead guilty to assault with a deadly weapon inflicting serious injury, felony failure to appear, and attaining the status of a habitual felon; and (2) the State would dismiss the second habitual felon charge. The plea agreement also reflected that Defendant would be sentenced as a habitual felon in the mitigated range and that he "stipulated that he ha[d] 16 points and [was] a Level V for Habitual Felon sentencing purposes."

In connection with this plea agreement, the parties submitted to the trial court a prior record level worksheet for Defendant containing a stipulation as to the existence of six prior convictions generating prior record level points. One of the convictions listed was a second-degree murder conviction from 1994 (the "1994 Conviction"), which was designated in the worksheet as a Class B1 offense. The 1994 Conviction gave rise to 9 of the 16 total prior record level points reflected on the worksheet pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(1a).

A plea hearing was held in Buncombe County Superior Court before the Honorable Alan Z. Thornburg on 14 September 2015. During the hearing, Defendant's counsel stipulated to Defendant's designation as a Level V offender as stated on the prior record level worksheet. Defendant then pled guilty to assault with a deadly weapon inflicting serious injury, felony failure to appear, and attaining the status of a habitual felon. The second habitual felon charge was dismissed. The trial court consolidated

Defendant's convictions and sentenced him as a habitual felon to 96 to 128 months imprisonment.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must address whether we have jurisdiction over the present appeal. Defendant's sole argument is that the trial court erred by accepting his plea agreement because it was based upon an invalid stipulation of law that resulted in an incorrect calculation of his prior record level. As a result, Defendant argues, he was improperly sentenced as a Level V offender rather than a Level IV offender. Pursuant to N.C. Gen. Stat. § 15A-1444, a defendant who pleads guilty to a criminal offense in superior court is entitled to an appeal as a matter of right regarding the issue of whether the sentence imposed "[r]esult[ed] from an incorrect finding of the defendant's prior record level . . . ." N.C. Gen. Stat. § 15A-1444(a2)(1) (2015).

Defendant, however, did not file a notice of appeal that strictly conformed to Rule 4 of the North Carolina Rules of Appellate Procedure. He instead submitted a letter to the Buncombe County Clerk of Court on 21 September 2015 expressing his dissatisfaction with his plea agreement. Because of his failure to comply with Rule 4, Defendant's appeal is subject to dismissal. However, Defendant has filed a petition for writ of *certiorari* requesting that we consider his appeal notwithstanding his violation of Rule 4.

Pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure, this Court may, in its discretion, grant a petition for writ of *certiorari* and review an order or judgment entered by the trial court "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). In our discretion, we elect to grant Defendant's petition for writ of *certiorari* and reach the merits of his appeal.

II. Validity of Defendant's Stipulation

[2] Before imposing a sentence for a felony conviction, the trial court must determine the defendant's prior record level, N.C. Gen. Stat. § 15A-1340.13(b) (2015), which is calculated by adding together the points assigned to each of the defendant's qualifying prior convictions, N.C. Gen. Stat. § 15A-1340.14(a). Points are assessed based upon the classification of the prior offense, and "the classification of a prior offense is the classification assigned to that offense *at the time the offense for which the offender is being sentenced is committed*[,]" N.C.

Gen. Stat. § 15A-1340.14(c) (emphasis added), rather than at the time the prior offense was committed.

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists[,]" *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005) (citation and quotation marks omitted), and may — as a general matter — establish the existence of the defendant's prior convictions through any of the following means:

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

N.C. Gen. Stat. § 15A-1340.14(f).

While a sentencing worksheet alone is insufficient to satisfy the State's burden of establishing a defendant's prior record level, "a sentencing worksheet coupled with statements by counsel may constitute a stipulation by the parties to the prior convictions listed therein." *State v. Hinton*, 196 N.C. App. 750, 752, 675 S.E.2d 672, 674 (2009). Notably, however, we have held that

> [w]hile a stipulation by a defendant is sufficient to prove the *existence* of the defendant's prior convictions, which may be used to determine the defendant's prior record level for sentencing purposes, the trial court's assignment of defendant's prior record level is a question of law. *Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.*

State v. Wingate, 213 N.C. App. 419, 420, 713 S.E.2d 188, 189 (2011) (internal citation and quotation marks omitted and emphasis added). This principle is premised upon the longstanding doctrine in North Carolina that, "[g]enerally, stipulations as to matters of law are not binding upon courts." *State v. McLaughlin*, 341 N.C. 426, 441, 462 S.E.2d 1, 8 (1995); *see also Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 56, 213 S.E.2d 563, 569 (1975) ("[T]he stipulation was one of law and therefore not binding upon the court." (citation omitted)).

Here, Defendant purported to stipulate in his prior record level worksheet and during his plea colloquy both to the existence of several prior convictions, which resulted in the assessment of 16 prior record level points, and to his designation as a Level V offender. *See* N.C. Gen. Stat. § 15A-1340.14(c)(5) (providing that defendant with between 14 and 17 prior record level points is a Level V offender). As reflected in his prior record level worksheet, one of the convictions contributing to his total of 16 prior record level points was the 1994 Conviction, which Defendant stipulated was a Class B1 felony.

On appeal, Defendant argues that the calculation of his prior record level was incorrect because the 1994 Conviction should have instead been counted as a Class *B2* felony, for which only six prior record level points would have been assessed, *see* N.C. Gen. Stat. § 15A-1340.14(b)(2).[1] He contends his stipulation that the 1994 Conviction was a Class B1 felony was invalid because it concerned a *legal* issue and thus should not have been accepted by the trial court. The State, conversely, argues that Defendant's stipulation pertained to a *factual* issue and was therefore valid. For the reasons set out below, we agree with Defendant that the stipulation was invalid.

At the time of Defendant's 1994 Conviction, North Carolina's murder statute, N.C. Gen. Stat. § 14-17, placed *all* second-degree murder convictions in the same felony class. *See* 1981 N.C. Sess. Laws 957, 957, ch. 662, § 1 (designating second-degree murder as Class C felony). However, between 1994 and the date on which the Defendant committed the offenses giving rise to the present appeal, the General Assembly amended this statute by dividing the offense of second-degree murder into two classes — B1 and B2 — which were distinguished based upon the type of malice present in the commission of the offense. *See* N.C. Gen. Stat. § 14-17(b) (2015).[2] Therefore, at the time Defendant committed the

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1. Had the 1994 Conviction been classified as a Class B2 felony, this would have resulted in Defendant having a total of only 13 prior record level points and thus being designated as a Level IV offender rather than a Level V offender. *See* N.C. Gen. Stat. § 15A-1340.14(c)(4) (providing that defendant possessing between 10 and 13 prior record level points is Level IV offender).

2. The revised statute provides that all second-degree murders are now designated as Class B1 felonies *except* that they are Class B2 felonies in the following two circumstances:

> (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.

offenses from which the current appeal arises, the amended version of N.C. Gen. Stat. § 14-17, which created two classes of second-degree murder, controlled the classification of the 1994 Conviction for prior record level purposes.

Accordingly, Defendant's stipulation in connection with his guilty plea went beyond a factual admission that the 1994 Conviction existed. Instead, it constituted a stipulation as to the issue of whether the 1994 Conviction should be treated as a Class B1 or Class B2 felony — a question that required the retroactive application of a distinction in classifications that *did not exist* at the time of Defendant's conviction in 1994 and thus required a legal analysis as to how the 1994 Conviction would be classified under the new statutory scheme. Therefore, because Defendant's stipulation involved a question of law, it should not have been accepted by the trial court and is not binding on appeal. *See State v. Hanton*, 175 N.C. App. 250, 253, 623 S.E.2d 600, 603 (2006) ("Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate[.]" (citation and quotation marks omitted)).

Although our Supreme Court has yet to address this precise issue, our conclusion is consistent with the Court's decisions in this general context. *Alexander* articulates the basic rule that a defendant may stipulate to the existence of a prior conviction. In that case, the defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious injury. *Alexander*, 359 N.C. at 825, 616 S.E.2d at 915. In connection with his plea, the defendant submitted a prior record level worksheet that contained a conviction described as "Class A1 or 1 Misdemeanor Conviction" next to which appeared the numeral one to represent the number of prior record level points to be assessed for that conviction. *Id.* at 826, 616 S.E.2d at 916. During sentencing, the defendant's counsel stated that "up until this particular case [the defendant] had no felony convictions, as you can see from his worksheet." *Id.* (quotation marks omitted). The trial court proceeded to sentence the defendant as a Level II offender because he possessed one prior record level point. *Id.*

> (2) The murder is one that was proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, and the ingestion of such substance caused the death of the user.

N.C. Gen. Stat. § 14-17(b).

On appeal, the defendant argued that the State had failed to carry its burden of establishing his prior record level because "the State offered no court records or other official records in support of its assertion that defendant had one prior Class A1 misdemeanor conviction." *Id.* at 827, 616 S.E.2d at 917 (quotation marks and brackets omitted). The Supreme Court rejected the defendant's challenge, explaining that his prior record level worksheet, in conjunction with his counsel having "specifically directed the trial court to refer to the worksheet . . ." constituted a valid stipulation as to the existence of the prior conviction on the worksheet, thus satisfying the State's burden under N.C. Gen. Stat. § 15A-1340.14(f). *Id.* at 830, 616 S.E.2d at 918.

Accordingly, *Alexander* stands for the proposition — which Defendant here does not contest — that the State may establish a prior conviction by the defendant's stipulation to the existence of that conviction through (1) the presentation of a prior record level worksheet (2) that his counsel in some manner references or adopts at sentencing. As we stated in *Hinton*, "a sentencing worksheet coupled with statements by counsel may constitute a stipulation by the parties *to the prior convictions* listed therein." *Hinton*, 196 N.C. App. at 752, 675 S.E.2d at 674 (emphasis added).

Thus, the principal issue in *Alexander* was whether the particular statement of counsel regarding the worksheet was sufficient to constitute a stipulation as to the existence of a prior conviction. There was no legal ambiguity — as there is in the present case — regarding the *classification* of the prior conviction. Moreover, the defendant in *Alexander* never challenged the accuracy of the information (including the offense classification) contained in the worksheet, whereas Defendant makes such a challenge here.

The Supreme Court's recent decision in *State v. Sanders*, 367 N.C. 716, 766 S.E.2d 331 (2014), illustrates how *legal* questions related to the determination of a prior record level are for the trial court to resolve. *Sanders* dealt with the issue of whether an out-of-state conviction was "substantially similar" to a North Carolina offense for purposes of assessing prior record level points under N.C. Gen. Stat. § 15A-1340.14(e). The Court explained that the "determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *Id.* at 720, 766 S.E.2d at 334.

The Supreme Court cited the *Hanton* line of cases for this proposition. *Id.* In *Hanton*, we concluded that a defendant could not stipulate

to the substantial similarity of two offenses because such a comparison presents legal questions, and "[s]tipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate. This rule is more important in criminal cases, where the interests of the public are involved." *Hanton*, 175 N.C. App. at 253, 623 S.E.2d at 603.

Given our Supreme Court's determination in *Sanders* that a comparison of the elements of an out-of-state offense to the corresponding elements of a North Carolina offense for purposes of determining substantial similarity is a question of law, we can discern no logical basis for reaching a contrary conclusion regarding how a prior conviction would be classified under a statute *that was not in existence* at the time the prior offense was committed. Both situations involve matters of pure legal interpretation that must be addressed by the trial court rather than resolved through a stipulation between the parties.

In reaching a contrary conclusion, the dissent seeks to rely on *Wingate*. In *Wingate* the defendant stipulated in connection with his guilty plea that he had previously been convicted of "one count of conspiracy to *sell or deliver* cocaine and two counts of *selling or delivering* cocaine" and that these three convictions were Class G felonies. *Wingate*, 213 N.C. App. at 420, 713 S.E.2d at 189 (emphasis added).

On appeal, the defendant argued that "there was insufficient proof to establish whether he had previously been convicted of one count of conspiracy to *sell* cocaine and two counts of *selling* cocaine, which are Class G felonies, *or* whether he was convicted of one count of conspiracy to *deliver* cocaine and two counts of *delivery* of cocaine, which are Class H felonies." *Id.* The defendant contended that the ambiguity regarding whether these prior convictions involved selling offenses or delivering offenses involved an issue of law rather than of fact. Thus, he contended, the trial court erred by accepting his stipulation that these prior convictions were Class G felonies. *Id.* at 419, 713 S.E.2d at 189.

We disagreed, holding that because the defendant had "stipulated that the three convictions at issue were Class G felonies[, t]he trial court could, therefore, rely on this factual stipulation in making its calculations and the State's burden of proof was met." *Id.* at 421, 713 S.E.2d at 190. We emphasized that the "defendant does not assert that he was, in fact, convicted of one count of conspiring to *deliver* cocaine and two counts of *delivering* cocaine, as opposed to one count of conspiring to *sell* cocaine and two counts of *selling* cocaine. In other words, defendant does not dispute the accuracy of his prior conviction level or his

prior record level." *Id.* We summarized our holding by characterizing the defendant's stipulation as constituting "sufficient proof *of his prior convictions*." *Id.* (emphasis added).

It is important to note that in *Wingate* (unlike in the present case) there was no relevant change in the statute at issue — N.C. Gen. Stat. § 90-95(b) — between the time of the defendant's prior convictions and the commission of the offense giving rise to his sentencing. Rather, the statute at all relevant times placed the sale of cocaine and the delivery of cocaine into two distinct classes. Therefore, when the defendant in *Wingate* stipulated to having been convicted of "one count of conspiracy to *sell* or *deliver* cocaine and two counts of *selling* or *delivering* cocaine" and then stipulated that these were, in fact, Class G offenses, he was simply resolving the *factual* question of whether he been convicted of the selling offenses or the delivering offenses.

The dissent's overly broad characterization of *Wingate* as holding that the classification assigned to a prior conviction is always a factual determination is at odds with the actual language of that decision. We held in *Wingate* that "*in this case*, the class of felony for which defendant was previously convicted was a question of fact, to which defendant could stipulate, and was not a question of law requiring resolution by the trial court." *Id.* at 420, 713 S.E.2d at 190 (emphasis added). This was so because under the particular facts of *Wingate* the defendant's stipulation that the prior convictions were Class G felonies was related to a factual determination — i.e., that the defendant actually had been convicted of one count of conspiracy to sell cocaine and two counts of selling cocaine. No legal analysis was required to make that determination. Accordingly, *Wingate* stands for the proposition that a stipulation regarding the offense class of a prior conviction is permissible when the stipulation resolves a *factual* ambiguity regarding the specific prior offense for which the defendant had actually been convicted. That is simply not the case here.

We wish to emphasize that the present case constitutes a narrow exception to the general rule regarding a defendant's ability to stipulate to matters in connection with his prior record level. A stipulation as to the classification of a prior conviction is permissible so long as it does not attempt to resolve a question of law. In the great majority of cases in which a defendant makes such a stipulation, the stipulation will be valid because it does not concern an issue requiring legal analysis.

The present case falls within a small minority of cases in which the stipulation did concern a question of law. Here, because Defendant's

purported stipulation that his prior conviction was a B1 felony went beyond a factual admission that the 1994 Conviction existed and instead constituted a stipulation as to the legal issue of how that conviction should be treated under the current version of N.C. Gen. Stat. § 14-17, the stipulation should not have been accepted by the trial court and is not binding on appeal. The dissent does not (and cannot) explain how the proper classification of the 1994 Conviction under the new version of the statute could be retroactively ascertained without engaging in a legal analysis — absent the type of invalid stipulation that occurred here.

Having determined that Defendant's stipulation was invalid, the only remaining question is the effect of our holding on Defendant's guilty plea. Both the State and Defendant agree in their briefs that in the event we determine the trial court erred in accepting Defendant's stipulation, we should vacate the judgment and set aside his plea agreement. We agree. *See*, *e.g.*, *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) (concluding that judgment should be vacated and guilty plea set aside and that case must be remanded for disposition of original charges where trial court erroneously imposed aggravated sentence based solely on defendant's guilty plea and stipulation as to aggravating factor), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012).

Accordingly, the judgment entered by the trial court upon Defendant's guilty plea must be vacated and his plea agreement set aside. We remand to the trial court for disposition of the charges against him.

Conclusion

For the reasons stated above, we vacate the trial court's judgment, set aside Defendant's plea agreement, and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Chief Judge McGEE concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting.

Defendant contends in his brief that he was "sentenced as a Level V offender when his prior record supported only a Level IV sentence." The majority agrees with Defendant and vacates his guilty plea and sentence. I respectfully dissent from the majority opinion.

On September 14, 2015, Defendant pleaded guilty in Buncombe County Superior Court to assault with a deadly weapon inflicting serious injury, felony failure to appear, and having attained habitual felon status. Pursuant to a plea arrangement, the State dismissed a separate habitual felon indictment against Defendant. The parties agreed to the following terms:

> The defendant stipulates that he has 16 points and is a Level V for Habitual Felon sentencing purposes.
>
> The State agrees that [the felony failure to appear charge] will be consolidated for sentencing purposes into [the assault with a deadly weapon inflicting serious injury charge]. The defendant will be sentenced as an Habitual Felon in the mitigated range.

In conjunction with his plea of guilty, Defendant stipulated to his prior convictions and their classifications on his "Worksheet Prior Record Level for Felony Sentencing," which included a 1994 North Carolina conviction for second degree murder. Defendant stipulated that the murder conviction should be classified as a B1 felony. Defendant further stipulated, and the trial court found, that Defendant had sixteen prior record points and was a prior record level V for sentencing purposes. Pursuant to the terms and conditions of the plea agreement, the trial court sentenced Defendant as an habitual felon to an active term of imprisonment for 96 to 128 months.

During sentencing, the State is required to prove a defendant's prior convictions by a preponderance of the evidence, and one method of proof is a "[s]tipulation of the parties." N.C. Gen. Stat. § 15A-1340.14(f) (2015). As this Court has stated, "[t]he existence of a prior conviction . . . requires a factual finding" which may be proven through a stipulation. *State v. Powell*, 223 N.C. App. 77, 80, 732 S.E.2d 491, 493-94 (2012) (citation omitted).

Proof of a prior conviction is necessary for the proper classification of the prior offense. This Court has previously held that the classification assigned to a prior conviction is a factual determination. In *State v. Wingate*, 213 N.C. App. 419, 713 S.E.2d 188 (2011), the defendant stipulated that his prior convictions for one count of conspiracy to sell or deliver cocaine and two counts of selling or delivering cocaine were class G felonies. *Id.* at 420, 713 S.E.2d at 189. On appeal, that defendant argued the State failed to prove whether his convictions were for the class G felonies listed above or the class H felonies of delivery of cocaine. *Id.* at 420, 713 S.E.2d at 189-90. This Court held:

> in this case, *the class of felony* for which defendant was previously convicted was a question of fact, to which defendant could stipulate, and was not a question of law requiring resolution by the trial court. . . . The prior conviction worksheet expressly sets forth the class of offense to which a defendant stipulates and defendant in this case has not cited to any authority, nor have we found any, that requires the trial court to ascertain, as a matter of law, the class of each offense listed.

Id. at 420-21, 713 S.E.2d at 190 (emphasis added). *See also State v. Wilson*, 232 N.C. App. 523, 757 S.E.2d 526 (2014) (unpublished) (holding that the labeling of a criminal conviction and its punishment classification is a question of fact); *State v. Edgar*, ___ N.C. App. ___, ___, 777 S.E.2d 766, 769 (2015) (defendant's stipulation to prior offense and out-of-state classification "did not implicate any conclusions or questions of law")[1]; and *State v. Brown*, 221 N.C. App. 670, 729 S.E.2d 127 (2012) (unpublished) (holding no error in assignment of points based upon parties' stipulations).

The majority correctly states that prior to imposing a sentence, the trial court determines a defendant's prior record level pursuant to N.C. Gen. Stat. § 15A-1340.13. Determination of a defendant's prior record level, however, differs from determination of the existence of prior convictions and classification thereof. A defendant's "*prior record level . . .* is determined by calculating the sum of the points assigned to each of the offender's prior convictions." N.C. Gen. Stat. § 15A-1340.14(a) (2015) (emphasis added). Thus, the calculation of the sum of points used to determine a defendant's prior record level is a legal question undertaken by the trial court. *See Wingate*, 213 N.C. App. at 420, 713 S.E.2d at 189 ("[T]he trial court's assignment of defendant's prior record level is a question of law." (citation omitted)); *State v. Williams*, 200 N.C. App. 767, 771, 684 S.E.2d 898, 901 (2009) ("[T]he trial court's assignment of a prior record level is a conclusion of law . . . ." (citation and quotation marks omitted)); *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) ("The

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1. *State v. Edgar* addressed a question of the substantial similarity of an out-of-state conviction pursuant to N.C. Gen. Stat. § 15A-1340.14(e). The defendant in *Edgar* stipulated to the default Class I classification for out-of-state felonies, so the legal question of substantial similarity under the statute was not implicated.

Here, however, there is no statute or controlling authority that requires any such comparison of prior in-state convictions for which the parties have stipulated. Certainly, a hearing could be held, and the State put to its proof, if a defendant objected to a prior conviction or its classification.

determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." (citation omitted)).

Here, Defendant stipulated to the 1994 North Carolina conviction for second-degree murder listed on his prior record level worksheet. In addition, defense counsel was asked in open court during the sentencing hearing if Defendant stipulated "to the contents of the sentencing worksheet." Defendant did not question any item set forth on the worksheet, nor did he or his counsel object to the offenses or classifications set forth thereon. Instead, defense counsel responded, "We will stipulate to the sentencing sheet." Defense counsel also informed the court during sentencing, "There's nothing I can deny about [Defendant's] record, absolutely nothing."

Classification of prior offenses is determined "at the time the offense for which the offender is being sentenced is committed." N.C. Gen. Stat. § 15A-1340.14(c) (2015). When Defendant was convicted of second degree murder, that offense was classified as a B2 felony. Based upon a change to N.C. Gen. Stat. § 14-17 in 2012, however, second degree murder can now be classified as either a B1 or B2 felony. *See* 2012 N.C. Sess. Laws 781, 782, ch. 165, § 1. Defendant expressly stipulated to the classification of his second degree murder conviction as a B1 felony, consistent with N.C. Gen. Stat. § 14-17(b) (2015).

Prior convictions which are classified as B1 felonies are assigned nine prior record points. N.C. Gen. Stat. § 15A-1340.14(b)(1a) (2015). The sentencing worksheet, to which Defendant stipulated, properly assigned nine points to Defendant's B1 felony classification. The trial court accurately calculated Defendant's assigned points and specifically found, "the prior convictions, prior record points[,] and the prior record level of the defendant to be as shown herein."

The trial court designated Defendant as having a prior record level V. The assignment of nine points based upon the classification of the prior offense as a B1 felony is not inconsistent with N.C. Gen. Stat. § 15A-1340.14(b), and the calculations involved in designating Defendant as a prior record level V offender for sentencing are not inconsistent with N.C. Gen. Stat. § 15A-1340.14(c). It cannot be said that the trial court incorrectly calculated Defendant's prior record level.

Defendant entered into a valid stipulation regarding the classification of his prior murder conviction and was properly sentenced as a level V offender. I would affirm the trial court's judgment.

STATE OF NORTH CAROLINA
v.
GARY WILLIAM CANNON, DEFENDANT

No. COA16-1059

Filed 1 August 2017

1. Aiding and Abetting—larceny—motion to dismiss—sufficiency of evidence—vehicle parked for easy escape—car contained stolen goods—absurd statements to law enforcement

The trial court did not err by denying defendant's motion to dismiss the charge of aiding and abetting larceny where the evidence was sufficient to show that defendant's vehicle was parked in a manner to allow for an easy escape, defendant's car contained stolen goods from Wal-Mart and a large quantity of other goods that were a greater quantity than one person would use, and defendant made absurd statements to law enforcement regarding why he would travel from Gastonia to Denver solely to shop at Wal-Mart.

2. Sentencing—habitual felon status—stipulation—failure to submit to jury

The trial court erred by sentencing defendant as a habitual felon where defendant only stipulated to habitual felon status and the issue was not submitted to the jury as required by N.C.G.S. § 14-7.5.

Judge DIETZ concurring in separate opinion.

Judge CALABRIA dissenting.

Appeal by defendant from judgment entered 13 May 2016 by Judge Daniel A. Kuehnert in Lincoln County Superior Court. Heard in the Court of Appeals 5 April 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.

William D. Spence for defendant-appellant.

MURPHY, Judge.

Gary William Cannon ("Defendant") appeals from his judgment for aiding and abetting larceny and attaining habitual felon status. On

appeal, he contends: (1) that the trial court erred in denying his motion to dismiss the charge of aiding and abetting larceny; and (2) that the trial court erred in sentencing Defendant as a habitual felon when the issue was not submitted to the jury as required by N.C.G.S. § 14-7.5 (2015). After careful review, we hold that the trial court did not err in denying Defendant's motion to dismiss. However, we agree with Defendant that the trial court erred in sentencing Defendant as a habitual felon when the issue was not submitted to the jury. We affirm Defendant's conviction for aiding and abetting larceny, vacate the habitual felon enhancement, and remand for a new sentencing hearing.

I. Background

On 14 May 2015, Shawn Sanbower ("Sanbower"), a loss prevention officer at a Wal-Mart store in Denver, North Carolina, observed Amanda Eversole ("Eversole") remove several items of clothing from store shelves and attempt to leave the store without paying. Sanbower apprehended Eversole, and then reviewed surveillance tapes. He discovered that Eversole had been in the store with William Black ("Black"), who had taken a number of items from store shelves without paying. Law enforcement was contacted. Sanbower went out to the store parking lot and saw Black, along with several law enforcement officers. Black was in the rear passenger seat of a green SUV, which was filled with goods from the Wal-Mart with a total value of $1,177.49. At the vehicle, Sanbower also observed Defendant speaking with the officers.

Deputy Ken Davis ("Deputy Davis"), from the Lincoln County Sheriff's Office, was one of the officers present, having arrived in response to the store's call. Deputy Davis testified that he had approached Black's vehicle and found it was full of stolen goods. Defendant then approached the vehicle and asked Davis and other officers what they were doing. Deputy Davis asked Defendant how he knew Black, and Defendant replied that he had only just met "them," and that he was paid $50.00 to drive "him" to this Wal-Mart in Denver from Gastonia. Defendant further confirmed that he owned the vehicle.

On 9 November 2015, the Lincoln County Grand Jury indicted Defendant on the charges of felony larceny, conspiracy to commit felony larceny, and aiding and abetting larceny. Defendant was also indicted for attaining habitual felon status. This matter went to trial on 12 May 2016. At the close of the State's evidence, Defendant moved to dismiss all of the charges. This motion was denied. Defendant declined to put on evidence. During the jury charge conference, the trial court dismissed the felony larceny charge on its own motion.

The jury found Defendant not guilty of conspiracy to commit larceny, but guilty of aiding and abetting larceny. The State then amended the habitual felon indictment without objection, and submitted sentencing worksheets by stipulation. Defendant "stipulated" to habitual felon status. The trial court sentenced Defendant to an active minimum sentence of 80 months to a maximum of 108 months imprisonment. The trial court waived court costs, and awarded attorney's fees as a civil judgment.

Defendant appeals.

II. Motion to Dismiss

Defendant contends that the trial court erred in denying his motion to dismiss the charge of aiding and abetting larceny. We disagree.

A. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (emphasis omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quotation omitted).

The State is entitled to every reasonable inference that may be made from the evidence presented at trial. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387-88 (1984). "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witnesses' credibility . . . . Ultimately, the court must decide whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Blizzard*, 169 N.C. App. 285, 289-90, 610 S.E.2d 245, 249 (2005).

B. Analysis

[1] Defendant contends that the trial court erred in denying his motion to dismiss the charge of aiding and abetting larceny, on the grounds that the State failed to present sufficient evidence of all of the essential elements of the charge. We disagree.

"The essential elements of aiding and abetting are as follows: (1) the defendant was present at the scene of the crime; (2) the defendant intended to aid the perpetrator in the crime; and (3) the defendant communicated his intent to aid to the perpetrator." *State v. Capps*, 77 N.C. App. 400, 402, 335 S.E.2d 189, 190 (1985) (citation omitted).

Defendant's vehicle was parked on the far side of the parking lot, far from the store or any other cars, which would make an escape easy. Further, in addition to the goods stolen from the Wal-Mart, officers found a large quantity of Atkins drinks and cosmetics in Defendant's vehicle, which Sanbower contended were a greater quantity than one person would use. As the Dissent notes, this evidence standing alone would not withstand a motion to dismiss. However, we consider this evidence in light of Defendant's statements to law enforcement.

The State is entitled to every reasonable inference that may be made from the evidence presented at trial, *Bullard*, 312 N.C. at 160, 322 S.E.2d at 387-88, and we consider the reasonable inferences that may be drawn from Defendant's statement that he had just met the principals and the absurdity that a person would travel from Gastonia to Denver solely to shop at Wal-Mart for an otherwise valid purpose.

The evidence shows that Defendant claims to have been paid $50.00 to travel from Gastonia to the Wal-Mart in Denver. There is nothing in the record that suggests a need for the principals to travel to this specific Wal-Mart over any of the other Wal-Marts in Gastonia or along the myriad of routes from Gastonia to Denver. While not explicitly requested to do so by the State, we take judicial notice of the geographic distance and commercial nature of the routes between Gastonia and Denver in considering the circumstances present in this case. "Judicial notice may be taken at any stage of the proceeding." N.C.G.S. § 8C-1, Rule 201(f) (2015). Our Supreme Court has held it is appropriate to take judicial notice of the placing of towns. *State v. Saunders*, 245 N.C. 338, 342-43, 95 S.E.2d 876, 879 (1957); *see State v. Brown*, 221 N.C. App. 383, 387, 732 S.E.2d 584, 587-88 (2012) (taking judicial notice of the driving distance between Mebane and Durham in reviewing the sufficiency of evidence on appeal).

There is a strong case for taking such judicial notice "when almost every town in the country is connected by a ribbon of concrete or asphalt over which a constant stream of traffic flows." *Saunders*, 245 N.C. at 343, 95 S.E.2d at 879. "[S]o complete and so general is the common knowledge of places and distances that the court may be presumed to know the distances between important cities and towns in this State[.]" *Id.* at 343, 95 S.E.2d at 879.

We take judicial notice of the distance from Gastonia to Denver because the impracticality of traveling this distance and through areas with other Wal-Mart stores creates a reasonable inference of an improper purpose that, along with other incriminating aspects of the evidence,

demonstrates the intent of Defendant to aid and abet larceny. Such considerations that are not pronounced in the record are exactly why we give great deference to trial judges and local juries in making ultimate findings of fact, and they are proper for us to consider by judicial notice in a de novo review of the cold record.

Trial courts and jurors are free to consider the geographic distance between cities, the modes of travel between cities, the commercial aspects of their local area, and the ubiquitous nature of Wal-Mart stores. *See Saunders*, 245 N.C. at 342, 95 S.E.2d at 879; *State v. S. Ry. Co.*, 141 N.C. 846, 851, 54 S.E. 294, 296 (1906); *Brown*, 221 N.C. App. at 387, 732 S.E.2d at 587-88; *Hinkle v. Hartsell*, 131 N.C. App. 833, 836, 509 S.E.2d 455, 457-58 (1998) (providing a laundry list of situations where judicial notice is appropriate). The trial court here likely did consider these things due to the obvious and reasonable inference of guilt that the trial court was free to draw. Given the location of the vehicle in the parking lot, the items found in the vehicle, and the reasonable inference that can be made based on the geographic distance and commercial nature of the routes between Gastonia and Denver, the State met its low burden at the motion to dismiss stage.

We hold that the State presented evidence of every element of the offense of aiding and abetting larceny, and that the trial court therefore did not err in denying Defendant's motion to dismiss.

III. Habitual Felon

[2] Defendant argues, and the State concedes, that the trial court should not have sentenced Defendant as a habitual felon when the issue was not submitted to the jury and the trial court did not accept a formal plea from Defendant.

Under Section 14-7.5 of the North Carolina General Statutes, whether a defendant is a habitual felon is submitted to the jury, or, in the alternative, the defendant may enter a guilty plea to the charge of being a habitual felon. *State v. Gilmore*, 142 N.C. App. 465, 471, 542 S.E.2d 694, 698-99 (2001). Therefore, since Defendant only stipulated to habitual felon status, the conviction must be vacated and remanded for resentencing.

IV. Conclusion

For the reasons stated above, we affirm Defendant's conviction for aiding and abetting larceny, and vacate the habitual felon enhancement and remand for a new sentencing hearing.

AFFIRMED IN PART; VACATED IN PART; REMANDED FOR A NEW SENTENCING HEARING.

Judge DIETZ concurs by separate opinion.

Judge CALABRIA dissents by separate opinion.

DIETZ, Judge, concurring.

I agree that the trial court properly denied Cannon's motion to dismiss. In a criminal case, the trial court must deny a motion to dismiss if the State has presented substantial evidence that the defendant committed each element of the charged offense. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

Here, law enforcement found Cannon near his SUV in a Walmart parking lot. Cannon's SUV contained more than $1,000 worth of razors stolen from inside the Walmart. The SUV also contained separate bags containing a large number of unopened makeup packages and diet food packages. A Walmart employee testified that the makeup and diet food packages were not purchased or stolen from that Walmart.

Law enforcement asked Cannon about the stolen razors and the other goods found in his SUV. Cannon told law enforcement that he had no idea how the goods got there and that he did not have anything to do with it. He explained that he had just met Amanda Eversole and William Black when they offered to pay him $50 to drive them from Gastonia to the Walmart in Denver.

Something in this story was a lie. If Cannon had simply driven Black and Eversole from Gastonia to the Walmart in Denver—at which point Black and Eversole stole the razors without Cannon's knowledge—where did the other goods come from?

The jury, having heard Cannon's statements to the police, reasonably could have inferred that Cannon lied about taking Black and Eversole to other stores before going to Walmart because he knew Black and Eversole had stolen the makeup and diet food packages from those other stores, and Cannon did not want to implicate himself (or Black and Eversole) in those crimes, or provide law enforcement with information about where those crimes occurred.

This, combined with the details discussed in the majority opinion, such as the unusual distance traveled and the decision to park far away from the Walmart (and thus far away from security cameras or potential witnesses) is sufficient for the jury to infer that Cannon knew Eversole and Black intended to steal goods from the Walmart and that he agreed to assist them by acting as their driver. Thus, the State presented relevant evidence that a "reasonable mind might accept as adequate" to support all the elements of aiding and abetting. *Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169. Accordingly, the trial court properly denied Cannon's motion to dismiss.

CALABRIA, Judge, dissenting.

For the following reasons, I respectfully dissent.

Defendant was charged with aiding and abetting larceny, and moved to dismiss the charge on the ground that the State had failed to present sufficient evidence of each essential element of the charge. The majority opinion holds, however, that Defendant's statement to law enforcement, that Eversole and Black paid him to transport them from Gastonia to Denver, was sufficient evidence of Defendant's guilt. Specifically, the majority observes that "the impracticality of traveling this distance and through areas with other Wal-Mart stores creates a reasonable inference of an improper purpose that, along with other incriminating aspects of the evidence, demonstrates the intent of Defendant to aid and abet larceny."

Distance traveled, alone, is insufficient evidence to support the guilt of a defendant. The existence of taxis, and services such as Uber and Lyft, demonstrates that there are people willing to pay others to drive them long distances, and others who are willing to drive them distances for money. The majority's opinion would render such individuals guilty of aiding and abetting simply on the premise that it is "impractical[]" to drive such a distance, and that accepting money to do so is somehow evidence of an improper purpose.

The State's evidence established that Eversole and Black paid Defendant to drive them from Gastonia to the Wal-Mart, entered the Wal-Mart, and stole merchandise. The State had the burden of showing that Defendant was present at the scene of the crime, that Defendant intended to aid Eversole and Black, and that Defendant communicated his intent to do so. *See State v. Capps*, 77 N.C. App. 400, 402, 335 S.E.2d 189, 190 (1985).

Even assuming *arguendo* that Defendant's presence in the parking lot satisfied the element of presence, the fact that Defendant was willing to accept money to transport two individuals from Gastonia to Denver, a distance of roughly twenty-six miles, for a purpose not explicitly criminal does not satisfy the remaining two elements. It does not demonstrate that Defendant intended to aid Eversole and Black in any criminal endeavor, nor that he expressed that intent at any time, nor should it be construed to do so. I disagree with the majority that Defendant should have realized that Eversole and Black had an improper purpose in paying him fifty dollars to drive them to a Wal-Mart. Absent any evidence that Defendant was aware of their criminal aims, the State's case should not have gone to the jury.

In *Capps*, the evidence showed that the defendant drove his girlfriend, Debbie Hubbard, and friend, Sammy Miller, to a nightclub. Miller told the defendant that he wanted to get his clothes out of a car, and once out of the defendant's sight, Miller broke into a vehicle. The defendant was subsequently indicted for aiding and abetting Miller in the offenses of felonious breaking or entering a motor vehicle and felonious larceny, and the trial court denied the defendant's motion to dismiss.

On appeal, this Court first examined the impact of the defendant's presence at the scene of the crime. We observed that

> While the State's evidence does indicate the defendant was present at the scene of the crime, the State has failed to present substantial evidence that the defendant intended to aid Miller or communicated such intent to Miller. A defendant's mere presence at the scene of the crime does not make him guilty of felonious larceny even if he sympathizes with the criminal act and does nothing to prevent it.

Capps, 77 N.C. App. at 402-03, 335 S.E.2d at 190. This Court concluded that "defendant's presence at the scene of the crime, without more, does not show intent to aid." *Id.* at 403, 335 S.E.2d at 191.

We then further examined the defendant's conduct, in an attempt to find evidence of the defendant's intent to aid Miller. We held that

> The evidence in this case shows only that Miller told defendant he was going to get *his* clothes. There is no evidence that (1) defendant drove Miller to [the nightclub] with the purpose of aiding and abetting him in the commission of the larceny; (2) defendant observed Miller commit the crime; (3) defendant handled the stolen items; or

> (4) defendant participated in any discussions about the crime. There is no evidence from which the jury could infer that the defendant gave active encouragement to Miller, or that he made it known to Miller that he was ready to render assistance, if necessary.

Id. We concluded that, "[a]lthough there are circumstances which point suspicion toward defendant, insufficient evidence exists from which intent to aid can be inferred. The State's evidence fails to show that defendant intended to aid Miller in the crime or that defendant communicated intent to aid to Miller." *Id.*

I respectfully submit that the facts in this case mirror those in *Capps*. The State's evidence demonstrated merely that Defendant was present at the scene of the crime. It demonstrated that Defendant's intent was to drive Eversole and Black to the Wal-Mart for money. There is no evidence that (1) Defendant drove Eversole and Black to the Wal-Mart with the purpose of aiding and abetting them in the commission of the larceny; (2) Defendant observed Eversole and Black committing the crime; (3) Defendant handled the stolen goods; or (4) Defendant participated in any discussions about the crime. As in *Capps*, there is no evidence from which the jury could infer that Defendant gave active encouragement to Eversole and Black, or that he made it known to Eversole and Black that he was ready to render assistance, if necessary.

For these reasons, I would argue that the State failed to present substantial evidence of each element of aiding and abetting larceny. Therefore, I would argue that the trial court erred in denying defendant's motion to dismiss.

STATE v. FITTS

[254 N.C. App. 803 (2017)]

STATE OF NORTH CAROLINA
v.
RASHAND NICHOLAS FITTS, DEFENDANT

No. COA16-1106

Filed 1 August 2017

Homicide—felony murder—failure to instruct on self-defense—no intent to kill

The trial court did not err in a felony murder case, with the underlying felony being discharging a firearm into an occupied vehicle, by declining to instruct on self-defense where defendant's own testimony indicated that he did not shoot with the intent to kill. A defendant's testimony that he did not shoot to kill prevents the jury from hearing a self-defense instruction.

Appeal by defendant from judgment entered 7 October 2015 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 19 April 2017.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

MURPHY, Judge.

Rashand Nicholas Fitts ("Defendant") was convicted of felony murder, the underlying felony being discharging a firearm into an occupied vehicle. On appeal, he contends the trial court improperly refused to instruct the jury on self-defense despite there being evidence from which a jury could reasonably conclude that he acted in perfect self-defense. After careful review, we conclude the trial court did not err in declining to instruct on self-defense.

Background

On 24 May 2014, Defendant rode with his cousin, Archie Huff ("Huff"), in Huff's Tahoe SUV ("Tahoe") to a nearby service station. Huff went into the convenience store, leaving his handgun in a holster on the console, while Defendant waited in the Tahoe. When Huff attempted to make a purchase, he realized he had left his wallet at home. Defendant and Huff then left to retrieve the wallet.

While Defendant and Huff were gone, Travis Rhodes ("Rhodes"), Donte Alston ("Alston"), Devonte Tillery ("Tillery"), and Telvin arrived at the service station to sell liquid Phencyclidine ("PCP") in the service station's parking lot. Alston and Telvin rode in Alston's Chrysler sedan, while Rhodes and Tillery arrived in a black Mustang. The four were sitting together in Alston's sedan, socializing and smoking PCP, when Defendant and Huff returned to the service station.

Huff again entered the store, while Defendant remained outside. Rhodes and Tillery got out of Alston's sedan and approached Defendant. Defendant rolled down the window and Rhodes offered to sell him "high grade marijuana." Defendant responded that he already had some marijuana, but asked to see Rhodes' selection and said he would take Rhodes' cell phone number in case he needed to buy from Rhodes in the future.

Rhodes and Tillery returned to the Mustang with Rhodes in the driver's seat and Tillery in the passenger seat. Defendant exited the Tahoe with Huff's gun in his back pocket, and walked over to the Mustang. Defendant took Huff's gun with him because Huff asked Defendant not to leave it on the console if he left the car. Defendant looked at Rhodes' marijuana and told Rhodes that when Huff came out of the store he would use Huff's phone to get Rhodes' phone number. In response, Rhodes complained: "Man . . . you doing all this like you want to buy some weed, and you don't want to buy no weed," then drove off.

Defendant found Rhodes' behavior strange and returned to the Tahoe. Huff returned from the store and noticed Defendant appeared "concerned," but did not inquire further. Huff pulled out of the service station, driving north on Capital Boulevard toward the Starmount shopping center intersection. The north-bound side of the intersection has three lanes running straight through it and one left-turn lane. As Defendant and Huff approached the light, the Mustang stopped in the second straight lane from the left. Huff pulled into the leftmost lane at Defendant's direction and the Tahoe stopped parallel to the Mustang.

The events at the stoplight are disputed by Defendant and the State. For purposes of our inquiry, Defendant maintains as follows. As the Tahoe pulled alongside the Mustang, Defendant heard Rhodes shout: "what's up with y'all niggers? What you think, this is a game?" Rhodes then demanded Tillery "pass [him] the motherfucking gun." Tillery reached towards the back seat with both hands, while Rhodes left one hand on the steering wheel and reached into the back seat with his other hand.

Observing Rhodes and Tillery, Defendant "was scared" and "thought they [were] going to shoot in the [Tahoe.]" In response, Defendant grabbed Huff's gun from the console and opened the Tahoe's passenger door. He stepped out of the Tahoe, started to move away from the Mustang, then reached across his body to fire once at Rhodes, as he looked in the opposite direction. Defendant explained that he fired the gun "so [Rhodes would not] shoot me or Archie." Defendant returned to the Tahoe, and Huff drove away, through the intersection.

The bullet hit Rhodes in the torso, causing him to crash the Mustang into another car before jumping the median and striking a sign on the far side of the southbound lane. Tillery exited the Mustang. An off-duty police officer saw the crash, radioed dispatch, and approached the car to investigate. He found Rhodes unconscious. When on-duty law enforcement officers arrived and searched the Mustang, they found three cell phones and three grams of marijuana. No weapons, shell casings, or bullet holes were found in the Mustang. Law enforcement did, however, find a single spent shell casing on the street.

Defendant was charged with first-degree murder based on premeditation and deliberation and first-degree felony murder based on discharging a firearm into an occupied vehicle. Months before trial, Defendant filed a Motion of Intent to Rely Upon Self-Defense and Defense of Others. On the last day of trial, he filed a written request for jury instructions, requesting an instruction on self-defense based on Defendant and Huff's testimony of the events that took place at the intersection. The trial court denied this request and did not instruct on self-defense.

On the second day of its deliberation, the jury asked the trial court: "Is 'just cause' a component for our consideration in the first-degree felony murder rule." Defendant requested that the trial court respond by instructing the jury that "just cause" applies to felony murder, but the trial court refused. Instead, the trial court instructed the jury that "just cause is not a term used in the court's instruction" and that they were bound to follow the instructions provided by the trial court.

Defendant was convicted of first-degree felony murder and sentenced to life in prison without the possibility of parole. He gave notice of appeal in open court.

Analysis

On appeal, Defendant argues he was entitled to a jury instruction on self-defense and that the trial court's failure to so instruct was

prejudicial error. He contends that a reasonable jury could find the shooting constituted perfect self-defense based on the testimony given at trial. We disagree.[1]

We review a trial court's jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). "It is the duty of the [trial] court to charge the jury on all substantial features of the case arising on the evidence without special request . . . . [All] defenses presented by defendant's evidence are substantial features of the case." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974) (citations omitted).

Perfect self-defense is a complete defense to felony murder if it would be a complete defense to the underlying felony. *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995). It exists when, at the time of the homicide: (1) the defendant believes he is in imminent danger of death or serious bodily injury; (2) that belief is reasonable; (3) the defendant is not the aggressor in the dispute or altercation creating the threat; and (4) the defendant's use of force is not more than is reasonably necessary to protect himself or another person from death or serious bodily harm. *State v. Revels*, 195 N.C. App. 546, 550, 673 S.E.2d 677, 681 (2009). Merely reaching or appearing to reach for a deadly weapon is sufficient to satisfy elements (1) and (2). *State v. Spaulding*, 298 N.C. 149, 157, 257 S.E.2d 391, 396 (1979). If appropriate, perfect self-defense would provide a complete defense to the underlying offense here, discharging a firearm into an occupied vehicle. *State v. Juarez*, ___ N.C. ___, ___, 794 S.E.2d 293, 298 (2016).

However, testimony by a defendant that he attempted to use or threaten non-lethal force is evidence that he did not believe that deadly force was necessary to escape danger. *State v. Lyons*, 340 N.C. 646, 662, 459 S.E.2d 770, 778 (1995) (finding that no self-defense instruction was required for a defendant who claimed that he intended to fire a warning shot at people entering his home who he thought were burglars but were in fact police officers). Instead, " '[p]erfect self-defense' is available only if 'it appeared to defendant that he believed it to be necessary to kill the attacker in order to save himself from death or great bodily harm[.]' " *State v. Cook*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___,

1. Defendant further argues the trial court "compounded" the purported error by its response to the jury's question on the second day of its deliberations. However, as we do not find error with the trial court declining to instruct on self-defense, we do not address whether such an error was "compounded" by the trial court's response to the jury's question.

2017 WL 2644848, at *2, 2017 N.C. App. LEXIS 454, at *5 (2017) (holding that a defendant was not entitled to a self-defense instruction when he testified that he did not have the intent to kill when he fired through a closed door at an unidentified person breaking into his bedroom) (quoting *State v. Williams*, 342 N.C. 869, 872, 467 S.E.2d 392, 394 (1996)) (emphasis omitted).

Under our case law, as recently and exhaustively considered in *Cook*, the use of a firearm that a defendant describes as something other than an aimed, deliberate attempt to kill the victim cannot support a finding of perfect self-defense, and a defendant's testimony that he did not shoot to kill will prevent the jury from hearing a self-defense instruction "even if there is, in fact, other evidence from which a jury could have determined that the defendant did intend to kill the attacker." *Cook*, 2017 WL 2644848, at *2, 2017 N.C. App. LEXIS 454, at *5 (emphasis omitted). This results in Defendants who are on trial for firing poorly aimed warning shots being unable to receive jury instructions on self-defense. *See Williams*, 342 N.C. at 873-74, 467 S.E.2d at 394-95 (finding no error where the defendant testified that he fired into the air to scare off his alleged attackers and did not receive a self-defense instruction); *State v. Reid*, 335 N.C. 647, 671-72, 440 S.E.2d 776, 789-90 (1994) (upholding conviction and failure to provide self-defense instruction when the defendant claimed that he shot at the ground near the victim without ever intending to hit him); *State v. Hinnant*, 238 N.C. App. 493, 495-97, 768 S.E.2d 317, 319-20 (2014) (finding a defendant's testimony that the victim reached for a gun and the defendant intended to fire a warning shot did not require a self-defense instruction).

A trial court must provide a perfect self-defense instruction to the jury if the evidence presented tends to show all four elements of perfect self-defense existed at the time of the killing. *State v. Gappins*, 320 N.C. 64, 70-71, 357 S.E.2d 654, 659 (1987). To determine whether there was evidence of self-defense, we construe evidence in the light most favorable to the defendant. *State v. Webster*, 324 N.C. 385, 391, 378 S.E.2d 748, 752 (1989) (citation omitted).

Viewing the facts before us in the light most favorable to Defendant, the first three elements of self-defense were present when he shot Rhodes: (1) Defendant testified he believed Rhodes and Tillery were about to shoot him or Huff; (2) a reasonable person could conclude from the evidence that Rhodes and Tillery were reaching for guns to shoot Defendant or Huff; and (3) until the moment Defendant fired at Rhodes, Defendant had not attacked or threatened Rhodes in any way.

Defendant's own testimony, however, indicates that he did not shoot to kill. In his direct examination, he did not specify what he was aiming at or what his intent was when he fired. He simply testified that he "[pulled] the gun out [of] the holster and fire[d] one time," in order to ensure that "[Rhodes] wouldn't shoot me or Archie." Defendant described the event in more detail during his cross examination:

> [THE STATE]: How about this, what direction were you facing when you fired the gun?
>
> [DEFENDANT]: I was facing the rear of the truck. I was trying to flee.
>
> [THE STATE]: Okay. And so would that put the Mustang to your side?
>
> [DEFENDANT]: Well, the Mustang would be to my left now –
>
> [THE STATE] Okay.
>
> [DEFENDANT]: [W]hen I fired the shot.
>
> [THE STATE]: Did you fire over your shoulder?
>
> [DEFENDANT]: No, ma'am, like this.
>
> [THE STATE]: Are you right handed or left handed?
>
> [DEFENDANT]: Right handed.
>
> [THE STATE]: So where was the gun?
>
> THE COURT: You can stand up and demonstrate.
>
> [DEFENDANT]: If I'm sitting in the truck like this, and I open the door trying to run this way, that would leave the Mustang right here. I pulled the gun out of the holster, I fired one time.
>
> [THE STATE]: Okay. So, basically, you're not you're facing away?
>
> [DEFENDANT]: Yes, ma'am.

Defendant makes clear he was not looking at the car when he fired, and he had to reach across his body to fire the gun behind him while running in the opposite direction. Like the defendant in *Cook*, who testified that he fired through a closed door at someone that he could not see, Defendant's testimony as to the circumstances in which he shot Rhodes

demonstrates that he did not intend for his use of force to kill the victim. Such an intent is required for a trial court to instruct a jury on perfect self-defense. Significantly, had Defendant testified that he shot Rhodes with the intent to kill, he would have been entitled to a self-defense instruction. This may not be "what most citizens would believe our law to be and what I believe self-defense law *should be* in our state[,]"*Cook*, 2017 WL 2644848, at *3, 2017 N.C. App. LEXIS 454, at *9 (Murphy, J., concurring) (emphasis in original); nevertheless, we are bound by precedent to rule that Defendant was not entitled to an instruction on self-defense.

Conclusion

Defendant's own testimony makes clear that he did not have the intent to kill and was not entitled to an instruction on self-defense. We find no error and affirm Defendant's conviction.

AFFIRMED.

Judges CALABRIA and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CLARENCE JOSEPH TRENT

No. COA16-839

Filed 1 August 2017

1. Probation and Parole—probation revocation—willfully absconded from supervision—oral findings of fact—standard of proof

The trial court did not abuse its discretion in a probation revocation case by making oral findings of fact without explicitly stating the legal standard of proof where the totality of the court's statements indicated that defendant willfully violated N.C.G.S. § 15A-1343(b)(3a) by avoiding supervision or by making his whereabouts unknown, but that he did not violate N.C.G.S. § 15A-1343(b)(3) regarding failure to notify of a change of address.

2. Probation and Parole—probation revocation—willfully absconded from supervision—findings of fact—failure to be at residence at pertinent time

The trial court did not abuse its discretion by revoking defendant's probation based on its finding that he willfully absconded

from supervision where the trial court found that defendant failed to be at his residence during two unannounced visits by his supervising officer. Although defendant contended that his wife misinformed the officer in his absence, defendant failed to notify the officer that he had to travel for eight days for a painting job as required by N.C.G.S. § 15A-1343(b)(3a), and further failed to notify the officer once he returned.

3. Criminal Law—remand—clerical errors

Although the Court of Appeals affirmed the trial court's judgments revoking defendant's probation and activating his suspended sentences, it remanded for the limited purpose of correcting two clerical errors within the findings section of the court's judgments.

Appeal by defendant from judgments entered 6 June 2016 by Judge Michael R. Morgan in Randolph County Superior Court. Heard in the Court of Appeals 22 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Carole Biggers, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

CALABRIA, Judge.

Clarence Joseph Trent ("defendant") appeals from judgments revoking his probation and activating his suspended sentences. After careful review, we affirm the trial court's judgments but remand for correction of clerical errors.

I. Background

On 10 March 2016 in Guilford County Superior Court, defendant pleaded guilty to two counts of obtaining property by false pretenses (15 CRS 80278-79) and two counts of conspiring to obtain property by false pretenses (15 CRS 81150-51). The trial court consolidated 15 CRS 80278 and 15 CRS 81150 into one judgment, and 15 CRS 80279 and 15 CRS 81151 into another. The court sentenced defendant to serve two consecutive terms of 8 to 19 months in the custody of the North Carolina Division of Adult Correction. The trial court suspended both sentences, placed defendant on 36 months of supervised probation, and ordered him to serve a 30-day active term as a condition of special probation in 15 CRS 80278. Defendant's probation supervision was transferred to Randolph County.

On 18 March 2016, defendant met with his new supervising officer ("Officer Russell") to review the conditions of his probation. Defendant told Officer Russell that he and his wife ("Kim") were in the process of being evicted from their residence at 3550 Holly Ridge Drive in Trinity. Officer Russell instructed defendant to provide an update whenever his address changed. When defendant next met with Officer Russell on 12 April 2016, he provided his new address as 150 U.S. Highway 311, Lot 9 in Randleman. At the conclusion of the meeting, Officer Russell scheduled defendant's next appointment for 9 May 2016.

On 24 April 2016, Officer Russell made an unannounced visit to defendant's home in Randleman. Defendant was not home, and Kim was "very upset." Kim told Officer Russell that she had not seen defendant since the previous day, when he took her car and bank card without permission and left the residence. Kim also told Officer Russell that it was defendant's "normal pattern . . . to go out and be gone for days on drugs." Officer Russell informed Kim that if defendant did not come home within a few days, she would consider him to be absconding. When Officer Russell revisited the residence on 5 May 2016, Kim said that defendant still had not returned, and she did not know where he was.

On 9 May 2016, Officer Russell filed reports in both cases alleging that defendant had committed the following willful violations of his probation[1]:

> 1. Regular Condition of Probation: "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that,
>
> THE DEFENDANT LEFT HIS RESIDENCE AT 150 US HWY 311, LOT 9, RANDLEMAN ON OR ABOUT 04/23/2016, AFTER TAKING HIS WIFE'S CAR AND BANK CARD AND HAS FAILED TO RETURN TO THE RESIDENCE SINCE THAT TIME. HIS WHEREABOUTS ARE UNKNOWN.
>
> 2. Condition of Probation " . . . obtain prior approval from the officer for, and notify the officer of, any change in address . . . " in that
>
> THE DEFENDANT HAS FAILED TO NOTIFY HIS PROBATION OFFICER OF ANY CHANGE IN ADDRESS AND DID NOT HAVE PERMISSION TO MOVE.

1. At that time, case numbers 15 CRS 80278 and 15 CRS 81150 were renamed 16 CRS 96, and case numbers 15 CRS 80279 and 15 CRS 81151 were renamed 16 CRS 97.

Defendant did not appear for his scheduled appointment with Officer Russell that afternoon. On 10 May 2016, Officer Russell learned that defendant had been arrested in Guilford County the previous day. Defendant was subsequently transferred to the Randolph County jail, where he remained in custody until his probation violation hearing on 6 June 2016.

At the hearing, Officer Russell testified for the State and recommended that the trial court revoke defendant's probation. After the State presented evidence, defendant testified that during Officer Russell's unscheduled visits to his residence, he was working in Raleigh on an eight-day painting job. According to defendant's testimony, Kim agreed to inform Officer Russell that he was away. However, when defendant returned home on 6 or 7 May 2016, he discovered that Kim had been "lying" to Officer Russell and "was trying to get [him] locked up" because she was having an affair. During cross-examination by the State, defendant admitted that despite knowing that Officer Russell had visited his residence while he was away, he did not contact her at any time after he returned from Raleigh.

At the hearing's conclusion, the trial court found that the State had proven that defendant absconded from supervision, but not that he failed to notify Officer Russell of a change to his address. Based on its finding that defendant willfully absconded from supervision, the court revoked defendant's probation and activated both of his suspended sentences. Defendant appeals.

II. Analysis

On appeal, defendant contends the trial court erred in revoking his probation based on its finding that he willfully absconded from supervision. We disagree.

A. Standard of Review

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation and quotation marks omitted). "[O]nce the State has presented competent evidence establishing a defendant's failure to comply with

the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Talbert*, 221 N.C. App. 650, 652, 727 S.E.2d 908, 910-11 (2012) (citation and quotation marks omitted).

We review the trial court's decision to revoke a defendant's probation for abuse of discretion. *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). "Abuse of discretion occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation, quotation marks, and brackets omitted).

B. Probation Revocation

N.C. Gen. Stat. § 15A-1343(b) (2015) provides the regular conditions of probation which "apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court." *E.g.*, N.C. Gen. Stat. §§ 15A-1343(b)(2), (4), (7) (requiring a probationer to: "[r]emain within the jurisdiction of the court unless granted written permission to leave"; "[s]atisfy child support and other family obligations"; and "[r]emain gainfully and suitably employed or faithfully pursue a course of study or of vocational training").

Violations of these statutory conditions can have various consequences. *See* N.C. Gen. Stat. § 15A-1344(a) (stating that "probation may be reduced, terminated, continued, extended, modified, or revoked"). However, the trial court is only authorized to revoke probation under circumstances where the defendant: (1) commits a new criminal offense, in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds "by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer," in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after previously serving two periods of confinement in response to violations, pursuant to N.C. Gen. Stat. § 15A-1344(d2). N.C. Gen. Stat. § 15A-1344(a). For all other violations, the trial court may either modify the conditions of the defendant's probation or impose a 90-day period of imprisonment pursuant to N.C. Gen. Stat. § 15A-1344(d2). *Id.*

In the instant case, the State alleged violations of N.C. Gen. Stat. §§ 15A-1343(b)(3) and 15A-1343(b)(3a). *See* N.C. Gen. Stat. § 15A-1343(b)(3) (providing that a defendant must, *inter alia*, "obtain prior approval from the [supervising] officer for, and notify the officer of, any change in address or employment"). At the hearing, before delivering its ultimate

findings, the trial court offered a recitation of the evidence presented by both parties:

> THE COURT: Upon reviewing my notes concerning the evidence that has been received, I'm ready at this time to address the two allegations that have been lodged against the probationer. The first allegation as to probation violation is that the defendant absconded his probation by willfully avoiding supervision or by willfully making his whereabouts unknown to the supervising probation officer in that defendant left his residence at 150 U.S. Highway 311, Lot 9, Randleman, on or about 4-23-2016, that's April 23, 2016, after taking his wife's car and bank card and has failed to return to the residence since that time. His whereabouts are unknown.
>
> The evidence of the State on that allegation is that, in terms of what is salient at least for this determination, that on March 18, 2016 the probationer reported for his first visit with the probation officer. On April 16, 2016, he reported again to the probation officer saying that he was going to be moving to another address, and another appointment was set for May 9th, 2016, which the probationer did not keep.
>
> Along the way on April 24, 2016 an unannounced visit was made by the probation officer to the residence at which the probationer was expected to be. Probation officer talked to the wife. The probationer was not there. The wife was upset because the probationer had, according to the wife, taken her car and left. On May 5, 2016, a Thursday, probation officer again went to the residence at which probationer was supposed to be. Probationer was not there. Probation officer talked to the wife and was told that the probationer had not returned to the home. The probation officer found that on May 10, 2016 that the probationer was incarcerated.
>
> On those pertinent issues the probationer has testified that he needed money and his brother-in-law offered him some work. The wife told the probationer to go ahead and go to work and that she would tell the probation officer that the probationer was at work. It's the probationer's understanding that his wife was having an affair. He went

> to his mother's home for a couple days but did not contact his probation officer to say where he was and that, if it wasn't for the domestic squabble between him and his wife concerning a vehicle, that this whole probation violation matter would not even be occurring.
>
> I do find that the State by the appropriate standard of evidence has proven the existence of the first allegation of probation violation in that he failed to be at the residence at the time that he was to be there. As a result, that has been proven.
>
> On the second allegation of probation violation the allegation is that the defendant had failed to notify his probation officer of any change in address and did not have permission to move. The pertinent dates upon which the probation officer has made that determination for the probation violation report are the unannounced visits of April 24, 2016 and May 5, 2016, a period of a couple of weeks. The court does not find that a two-week absence is sufficient at least in this case to equate to a change in address or a move especially in light of the probationer's testimony that he still had items of value at the residence including his clothing and pet or some animal dear to him.
>
> So I do not find that allegation No. 2 has been proven by the appropriate standard of evidence, but I do find that, as to the absconding in allegation 1, that has been proven.

1. Standard of Proof

[1] Defendant first argues that the trial court abused its discretion by making its oral findings of fact without explicitly stating the legal standard of proof, as demonstrated by the following statement:

> THE COURT: I do find that the State by the appropriate standard of evidence has proven the existence of the first allegation of probation violation in that he failed to be at the residence at the time that he was to be there. As a result, that has been proven.

This Court has held that a trial court's failure to state the standard of proof underlying its findings may constitute reversible error where certain protected interests are involved. *See, e.g.*, *State v. Phillips*, 230 N.C. App. 382, 386, 750 S.E.2d 43, 46 (2013) (holding that "the trial court's failure to indicate that he applied 'beyond a reasonable doubt' as the

standard of proof in finding facts" rendered the criminal contempt order fatally deficient, because N.C. Gen. Stat. § 5A-15(f) specifically instructs that "[t]he facts must be established beyond a reasonable doubt"), *disc. review improvidently allowed*, 367 N.C. 715, 766 S.E.2d 340 (2014). However, we have never held so in the context of a probation hearing, and we decline to do so now.

A probation revocation proceeding "is not a criminal prosecution and is often regarded as informal or summary." *Murchison*, 367 N.C. at 464, 758 S.E.2d at 358 (citation and quotation marks omitted). "The Supreme Court of the United States has observed that revocation of probation 'deprives an individual . . . only of the conditional liberty' dependent on the conditions of probation." *Id.* at 463, 758 S.E.2d at 358 (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 36 L. Ed. 2d 656, 661 (1973), *superseded by statute*, Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 228 (1976)). Furthermore, "the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Id.* at 464, 758 S.E.2d at 358 (citation and quotation marks omitted). Rather, all that is required is "that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation . . . ." *Young*, 190 N.C. App. at 459, 660 S.E.2d at 576.

Although the trial court failed to employ the best practice and explicitly state the legal standard of proof, the totality of the court's statements indicate that the court was "reasonably satisfied," in light of all of the evidence presented, that defendant had willfully violated N.C. Gen. Stat. § 15A-1343(b)(3a), but not § 15A-1343(b)(3). *Id.* Accordingly, we conclude that the trial court's oral finding did not constitute an abuse of discretion.

2. Absconding

[2] Defendant next argues that the trial court's finding that "he failed to be at the residence at the time that he was to be there" does not support that he willfully absconded from supervision. Specifically, defendant contends, "there was no evidence presented that [he] was required to be at home during [Officer Russell's] two unscheduled visits." However, the State was not required to present such evidence. As a regular condition of probation, defendant consented to unannounced visits from his supervising officer. *See* N.C. Gen. Stat. § 15A-1343(b)(3) (requiring a defendant to "[r]eport as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, *permit the officer to visit him at reasonable times*, answer all

reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment" (emphasis added)).

Defendant is correct that his probation could not be revoked based on a violation of this condition alone. *See* N.C. Gen. Stat. § 15A-1344(a). Nevertheless, in relying on our decisions in *State v. Johnson*, __ N.C. App. __, 783 S.E.2d 21 (2016) and *State v. Williams*, __ N.C. App. __, 776 S.E.2d 741 (2015), defendant overlooks key facts that distinguish those cases from the instant case.

In *State v. Johnson*, the defendant told his probation officer that he would be unable to attend their appointment the following morning because he did not have a car or a ride. __ N.C. App. at __, 783 S.E.2d at 23. He asked whether they might reschedule for later that day, but the officer declined his request. *Id.* After the defendant failed to attend his appointment, the officer filed violation reports for absconding, and the trial court subsequently revoked his probation. *Id.* On appeal, we determined that the defendant's "actions, while clearly a violation of N.C. Gen. Stat. § 15A-1343(b)(3), . . . do not rise to 'absconding supervision' in violation of N.C. Gen. Stat. § 15A-1343(b)(3a)." *Id.* at __, 783 S.E.2d at 25. We explained that

> a defendant informing his probation officer he would not attend an office visit the following day and then subsequently failing to report for the visit, does not, without more, violate N.C. Gen. Stat. § 15A-1343(b)(3a) when these *exact actions* violate the explicit language of a wholly separate regular condition of probation which does not allow for revocation and activation of a suspended sentence.
>
> To hold otherwise would render portions of N.C. Gen. Stat. § 15A-1344(a) superfluous. Allowing actions which explicitly violate a regular or special condition of probation other than those found in N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) to also serve, without the State showing more, as a violation of N.C. Gen. Stat. § 15A-1343(b)(1) or N.C. Gen. Stat. § 15A-1343(b)(3a) would result in revocation of probation without following the mechanism the General Assembly expressly provided in N.C. Gen. Stat. § 15A-1344(d2).

Id. at __, 783 S.E.2d at 26 (internal citations omitted). Furthermore, because the defendant had also been ordered to submit to house arrest with electronic monitoring as a special condition of probation, *id.* at __,

783 S.E.2d at 22, his supervising officer "was able to monitor and keep continuous track of [his] locations and movements through the use of the electronic monitoring device [he] wore." *Id.* at __, 783 S.E.2d at 27. Therefore, the defendant's whereabouts were never unknown to his probation officer. *Id.*

Similarly, in *State v. Williams*, the probation officer alleged that the defendant had violated seven conditions of his probation, including N.C. Gen. Stat. § 15A-1343(b)(3a). __ N.C. App. at __, 776 S.E.2d at 742. At the violation hearing, the State presented evidence that the defendant had missed multiple scheduled appointments with his supervising officer; was traveling "back and forth from North Carolina to New Jersey" without permission; and had "never really lived" at his reported address. *Id.* The trial court found each violation alleged and revoked the defendant's probation. *Id.* On appeal, we explained that "[a]lthough the report alleged that [the d]efendant's actions constituted 'absconding supervision,' this wording cannot convert violations of N.C. Gen. Stat. §§ 15A-1343(b)(2) and (3) into a violation of N.C. Gen. Stat. § 15A-1343(b)(3a)."*Id.* at __, 776 S.E.2d at 745. Furthermore, the probation officer had testified that she had several telephone conversations with the defendant regarding his missed appointments and was even able to contact him during his travels to New Jersey. *Id.* at __, 776 S.E.2d at 742. Because there was insufficient evidence to support the trial court's finding of willful absconding, we reversed the judgment revoking the defendant's probation. *Id.* at __, 776 S.E.2d at 746.

The instant case is distinguishable from *Johnson* and *Williams* for the simple, but significant, fact that Officer Russell was never aware of defendant's whereabouts after he left Randleman on 23 April 2016. When defendant accepted an eight-day painting job in Raleigh, he failed to notify Officer Russell of his employment opportunity prior to traveling. As a result, Officer Russell was unaware that defendant would not be in Randleman when she made her first unscheduled visit to his residence on 24 April 2016. Upon her arrival, Officer Russell met defendant's wife, Kim, who was "very upset." Kim told Officer Russell that she had not seen defendant since the previous day, when he took her car and bank card without permission and left the residence. These allegations prompted Officer Russell's second unscheduled visit less than two weeks later. When Officer Russell revisited the residence on 5 May 2016, Kim said that defendant still had not returned, and she did not know where he was. Consequently, on 9 May 2016, Officer Russell filed violation reports.

Unlike the officer in *Johnson*, however, Officer Russell did not have the benefit of tracking defendant's movements via electronic monitoring device. *Contra* __ N.C. App. at __, 783 S.E.2d at 27. Moreover, unlike in

Williams, Officer Russell had absolutely no means of contacting defendant during his unauthorized trip to Raleigh. *Contra* __ N.C. App. at __, 776 S.E.2d at 742.

Defendant asserts that Officer Russell made a "premature" determination that he absconded, because she "did not testify that she attempted to contact [defendant] by telephone, by mail or by any other means . . . [or] that she contacted any relatives or associates other than his wife listed in [his] file." As previously explained, however, once the State presented competent evidence establishing defendant's failure to comply with the terms of his probation, the burden was on *defendant* to demonstrate through competent evidence his inability to comply with those terms. *Talbert*, 221 N.C. App. at 652, 727 S.E.2d at 910-11. Defendant was given ample opportunity to do so at the hearing, but instead, he attempted to deflect the blame for his actions:

> A. So basically it boils down to the fact that [Kim]'s a liar, she's a manipulator, she doesn't get her way, and she's come down here on three different occasions before and she's filed 50B, she's filed assault on a females, had me locked up. As soon as the magistrate assigns me a bond, in 24, 48 hours she's down here crying, "I'm sorry," she gets people over at Shell Bonding to come and get me out.
>
> And so, basically, I'm thinking that she's taking care of the change of address with my probation officer. And I come to find out when I get back that she's been having an affair and that I'm not allowed to be at that trailer park anymore. And now I find out that she's been in contact – my probation officer's been in contact with the disgruntled wife, and the whole time the disgruntled wife's been telling her I did this and I did that. And my Maltese, Trixie, is like my child. My dog is still at that trailer. Every stick of clothes that I own is still at that trailer. Everything I own is still at that trailer. I haven't changed address. I haven't absconded. She's listening to this vindictive and deceitful individual who is telling me one thing and she's going back telling her another.
>
> And what it boils down to is she was trying to get me locked up so that she didn't have to deal with the confrontation when I found out . . . That's what it boils

> down to. I haven't absconded. I've still – I still lived at that address I thought until I come back and found out somebody else had took my place.

Despite defendant's accusation that Kim misinformed Officer Russell in his absence, during cross-examination by the State, defendant admitted that he failed to contact Officer Russell even after he returned from Raleigh:

> Q. Okay. And when you found [out on May] the 6th or 7th about [Officer Russell's unscheduled visits], did you contact your probation officer?
>
> A. No, I didn't. I didn't have a phone. I didn't have anything.
>
> . . .
>
> . . .
>
> A. – to answer your question, no, I didn't contact her immediately. I wasn't in any shape to do anything. I went to my mother's and I stayed in the bed for five days. I couldn't eat or anything so…
>
> Q. So you had an opportunity to call her then but you just didn't, correct?
>
> A. Yeah, but, I mean, I thought it was – I thought it was already taken care of. And, I mean, I wasn't –
>
> . . .
>
> Q. I'm sorry. But when your wife kicked you out of the place you just said on the . . . 6th or the 7th of May you were told to leave. Now, if you left that place, wouldn't you have contacted your probation officer then since you went to your mother's?
>
> A. Well, because I was only going to my mother's for a couple days. I wasn't – I wasn't moving. I was giving her a couple days to get over her little ole thing, and then as usual she gets her – you know, her feather – she gets her feathers ruffled and I go to jail for two days. In 48 hours they set me a bond, she comes and bonds me out, and then we continue the zoo as usual, I mean.
>
> Q. So my point is you knew that you were getting kicked out of that residence but you didn't contact the probation

> officer until you were arrested basically but you had several days to do that, correct?
>
> A. Yes, I guess you could look at it in that perspective, but I was looking at it from the – from a homeowner and a renter's – renter's rights perspective. And I still don't consider myself of being left there and moved as you're trying to allude to. I didn't move from there. Everything I own is still in that trailer.

Despite the fact that he did not have a phone, it was defendant's responsibility to keep his probation officer apprised of his whereabouts. During defendant's testimony, he never explained how he tried to borrow anyone else's phone in order to let Officer Russell know that he was working. Indeed, defendant admitted that he made *no* attempt to contact Officer Russell. He never contacted her before he left home, while he was in Raleigh, or after he returned to Randleman on 6 or 7 May 2016. Even after learning about Officer Russell's unscheduled visits during his travels, defendant still did not contact her to correct any allegedly inaccurate information that Kim may have communicated. Instead, defendant claimed that he went to stay at his mother's house "for a couple days" until he was arrested in Greensboro on 9 May 2016.

"Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime." *Murchison*, 367 N.C. at 463, 758 S.E.2d at 358 (citation and quotation marks omitted). According to the plea transcript, defendant could have been sentenced to a maximum of 126 months' imprisonment based on his underlying offenses and prior record level. Although defendant received a favorable plea arrangement with suspended sentences, as the trial court stated, "[u]nfortunately, probation is not the priority he chose."

We hold that there was sufficient competent evidence to establish defendant's willful violation of N.C. Gen. Stat. § 15A-1343(b)(3a), a valid condition of his probation. Therefore, the trial court did not abuse its discretion in finding that defendant willfully absconded from supervision, or in revoking his probation on that basis. *Young*, 190 N.C. App. at 459, 660 S.E.2d at 576.

III. Clerical Errors

[3] Although we affirm the revocation of defendant's probation, we nevertheless must remand to the trial court for correction of two clerical errors appearing within the Findings section of the court's judgments. First, the trial court failed to select box 2a, which would have indicated

that the court was "reasonably satisfied in its discretion that the defendant violated" the absconding condition of probation, as the court found at the hearing. Instead, the trial court selected box 2b, erroneously indicating that defendant "waived a violation hearing and admitted that he . . . violated each of the conditions of his . . . probation . . . ." Second, box 3a of the judgments inaccurately suggest that the trial court found that defendant violated both of the conditions alleged in the 9 May 2016 violation reports, rather than N.C. Gen. Stat. § 15A-1343(b)(3a) alone.

However, these are clearly clerical errors. In the Conclusion and Order section of the judgments, the trial court included the following additional findings, which accurately reflect the court's statements in open court:

> DENIES VIOLT – STATE HAS PROVED DEF ABSCONDED – STATE HAS NOT PROVED DEF FAILED TO NOTIFY PO OF ADDRESS CHANGE – PROBT REVOK – ACTV SENT – DEF GIVES NOTICE OF APPEAL – BOND SET AT $75,000 SEC

"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." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted). Accordingly, we affirm the trial court's judgments revoking defendant's probation and activating his suspended sentences, but remand for the limited purpose of correcting these clerical errors.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges HUNTER, JR. and BERGER concur.

TANGLEWOOD PROPERTY OWNERS' ASSOCIATION, INC., PLAINTIFF
v.
BRANDON WAYNE ISENHOUR; ROBERT MALLANEY AND WIFE MARY MALLANEY; VICKIE CORBETT; LARRY SPAINHOUR AND WIFE LINDA SPAINHOUR; FRANK W. REGISTER AND WIFE LINDA FAYE REGISTER; HOMER BEST; BRENDA GLENN; BERT ANTHONY MCGEE AND WIFE DARLENE MCGEE, DEFENDANTS

No. COA17-101

Filed 1 August 2017

1. Associations—property owner association—easement appurtenant—duty to maintain common areas

The trial court erred in a declaratory judgment action by denying plaintiff property owner association's motion for summary judgment regarding defendant homeowners' responsibility to maintain certain common areas within a subdivision (streets, ditches, public areas, intracoastal waterway water access, and boat ramp) where defendants possessed an easement appurtenant over these areas. Defendants were conferred a benefit even if they did not currently use all of the easement areas. The case was remanded to the trial court to calculate the amount owed by the landowners.

2. Appeal and Error—additional arguments—mootness

Plaintiff property owner association's additional arguments regarding the trial court's grant of judgment in favor of defendant homeowners and denial of its untimely amended motion for amended judgment did not need to be addressed where the Court of Appeals already determined that the trial court erred by denying summary judgment in favor of plaintiff.

Appeal by Plaintiff from order entered 11 February 2015, judgment entered 7 March 2016, and order entered 23 August 2016 by Judge Pauline Hankins in Brunswick County District Court. Heard in the Court of Appeals 7 June 2017.

Hodges, Coxe, Potter & Phillips, LLC, by Bradley A. Coxe, for Plaintiff-Appellant.

No brief filed for Defendant-Appellees.

HUNTER, JR., Robert N. Judge.

Tanglewood Property Owners' Association, Inc. ("Plaintiff") appeals an 11 February 2015 order denying Plaintiff's motion for summary judgment and a 7 March 2016 judgment. Plaintiff also appeals a 23 August 2016 order denying Plaintiff's motion for judgment notwithstanding the verdict and to amend judgment.

On appeal, Plaintiff contends the trial court erred in two respects: (1) finding an easement by necessity, limited to the roads required for ingress and egress, because Frank W. Register and Linda Faye Register ("Defendants") possess easements appurtenant in all "streets, ditches, public areas, ICW[1] water access and boat ramp" pursuant to the Tanglewood West plat; and (2) concluding Defendants' pro rata share for the 2013 maintenance of their easements could not be calculated. Plaintiff further contends the 2013 pro rata share per lot for property owners in Tanglewood West totaled $133 per lot and Defendants, accordingly, are responsible for $266 for their two lots.[2] We reverse and remand.

I. Factual and Procedural History

On 20 May 2014, Plaintiff filed a declaratory judgment action seeking declaration of parties'[3] rights and obligations over "the streets, ditches, public areas, ICW water access and boat ramp" located in Tanglewood "pursuant to the plats recorded with the Brunswick County Register of Deeds" and costs attendant thereto. The complaint alleges the cost of maintaining all easements in Tanglewood for 2013 totaled $83,269[4] and each property owner's pro rata share per lot, based upon 652[5]

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1. ICW stands for intracoastal waterway.

2. On appeal, Plaintiff amends its original calculations; thus, the $133 pro rata share per lot differs from that alleged in the complaint.

3. Plaintiff subsequently reached a settlement agreement with Defendants Isenhour, Mallaney, Glenn, and McGee. The trial court entered default judgments against Defendants Spainhour and Best. On 2 November 2015, Judge Thomas Aldridge granted summary judgment in favor of Defendant Corbett, determining as a matter of law, Tanglewood North property owners take pursuant to the Tanglewood North plat *only* and do not possess any easement over "roads, ditch[es], common area[s], boat ramp or ICW access in the subdivisions known as Tanglewood East, Tanglewood West or Windy Point Park" and, therefore, possess no maintenance duty because the Tanglewood North plat does not depict these areas. Thus, Defendants Register are the only parties to this appeal.

4. The $83,269 figure, initially submitted by Plaintiff, reflected the total cost of maintenance for roads and common areas in Tanglewood East, Tanglewood West, and Windy Point Park. This figure does not encompass any cost of maintenance associated with Tanglewood North.

5. The 652 lots included all non-developer lots in Tanglewood East, Tanglewood North, Tanglewood West, and Windy Point Park. Windy Point Park is a separate subdivision,

non-developer lots, totaled $128.[6] In sum, Plaintiff alleged Defendant was liable for $281, which represented their pro rata share, plus a $25 late fee. Plaintiff sought injunctive relief until such time Defendants remitted $281.[7]

On 28 July 2014, Defendants filed an answer, admitting "owner[ship] of the dominant estate over the streets, ditches, public areas, ICW water access and boat ramp" pursuant to the Tanglewood West plat and by prescription. However, Defendants denied any duty to maintain the easements. Defendants pointed to Plaintiff's alleged noncompliance with the North Carolina Planned Community Act. Defendants additionally stated that Plaintiff and other property owners "have not been provided a fair portion for maintenance, upkeep and operation[,]" and further alleged, "[m]embers have more benefits and pay less than this lawsuit is requiring of the Defendants."[8]

On 24 September 2014, Plaintiff moved for summary judgment against Defendants.[9] The trial court held a hearing for the motion for summary judgment on 1 December 2014.

Plaintiff asserted the following arguments: (1) when property is conveyed by deed, referencing a plat depicting common areas, an easement over the common areas is held by the purchaser; 2) in accordance with the acquired easement rights, the easement holder possesses a duty to maintain their easement, which is irrespective of the easement holder's actual use of the easement; (3) the pro rata share of maintenance is then calculated based upon a per lot basis, with the number of lots

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that borders the Tanglewood subdivision. Windy Point Park property owners possess an express easement over Tanglewood West's private roads to gain access to the boat ramp and parking area located in Tanglewood West. In accordance with this agreement, Windy Point Park lots are included in the total number of lots.

6. The $128 pro rata share per lot was calculated by dividing $83,269 by 652.

7. Plaintiff additionally submitted the following arguments in the alternative: (1) Defendants possess an easement by prescription; (2) Defendants do not possess any easement in the identified areas; (3) breach of contract implied by law; and (4) breach of contract implied in fact.

8. Membership in the Tanglewood Property Owners' Association ("TPOA") is voluntary. TPOA was established after the lots within Tanglewood were conveyed, and, thus, membership is not compulsory. Members are assessed annual dues, which encompass maintenance costs, and, therefore, members were not assessed an additional pro rata amount for maintenance.

9. On 23 October 2014, Plaintiff also moved for summary judgment against Defendant Corbett.

determined at the time of conveyance, irrespective of any subsequent lot consolidation; and (4) accordingly, Defendants hold an easement over "the streets, ditches, public areas, intracoastal waterway access, and the boat ramp" pursuant to their deed and possess a duty to maintain their easements based upon ownership of two lots.

Defendants appeared *pro se* and presented the following arguments: (1) with the exception of the roads necessary to gain access to their property, they do not use the easements depicted on the plat; (2) use of some of the alleged easement areas, including the boat ramp and picnic shelter, is restricted to member use; 3) they are willing to contribute to the maintenance of the roads, but as a result of this dispute have been "forced to join an association [they] don't want to be a member of"; (4) members are assessed less and afforded greater benefits within the community, with their dues calculated on a per owner basis and not on a per lot basis; and (5) their two lots were combined into one per the "direction of the Brunswick County Central Permitting[.]"[10]

On 11 February 2015, the trial court denied Plaintiff's motion for summary judgment against Defendants Register and Corbett. The matter proceeded to a bench trial on 16 February 2016.

Plaintiff called one witness, Jeremy Bass, Vice President of TPOA. Bass explained the Tanglewood subdivision encompasses three phases: Tanglewood East, Tanglewood North, and Tanglewood West. TPOA is a voluntary property owners' association, established in 1985 to maintain Tanglewood's common areas and private streets. Following establishment of TPOA, the developer of the Tanglewood subdivision deeded all common areas and private roads to TPOA. While there are some areas within Tanglewood reserved for members only, all property owners may use the boat ramp, parking lot, and private streets.[11]

Tanglewood subdivision encompasses both public roads, maintained by the North Carolina Department of Transportation, and private roads,

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10. Defendant Corbett additionally presented arguments. As stated *supra*, Defendant Corbett subsequently moved for summary judgment, which was later granted by Judge Aldridge on 2 November 2015. Thus, Defendant Corbett is not a party to this appeal. However, it is important to note, at the 1 December 2014 summary judgment hearing, Defendant Corbett argued Tanglewood North property owners take subject to the Tanglewood North plat *only*. While Plaintiff initially disputed this contention, arguing Tanglewood property owners had notice of the other phases, on appeal, Plaintiff has modified its stance, incorporating Judge Aldridge's order. Plaintiff now argues, Defendants Register, as owners of property in Tanglewood West, take subject to the Tanglewood West plat *only*.

11. Only the gazebo and pond are restricted to members only.

maintained by TPOA. Although Plaintiff compiled a list of Tanglewood's roads, some roads, including Lake Peggy Circle, the road Defendant resides on, appears to be missing from the list. Despite this, Lake Peggy Circle is depicted on the Tanglewood West plat.[12]

From 1985 until 2013, Plaintiff paid for the maintenance of all common areas and private streets, and non-members were not required to contribute to maintenance of these areas. However in 2013, the board of TPOA consulted with an attorney to determine "if there was a way to have non-members pay for their fair share[.]" The board acquired a breakdown of the estimated cost of maintaining all common areas and private streets within Tanglewood East, Tanglewood West, and Windy Point Park. The estimated cost of maintaining the easement areas, excluding any areas restricted to member use only, totaled $83,269. The board ascertained the total number of nondeveloper lots, 652, in Tanglewood East, Tanglewood North, Tanglewood West, and Windy Point Park from the original plats, irrespective of any subsequent purchases that may have resulted in lots being combined. Additionally, although members of TPOA were not assessed an additional maintenance fee because their membership dues encompass maintenance costs, the total number of lots included both member and non-member lots. The maintenance cost per lot was then calculated by dividing the total cost of maintenance by the total number of non-developer lots, equaling approximately $128 per lot.[13]

Plaintiff sent a demand letter to all non-member property owners, including Defendant, on or about 31 December 2013, seeking pro rata contribution of $128 per lot owned. Plaintiff assessed Defendants $256 pursuant to their ownership of lots 298 and 299 in Tanglewood West;

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12. On the plat, Lake Peggy Circle is listed as "Peggy Drive."

13. During trial, Bass additionally estimated the pro rata cost of maintenance specific to Tanglewood West, to be $134 per lot. This was calculated by subtracting the cost of maintenance of Windy Point Park ($696) and the cost of maintenance of Tanglewood East ($27,524.33 (one third of $82,573)) from the total cost of maintenance ($83,269). This resulting figure (the transcript states two figures, $54,498 and $54,958) was then divided by the total number of lots in Tanglewood West and Windy Point Park (410). As stated *supra*, on appeal, Plaintiff utilizes this approach, estimating the cost of maintenance to be $133 per lot. Despite Plaintiff's revised approach, Plaintiff's calculations contain mathematical errors. Assuming Plaintiff's submitted estimates for the cost of maintenance are correct, our calculations indicate the pro rata share should be $134.27. This is calculated by taking $83,269 (total cost of maintenance) and subtracting $696 (cost of maintenance of Windy Point Park) to get $82,573. Then, $27,524.33 (cost of maintenance of Tanglewood East–assuming Plaintiff's assertion that Tanglewood East represents 1/3 of the total cost of maintenance of Tanglewood East and West) is subtracted to get $55,048.67. This is then divided by 410 (number of lots in Tanglewood West and Windy Point Park) to get $134.27.

however, Defendants failed to remit payment. A second letter requesting payment went unanswered.

Following Bass's testimony, Plaintiff moved for a directed verdict. Plaintiff argued Defendants possessed an easement pursuant to the Tanglewood West plat and, accordingly, possess a duty to maintain their easement. Plaintiff further contended, if the trial court determined Defendant possessed an easement over Tanglewood East, Tanglewood West, and Windy Point Park, Defendant's pro rata share of maintenance costs would be $148 per lot. Alternatively, if the trial court construed an easement only over Tanglewood West and Windy Point Park, Defendant's pro rata share would be $134 per lot.[14] The trial court denied Plaintiff's motion for directed verdict.

Mr. Register testified for the defense, and largely narrated his testimony. He and Mrs. Register have resided in the Tanglewood subdivision for approximately twenty years. They elected to be members of TPOA for approximately ten years[15]; however, they since withdrew from membership. They did not enter into any agreement regarding any easements or associated duty of maintenance. However, their deed does reference the Tanglewood West plat, which depicts the boat ramp, parking lot, and Lake Peggy Circle. Although they possess easements "over streets, ditches, public areas, intracoastal water access and a boat ramp that are owned by the plaintiff, Tanglewood", he disputed their duty to maintain these areas.

Defendants received Plaintiff's first demand letter, which "said it was for road usage." The letter did not mention easements, and Defendants refused to pay because they were "entitled to the right of way to [their] property." Defendants then received a second demand letter from Plaintiff's attorney, specifically asserting Defendants possessed easements in common areas and the roads in Tanglewood. However, Defendants did not have access to these areas. Defendants maintained their property, and Plaintiff has not provided any maintenance over their property. He believed Plaintiff's actions are "criminal" and he "cannot understand how [Plaintiff] can just come . . . take money . . . for something that [they have] not agreed to or even had any say-so in."

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14. Plaintiff's alternative argument presented at trial provides conflicting information. Plaintiff refers to the alternative approach as encompassing an easement over Tanglewood West *and* Windy Point Park. However, the $134 per lot was the pro rata share specific to maintenance of Tanglewood West only.

15. The record does not establish when exactly Defendants were members, whether it was upon purchase or if they later became members.

On 7 March 2016, the trial court entered judgment and concluded the following: (1) Defendants do not possess any easement "in the private streets, ditches, boat ramp, ICW water access and parking lots in Tanglewood West" pursuant to their general warranty deed or the Tanglewood West plat; (2) Defendants possess an easement by necessity over Lake Peggy Circle and West Tanglewood Drive SW to gain access to their property; (3) Defendants possess "a duty to provide their reasonable pro rata share" for the maintenance of their easement over Lake Peggy Circle and West Tanglewood Drive SW; (4) Defendants do not possess any easement over "any other private street, ditch, boat ramp, ICW water access, parking lot, pier, gazebo, or any other common area including those shown on the plats of Tanglewood West, Tanglewood East, and Windy Point Park" and are, therefore, not liable for maintenance of those areas; (5) based on the evidence presented, Defendants' pro rata share for the 2013 maintenance of their easements cannot be determined and Defendants are, therefore, not liable to Plaintiff for the 2013 maintenance of their easement; and (6) Defendants, or their successors in title, shall pay for their "annual, reasonable pro rata share of the maintenance costs," which shall be calculated based upon the two lots initially conveyed to Defendants, for 2014 and "until such time as Lake Peggy Circle and/or West Tanglewood Dr. SW is owned and maintained by the North Carolina Department of Transportation as a public road."

On 16 March 2016, Plaintiff filed a motion for judgment notwithstanding the verdict. On 31 March 2016, Plaintiff filed a joint motion—an amended motion for judgment notwithstanding the verdict and a motion to amend the judgment. On 23 August 2016, the trial court denied Plaintiff's motions for judgment notwithstanding the verdict and to amend the judgment. Plaintiff timely filed notice of appeal on 1 September 2016.

II. Standard of Review

The issue of denial of summary judgment is reviewed *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). "[S]uch 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.' " *Id.* at 573, 669 S.E.2d at 576 (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)).

III. Analysis

A. Summary Judgment

[1] On appeal, Plaintiff contends the trial court erred in denying summary judgment. Specifically, Plaintiff argues Defendants possess easements

"in the streets, ditches, public areas, ICW water access and boat ramp" and, accordingly, as holders of the easements, possess a duty to maintain their easements. We agree.

"An easement is a right to make some use of land owned by another . . . ." *Builders Supplies Co. of Goldsboro, N.C. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972) (citing *Richfield Oil Co. v. Hercules Gasoline Co.*, 112 Cal. App. 431, 297 P. 73; James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* §§ 270, 309; 25 Am. Jur. 2d *Easements* §§ 2, 4; 28 C.J.S., *Easements*, Black's Law Dictionary). An easement is either appurtenant or in gross. *Davis v. Robinson*, 189 N.C. 589, 598, 127 S.E. 697, 702 (1925). "An appurtenant easement is an easement created for the purpose of benefiting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 161, 418 S.E.2d 841, 846 (1992) (citing *Gibbs v. Wright*, 17 N.C. App. 495, 195 S.E.2d 40 (1973)). By contrast, "[a]n easement in gross is not appurtenant to any estate in land and does not belong to any person by virtue of his ownership of an estate in other land, but is a mere personal interest in or right to use the land of another; it is purely personal and usually ends with the death of the grantee." *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963) (citing Davis, 189 N.C. at 598, 127 S.E. at 697).

An easement can be created in several ways, including grant, estoppel, way of necessity, implication, dedication, prescription, reservation, and condemnation. *Davis*, 189 N.C. at 598, 127 S.E. at 702 (citation omitted). "Although easements must generally be created in writing, courts will find the existence of an easement by implication under certain circumstances." *Knott v. Wash. Hous. Auth.*, 70 N.C. App. 95, 97, 318 S.E.2d 861, 862-63 (1984) (citing James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 280 at 346 (1971)). Appurtenant easements implied by plat are recognized in North Carolina. *See Hinson v. Smith*, 89 N.C. App. 127, 131, 365 S.E.2d 166, 168 (1988) (holding property owners possess "a private easement over and across all of the property designated as 'Beach' on the recorded plat"). The easement areas must be sufficiently identified on the plat in order to establish an easement, although an express grant is not required. *See Conrad v. West-End Hotel & Land Co.*, 126 N.C. 776, 779-80, 36 S.E. 282, 283 (1900) (holding purchasers' deed reference to plat containing area identified "Grace Court" sufficient to establish purchasers' right to "open space of land"); *Harry v. Crescent Res., Inc.*, 136 N.C. App. 71, 75, 80, 523 S.E.2d 118, 121, 123-24 (1999) (determining remnant parcels depicted on plat and "described by metes and bounds" but not further identified insufficient

to establish an easement); *Hinson*, 89 N.C. App. at 130-31, 365 S.E.2d at 167-68 (finding area designated "Beach" on recorded plat referenced by property owners' deeds sufficient to establish a private easement).

We are further guided by our Supreme Court in *Cleveland Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E.2d 30 (1964):

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. It is said that such streets, parks and playgrounds are dedicated to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. Thus, a street, park or playground may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated.

Id. at 421, 135 S.E.2d at 35-36 (citations omitted).

The general rule governing easement maintenance is: "in the absence of contract stipulation or prescriptive right to the contrary, the owner of an easement is liable for the costs of maintenance and repairs where it exists and is used and enjoyed for the benefit of the dominant estate alone . . . ." *Lamb v. Lamb*, 177 N.C. 150, 152, 98 S.E. 307, 309 (1919). "[T]he owner of the servient tenement is under no duty to maintain or repair it, in the absence of an agreement therefor." *Green v. Duke Power Co.*, 305 N.C. 603, 611, 290 S.E.2d 593, 598 (1982) (citations omitted). This duty of maintenance exists in the context of implied easements, specifically easements implied by plat. *Shear*, 107 N.C. App. at 161, 165, 418 S.E.2d at 846, 848 (holding lot owners possessed an easement appurtenant "to the lake and surrounding undeveloped land" pursuant to their plat and, accordingly, had "the sole responsibility of bearing the cost of maintaining their easement"). Furthermore, an easement holder's share of maintenance may be calculated on a pro rata,

per lot basis.[16] *Lake Toxaway Cmty. Ass'n v. RYF Enters.*, 226 N.C. App. 483, 491-92, 742 S.E.2d 555, 561-62 (2013) (upholding pro rata maintenance amount assessed to a property owner, even though the property owner did not use *all* easements in question and rejecting the property owner's contention that maintenance duty "extend[ed] only to those amenities used by [property owner] in an amount proportional to its use of those amenities").

In *Shear*, defendant developer sought to drain a lake located within the community and develop the surrounding area. 107 N.C. App. at 159, 418 S.E.2d at 844. In response, plaintiff property owners argued they possessed implied easements, pointing to their deeds that referenced a recorded plat "depict[ing] streets, the lake and undeveloped areas surrounding the lake . . . includ[ing] a playground." *Id.* at 156, 418 S.E.2d at 843. Plaintiffs additionally relied on defendant's representations regarding the lake, specifically "they were informed that the lake was for the use and enjoyment of the residents of Cardinal Hills." *Id.* at 157, 418 S.E.2d at 843. While this Court noted the "oral representations and actions" further evidenced the defendant's intent, this Court held, "[t]he contents of this map, and the [defendant's] selling and conveying in reference to this map, *alone* creates an easement to the lake and the surrounding property." *Id.* at 163, 418 S.E.2d at 846 (emphasis added). Additionally, finding "[n]o agreement or intent to the contrary," in accordance with the general rule of easement maintenance, this Court found, "the cost of maintaining the lake and the surrounding undeveloped land should be paid by the [easement holders]." *Id.* at 165, 418 S.E.2d at 848.

At the outset, we note Defendants admitted in their Answer and at trial possession of easements "over the streets, ditches, public areas, ICW water access and boat ramp . . . ."[17] Additionally, there is no dispute over whether the Tanglewood West plat "sufficiently identified" the easement areas in question. *See Conrad*, 126 N.C. at 779-80, 36 S.E. at 283;

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16. In *Sanchez v. Cobblestone Homeowners Ass'n*, ___ N.C. App. ___, ___, 791 S.E.2d 238 (2016), this Court held access to benefits alone was insufficient to meet the requirements set forth in *Lake Toxaway*. *Id.* at ___, 791 S.E.2d at 246. However, *Sanchez* applied *Lake Toxaway* solely in the context of an implied contract.

17. While parties are bound by their pleadings, we note Defendants' admission is a conclusion of law. *Universal C.I.T. Credit Corp. v. Saunders*, 235 N.C. 369, 372, 70 S.E.2d 176, 178 (1952) ("[I]n searching the pleadings to determine the *material facts* which are controverted and those which are taken as true, the rule is that each party is bound by his pleading, and unless withdrawn, amended, or otherwise altered, the allegations contained in a pleading ordinarily are conclusive as against the pleader.") (emphasis added) (citations omitted).

Harry, 136 N.C. App. at 80, 523 S.E.2d at 123-24; *Hinson*, 89 N.C. App. at 131, 365 S.E.2d at 168. The Tanglewood West plat depicts the lots, streets, and common areas located within the boundaries of the Tanglewood West phase of the subdivision.[18] The characterization of the easements as appurtenant is also not in contention, and it is clear the rights in question benefit a specific parcel of property and are "an incident of ownership," *Shear*, 107 N.C. App. at 161, 418 S.E.2d at 846 (citation omitted), and are not personal rights. *Shingleton*, 260 N.C. at 454, 133 S.E.2d at 185 (citation omitted). Therefore, in accordance with the Defendants' deed reference to the Tanglewood West plat, Defendants possess an easement appurtenant over these areas located in Tanglewood West.

Next, we examine Defendants' duty of maintenance. To begin, we observe the language in *Lamb*, specifically the inclusion of "and is *used and enjoyed*[.]" 177 N.C. at 152, 98 S.E. at 309 (emphasis added). We believe Plaintiff's assertion, specifically that an easement holder's duty of maintenance exists *completely irrespective* of use, mischaracterizes *Lake Toxaway*. *Lake Toxaway's* discussion of an easement holder's duty of maintenance cites to *Lamb*. *Lake Toxaway Cmty. Ass'n*, 226 N.C. App. at 492, 742 S.E.2d at 562. *Lamb's* inclusion of "and is *used and enjoyed*" would be rendered meaningless if an easement holder's duty of maintenance exists completely irrespective of use. 177 N.C. at 152, 98 S.E. at 309 (emphasis added). While the Defendants contend they do not use any of the easement areas in question, with the exception of the roads necessary for ingress and egress, we note, similar to *Lake Toxaway*, a portion of Defendants' easement is, indeed, used. Furthermore, although the Defendants may not currently use *some* of the easement areas, as easements appurtenant, Defendants' rights to these areas will run with the land and add value to Defendants' property. *Shear*, 107 N.C. App. at 161, 418 S.E.2d at 846 (citation omitted). Thus, Defendants are conferred a benefit, even if they do not currently use *all* of the easement areas. In accordance with this Court's precedent, we hold Defendants, as property owners in Tanglewood West, possess a duty to maintain their easements located in Tanglewood West.[19]

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18. In contrast, the Tanglewood East and Tanglewood North plats depict the areas encompassed within the boundaries of their respective phases, which does not include these common areas.

19. We note the well-established rule governing enforcement of restrictive covenants imposing affirmative obligations on property owners. *See Allen v. Sea Gate Ass'n, Inc.*, 119 N.C. App. 761, 764, 460, S.E.2d 197, 199 (1995) (citing *Beech Mountain Prop. Ass'n, Inc. v. Seifart*, 48 N.C. App. 286, 295, 269 S.E.2d 178, 183 (1980)) ("Covenants that impose affirmative obligations on property owners are strictly construed and unenforceable unless the obligations are imposed 'in clear and unambiguous language' that is 'sufficiently definite' to

As stated *supra* in footnote 13, Plaintiff's revised calculations contain mathematical errors. Pursuant to our review of the record, Tanglewood West property owners' pro rata share for easements located in Tanglewood West is calculated by ascertaining the total cost of maintenance, specific to the easement areas located in Tanglewood West, and dividing that figure by the total number of lots in Tanglewood West and Windy Point Park.

As easements appurtenant, the rights and duties associated with the easement areas "attach[ ] to, pass[ ] with and [are] an incident of ownership of the particular land." *Shear*, 107 N.C. App. at 161, 418 S.E.2d at 846 (citation omitted). As noted *supra* in footnote 6, pursuant to an agreement between Plaintiff and the developer, lots retained by the developer were not assessed additional maintenance costs and were, therefore, excluded from the total number of lots used to calculate the pro rata maintenance costs. While this issue was not raised on appeal, it would seem this agreement does not alter the easement rights and duties imposed on the lots owned by the developer. Thus, while Plaintiff was free to enter into this agreement with the developer, developer lots should not be excluded from the total number of lots (just as the member lots were not excluded from the total number).

Furthermore, Defendants possess easement rights and duties for each lot owned. *See Claremont Prop. Owners Ass'n v. Gilboy*, 142 N.C. App. 282, 287, 542 S.E.2d 324, 327-28 (2001) (holding a real covenant that "run[s] with the land" and imposes an affirmative obligation to contribute to road maintenance attaches to both lots owned individually, and consolidation of lots into one lot "did not alter or negate the real

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assist courts in its application."). However, *Allen* dealt with restrictive covenants and is thus distinguished from the present case, which is in the context of easements. As previously noted, we are bound by our precedent pertaining to an easement holder's duty of maintenance.

We further note, over twenty years has elapsed during which Plaintiff assumed responsibility for maintaining the easement areas and did not enforce Defendants' duty of maintenance. One might speculate whether such conduct constituted wavier. *See Medearis v. Tr. of Meyers Park Baptist Church*, 148 N.C. App. 1, 12, 558 S.E.2d 199, 206-07 (2001) ("A waiver is implied when a person dispenses with a right 'by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right.'") (quoting *Guerry v. Am. Tr. Co.*, 234 N.C. 644, 648, 68 S.E.2d 272, 275 (1951)). Since this issue was not raised at trial or on appeal, it is unclear whether Defendants, pursuant to the plat, inquired what maintenance duties they would be charged with prior to acquiring their property. Conceivably, they would have been informed that this duty had been assumed by Plaintiff. However, the issue of waiver was not presented to this Court, and, thus, we do not address it. *See* N.C. R. App. P. 28(a) (2016) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

covenants that had previously attached to each lot"). While *Claremont* was in the context of a *real covenant* that attached to the land and not an *appurtenant easement*, the reasoning applies equally in this context, as both attach to or "run with the land."

In conclusion, the depiction of the streets, ditches, public areas, ICW water access, and boat ramp on the Tanglewood West plat is undisputed, and Plaintiff is entitled to judgment as a matter of law. As such, the trial court erred in denying Plaintiff's motion for summary judgment. We, therefore, remand to the trial court to calculate the amount owed by the landowners, in accordance with our opinion.

B. Judgment and Amended Judgment

[2] Plaintiff finally contends the trial court erred by granting judgment in favor of Defendants and denying its untimely amended motion for amended judgment. Because we hold the trial court erred in denying summary judgment, we need not address these issues on appeal.[20]

IV. Conclusion

For the foregoing reasons we reverse and remand to the trial court to enter an order consistent with this opinion and declare the amount of maintenance costs owed by Defendants to Plaintiff. To achieve this result, the trial court may, if it deems necessary, take additional evidence.

REVERSED AND REMANDED.

Judges DAVIS and MURPHY concur.

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20. We note the trial court properly denied Plaintiff's joint amended motion for judgment notwithstanding the verdict and motion to amend judgment. Pursuant to Rule 59(e), "[a] motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment." N.C. R. Civ. P. 59(e) (2016). Here, the trial court entered judgment on 7 March 2016. Plaintiff failed to comply with the time constraints pursuant to its amended motion for judgment notwithstanding the verdict and motion for amended judgment, filed 23 days after entry of judgment, on 31 March 2016.

We additionally note, while Plaintiff's notice of appeal references the denial of its motion for judgment notwithstanding the verdict, this issue is not presented in Plaintiff's brief. Once again, pursuant to Rule 28, "[t]he scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned." N.C. R. App. P. 28(a).

Furthermore, the trial court properly denied Plaintiff's motions for directed verdict and judgment notwithstanding the verdict as such motions are improper in nonjury trials. *See Whitaker v. Earnhardt*, 289 N.C. 260, 264, 221 S.E.2d 316, 319 (1976) (citation omitted) ("The motion for judgment n.o.v. must be preceded by a motion for a directed verdict which is improper in non-jury trials.").

VAN-GO TRANSPORTATION, INC., PLAINTIFF
v.
SAMPSON COUNTY, SAMPSON COUNTY BOARD OF COMMISSIONERS AND ENROUTE TRANSPORTATION SERVICES, INC., DEFENDANTS

No. COA16-849

Filed 1 August 2017

1. Penalties, Fines, and Forfeitures—injunction bond—temporary restraining order—voluntary dismissal of lawsuit—wrongful enjoinder—Blatt rule

The trial court did not err in an action regarding the award of a contract for transportation of area Medicaid patients by holding that defendant county and transportation service had been wrongfully enjoined by plaintiff transportation company's temporary restraining order, and thus, plaintiff was not entitled to the return of its $25,000 injunction bond. Plaintiff's voluntary dismissal of its lawsuit was equivalent to a decision by the trial court that plaintiff admitted it wrongfully enjoined defendants. The enjoining party may not avoid operation of the *Blatt* rule, determining when a party is entitled to the return of the bond, simply by asserting that the voluntary dismissal of the action was a business decision.

2. Penalties, Fines, and Forfeitures—injunction bond—wrongful temporary restraining order—lost profits—reasonable degree of certainty

The trial court did not err in an action regarding the award of a contract for transportation of area Medicaid patients by awarding $15,993.57 of a $25,000 injunction bond to defendant transportation service as damages for lost profits resulting from plaintiff transportation company's wrongful temporary restraining order where the evidence provided a reasonable degree of certainty for the amount.

3. Penalties, Fines, and Forfeitures—injunction bond—Medicaid patients transportation services

The trial court did not err in an action regarding the award of a contract for transportation of area Medicaid patients by awarding damages of $9,006.03 under a $25,000 injunction bond to defendant County for the difference between the amount it actually paid plaintiff transportation company and the amount it would have paid defendant transportation service to perform the same services if a temporary restraining order had not been issued. The existence of any obligation the County may have had to reimburse the State

for the $9,006.43 was not relevant to the County's entitlement to seek recovery of taxpayer funds that were wrongfully expended due to plaintiff's wrongful actions.

Appeal by plaintiff from order entered 12 May 2016 by Judge Gale M. Adams in Sampson County Superior Court. Heard in the Court of Appeals 9 February 2017.

The Charleston Group, by R. Jonathan Charleston, Jose A. Coker, and Quintin D. Byrd, for plaintiff-appellant.

Daughtry Woodard Lawrence & Starling, by W. Joel Starling, Jr., for defendant-appellee Sampson County.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Norwood P. Blanchard, III, for defendant-appellee EnRoute Transportation Services, Inc.

DAVIS, Judge.

This appeal requires us to once again examine the issue of when a defendant is entitled to recover on an injunction bond previously posted by the plaintiff after the plaintiff voluntarily dismisses the lawsuit. Plaintiff Van-Go Transportation, Inc. ("Van-Go") appeals from the trial court's order awarding damages to Sampson County (the "County") and EnRoute Transportation Services, Inc. ("EnRoute") (collectively "Defendants"). Because we conclude that the trial court properly ruled that Van-Go's voluntary dismissal was equivalent to an admission that it wrongfully enjoined Defendants, we affirm.

Factual and Procedural Background

From 1997 until 2013, the County contracted with EnRoute for the transportation of area Medicaid patients to and from appointments for medical services. During the period from July 2013 to June 2015, the County contracted with Van-Go to provide these transportation services. In February 2015, the County issued a Request for Proposals ("RFP") seeking bids from vendors to provide these services for the period between July 2015 and June 2017.

Among other requirements, the RFP instructed each bidder to (1) identify its insurer and show that it possessed a certain amount of insurance coverage; and (2) state the fixed cost per mile that it would charge the County for provision of the transportation services. Van-Go and

EnRoute each submitted proposals that the County deemed timely and responsive to the RFP.

Van-Go's bid identified its insurer and level of coverage and stated that its fixed cost per mile of service was $1.74. EnRoute's proposal did not identify its insurance carrier but stated that it would obtain the required insurance coverage if awarded the contract. In addition, it stated that its cost per mile of service was $1.54 "[p]lus a fuel surcharge of $.01 per mile for each $.05 increase over $3.95 per gallon (based on average daily price at Go Gas-Clinton)." On 6 April 2015, the Sampson County Board of Commissioners voted to award the Medicaid transportation services contract (the "Contract") to EnRoute based upon the terms specified in its bid.

On 29 June 2015, Van-Go filed its initial complaint against Defendants in which it requested monetary damages and injunctive relief for alleged violations of N.C. Gen. Stat. § 143-129 (which governs the procedure for awarding public contracts); 5 C.F.R. §§ 2635.101 and 2635.702 (which address conflicts of interest in contracts involving federal monies); and the due process clauses of the federal and state constitutions. These claims were premised upon Van-Go's contentions that the Contract should not have been awarded to EnRoute because (1) EnRoute's proposal was not responsive to the RFP in that it both failed to demonstrate that EnRoute had procured the required insurance coverage and did not provide a fixed cost per mile; and (2) a conflict of interest existed between the owners of EnRoute and the Director of the Sampson County Department of Social Services, who participated in the County's consideration of the bids.

The complaint included a request for a temporary restraining order ("TRO") pursuant to Rule 65 of the North Carolina Rules of Civil Procedure to enjoin EnRoute from performing under the Contract and to allow Van-Go to extend its then-existing contract with the County by continuing to provide transportation services at the cost-per-mile rate of $1.85 as specified in that agreement. A TRO hearing was held in Sampson County Superior Court on 29 June 2015 after which Judge W. Allen Cobb, Jr. issued a TRO granting Van-Go its requested relief pending the outcome of a preliminary injunction hearing. The TRO further directed Van-Go to post an injunction bond in the amount of $25,000.

Defendants subsequently filed a motion to dissolve the TRO on 13 July 2015. Following a hearing, Judge Charles H. Henry issued an order on 20 July 2015 denying Van-Go's request for a preliminary injunction and

granting Defendants' motion to dissolve the TRO. In its order, the court determined that Van-Go had not shown a likelihood of success on the merits because, *inter alia*, (1) EnRoute's bid substantially conformed to the specifications of the RFP; and (2) Van-Go failed to show that a conflict of interest had tainted the bidding process.

Following the entry of this order, Defendants removed the case to the United States District Court for the Eastern District of North Carolina based upon the federal questions presented in Van-Go's complaint. Van-Go subsequently filed an amended complaint that did not contain any claims arising under federal law. Based upon the lack of a federal question in the amended complaint, the federal court granted Van-Go's motion to remand the case to Sampson County Superior Court on 29 July 2015.

On 17 August 2015, EnRoute filed a motion to dismiss Van-Go's amended complaint in Sampson County Superior Court. On 10 December 2015 — while EnRoute's motion to dismiss was pending — Van-Go filed a voluntary dismissal of its lawsuit without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. Van-Go subsequently filed a motion on 1 February 2016 requesting the release of the $25,000 injunction bond it had posted in connection with the TRO. On 4 February 2016, EnRoute submitted an objection to Van-Go's motion along with a motion of its own seeking an award of damages in the full amount of the bond on the ground that EnRoute had been wrongfully enjoined. On 18 March 2016, the County filed a similar motion.

A hearing was held before the Honorable Gale M. Adams on 21 March 2016. Judge Adams issued an order on 12 May 2016 denying Van-Go's motion for release of the bond and awarding Defendants the proceeds of the bond. In its order, the trial court allocated $15,993.57 of the $25,000 to EnRoute and $9,006.43 to the County. Van-Go filed a timely notice of appeal from this order.

Analysis

Van-Go raises several issues on appeal. First, it asserts that the $25,000 injunction bond should have been released to Van-Go. Alternatively, it asserts that even if EnRoute was entitled to recover some portion of the bond, EnRoute failed to provide sufficient evidence of the damages it had incurred so as to warrant the trial court's award of $15,993.57. Finally, Van-Go argues that the trial court erred in awarding any amount of damages to the County because all monies at issue belonged to the State rather than the County.

I. Determination that Defendants Were Wrongfully Enjoined

[1] Pursuant to Rule 65(c), a party who obtains a TRO or preliminary injunction must post a security bond. *See* N.C. R. Civ. P. 65(c) (providing that, with limited exceptions, "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."). In reviewing a trial court's judgment concerning the disposition of an injunction bond, "[w]e consider whether the trial court's findings of fact and conclusions of law are sufficient to support the judgment." *Allen Indus., Inc. v. Kluttz*, __ N.C. App. __, __ 788 S.E.2d 208, 209 (2016).

In its 12 May 2016 order, the trial court made the following findings of fact in determining that Van-Go was not entitled to the return of its $25,000 injunction bond:

> 26. On December 10, 2015, [Van-Go] filed a Notice of Voluntary Dismissal without prejudice pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure. The Notice of Dismissal was unconditional, in that it was not stipulated as pursuant to Rule 41(a)(1)(ii) of the North Carolina Rules of Civil Procedure.
>
> . . . .
>
> 30. The Court finds that, as a result of the TRO entered on June 29, 2015, the County and Enroute were restrained from performing under the Contract, which would have taken effect on July 1, 201[5], for a period of twenty (20) days.

The trial court proceeded to enter the following pertinent conclusion of law:

> 4. The Notice of Voluntary Dismissal without prejudice filed by [Van-Go] in this matter on or about December 10, 2015, which was unstipulated, is equivalent to a finding that the County and Enroute were wrongfully restrained by the entry of the TRO on June 29, 2015.

(Citation omitted.)

In determining whether a party has been wrongfully enjoined, courts must analyze the issue in a manner "consistent with the very purpose of the bond[,] which is to require that the plaintiff assume the

risks of paying damages he causes as the price he must pay to have the extraordinary privilege of provisional relief." *Indus. Innovators, Inc. v. Myrick-White, Inc.*, 99 N.C. App. 42, 50, 392 S.E.2d 425, 431 (citation and quotation marks omitted), *disc. review denied*, 327 N.C. 483, 397 S.E.2d 219 (1990); *see also Leonard E. Warner, Inc. v. Nissan Motor Corp. in U.S.A.*, 66 N.C. App. 73, 76, 311 S.E.2d 1, 3 (1984) ("The purpose of the security requirement is to protect the restrained party from damages incurred as a result of the wrongful issuance of the injunctive relief." (citation omitted)).

It is well established that "no right of action accrues upon an injunction bond until the court has finally decided that plaintiff was not entitled to the injunction, or until something occurs equivalent to such a decision." *M. Blatt Co. v. Southwell*, 259 N.C. 468, 471, 130 S.E.2d 859, 861 (1963) (citation and quotation marks omitted). The defendant has the burden of proof on the issue of whether it is entitled to recover under the bond. *Id.* at 473, 130 S.E.2d at 862.

In the present case, Defendants do not contend that the trial court expressly determined that Van-Go had not been entitled to the 29 June 2015 TRO.[1] Rather they contend that Van-Go's voluntary dismissal of its lawsuit was equivalent to a decision by the trial court that Van-Go was not entitled to the TRO.

The seminal case on this issue is *Blatt*, in which our Supreme Court articulated the following rule:

> *[T]he voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful*, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought.
>
> When, however, the dismissal of the action is by an amicable and voluntary agreement of the parties, the same is not a confession by the plaintiff that he had no right to the

1. We note that a trial court's subsequent refusal to grant a preliminary injunction to a plaintiff does not, in itself, constitute a determination that the defendant was wrongly enjoined by the earlier issuance of a TRO. *See Blatt*, 259 N.C. at 471, 130 S.E.2d at 861 (holding that trial court's determination that plaintiff was not entitled to continuation of TRO did not constitute ruling that TRO had been wrongfully issued given that trial court failed to make any "recital, finding or adjudication that plaintiff was not entitled to the temporary restraining order during the period it was in effect").

> injunction granted, and does not operate as a judgment to that effect.

Id. at 472, 130 S.E.2d at 862 (internal citations and quotation marks omitted and emphasis added). Thus, *Blatt* distinguished between, on the one hand, a plaintiff's voluntary dismissal of an action without conditions and, on the other hand, a plaintiff's voluntary dismissal that is conditioned upon an agreement between the plaintiff and the defendant. *Blatt* makes clear that the former category of voluntary dismissals entitles the defendant to recovery on the injunction bond whereas the latter category does not.

Here, there was no "amicable" or "voluntary" agreement between Van-Go, the County, and EnRoute at the time Van-Go dismissed its lawsuit. Instead, Van-Go voluntarily, without any promise, consideration, or involvement of Defendants, dismissed its lawsuit "as to all defendants" on 10 December 2015. Due to the voluntary, unilateral dismissal of its lawsuit, Van-Go "is held to have confessed that [it] was not entitled to the equitable relief sought" by the 29 June 2015 TRO. *Id.*

North Carolina courts have recognized one narrow exception to *Blatt's* general rule that a voluntary and unconditional dismissal is deemed to be an admission by the plaintiff that it wrongfully enjoined the defendant. This exception applies in instances in which a plaintiff dismisses a claim that has become legally moot. In *Democratic Party of Guilford County v. Guilford County Board of Elections*, 342 N.C. 856, 467 S.E.2d 681 (1996), the plaintiffs filed suit to compel the Guilford County Board of Elections to extend voting hours on Election Day in November 1990. The trial court issued a TRO directing the board to keep polling places open for an additional hour. *Id.* at 858, 467 S.E.2d at 682-83. Approximately one month later, the board moved to vacate the TRO and sought damages for having been wrongfully enjoined. *Id.* at 858, 467 S.E.2d at 683. A few hours later, the plaintiffs filed a voluntary dismissal of the action. The trial court denied the board's request for damages on the grounds that the TRO was no longer in existence and the board had failed to demonstrate that it was wrongfully enjoined. *Id.* at 859, 467 S.E.2d at 683.

On appeal to the Supreme Court, the board cited *Blatt* to support its contention that the plaintiffs' dismissal of their action "constituted a *per se* admission of wrongful restraint which automatically entitled [the board] to damages." *Id.* at 861, 467 S.E.2d at 684. The Court rejected this argument, explaining that the plaintiffs' dismissal of their action was in effect a "legal nullity" given that their complaint "sought no relief

other than the temporary restraining order, and that order expired, at the latest, ten days after [the trial court] entered it." *Id.* at 862, 467 S.E.2d at 685.

Another application of the mootness exception occurred in *Allen Industries*. In that case, the plaintiff employer sued a former employee for breaching a covenant not to compete contained in her employment contract by working for a direct competitor and by improperly using the plaintiff's customer data in that new position. *Allen Indus.*, __ N.C. App. at __, 788 S.E.2d at 209. The trial court granted the plaintiff's motion for a preliminary injunction prohibiting the defendant from working for the competitor through March 2014 — the end of the noncompetition period specified in the agreement. *Id.* at __, 788 S.E.2d at 209.

The defendant appealed the preliminary injunction order to this Court, and we dismissed the appeal as moot because the period of the covenant not to compete had expired. *Id.* at __, 788 S.E.2d at 209. Following our remand to the trial court, the plaintiff voluntarily dismissed its action. The defendant then moved for damages on the ground that she had been wrongfully enjoined. The trial court denied the motion on the basis that the defendant's actions had, in fact, violated the covenant not to compete. *Id.* at __, 788 S.E.2d at 209.

On a second appeal to this Court, the defendant argued that the trial court should have treated the plaintiff's voluntary dismissal as an admission that it had wrongfully enjoined her. *Id.* at __, 788 S.E.2d at 209. We disagreed, explaining that "the dismissal was taken *only after there was no longer any need to maintain the case* because the covenant not to compete had expired by its own terms." *Id.* at __, 788 S.E.2d at 210 (emphasis added). Therefore, based on the fact that the case had become moot before the voluntary dismissal was taken, we affirmed the trial court's ruling. *Id.* at __, 788 S.E.2d at 211.

Here, the trial court specifically concluded that "[t]he Notice of Voluntary Dismissal without prejudice filed by [Van-Go] in this matter on or about December 10, 2015, which was unstipulated, is equivalent to a finding that the County and Enroute were wrongfully restrained by the entry of the TRO on June 29, 2015." (Citation and quotation marks omitted.) Van-Go does not dispute the trial court's finding that its dismissal of this action was voluntary and without conditions. However, Van-Go argues that the mootness exception to the *Blatt* rule is applicable here on the theory that its lawsuit had effectively become moot once its request for a preliminary injunction was denied. To support this position, Van-Go's president, Azzam Osman, testified as follows in an affidavit submitted by Van-Go to the trial court:

> Van-Go's decision to discontinue the present litigation was consistent with its responsible financial business practices, taking into consideration the cost of further litigation, the profit that would be gained on the remainder of the contract, and the time that would be remaining on the contract by the time that the case would come to a final resolution.

Essentially, Van-Go asks us to recognize a "constructive mootness" doctrine premised upon its assertion that it dismissed its lawsuit based upon a "fiscally sound business decision." Recognition of such an exception, however, would be inconsistent with both our precedent and the purpose of Rule 41. Unlike in *Allen Industries*, where "the dismissal was taken only after there was no longer any need to maintain the case[,]" *id.* at __, 788 S.E.2d at 210, or in *Democratic Party of Guilford County*, where the plaintiffs' dismissal came after receiving the only relief they sought, 342 N.C. at 862, 467 S.E.2d at 685, Van-Go does not actually assert that its claims were legally moot at the time it dismissed its lawsuit. Rather, as Osman's above-quoted testimony demonstrates, Van-Go is making the qualitatively different argument that the value of the case going forward would have been diminished in comparison to the costs of litigation.

Van-Go points to no North Carolina legal authority — nor are we aware of any — holding that the enjoining party may avoid operation of the *Blatt* rule simply by asserting that the voluntary dismissal of the action was a business decision. Indeed, the adoption of such an exception would swallow the general rule articulated in *Blatt* as virtually any plaintiff in this procedural posture could claim its voluntary dismissal was motivated by a cost-benefit analysis. Moreover, in addition to being unworkable, such an exception would not be "consistent with the very purpose of the bond[,] which is to require that the plaintiff assume the risks of paying damages he causes as the price he must pay to have the extraordinary privilege of provisional relief." *Indus. Innovators*, 99 N.C. App. at 50, 392 S.E.2d at 431 (citation and quotation marks omitted).

Thus, the general rule articulated in *Blatt* is controlling on the present facts. Accordingly, the trial court did not err in holding that Defendants had been wrongfully enjoined by Van-Go.

II. Award of Damages to Defendants

In its alternative argument, Van-Go contends that the specific awards to EnRoute and the County were improper albeit for different reasons. We address each of Van-Go's arguments in turn.

A. EnRoute's Damages

[2] Van-Go asserts that the trial court's award of $15,993.57 to EnRoute was not supported by proper evidence. "According to well-established North Carolina law, a party seeking to recover damages bears the burden of proving the amount that he or she is entitled to recover in such a manner as to allow the finder of fact to calculate the amount of damages that should be awarded to a reasonable degree of certainty." *Lacey v. Kirk*, 238 N.C. App. 376, 392, 767 S.E.2d 632, 644 (2014) (citation omitted), *disc. review denied*, __ N.C. __, 771 S.E.2d 321 (2015). In so doing, "absolute certainty is not required but evidence of damages must be sufficiently specific and complete to permit the [fact finder] to arrive at a reasonable conclusion." *Fortune v. First Union Nat'l Bank*, 323 N.C. 146, 150, 371 S.E.2d 483, 485 (1988) (citation and quotation marks omitted).

We have specifically applied this rule to the calculation of damages for lost profits. *See Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 223, 768 S.E.2d 582, 594 (2015) ("To recover lost profits, the claimant must prove such losses with 'reasonable certainty.' Although absolute certainty is not required, damages for lost profits will not be awarded based on hypothetical or speculative forecasts." (citation omitted)). "The amount of damages is generally a question of fact, but whether that amount has been proven with reasonable certainty is a question of law we review *de novo*." *Plasma Ctrs. of Am., LLC v. Talecris Plasma Res., Inc.*, 222 N.C. App. 83, 91, 731 S.E.2d 837, 843 (2012).

Here, the owner of EnRoute, Ricky Nelson Moore, submitted an affidavit to the trial court in which he set forth the basis for EnRoute's damages claim resulting from the TRO. Moore testified that EnRoute incurred revenue losses in the amount of $44,741.62 while the TRO was in effect. This figure was reached by multiplying the actual number of miles (29,053) for which Van-Go billed the County in connection with Medicaid transportation services provided during the time period in which the TRO was in effect by the rate ($1.54) to which EnRoute and the County agreed in the Contract.

Moore's affidavit then stated that EnRoute was able to avoid $20,918.00 in "variable costs (such as fuel and labor expenses)" that it would have incurred had the TRO not been in place and EnRoute actually performed the Contract during that time period. To support this figure, Moore explained that he "calculated that EnRoute's total fuel and labor expenses amount to approximately $.72 per mile, based on historical data (namely, our costs per mile during the past few months)."

Moore then subtracted these avoided costs ($20,918.00) from the lost revenue ($44,741.62) to arrive at a lost profits figure of $23,823.00.[2]

In response to Moore's affidavit, Van-Go filed the affidavit of Osman stating that, based upon Van-Go's operating costs during the month of July, "[i]t is very unlikely that EnRoute could provide 29,053 service miles at a rate of $1.54 per mile over [the period during which the TRO was in effect] and realize a profit in excess of ten thousand dollars[.]"

After holding a hearing on 21 March 2016, the trial court issued its order awarding damages in the amount of $15,993.57 to EnRoute. The trial court's order contained the following pertinent findings of fact:

> 30. [A]s a result of the TRO entered on June 29, 2015, the County and Enroute were restrained from performing under the Contract, which would have taken effect on July 1, 201[5], for a period of (20) days.
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> 31. According to the Affidavit of Ricky Nelson Moore, which relies in part upon information that is also contained in the Affidavit of Azzam Osman, Enroute incurred lost profits of $23,823.00 during the period from July 1, 2015 to July 20, 2015 as a result of the TRO.
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> . . . .
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> 35. The Court finds that, but for the issuance of the TRO, Enroute would have been able to perform its duties under the Contract beginning on July 1, 2015. Accordingly, Enroute has demonstrated, to the satisfaction of the Court, that it has sustained substantial lost revenues and profits as a result of the issuance of the TRO. The Court finds the affidavit testimony of Mr. Ricky Nelson Moore credible as to the amounts of lost revenues and profits.

The trial court then entered the following conclusion of law: "Enroute ha[s] established that, by reason of said wrongful restraint, [it has] incurred actual and substantial damages and, accordingly, [EnRoute is] entitled to a distribution of the bond proceeds." The trial court proceeded to award the sum of $15,993.57 to EnRoute.

On appeal, Van-Go contends that EnRoute failed to adequately support its calculation that its costs would have amounted to $0.72 per mile. Specifically, Van-Go faults EnRoute for failing to provide evidence other

2. Moore rounded down to the nearest dollar in arriving at this figure.

than Moore's affidavit that would support this figure and for basing the amount upon fuel and labor "costs per mile during the past few months" rather than costs during the time period covered by the TRO. Van-Go points out that Moore's affidavit was executed on 4 February 2016, meaning that the avoided costs figure was derived from costs incurred during the latter part of 2015 and early 2016 whereas the TRO was in place during July 2015. Van-Go states in its brief that "Moore's calculation does not take into account the difference in fuel price in July 2015 and the 'past few months.' "

As noted above, damages for lost profits may not be speculative. *See*, *e.g.*, *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 292 N.C. 557, 560, 234 S.E.2d 605, 607 (1977) (holding that party's mere statement of amount of losses "provides no basis for an award of [the party's] damages for lost profits, since any estimate of [the party's] expected profits must on the evidence presented be based solely upon speculation"); *Rankin v. Helms*, 244 N.C. 532, 538, 94 S.E.2d 651, 656 (1956) (ruling that party's bald statement of damages amount was "if not a mere guess, a statement of his mere opinion or conclusion as to the amount of damages he has suffered, where no proper basis for the receipt of such evidence had been shown"); *Iron Steamer, Ltd. v. Trinity Rest., Inc.*, 110 N.C. App. 843, 847, 431 S.E.2d 767, 770 (1993) ("North Carolina courts have long held that damages for lost profits will not be awarded based upon hypothetical or speculative forecasts of losses.").

The risk of speculative lost profits calculations is greatest in situations where parties must estimate revenues that they likely would have earned in an uncertain industry with numerous variables. *See*, *e.g.*, *id.* at 849, 431 S.E.2d at 771 ("[I]n an unestablished resort restaurant context, the relationship between lost profits and the income needed to generate such lost profits is peculiarly sensitive to certain variables including the quality of food, quality of service, and the seasonal nature of the business. Therefore, proof of lost profits with reasonable certainty under these circumstances requires more specific evidence and thus a higher burden of proof.").

The present case, however, deals not with an inherently uncertain forecast of profits but rather with known historical facts. Here, the expected revenue was both precise and undisputed as it was based upon the per-mile rate ($1.54) set forth in the Contract and the actual number of miles (29,053) Van-Go billed to the County during the TRO period. Moreover, Moore specified his basis for the other key variable, the avoided costs figure, stating that EnRoute's records reflected a cost-per-mile rate during "the past few months" of $0.72, which included

fuel and labor costs. We are not convinced that the discrepancy in time frames Van-Go attempts to rely upon is material under the facts of this case given (1) the relatively close proximity of these two time frames; and (2) the fact that although the total amount of damages for lost profits stated in Moore's affidavit was $23,823.00, the trial court awarded EnRoute only $15,993.57.

We have never held that a party is required to meet a formulaic standard in order to satisfy its burden of affixing damages with reasonable certainty. Rather, we have previously explained that generally "[e]xpert testimony and mathematical formulas are not required to meet the burden of proof concerning damages." *Hudgins v. Wagoner*, 204 N.C. App. 480, 492, 694 S.E.2d 436, 446 (2010), *appeal dismissed and disc. review denied*, 365 N.C. 88, 706 S.E.2d 250 (2011).

Our decision in *United Leasing Corp. v. Guthrie*, 192 N.C. App. 623, 666 S.E.2d 504 (2008) is instructive. In that case, the damages issue concerned the value of merchandise in a large box truck that was being transferred from one store to another. At trial, a witness testified that the aggregate value of this merchandise was $150,000. The witness based this assessment upon his professional background, which included moving similar inventory during the process of setting up new stores and his "familiarity with the inventory at the various store locations and its pricing." *Id.* at 628, 666 S.E.2d at 508. On appeal, we held that his testimony was properly admitted lay opinion testimony as it "tended to show that he had knowledge of the property and some basis for his opinion regarding the value of said property at the time of its conversion." *Id.* at 629, 666 S.E.2d at 508 (citation, quotation marks, and brackets omitted). We then determined that this "lay opinion testimony was sufficient to establish the aggregate value of the converted inventory." *Id.* at 631-32, 666 S.E.2d at 510.

Here, we conclude that Moore's testimony provided a sufficient basis from which the trial court could assess EnRoute's damages with a reasonable degree of certainty. In fixing the specific amount of damages, the trial court was permitted to determine the appropriate weight to be accorded to the evidence before it. *See CDC Pineville, LLC v. UDRT of N.C., LLC*, 174 N.C. App. 644, 655, 622 S.E.2d 512, 520 (2005) ("If there is a question regarding the reliability of the evidence presented to support an award of damages, the questions should go to the weight of the evidence[.]"), *disc. review denied*, 360 N.C. 478, 630 S.E.2d 925 (2006). Accordingly, we are unable to conclude that the trial court committed reversible error in its award of damages to EnRoute.

B. Damages Awarded to County

[3] Finally, Van-Go argues that the trial court erred in awarding damages under the injunction bond to the County because the issuance of the TRO did not actually cause the County to suffer any damages. Instead, Van-Go contends, any additional monies paid by the County during the period in which the TRO was in effect belonged to the State given the manner in which funding for local Medicaid programs is administered. This argument lacks merit.

In its verified response in opposition to Van-Go's motion for return of the bond, the County stated that during the TRO period, it paid Van-Go a total of $53,748.05 for Medicaid transportation services. This figure was based on a total of 29,053 miles driven under the then-existing contract rate of $1.85 per mile. The County's response also stated that had the TRO not been in place and EnRoute been permitted to perform the Contract, the County would have paid EnRoute $1.54 per mile for these 29,053 miles, resulting in a total of $44,741.62. Therefore, according to the response, the County was damaged in the amount of $9,006.43 — the difference between the amount it actually paid Van-Go and the amount it would have paid EnRoute to perform the same services had the TRO not been issued.

The trial court made the following pertinent findings of fact on this issue:

> 32. [T]he verified Opposition submitted by the County and Board clearly establishes that the County was required to pay [Van-Go] a rate of $1.85 per mile, which was the rate under the prior Medicaid Transportation Contract, as opposed to the $1.54 per mile rate that the County would have been required to pay Enroute for the same number of miles.
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> 33. It is undisputed based upon the Affidavits and other filings before the Court that [Van-Go] billed the County, through its DSS, for 29,053 miles during the period from July 1, 2015 to July 20, 2015 and that these miles were billed at the prior contract rate of $1.85 per mile.
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> 34. Accordingly, the County incurred $9,006.43 in Medicaid Transportation costs that it would not otherwise have had to pay as a result of the TRO. The fact that the funds originated with DHHS does not alter this fact, and the Court finds that the County has a duty to seek to

> recover the above amount, despite the fact that the funds may have originated with DHHS.

The trial court therefore awarded the County the full $9,006.43 it sought. On appeal, Van-Go does not challenge the calculation of this figure but rather asserts that the *County* was not damaged by paying out the extra funds because (1) the County is "simply a conduit for the State" in that the State provided the County the funds to pay Van-Go for the transportation services; and (2) the County does not possess a legal duty to recoup the funds on behalf of the State.

Van-Go has failed to cite any legal authority showing that the County — after being sued, wrongfully enjoined, and forced to pay out funds to Van-Go — had no right to collect from Van-Go the monetary damages that Van-Go caused to the County's Medicaid transportation program. Pursuant to applicable law, counties bid out, award, and administer contracts for Medicaid transportation services and cause public monies to be paid to vendors performing those contracts. The existence of any obligation that the County may ultimately have to reimburse the State for the $9,006.43 it was awarded is not relevant to the question of whether the County was entitled to seek recovery of taxpayer funds that were wrongfully expended due to the actions of Van-Go. Accordingly, Van-Go has failed to show that the award of damages to the County was improper.

Conclusion

For the reasons stated above, we affirm the trial court's 12 May 2016 order.

AFFIRMED.

Chief Judge McGEE and Judge MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 1 AUGUST 2017)

ANDERS v. UNIVERSAL LEAF N. AM. No. 16-910-2	N.C. Industrial Commission (X43019)	Affirmed in part; Vacated and remanded in part
COX v. CITY OF KANNAPOLIS No. 16-1183	Cabarrus (15CVS1805)	Affirmed
CRAZIE OVERSTOCK PROMOTIONS, LLC v. McVICKER No. 16-932	Bladen (16CVS204)	Affirmed
EMERALD PLACE DEV. PROPS., LLC v. HORNE No. 16-1138	Pitt (14CVS2381)	Affirmed
IN RE A.C. No. 17-181	Ashe (15JA15) (15JA16) (15JA17) (15JA18) (15JA19) (15JA20)	Affirmed in Part, Reversed in Part and Remanded
IN RE A.L.W. No. 17-157	Beaufort (15JA59)	Affirmed
IN RE B.M.C.H. No. 17-105	Davidson (14JT69)	Affirmed
IN RE E.R. No. 16-1320	Watauga (14JT61)	Affirmed
IN RE ESTATE OF GARNER No. 17-104	Vance (16E7)	Affirmed
IN RE J.C.C. No. 17-163	Mecklenburg (16JA266)	Affirmed
IN RE J.M.N. No. 17-129	Guilford (14JT212) (14JT319)	Affirmed
IN RE K.A.R. No. 17-56	Iredell (14JT213)	Affirmed
IN RE M.G.S. No. 17-238	Harnett (14JT98)	Affirmed

IN RE P.D. No. 16-1317	Chatham (14JT4) (14JT5)	Vacated
IN RE R.S. No. 17-204	Ashe (10JA6) (15JA35)	Affirmed in Part and Dismissed in Part
PATTON v. CHARLOTTE- MECKLENBURG HOSP. AUTH. No. 16-812	Mecklenburg (11CVS18041)	Dismissed in Part; Affirmed in Part
STATE v. BENTON No. 16-1149	Durham (15CRS3445-46) (15CRS58952) (16CRS1821)	Affirmed
STATE v. ELLIS No. 16-938	Wayne (13CRS50677) (13CRS50679)	Vacated and Remanded.
STATE v. FELLNER No. 16-1092	Wake (14CRS222735-37)	No Error
STATE v. GALLEGOS No. 16-1058	Wake (14CRS222622)	No Error
STATE v. HARRIS No. 16-1304	Edgecombe (13CRS53358) (13CRS53359) (14CRS50829)	NO PREJUDICIAL ERROR.
STATE v. HOWELL No. 16-1172	Wake (13CRS231273)	Vacated and Remanded.
STATE v. MADDUX No. 16-1248	Johnston (15CRS54467) (15CRS55398)	New Trial
STATE v. PASTORE No. 16-1205	Wake (12CRS201966-69) (12CRS202498-99)	No Error
THOMPSON v. GERLACH No. 16-770	Durham (07CVD4521)	Affirmed
U.S. BANK NAT'L ASS'N v. PINKNEY No. 15-797-2	Forsyth (14CVS5603)	Reversed

VECELLIO & GROGAN, INC. v. N.C. DEP'T OF TRANSP. No. 16-670	Wake (12CVS7420)	Affirmed; Remanded for Correction of Clerical Error
WHITLEY v. WHITLEY No. 16-1234	Edgecombe (14CVS803)	Affirmed
WOLFE v. WOLFE No. 16-57	Catawba (10CVD3703)	Vacated and remanded for new trial