255 N.C. App.—No. 2 Pages 217-450

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 25, 2019

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COURT OF APPEALS

CASES REPORTED

FILED 5 SEPTEMBER 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ALIENATION OF AFFECTIONS

Alienation of Affections—criminal conversation—due process—not offended—North Carolina's common law causes of action for alienation of affections and criminal conversation do not violate the Fourteenth Amendment. Adult individuals have a constitutionally protected interest in engaging in intimate sexual activities free of governmental intrusion or regulation, but the State has a legitimate interest in protecting the institution of marriage and deterring conduct that would cause injury to one of the spouses. **Malecek v. Williams, 300.**

Alienation of Affections—criminal conversation—free speech—no violation—Defendant's rights to free speech and expression were not violated by claims for alienation of affections and criminal conversation where defendant and plaintiff's wife had an affair. An extra-marital relationship can implicate protected speech and expression, but theses torts exist for the unrelated reason of remedying the harms that result from breaking the marriage vows. **Malecek v. Williams, 300.**

EMPLOYER AND EMPLOYEE—Continued

Employer and Employee—retaliation—42 U.S.C. § 1981 and § 1983 claims— The trial court properly granted summary judgment for Durham a police officer's claim under 42 U.S.C. § 1983 that rose from his being passed over for promotion, allegedly in retaliation for mentioning the perception of racial discrimination by African-American officers to the police chief. Plaintiff did not direct the appellate courts to any policy or regulation that caused or encouraged the retaliation. **Forbes v. City of Durham, 255.**

Employer and Employee—retaliation—being passed over for promotion— Summary judgment was properly granted for a police chief, a city manager, and the City of Durham on a claim under the North Carolina Constitution arising from plaintiff being passed over for promotion, allegedly in retaliation for reporting racial concerns. Plaintiff did not provide support for his argument that there was a claim available under Article I, Section 19 of the State Constitution. **Forbes v. City of Durham, 255.**

Employer and Employee—retaliation—police chief—promotion decision— Summary judgment was properly granted for a police chief on claims under 42 U.S.C. § 1981 and 1983 by one of his officers who was passed over for promotion. Plaintiff lacked sufficient evidence of a connection between his protected actions and the decision to pass him over for promotion. **Forbes v. City of Durham, 255.**

Employer and Employee—wrongful retaliation—summary judgment—The trial court properly granted summary judgement for the City of Durham in a claim for employment retaliation under Title VII by a police officer passed over for promotion. While the officer contended that his comments to the police chief about perceived racial discrimination by African American officers were protected activities that caused the adverse action of changing the hiring process and passing him over for promotion, there must be a direct link connecting the comments to the promotion decision that is more than speculation. Moreover, a non-retaliatory reason for the promotion decision could be demonstrated. **Forbes v. City of Durham, 255.**

EVIDENCE

Evidence—expert witness testimony—sexual abuse—children delay disclosure of sexual abuse—reasons for delay—reliability test—Rule 702(a)—The trial court did not abuse its discretion in a child sex abuse case by allowing an expert witness in clinical social work specializing in child sexual abuse cases to testify that it was not uncommon for children to delay the disclosure of sexual abuse and by allowing the witness to provide possible reasons for delayed disclosures where the testimony satisfied the three-prong reliability test under N.C.G.S. § 8C-1, Rule 702(a). Defendant failed to demonstrate that his arguments attacking the principles and methods of the testimony were pertinent in assessing its reliability. **State v. Shore, 420.**

Evidence—felony child abuse—nurse practitioner testimony—vouching for victim's credibility—The trial court did not commit plain error in a child abuse case by concluding a nurse practitioner's testimony relating the victim's disclosure about how his injuries occurred and who caused the injuries was not improper vouching. The nurse was describing her process of gathering necessary information to make a medical diagnosis, and further, there was no prejudice based on the overwhelming evidence of defendant's guilt, including the testimony of three eyewitnesses. **State v. Prince, 389**.

The declaration clearly obligated the association and the evidence clearly created a genuine issue or material fact regarding the developer's breach of contract and good faith claims. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners, 236.**

Real Property—condos—clubhouse—contractual obligation—The question of whether a homeowners association was obligated to pay clubhouse dues to the developer under a Declaration was contractual in nature and not a matter of real or personal covenants. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

Real Property—condos—clubhouse dues—In an action arising from the refusal of a homeowners association to collect and remit clubhouse dues to the developer after the homeowners association had gained control of the development, the argument that the association had no duty to collect the clubhouse dues was rejected. The Legislature did not intend N.C.G.S § 47F-3-102 to limit the power of a planned community's association, but to provide additional powers if the declaration is silent on the point. Here, the 1999 Declaration specifically authorized the Association to assess clubhouse dues. Moreover, N.C.G.S. § 47F-3-102 authorized the imposition of charges for services provided to lot owners, such as providing access to and maintaining a clubhouse amenity. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

Real Property—condos—dispute with homeowners association—clubhouse dues—The trial court's dismissal of claims by a homeowners association against the developer concerning clubhouse dues was affirmed. The trial court concluded that the claims were time barred, but in fact the one-year limitation relied on by the trial court concerned amendments to an existing Declaration, not to a new declaration. Whether labelled an "amendment" or not, the declaration at issue here merged two former communities into a single planned community, which the Planned Community Act treats as terminating the former declarations and establishing a new declaration. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

Real Property—condos—homeowners association and developer—breach of fiduciary duty—The trial court correctly dismissed a counterclaim by a homeowners association against the members of a family who constituted the developer (excepting two members of the family who were an officer and director of the association). The developer's relationship with the homeowners association was contractual and parties to a contract do not become each other's fiduciaries. However, the officers and directors of the association owed a fiduciary duty to the association. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

Real Property—condos—homeowners association and developer—clubhouse dues—civil conspiracy—The trial court properly granted summary judgment for a homeowners association on the developer's civil conspiracy claim arising from a dispute over clubhouse dues. There was no allegation that the association conspired with any third party regarding the dues. The association, as a corporation, cannot conspire with itself. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

Real Property—condos—reformation of Declaration provisions—necessary parties—A homeowners association's counterclaim seeking reformation of its

Declaration provisions was properly dismissed. Any reformation order would necessarily affect the ownership interests of condo unit orders in certain common areas and they were necessary parities. Without all necessary parties, there was no authority to decide the reformation claim. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

Real Property—condos—status of ownership—A homeowners association was entitled to an order declaring that a 1999 Declaration recorded by the developer established a form of property ownership not recognized in North Carolina, and an order dismissing the association's counterclaim was reversed. While North Carolina's Condominium Act requires that the common areas be owned by the unit owners in common, here the homeowners association owned the common areas. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

SENTENCING

Sentencing—first-degree murder—resentencing—lack of jurisdiction—Supreme Court mandate not issued—The trial court lacked jurisdiction to resentence a sixteen-year-old defendant in a first-degree murder case where the mandate from the N.C. Supreme Court had not been issued. The judgment was vacated and remanded for resentencing. **State v. Seam, 417.**

UNFAIR TRADE PRACTICES

Unfair Trade Practices—condos—homeowners association and developer—clubhouse dues—The trial court erroneously dismissed a homeowners association's counterclaim for unfair and deceptive practices arising from a dispute with the developer. The purported misconduct took place while the developer controlled the association and was more properly classified as having taken place within a single entity rather than in commerce. **Conleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc., 236.**

WORKERS' COMPENSATION

Workers' Compensation—average weekly wage—per diem payments—in lieu of wages—The Industrial Commission did not err in a worker's compensation case in its determination of plaintiff's average weekly wage—specifically, the determination that per diem payments were in lieu of wages. This was a question of fact which was supported by the evidence, and the Court of Appeals was not free to conduct a de novo review. **Myres v. Strom Aviation, Inc., 309.**

Workers' Compensation—expert opinions—competent evidence—injuries causally related to workplace accident—The Industrial Commission did not err in a workers' compensation case by concluding that the expert opinions supported competent evidence to prove plaintiff employee's neck, hand, and wrist injuries were causally related to her workplace accident. The Commission is the sole judge of the credibility of witnesses and the weight to be given to their testimony. **Pine v. Wal-Mart Assocs., Inc., 321.**

Workers' Compensation—Parsons presumption erroneously applied—preponderance of evidence—additional medical conditions—causally related to workplace injury—Although the Industrial Commission erred in a workers'

compensation case by applying the *Parsons* presumption to a medical condition not listed on an employer's admission of compensability form, the error did not require reversal where the Commission also found that plaintiff employee had proved by a preponderance of the evidence that her additional medical conditions were causally related to her workplace injury. **Pine v. Wal-Mart Assocs., Inc., 321.**

Workers' Compensation—symphony violinist—average weekly wage—Of the five methods of determining the average weekly wage of an injured symphony violinist, method five applied because none of the other statutory reasons were appropriate. The violinist was employed for 36 weeks in the year rather than 52 weeks; applying the methods intended for employment for less than 52 weeks would result in putting the violinist in a better position than before her injury or agreed by the parties to be inapplicable. **Frank v. Charlotte Symphony, 269.**

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.

BRASWELL v. MEDINA

[255 N.C. App. 217 (2017)]

PHILLIP BRASWELL, PLAINTIFF
v.
BRANDON MEDINA, JOHN W. DENTON, MICHAEL A. WHITLEY, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES; THE CITY OF ROCKY MOUNT, N.C. AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA17-33

Filed 5 September 2017

1. Appeal and Error—preservation of issues—claims not addressed in principal brief

Claims not addressed in the appellant's brief were abandoned.

2. Civil Rights—42 U.S.C. § 1983—malicious prosecution

In a claim under 42 U.S.C. § 1983 for malicious prosecution, the complaint adequately alleged lack of probable cause for the underlying arrest and prosecution on the charge of obtaining property by false pretenses. Plaintiff had borrowed money from family members to invest in the stock market, then lost the money in an economic crash, but the evidence possessed by the officers actually exculpated plaintiff.

3. Civil Rights—42 U.S.C. § 1983—malicious prosecution—causation—decision of prosecutors and grand jury

In a 42 U.S.C. § 1983 claim for malicious prosecution, the intervening decision of the prosecutor or the grand jury in the underlying criminal prosecution did not immunize the officers from liability.

4. Malicious Prosecution—prosecution for false pretenses—probable cause fabricated

The trial court erred by dismissing plaintiff's claims for malicious prosecution for false pretenses arising from loans from relatives and stock market investments. Plaintiff alleged that the prosecuting officers not only lacked probable cause but also concealed and fabricated evidence in order to cause him to be prosecuted.

5. Obstruction of Justice—civil claim—actions in underlying criminal case

The trial court properly dismissed plaintiff's obstruction of justice claims that arose from a prosecution for false pretensions following loans from relatives and stock market losses. Plaintiff sought to hold the prosecuting officers civilly liable for obstruction of justice solely for their actions taken in the course of his criminal

prosecution, not for obstruction of plaintiff's ability to obtain a legal remedy.

6. Constitutional Law—state constitutional claim—adequate remedy—action against city—immunity claim not resolved

The dismissal of defendant's state constitutional claim against the City of Rocky Mount was premature where the City had raised immunity claims that had not been adjudicated, so that it was not clear whether plaintiff would have an adequate state remedy.

Appeal by plaintiff from order entered 24 August 2016 by Judge Allen Baddour in Nash County Superior Court. Heard in the Court of Appeals 17 May 2017.

Ekstrand & Ekstrand LLP, by Robert C. Ekstrand, for plaintiff-appellant.

Poyner Spruill LLP, by J. Nicholas Ellis, for defendants-appellees Medina, Denton, Whitley, and the City of Rocky Mount.

Attorney General Joshua H. Stein, by Special Deputy Attorney General David J. Adinolfi II, for defendant-appellee State of North Carolina.

DAVIS, Judge.

In this appeal, we consider whether the plaintiff's complaint stated valid claims for relief both under 42 U.S.C. § 1983 and North Carolina common law based on his allegations that the defendants caused him to be arrested and indicted without probable cause by concealing and fabricating evidence. Plaintiff Phillip Braswell appeals from the trial court's order granting the motions to dismiss of Brandon Medina, John W. Denton, Michael A. Whitley and the City of Rocky Mount (collectively the "Rocky Mount Defendants") and the State of North Carolina pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. For the following reasons, we affirm in part and reverse in part.

Factual and Procedural Background

We have summarized — and, at times, quoted — the pertinent facts below using Plaintiff's statements from his complaint, which we treat as true in reviewing the trial court's order granting a motion to dismiss under Rule 12(b)(6). *Feltman v. City of Wilson*, 238 N.C. App. 246, 247, 767 S.E.2d 615, 617 (2014).

After working at a Ford dealership for 19 years, Braswell left that job to become a self-employed investor in 1997. Braswell's uncle, William Greene, subsequently loaned Plaintiff $10,000 in 1998 for investment purposes. The loan was memorialized by an agreement in which Braswell agreed to repay the loan at an interest rate of 10%. Between 1998 and 2009, this loan was extended or "rolled over" each year by agreement between Mr. Greene and Braswell. At no time was Braswell a licensed investment advisor, and he did not hold himself out to be one.

Between 1998 and 2006, Mr. Greene made additional loans to Braswell.[1] Braswell's aunt, Ola Beth Greene, also lent him money during this time period.

In August or September of 2009, the Greenes requested repayment of one of the loans, and Braswell responded that he "did not have the money, but he was working on it." In December of that year, Braswell explained to the Greenes that he could not repay the loans because their money had been "lost along with [Braswell's] own money in a collapse of investment markets that finance experts called a 'global financial meltdown.' "

On 4 February 2010, the Greenes reported the loss of these funds — which they claimed totaled $112,500 — to Officer Medina of the Rocky Mount Police Department. Officer Medina subsequently secured a search warrant for Braswell's home, which was executed on 9 February 2010. During the search, Officer Medina seized computers; thumb drives; tax returns for the years 2003 through 2008; financial statements from RBC, Bank of America, First South, Fidelity Investments, and MBNA; delinquency notices; and two blank Fidelity Investments checkbooks.

These records revealed that Braswell's account with Fidelity Investments had contained over $100,000 in early 2008, but by the end of that year "the financial crisis had taken its toll on [Braswell]'s investments and the account had essentially no value." None of the records "seized from [Braswell's] home tended to show that [he] had done anything with the money he received from the Greenes other than invest it in legitimate financial institutions."

Officer Medina proceeded to arrest Braswell pursuant to an arrest warrant he had obtained. After being read his *Miranda* rights, Braswell gave the following statement to Officer Medina:

> I began investing in stocks to try to make a living in late 1998. I had mentioned to my uncle, Willie Greene, that

1. At some point, the interest rate on the loans was reduced to 6%.

> I could pay him higher interest than a CD so he started investing some money with me too. I took this money and invested [in] stocks along with my own. I did real well for a while but then things started to change. I started losing money. I began to borrow from real estate [] my mom owned with her permission to recoup my losses. . . . Eventually I had lost my money along with my mom's and my uncle's and aunt's. In May 2008, I had an accident [from] which I was expecting a settlement. I haven't received the settlement yet, but between that [and] work I was expecting to make some or all of what I . . . owed my uncle and aunt. They had been rolling over their investments with me and I thought I would have several years to come up with the money. In September 2009, Willie said that he wanted to cash in one of his investments. I asked him to wait a while and I was going to try to come up with money but didn't. My aunt asked me on December 8, 2009 about their investments and I told them that I had lost their money. I had taken my money that I borrowed from my mom's property and some other money she had to try to invest to rectify the situation. But sadly it went from bad to worse when I had lost that too.

(Brackets and ellipses in original.)

In addition to this statement, Braswell "provided [Officer] Medina [with] records, documents and electronically stored information proving that he invested his and the Greenes' funds in legitimate financial institutions." Nevertheless, Officer Medina instituted criminal proceedings against Braswell, which ultimately resulted in a grand jury indicting him on 5 April 2010 on the charge of obtaining property by false pretenses in excess of $100,000.

Specifically, the indictment alleged that Braswell "unlawfully, willfully and feloniously did knowingly and designedly with the intent to cheat and defraud, obtain $112,500.00 in U.S. Currency from William Irvin Green [sic] and Ola Beth Green [sic], by means of a false pretense which was calculated to deceive and did deceive" — the false pretense being that the "property was obtained by [Braswell] guaranteeing a six percent return on all invested monies from William Irvin Green [sic] and Ola Beth Green [sic], *when in fact [Braswell] did not invest the monies into legitimate financial institutions*." (Emphasis added.)

Braswell was held in pre-trial detention until his trial on 6 February 2012. He was convicted and sentenced to 58 to 79 months imprisonment. On appeal, this Court vacated his conviction, explaining as follows:

> [T]he "false pretense" or "false representation" which [Braswell] allegedly made to the Greenes consisted of a statement that [Braswell] was borrowing money from the Greenes for investment-related purposes despite the fact that he did not actually intend to invest the money that he received from them in any "legitimate financial institution." A careful review of the record developed at trial reveals the complete absence of any support for this allegation.

State v. Braswell, 225 N.C. App. 734, 741, 738 S.E.2d 229, 234 (2013).

We noted that the State did not present any records seized from the search of Braswell's home showing that he had failed to invest the Greenes' money in legitimate financial institutions and observed that "the fact that [Braswell]'s account with Fidelity Investments contained $100,000 in early 2008 suggests that he did, in fact, make investments with such institutions." *Id.* Moreover, we explained, "the State offered no direct or circumstantial evidence tending to show that, instead of investing the money he borrowed from the Greenes, [Braswell] converted it to his own use." *Id.* at 742, 738 S.E.2d at 234.

On 24 March 2016, Braswell filed a civil lawsuit in Nash County Superior Court from which the present appeal arises. In his complaint, Braswell alleged, in pertinent part, that

> [o]n 5 April 2010, Defendants Medina, Denton, and . . . Whitley[ ] fabricated probable cause to mislead a Nash County grand jury into returning a bill of indictment charging [Braswell] with felony obtaining property by false pretenses. At the time they caused the indictment to issue, Medina, Denton, and Whitley knew they did not have probable cause to believe [Braswell] committed that or any other crime.

Braswell alleged federal claims under 42 U.S.C. § 1983 against Officers Medina, Denton, and Whitley (collectively the "Officers") in their individual capacities.[2] Additionally, Braswell asserted state law

2. Although Braswell's complaint focuses heavily on the actions of Officer Medina, it also includes allegations against Officers Denton and Whitley in connection with their

claims against the Rocky Mount Defendants for malicious prosecution, obstruction of justice, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. Finally, his complaint contained claims against the City and the State of North Carolina for violations of the North Carolina Constitution.

On 6 April 2016, the State filed a motion to dismiss pursuant to Rules 12(b)(1) and (6). The Rocky Mount Defendants filed a motion to dismiss on 15 April 2016 seeking dismissal of all of Braswell's claims against them pursuant to Rule 12(b)(6). Following a hearing before the Honorable Allen Baddour on 5 August 2016, the trial court issued an order on 24 August 2016 dismissing this entire action pursuant to Rule 12(b)(6). Braswell filed a timely notice of appeal.[3]

Analysis

[1] As an initial matter, we conclude that Braswell has abandoned any challenges to the trial court's dismissal of his claims against the Rocky Mount Defendants for negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress because he failed to address the dismissal of these claims in his principal brief on appeal. *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.").[4]

Accordingly, we consider only whether the trial court erred in dismissing Braswell's § 1983 claims; state law claims for malicious prosecution and obstruction of justice; and claim under the North Carolina Constitution.

> 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

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alleged participation in the fabrication and concealment of evidence that led to Braswell's prosecution. Moreover, the Rocky Mount Defendants' arguments on appeal do not differentiate between the three officers. We therefore utilize this same approach in our legal analysis of Braswell's claims.

3. Braswell has not appealed from the portion of the trial court's order dismissing his claim against the State of North Carolina.

4. While Braswell's reply brief does contain arguments relating to his intentional infliction of emotional distress and negligence claims, this Court has made clear that "under 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 and cannot revive the issue via reply brief." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 79, 772 S.E.2d 93, 96 (2015).

> 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).

I. Claims Under 42 U.S.C. § 1983

[2] *Section 1983* provides a private right of action against any person 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. "A malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort" of malicious prosecution. *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012) (citation and quotation marks omitted). In order to state a § 1983 claim premised upon a malicious prosecution theory, "a plaintiff must allege that the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in [the] plaintiff's favor." *Id.*

It is undisputed that Braswell has pled facts in his complaint establishing that he was seized pursuant to legal process and that the criminal proceedings terminated in his favor. The Officers argue, however, that Braswell failed to state valid claims under § 1983 because (1) probable cause existed to support his arrest; and (2) the actions of the prosecutor and the grand jury in seeking and issuing the indictment constituted a break in the causal chain such that the Officers cannot be deemed to have *caused* an illegal seizure. We address each argument in turn.

A. Probable Cause

"Probable cause exists when the information known to the officer is sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Dickens*, 346 N.C. 26,

36, 484 S.E.2d 553, 558 (1997) (citation and quotation marks omitted). Here, Braswell has sufficiently alleged in his complaint that the Officers lacked probable cause to believe he had committed the crime of obtaining property by false pretenses. As reflected in the indictment, the theory of criminal liability was that Braswell obtained $112,500 from the Greenes "by means of a false pretense which was calculated to deceive and did deceive" and that the false pretense was that he would provide the Greenes with "a six percent return on all invested monies . . . when in fact [Braswell] did not invest the monies into legitimate financial institutions."

In our decision vacating Braswell's conviction, we held that "[a] careful review of the record developed at trial reveals the *complete absence of any support* for this allegation." *Braswell*, 225 N.C. App. at 741, 738 S.E.2d at 234 (emphasis added). Moreover, all that matters for purposes of applying the Rule 12(b)(6) standard is that Braswell has *alleged* sufficient facts showing the absence of probable cause. Specifically, he asserted the following in his complaint:

> 49. On 5 April 2010, Defendants Medina, Denton, and upon information and belief, Defendant Whitley, fabricated probable cause to mislead a Nash County grand jury into returning a bill of indictment charging [Braswell] with felony obtaining property by false pretenses. At the time they caused the indictment to issue, Medina, Denton, and Whitley knew they did not have probable cause to believe [Braswell] committed that or any other crime.

In addition, the complaint alleged that

> [t]o conceal the absence of evidence of [Braswell]'s alleged false pretense or fraudulent intent, Officer Medina fabricated probable cause – by manufacturing false inculpatory evidence and concealing exculpatory evidence in order to mislead judicial officials into authorizing the arrest and pretrial detention of [Braswell], to mislead prosecutors to authorize a felony indictment for obtaining property in excess of $100,000 by false pretenses, to mislead the grand jury into issuing said indictment, and to mislead prosecutors into maintaining felony criminal proceedings against [Braswell] and ultimately convicting him.

As demonstrated by these and other allegations in Braswell's complaint, the crux of his § 1983 claims is that evidence possessed by the Officers — including records seized from Braswell's home — actually

exculpated rather than inculpated Braswell by showing that he had, in fact, invested large sums of money into legitimate financial institutions. In light of these allegations, we are satisfied that Braswell's complaint adequately alleged a lack of probable cause for his arrest and prosecution on the charge of obtaining property by false pretenses. *See*, *e.g.*, *Simpson v. Sears, Roebuck & Co.*, 231 N.C. App. 412, 417, 752 S.E.2d 508, 510 (2013) (reversing trial court's dismissal of plaintiff's malicious prosecution claim because her "allegations, which we are required to treat as true, [were] sufficient to withstand a motion to dismiss."); *Enoch v. Inman*, 164 N.C. App. 415, 419, 596 S.E.2d 361, 364 (2004) (reversing trial court's granting of motion to dismiss because the "allegations, including the factual details summarized above, [were] sufficient to support a § 1983 claim . . . .").[5]

B. Causation

[3] The Officers next argue that Braswell failed to plead facts sufficient to satisfy the causation prong of a § 1983 claim grounded in a theory of malicious prosecution. They contend that the intervening decision by the district attorney to submit a bill of indictment to the grand jury and the grand jury's decision to issue an indictment insulate the Officers from liability by interrupting the causal chain.

It is true that "acts of independent decision-makers (*e.g.*, prosecutors, grand juries, and judges) *may* constitute intervening superseding causes that break the causal chain between a defendant-officer's misconduct and a plaintiff's unlawful seizure." *Evans*, 703 F.3d at 647 (emphasis added). However, it is well established that even once the prosecutor has submitted a bill of indictment to a grand jury and the grand jury has indicted the defendant, "police officers may be held to have caused the seizure and remain liable to a wrongfully indicted defendant under certain circumstances." *Id.*

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5. We likewise reject the Officers' argument that the dismissal of Braswell's claims was proper on the theory that Braswell invested the Greenes' funds "without a dealer's license" in violation of N.C. Gen. Stat. § 78A-36. Section 78A-36 makes it "unlawful for any person to transact business in this State as a dealer or salesman unless he is registered under this Chapter." N.C. Gen. Stat. § 78A-36(a) (2015). N.C. Gen. Stat. § 78A-2 defines "dealer" as "any person engaged in the business of effecting transactions in securities for the account of others or for his own account." N.C. Gen. Stat. § 78A-2(2) (2015). However, Braswell was not charged with violating N.C. Gen. Stat. § 78A-36. The issue of whether Braswell failed to invest the Greenes' money in legitimate financial institutions — which was the theory upon which the indictment was based — is separate and distinct from the issue of whether Braswell was in compliance with N.C. Gen. Stat. § 78A-36.

> The intervening acts of a grand jury have never been enough to defeat an otherwise viable malicious prosecution claim, whether or not the grand jury votes a true bill or even returns an indictment ultimately determined to be deficient as a matter of law. And though an indictment by a grand jury is generally considered *prima facie* evidence of probable cause in a subsequent civil action for malicious prosecution, this presumption may be rebutted by proof that the defendant *misrepresented*, *withheld*, *or falsified evidence*.
>
> . . . .
>
> As with the grand jury, . . . the public prosecutor's role in a criminal prosecution will not necessarily shield a complaining witness from subsequent civil liability where the witness's testimony is knowingly and maliciously false.

White v. Frank, 855 F.2d 956, 961-62 (2d Cir. 1988) (internal citation and quotation marks omitted and emphasis added); *see also Evans*, 703 F.3d at 647-48 ("[O]fficers may be liable when they have lied to or misled the prosecutor; failed to disclose exculpatory evidence to the prosecutor; or unduly pressured the prosecutor to seek the indictment[.]" (internal citations and quotation marks omitted)); *Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988) ("An independent intermediary breaks the chain of causation unless it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant."); *Jones v. City of Chicag*o, 856 F.2d 985, 994 (7th Cir. 1988) ("[A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial — none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision.").

Accordingly, in cases where law enforcement officers conceal or fabricate evidence in order to falsely show that probable cause exists to prosecute a criminal defendant, the intervening decision of the prosecutor or grand jury will not immunize the officers from liability on a malicious prosecution claim under § 1983. As shown above, Braswell's complaint in the present case sufficiently pled facts in support of such a theory.[6]

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6. We are not persuaded by the Officers' reliance on *Massey v. Ojaniit*, 759 F.3d 343 (4th Cir. 2014), in support of their argument that Braswell failed to allege sufficient details so as to establish causation. In *Massey*, the plaintiff alleged that the defendant police

C. Qualified Immunity

We also reject the Officers' assertion that dismissal of Braswell's § 1983 claims was appropriate pursuant to the qualified immunity doctrine. "The defense of qualified immunity shields government officials from personal liability under § 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Toomer v. Garrett*, 155 N.C. App. 462, 473, 574 S.E.2d 76, 86 (2002) (citation and quotation marks omitted).

Braswell's right to be free from a seizure and prosecution lacking in probable cause and based upon the deliberate concealment or fabrication of evidence was clearly established at the time of Braswell's arrest, and a reasonable officer would have been aware of that right. *See Webb v. United States*, 789 F.3d 647, 667 (6th Cir. 2015) ("It is well established that a person's constitutional rights are violated when evidence is knowingly fabricated and a reasonable likelihood exists that the false evidence would have affected the decision of the jury. A reasonable police officer would know that fabricating probable cause, thereby effectuating a seizure, would violate a suspect's clearly established Fourth Amendment right to be free from unreasonable seizures." (internal citation, quotation marks, and brackets omitted)); *Wilkins v. DeReyes*, 528 F.3d 790, 805 (10th Cir. 2008) ("[I]t of course has long been clearly established that knowingly arresting a defendant without probable cause, leading to the defendant's subsequent confinement and prosecution, violates the Fourth Amendment's proscription against unreasonable searches and seizures.").

The cases that the Officers rely upon in their brief on this issue are clearly inapposite as they involve determinations made at the *summary judgment* stage that there was, in fact, probable cause to seize the plaintiffs. *See*, *e.g.*, *Durham v. Horner*, 690 F.3d 183, 189 (4th Cir. 2012)

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officers fabricated information that led to the plaintiff's illegal arrest, prosecution, and conviction. *Id.* at 347. The Fourth Circuit found the plaintiff's allegations of causation to be lacking, however, because the record showed that probable cause existed to arrest the plaintiff even *after* the piece of fabricated evidence was excluded from consideration. *See id.* at 357 (explaining that "[t]hough [the plaintiff] alleges that [the officers] deliberately supplied fabricated evidence, he has not pleaded facts adequate to undercut the grand jury's probable cause determination. That is, . . . even removing the fabricated statement . . . , there still existed sufficient probable cause to arrest [the plaintiff]." (quotation marks and brackets omitted)). In the present case, conversely, Braswell's complaint alleged facts showing that his prosecution was a *direct result* of the fabrication and concealment of evidence by the Officers. Therefore, *Massey* is distinguishable on its face.

(explaining that "the prosecution was plainly supported by probable cause" and plaintiff failed to "put forward any evidence to show that [the defendant officer] acted maliciously or conspired . . . to mislead the grand jury"); *Porterfield v. Lott*, 156 F.3d 563, 570 (4th Cir. 1998) ("Since there were sufficient indicia of probable cause to arrest [the plaintiff], as we have indicated already, it follows that there were sufficient indicia of probable cause to seek a warrant.").

Here, conversely, the facts alleged in the complaint — which we are required to accept as true in this appeal — were that the Officers fabricated and concealed evidence in order to bring about Braswell's indictment despite the absence of probable cause to believe he was guilty of the crime for which he was charged. Thus, the Officers are not entitled to qualified immunity at this stage of the litigation.

* * *

For these reasons, we conclude that Braswell has stated valid claims under 42 U.S.C. § 1983. The trial court's dismissal of these claims therefore constituted error.

II. State Law Claims

A. Malicious Prosecution

[4] In order to state a common law claim for malicious prosecution under North Carolina law,

> the plaintiff must demonstrate that the defendant (1) instituted, procured or participated in the criminal proceeding against the plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of the plaintiff.

Moore v. Evans, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citation, quotation marks, and brackets omitted). "[A] grand jury's action in returning an indictment is only prima facie evidence of probable cause and . . . as a result, the return of an indictment does not as a matter of law bar a later claim for malicious prosecution." *Turner v. Thomas*, 369 N.C. 419, 445, 794 S.E.2d 439, 445 (2016).

As shown above, Braswell's complaint alleged facts showing that (1) the Officers initiated or participated in the criminal proceeding against him; (2) they lacked probable cause to believe he committed the offense of obtaining property by false pretenses; (3) they acted with malice; and (4) the prosecution was terminated in Braswell's favor. " 'Malice' in a malicious prosecution claim may be shown by offering evidence that

defendant was motivated by personal spite and a desire for revenge or that defendant acted with reckless and wanton disregard for plaintiffs' rights." *Lopp v. Anderson*, __ N.C. App. __, __, 795 S.E.2d 770, 780 (2016) (citation and quotation marks omitted). Moreover, "[m]alice can be inferred from the want of probable cause alone." *Id.* at __, 795 S.E.2d at 779 (citation and quotation marks omitted).

Here, Braswell has adequately alleged malice by pleading facts showing that the Officers not only lacked probable cause to believe he was guilty of the crime for which he was ultimately charged but also concealed and fabricated evidence in order to cause him to be prosecuted for that offense. Accordingly, Braswell has properly stated claims for malicious prosecution against the Rocky Mount Defendants under North Carolina law, and the trial court erred in dismissing these claims. *See Chidnese v. Chidnese*, 210 N.C. App. 299, 310, 708 S.E.2d 725, 734 (2011) ("Treating these allegations as true, these facts can be construed to state that [the defendant] procured a criminal prosecution against plaintiff with malice and without probable cause, and that the prosecution terminated favorably for the plaintiff, satisfying all of the elements of malicious prosecution." (citation omitted)).

B. Obstruction of Justice

[5] Braswell next argues that the trial court improperly dismissed his claims for obstruction of justice. We disagree.

North Carolina's appellate courts have recognized that "[a]t common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983). This articulation of common law obstruction of justice first appeared in North Carolina caselaw in our Supreme Court's *Kivett* decision. In that case, which concerned an appeal from a judicial discipline proceeding, the Court held that the respondent judge's attempt to prevent a grand jury from convening in order to investigate suspected criminal conduct on his part "would support a charge of common law obstruction of justice." *Id.*

North Carolina is one of a small minority of jurisdictions that also recognizes a *civil* cause of action for obstruction of justice. This tort was first recognized by our Supreme Court in *Henry v. Deen*, 310 N.C. 75, 310 S.E.2d 326 (1984), a wrongful death action brought by the administrator of the decedent's estate alleging that his medical providers had negligently rendered care to him. The plaintiff also asserted that the defendants had created false entries in the decedent's medical chart and concealed his genuine medical records. *Id.* at 87, 310 S.E.2d at 334.

These actions, the plaintiff argued, rendered the defendants liable for civil conspiracy because their actions were intended "to prevent the plaintiff from discovering the negligent acts of the defendants . . . ." *Id.* at 79, 310 S.E.2d at 329-30.

On appeal from the trial court's dismissal of the plaintiff's civil conspiracy claim, the Supreme Court held that the plaintiff had properly alleged a claim for civil conspiracy based upon the underlying wrongful act of obstruction of justice.[7] *Id.* at 87, 310 S.E.2d at 334. The Court explained that the defendants' alleged concealment and fabrication of evidence, "if found to have occurred, would be acts which obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstructing public justice." *Id.*

Our decision in *Grant v. High Point Regional Health System*, 184 N.C. App. 250, 645 S.E.2d 851 (2007), applied *Henry* in a similar context. In that case, the executrix of the decedent's estate alleged that the defendant hospital was liable for obstruction of justice for destroying the decedent's medical records because that action "effectively precluded [the plaintiff] from obtaining the required Rule 9(j) certification . . . . and thus effectively precluded [the plaintiff] from being able to successfully prosecute a medical malpractice action against [the defendant]." *Id.* at 255, 645 S.E.2d at 855 (quotation marks and ellipses omitted).

We reversed the trial court's dismissal of this claim, holding that "such acts by [the defendant], if true, would be acts which obstruct, impede or hinder public or legal justice and would amount to the common law offense of obstructing public justice." *Id.* at 255, 645 S.E.2d at 855 (citation and quotation marks omitted). In so holding, we explicitly rejected the defendant's argument that *Henry* was inapplicable

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7. The Court explained that a civil conspiracy cause of action must be predicated upon an underlying tort:

> In civil actions for recovery for injury caused by acts committed pursuant to a conspiracy, this Court has stated that the combination or conspiracy charged does no more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under the proper circumstances the acts of one may be admissible against all. The gravamen of the action is the resultant injury, and not the conspiracy itself. To create civil liability for conspiracy there must have been a wrongful act resulting in injury to another committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the objective.

Henry, 310 N.C. at 86-87, 310 S.E.2d at 334 (internal citations omitted).

on the theory that the plaintiff's claim in *Henry* had been based on civil conspiracy rather than obstruction of justice. We explained that "in *Henry*, the wrongful acts necessary to prove conspiracy were the acts constituting obstruction of justice. Accordingly, as the acts constituting obstruction of justice underlying the civil conspiracy in *Henry* were similar to [the defendant's] alleged actions in the present case, *Henry* is persuasive." *Id.* (internal citation omitted).

We also had occasion to consider a civil obstruction of justice claim in *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 588 S.E.2d 20 (2003). The plaintiff in *Broughton* sued the News and Observer ("N&O") and certain N&O employees alleging, *inter alia*, that the defendants were liable for obstruction of justice because they had published an article about the plaintiff's ongoing divorce proceeding with her husband. *Id.* at 22, 588 S.E.2d at 23-24. On appeal, we affirmed the trial court's entry of summary judgment in the defendants' favor as to that claim on the ground that the plaintiff "presented no evidence that her [divorce case] was in some way judicially prevented, obstructed, impeded or hindered by the acts of defendants. There is no evidence as to the disposition of that action or any showing that the newspaper articles adversely impacted that case." *Id.* at 33, 588 S.E.2d at 30.

Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4 (2001), involved an underlying medical malpractice lawsuit against two physicians in which the jury found one of them liable. After that trial had concluded, the other physician sent a letter to all of the doctors at the hospital where he worked in which he provided the names and addresses of the jurors who had — as the letter stated — "found a doctor guilty." *Id.* at 397, 544 S.E.2d at 6. Several of those jurors proceeded to file a lawsuit of their own alleging that the doctor's act of sending the letter constituted obstruction of justice. *Id.* at 398, 544 S.E.2d at 6.

We reversed the trial court's dismissal of this claim, explaining that the plaintiffs' "complaint sufficiently alleges a cause of action for common law obstruction of justice in that it alleges (1) defendant alerted health care providers to the names of the jurors in retaliation for their verdict; (2) this retaliation was designed to harass plaintiffs; and (3) defendant's conduct was meant to obstruct the administration of justice in Rowan County." *Id.* at 409, 544 S.E.2d at 13.

Our decision in *Blackburn v. Carbone*, 208 N.C. App. 519, 703 S.E.2d 788 (2010), is particularly instructive in analyzing the scope of the obstruction of justice tort in North Carolina. In that case, the plaintiff alleged that the defendant physician was liable for obstruction of justice

on the ground that he had prepared an inaccurate medical report — which he subsequently failed to correct — for use in a lawsuit that the plaintiff had brought against a third party relating to an automobile accident. *Id.* at 520, 703 S.E.2d at 790. The plaintiff claimed that the physician's act had forced him to settle the lawsuit for an amount considerably less than the actual damages he had incurred. *Id.* at 520, 703 S.E.2d at 791. The trial court entered summary judgment against the plaintiff and dismissed his obstruction of justice claim. *Id.* at 521, 703 S.E.2d at 791.

On appeal, we summarized the caselaw from our appellate courts recognizing a civil claim for obstruction of justice as follows:

> In *Henry* and *Grant*, allegations that the defendants had destroyed certain medical records and created other false medical records for the purpose of defeating a medical negligence claim were held to be sufficient to state a claim for common law obstruction of justice. *Henry*, 310 N.C. at 88, 310 S.E.2d at 334-35 (stating that, "where, as alleged here, a party deliberately destroys, alters or creates a false document to subvert an adverse party's investigation of his right to seek a legal remedy, and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie"); *Grant*, 184 N.C. App. at 255-56, 645 S.E.2d at 855 (stating that allegations that "Defendant destroyed the medical records of the decedent" so as to "effectively preclude Plaintiff from obtaining the required Rule 9(j) certification" and prevent " 'Plaintiff from being able to successfully prosecute a medical malpractice action against . . . Defendant . . . and others' " "stated a cause of action for common law obstruction of justice"). Similarly, this Court has held that "Plaintiff's complaint sufficiently alleged a cause of action for common law obstruction of justice in that it alleges (1) defendant alerted health care providers to the names of the jurors who returned a verdict against another health care provider in a medical negligence case in retaliation for their verdict; (2) this retaliation was designed to harass plaintiffs; and (3) defendant's conduct was meant to obstruct the administration of justice." *Burgess*, 142 N.C. App. at 409, 544 S.E.2d at 13. As a result, any action intentionally undertaken by the defendant for the purpose of obstructing, impeding, or hindering the plaintiff's ability

> *to seek and obtain a legal remedy will suffice to support a claim for common law obstruction of justice.*

Id. at 526-27, 703 S.E.2d at 795 (brackets omitted and emphasis added).[8]

In the present case, the Rocky Mount Defendants contend that no "court in North Carolina ha[s] ever recognized a common-law obstruction of justice civil claim based on a police officer's actions in a criminal proceeding." In his attempt to show the viability of such a claim, Braswell relies primarily upon our decision in *Jones v. City of Durham*, 183 N.C. App. 57, 643 S.E.2d 631 (2007). However, *Jones* is readily distinguishable from the present case.

In *Jones*, the plaintiff bought a lawsuit against a police officer alleging that he had negligently struck her with his car while responding to an unrelated call for assistance from another officer. *Jones v. City of Durham*, 168 N.C. App. 433, 435, 608 S.E.2d 387, 389, *aff'd*, 360 N.C. 81, 622 S.E.2d 596 (2005), *opinion withdrawn and superseded on reh'g and decision rescinded in part based upon dissenting opinion*, 361 N.C. 144, 638 S.E.2d 202 (2006). Among the causes of action contained in her suit against the officer was a claim for obstruction of justice based upon the officer's alleged destruction of dashboard camera footage of the accident. The trial court granted partial summary judgment for the officer but did not dismiss the obstruction of justice claim. *Id.* at 434, 608 S.E.2d at 388.

In the plaintiff's initial appeal to this Court, we determined that all of the plaintiff's claims should be dismissed. *Id.* at 443, 608 S.E.2d at 392. However, the Supreme Court reversed our decision, and upon remand to this Court, we affirmed the trial court's denial of the defendant's motion to dismiss the obstruction of justice claim, explaining that "the evidence would allow a jury to conclude that a camera in [the defendant's] police car had made a videotape recording of the accident, and that the videotape was subsequently misplaced or destroyed." *Jones*, 183 N.C. App. at 59, 643 S.E.2d at 633.

Jones is distinguishable from the present case in that it involved allegations that the defendant officer had obstructed justice by destroying evidence related to a *civil* negligence claim that the plaintiff

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8. We ultimately affirmed the dismissal of the plaintiff's obstruction of justice claim in *Blackburn* because, among other reasons, he had failed to show that the defendant acted intentionally and "for the purpose of deliberately obstructing, impeding or hindering the prosecution of [the plaintiff's] automobile accident case." *Blackburn*, 208 N.C. App. at 529, 703 S.E.2d at 796.

had asserted against him. *Id.* Accordingly, *Jones* fits squarely within the line of cases discussed above that allow a plaintiff to sue under an obstruction of justice theory when the defendant has improperly obstructed, impeded, or hindered a "plaintiff's ability to seek and obtain a legal remedy[.]" *Blackburn*, 208 N.C. App. at 527, 703 S.E.2d at 795.

Here, conversely, Braswell seeks to hold the Officers civilly liable on an obstruction of justice theory *not* for their obstruction of his ability to obtain a legal remedy but rather solely for their actions taken in the course of his criminal prosecution. While torts such as malicious prosecution and false arrest allow law enforcement officers to be held liable for their wrongful acts while conducting a criminal investigation, neither this Court nor our Supreme Court has ever enlarged the scope of the obstruction of justice tort so as to encompass claims based on acts occurring solely in the course of an officer's criminal investigation that are unrelated to a plaintiff's ability to seek and obtain a legal remedy. On these facts, we conclude that the trial court properly dismissed Braswell's obstruction of justice claims.

C. Claim Under North Carolina Constitution

[6] Finally, Braswell argues that the trial court erred in dismissing his claim against the City alleging that his rights under the North Carolina Constitution were violated by his arrest and prosecution. Our Supreme Court has explained that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). "[A] n adequate remedy must provide the possibility of relief under the circumstances." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009).

The City argues that the dismissal of Braswell's state constitutional claim was proper because Braswell "made no allegation [for which] he does not have an adequate state remedy." This Court has held that where a defendant has raised immunity defenses that have not yet been adjudicated — thus creating uncertainty regarding whether a plaintiff will, in fact, have an adequate state remedy — dismissal of the plaintiff's state constitutional claim at the pleadings stage is premature.

In *Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 745 S.E.2d 316 (2013), we addressed this issue as follows:

> As long as Defendants' sovereign immunity defense remains potentially viable for any or all of Plaintiffs'

> wrongful discharge-related claims, . . . Plaintiffs' associated North Carolina constitutional claims are not supplanted by those claims. This holding does not predetermine the likelihood that plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case. Rather, it simply ensures that an adequate remedy must provide the possibility of relief under the circumstances.

Id. at 15, 745 S.E.2d at 326 (citation and quotation marks omitted).

Here, in the third affirmative defense contained in its answer, the City has asserted governmental immunity as a bar to Braswell's tort claims. The merits of this immunity defense have not yet been resolved. If it is ultimately determined that governmental immunity *does* shield the City from all of these claims, then Braswell would not possess an adequate remedy under state law apart from his claim under the North Carolina Constitution. *See*, *e.g.*, *Craig*, 363 N.C. at 340, 678 S.E.2d at 355 ("Plaintiff's common law cause of action for negligence does not provide an adequate remedy at state law when governmental immunity stands as an absolute bar to such a claim.").

Therefore, because it is not yet clear at this stage of the litigation whether Braswell will have an adequate state law remedy, the dismissal of his state constitutional claim against the City was premature. Accordingly, we reverse the trial court's dismissal of that claim.

Conclusion

For the reasons stated above, we affirm the trial court's dismissal of Braswell's claims for obstruction of justice, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress as well as his claim against the State under the North Carolina Constitution. We reverse the trial court's dismissal of his § 1983 claims, common law malicious prosecution claims, and claim against the City under the North Carolina Constitution. We remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges HUNTER, JR. and MURPHY concur.

CONLEYS CREEK LTD. P'SHIP v. SMOKY MOUNTAIN COUNTRY CLUB PROP. OWNERS ASS'N

[255 N.C. App. 236 (2017)]

CONLEYS CREEK LIMITED PARTNERSHIP, a North Carolina limited Partnership, and MARSHALL CORNBLUM, Plaintiffs

AND

MICHAEL CORNBLUM, MADELINE CORNBLUM, M&D CREEK, INC., a North Carolina corporation, CORNDERMAY PARTNERS, by and through its general partners, M&D Creek, Inc. and other unknown partners, and SMCC CLUBHOUSE, LLC, a North Carolina limited liability company, Counterclaim Defendants

v.

SMOKY MOUNTAIN COUNTRY CLUB PROPERTY OWNERS ASSOCIATION, INC., a North Carolina nonprofit corporation, Defendant, Counterclaimant

WILLIAM SPUTE, RONALD SHULMAN, and CLAUDETTE KRIZEK, Defendants

AND

ROBERT YOUNG, Defendant in Counterclaim of SMCC Clubhouse

No. COA16-647

Filed 5 September 2017

1. Real Property—condos—status of ownership

A homeowners association was entitled to an order declaring that a 1999 Declaration recorded by the developer established a form of property ownership not recognized in North Carolina, and an order dismissing the association's counterclaim was reversed. While North Carolina's Condominium Act requires that the common areas be owned by the unit owners in common, here the homeowners association owned the common areas.

2. Real Property—condos—reformation of Declaration provisions—necessary parties

A homeowners association's counterclaim seeking reformation of its Declaration provisions was properly dismissed. Any reformation order would necessarily affect the ownership interests of condo unit orders in certain common areas and they were necessary parities. Without all necessary parties, there was no authority to decide the reformation claim.

3. Real Property—condos—dispute with homeowners association—clubhouse dues

The trial court's dismissal of claims by a homeowners association against the developer concerning clubhouse dues was affirmed. The trial court concluded that the claims were time barred, but in fact the one-year limitation relied on by the trial court concerned

amendments to an existing Declaration, not to a new declaration. Whether labelled an "amendment" or not, the declaration at issue here merged two former communities into a single planned community, which the Planned Community Act treats as terminating the former declarations and establishing a new declaration.

4. Real Property—condos—clubhouse dues

In an action arising from the refusal of a homeowners association to collect and remit clubhouse dues to the developer after the homeowners association had gained control of the development, the argument that the association had no duty to collect the clubhouse dues was rejected. The Legislature did not intend N.C.G.S § 47F-3-102 to limit the power of a planned community's association, but to provide additional powers if the declaration is silent on the point. Here, the 1999 Declaration specifically authorized the Association to assess clubhouse dues. Moreover, N.C.G.S. § 47F-3-102 authorized the imposition of charges for services provided to lot owners, such as providing access to and maintaining a clubhouse amenity.

5. Real Property—condos—clubhouse—contractual obligation

The question of whether a homeowners association was obligated to pay clubhouse dues to the developer under a Declaration was contractual in nature and not a matter of real or personal covenants.

6. Real Property—condos—association and developer—clubhouse dues—breach of contract—breach of covenant of good faith

Summary judgment for a homeowners association was reversed in a dispute arising from the association's refusal to collect clubhouse dues from homeowners and pay them to the developer. The declaration clearly obligated the association and the evidence clearly created a genuine issue or material fact regarding the developer's breach of contract and good faith claims.

7. Real Property—condos—homeowners association and developer—clubhouse dues—civil conspiracy

The trial court properly granted summary judgment for a homeowners association on the developer's civil conspiracy claim arising from a dispute over clubhouse dues. There was no allegation that the association conspired with any third party regarding the dues. The association, as a corporation, cannot conspire with itself.

8. Real Property—condos—homeowners association and developer—breach of fiduciary duty

The trial court correctly dismissed a counterclaim by a homeowners association against the members of a family who constituted the developer (excepting two members of the family who were an officer and director of the association). The developer's relationship with the homeowners association was contractual and parties to a contract do not become each other's fiduciaries. However, the officers and directors of the association owed a fiduciary duty to the association.

9. Unfair Trade Practices—condos—homeowners association and developer—clubhouse dues

The trial court erroneously dismissed a homeowners association's counterclaim for unfair and deceptive practices arising from a dispute with the developer. The purported misconduct took place while the developer controlled the association and was more properly classified as having taken place within a single entity rather than in commerce.

10. Appeal and Error—mootness— claim for equitable accounting

An issue concerning an equitable accounting between a homeowners association and a developer was moot where the parties had agreed via a consent order that financial records would be disclosed.

Appeal by Smoky Mountain Country Club Property Owners Association from two orders entered in Swain County Superior Court: (1) order entered 30 July 2015 by Judge Tanya T. Wallace and (2) order entered 26 January 2016 by Judge Marvin P. Pope, Jr. Cross-appeal by SMCC Clubhouse, LLC, from summary judgment order entered 26 January 2016 by Judge Marvin P. Pope, Jr., in Swain County Superior Court. Heard in the Court of Appeals 8 June 2017.[1]

Sigmon Law, PLLC, by Mark R. Sigmon and Sanford L. Steelman, Jr., for Conleys Creek Limited Partnership, Marshall Cornblum, Michael Cornblum, Madeline Cornblum, M&D Creek, Inc., Corndermay Partners, Counterclaim Defendants/Plaintiffs-Appellees, and SMCC Clubhouse, LLC, Counterclaim Defendant/Cross-Appellant.

1. This matter was originally heard in this Court on 1 December 2016. We filed an opinion on 4 April 2017. However, we withdrew that opinion. Shortly thereafter, Judge McCullough, who was on the original panel, resigned from this Court. This matter was heard again on 8 June 2017, with Judge Stroud replacing Judge McCullough on the panel.

James W. Kilbourne, Jr., for Smoky Mountain Country Club Property Owners Association, Inc., Defendant-Counter claimant/Appellant.

DILLON, Judge.

Smoky Mountain Country Club (the "Planned Community") is a residential planned community located in Swain County. This matter involves a dispute between the Planned Community's developer (the "Developer") and the Planned Community's homeowners association (the "Association"). The Developer consists of members of the Cornblum family and entities they control and are listed above the "v." in the caption. The Association includes the homeowners association and certain members of its board of directors and are listed below the "v." in the caption.

I. Factual Background

The Planned Community is located on 195 acres (the "Property"). It was established in 1999 pursuant to a declaration (the "1999 Declaration") recorded by the Developer. Prior to 1999, the Developer had developed two residential communities on different portions of the Property. The Planned Community consolidated these communities along with the Property's undeveloped portions into a new single community.

The Association's board was initially controlled by the Developer. This dispute arose shortly after the homeowners gained control of the board in 2014.

II. Procedural Background

Shortly after the homeowners took control of the Association board, the board voted to disregard certain provisions in the 1999 Declaration. In response to the board action, the Developer commenced this action against the Association. The Association responded by asserting a number of counterclaims against the Developer. In a series of orders, the trial court has dismissed a number of the claims and counterclaims from which this appeal arises.

On appeal, the Association seeks review of two orders in which the trial court dismissed its counterclaims against the Developer. The Developer seeks review of a summary judgment order which dismissed many of its claims against the Association.[2]

2. All other claims which have been pleaded in this matter have been dismissed and are not subject to this appeal.

III. Analysis

[1] In its brief, the Association contests trial court rulings concerning three different areas of dispute. The Developer's cross-appeal contests a trial court ruling concerning one of these areas. We address each area of dispute in turn.

A. Status of the Planned Community's Condo Units

The first area of dispute concerns the legal status of the Planned Community's condominium-style residential units which were established, developed, and sold by the Developer in accordance with the 1999 Declaration.

Specifically, the Planned Community includes single-family residences and townhomes, separated from adjacent residences by vertical property boundaries. The Planned Community also includes multi-story buildings with residences (the "condo units") located on each floor. Each condo unit is separated by vertical boundaries from other condo units on the same floor and by horizontal boundaries from condo units located on different floors.

Pursuant to the 1999 Declaration, each condo unit owner acquired an interest in real estate which does not fit the technical definition of "condominium" found in our Condominium Act. More specifically, the condo unit owners own the air space and interior walls within their respective units, but the Association owns the common areas of the condo buildings and condo building lots. In contrast, the Condominium Act states that property is not a "condominium" as defined by that Act *unless* the common areas are owned by the unit owners, in common, rather than owned by an association. N.C. Gen. Stat. § 47C-1-103(7) ("Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.").[3]

Based on the inconsistency between the 1999 Declaration and the Condominium Act, the Association sought (1) a declaratory judgment stating that the form of ownership held by the Planned Community's condo unit owners is illegal under North Carolina law and (2) a reformation of the provisions of the 1999 Declaration concerning the condo units to conform with our Condominium Act.

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3. In everyday parlance, the word "condominium" or "condo" sometimes refers to an individual condo unit. In the Condominium Act, however, the word "condominium" refers to the entire condominium community, which contains all of the units and common areas.

The trial court granted the Developer's Rule 12(b)(6) motions with respect to these counterclaims, without stating its reasoning. For the reasons stated below, we reverse the trial court's dismissal of the Association's declaration counterclaim. We affirm, however, the trial court's dismissal of the Association's reformation counterclaim.

1. Declaratory Counterclaim---Validity of Form of Ownership

The condo units established by the 1999 Declaration – where the common areas within the condo buildings and condo building lots are owned by the Association and *not* by the condo unit owners in common – would be permissible *under the common law*:

> At common law, the holder of a fee simple also owned the earth beneath and the air above – "*cujus est solum, ejus usuqe ad coelom et ad inferos*".[4] This law applies in North Carolina. Plaintiffs concede that air rights are thus a part of land ownership, but they argue that absent specific authority, the holder of a fee simple may not divide his fee horizontally. . . . It appears[,] [however,] to be the general rule that *absent some specific restraint*, the holder of a fee simple may divide his fee in any manner he or she chooses.

Cheape v. Chapel Hill, 320 N.C. 549, 563, 359 S.E.2d 792, 800 (1987) (emphasis added) (internal citations omitted). The General Assembly, however, has abrogated the common law by establishing a "specific restraint" against the form of ownership established by the 1999 Declaration through the passage of the Planned Community Act. Specifically, the Planned Community Act *requires* that residential real estate with horizontal boundaries and located within a planned community "shall" meet the definition of "condominium" as set forth in the Condominium Act, as explained below.

In 1985, thirteen years before enacting the Planned Community Act, the General Assembly enacted the Condominium Act. By its terms, the Condominium Act regulates those properties which fit the Act's definition of "condominium." Properties with horizontal boundaries which do not fit the Act's definition of "condominium" are not expressly

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4. Translation of italicized Latin phrase in the quote is "whoever's is the soil, it is theirs all the way to Heaven and all the way to hell."

forbidden by the Act; rather, such properties are simply not subject to the provisions of the Act.[5]

In 1998, thirteen years after the Condominium Act became law, the General Assembly passed the Planned Community Act to govern planned communities. The Planned Community Act allows properties within a planned community to have horizontal boundaries but forbids the type of ownership established by the 1999 Declaration. Specifically, the North Carolina Comment to N.C. Gen. Stat. § 47F-1-101 expresses the General Assembly's intent that residences within a planned community which has horizontal boundaries must be a "condominium" as defined by the Condominium Act:

> It is understood and intended that any [planned community] development which incorporates or permits horizontal boundaries or divisions between the physical portions of the planned community designated for separate ownership or occupancy *will be created under and governed by the North Carolina Condominium Act* and not this Act.

N.C. Gen. Stat. § 47F-1-101 cmt. 2 (emphasis added.)[6]

Based on the foregoing, we conclude that the Association is entitled to an order declaring that the 1999 Declaration establishes a form of property ownership in the Planned Community's condo units not recognized in North Carolina. Therefore, we reverse the order of the trial court dismissing the Association's counterclaim and remand the matter to enter judgment for the Association on this counterclaim. Such judgment, of course, would not affect the rights of those not parties to this action.

2. Reformation Claim

[2] The Association's counterclaim seeking reformation of the 1999 Declaration provisions relating to the condo units was properly

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5. The "Official Comment" to N.C. Gen. Stat. § 47C-1-103 states that "unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium. . . . Such projects may have many of the attributes of condominiums, but they are not covered by [the Condominium] Act"). N.C. Gen. Stat. § 47C-1-103 cmt. 5.

6. The North Carolina Comment is not technically part of the Act's statutory language. However, the General Assembly authorized that the comments be printed with the Act. Specifically, Section 2 of the session law which enacted the Planned Community Act states that the General Assembly's "Revisor of Statutes shall cause to be printed with this act all relevant portions of the official comments to the [Act] and all explanatory comments of the drafters of this act, as the Revisor deems appropriate." North Carolina Planned Community Act of October 15, 1998, ch. 199, sec. 2, 1998 N.C. Sess. Laws at 691.

dismissed. Any reformation order would necessarily affect the ownership interests of these condo unit owners in certain common areas; and, therefore, they are necessary parties. *See NCDOT v. Fernwood Hill*, 185 N.C. App. 633, 636-37, 649 S.E.2d 433, 436 (2007); *NCDOT v. Stagecoach Village*, 174 N.C. App. 825, 622 S.E.2d 142 (2005); N.C. Gen. Stat. § 1A-1, Rule 19(a)(2015). Also, any reformation order would decide whether the condo units would be subject to a single condominium association or whether each condo building would be governed by a separate association. Without all necessary parties, the trial court and this Court lack the authority to decide the reformation claim. *See Rice v. Randolph*, 96 N.C. App. 112, 113, 384 S.E.2d 295, 297 (1989). Therefore, we affirm Judge Pope's order dismissing the Association's reformation counterclaim.[7]

We note that the Planned Community Association may own the common elements of the Planned Community at large. The common elements of the condominium portion of the Planned Community, however, may not be owned by the Association but must be held in common by the condo unit owners in common. The condo unit owners are still part of the Planned Community and subject to the 1999 Declaration pertaining to common elements of the Planned Community, *see* N.C. Gen. Stat. § 47F-1-103 (providing that real estate comprising a condominium may be part of a planned community), notwithstanding the fact that they are also subject to a condominium association, *see* N.C. Gen. Stat. § 47C-3-101 (requiring that a condominium association be organized where a condominium is established).

B. The Clubhouse Dispute

[3] The second dispute between the Developer and the Association concerns the Planned Development's clubhouse amenity (the "Clubhouse"). Pursuant to the 1999 Declaration, ownership of the Clubhouse remains with the Developer in perpetuity, never to be turned over to the Association; and the Association is required in perpetuity to assess dues (the "Clubhouse Dues") from the homeowners and remit them to the Developer. Specifically, the 1999 Declaration provided as follows:

> Declarant shall grant to the Association and the Owners . . . a perpetual nonexclusive right to use the [Clubhouse],

7. Our holding should not be construed as an opinion that the property rights of the owners of the condominium-styled residences are, at present, unmarketable. *See* N.C. Gen. Stat. § 47F-2-103(d) ("Title to a lot and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this Chapter. Whether a substantial failure to comply with this Chapter impairs marketability shall be determined by the law of this State relating to marketability.")

> and each Owner, in consideration thereof, shall pay the Clubhouse Dues to the Association, and the Association shall pay all of the Clubhouse Dues collected . . . to Declarant. The obligation of each Owner to pay Clubhouse Dues to the Association shall be absolute for the entire period of time that such Owner is an Owner . . . , and shall not be dependent on such Owner's actual use of the [Clubhouse]. The Association shall bill and collect the Clubhouse Dues from each Owner . . . [and] shall pay the total collected amount of Clubhouse dues to Declarant.

After control of the Association's board was assumed by the homeowners, the board voted to stop honoring this obligation to assess and collect the Clubhouse Dues for the Developer.

In this action, the Developer and the Association have asserted a number of claims and counterclaims regarding the Clubhouse Dues, all of which have been dismissed in a series of orders by the trial court.

For the reasons below, we conclude that the Planned Community Act does not forbid the arrangement established in the 1999 Declaration, whereby (1) the Developer retains ownership of the Clubhouse amenity; (2) the Association is authorized to assess dues from its homeowners to pay the Developer for the right to use the amenity; and (3) the Association is obligated to assess its homeowners for the Clubhouse Dues and remit them to the Developer. (We note that the Planned Community Act does allow that when homeowners take control of an association board from the developer, the association may relieve itself of obligations made on its behalf by the developer, where it is found that the arrangement was "not bona fide or was unconscionable[.]" N.C. Gen. Stat. § 47F-3-105.) We address the Association's counterclaims and the Developer's claims concerning the Clubhouse dispute in turn below.

1. Association Clubhouse Dispute Counterclaims

The Association asserted four prayers for relief relating to the Clubhouse dispute which were dismissed by the trial court. For the reasons stated below, we affirm the dismissal as to three of these prayers for relief, but not based on the legal reasoning of the trial court.[8]

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8. The Association has not made any argument on appeal regarding the dismissal of the fourth prayer for relief and is therefore abandoned. Developer contends that the Association's failure to contest the dismissal of one prayer for relief prevents the Association from arguing its other claims. We disagree. While it is true that Rule 28 of

The trial court's legal justification for dismissing the Association's claims concerning the Clubhouse dispute was that the claims were time-barred by N.C. Gen. Stat. § 47F-2-117(b). This statute provides that "[n]o action to challenge the validity of an *amendment* [to a declaration] adopted pursuant to this section may be brought *more than one year* after the amendment is recorded." N.C. Gen. Stat. § 47F-2-117(b) (2015) (emphasis added).

We conclude that G.S. 47F-2-117(b) *does not apply* to the 1999 Declaration and that, therefore, the trial court erred by relying on this statute as its justification for dismissing the claims.[9] Specifically, one-year time limit contained in G.S. 47F-2-117(b) – by its plain language – only applies to challenges to "amendments" to an existing declaration, not to challenges to the declaration itself. Here, though, the 1999 Declaration was not an "amendment" of the prior declarations recorded by the Developer concerning the Property. Rather, the 1999 Declaration was a *new* declaration, and the prior declarations recorded by the Developer governing the predecessor communities developed on the Property were terminated.

Specifically, the Planned Community Act does not view the process by which communities subject to separate declarations are merged into one community as an *amendment* to the former declarations. Rather, the Act treats this process as a *merger* which essentially terminates the former planned communities/declarations and establishes a *new planned community* subject to a new declaration.[10] *See* N.C. Gen. Stat. § 47-2-121 (2015).

We note that the 1999 Declaration refers to itself as an "amendment." However, it also states that the *two* prior declarations "shall be . . . of

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our Appellate Rules provides that *issues* not presented in a party's brief are deemed abandoned, N.C. R. App. P. 28(b)(6), this does not affect the party's right to appeal "[f]rom any final judgment of a superior court[.]" N.C. Gen. Stat. § 7A-27(b)(1)(2015).

9. We need not – and do not – reach the issue of whether G.S. 47F-2-117(b) is, in fact, a statute of repose.

10. Under the Act, a merger requires the approval of the same percentage of owners which must approve a termination, not the lower percentage needed to approve an amendment. *See* N.C. Gen. Stat. § 47F-2-121. And under the Act, a termination (and therefore a merger) requires the approval of 80% of the owners. *See* N.C. Gen. Stat. § 47F-2-118. Here, it appears that one of the two former communities approved the merger with 99% of the vote and the other with 75% of the vote. We note that neither party has made any argument concerning the validity of the adoption of the 1999 Declaration, and all parties have been acting for almost two decades as if the 1999 Declaration was validly approved.

no further force and effect for any purpose whatsoever, and [shall be] replaced in their entirety by the [1999] Declaration." Whether labelled as an amendment or not, it is clear that the 1999 Declaration "merged or consolidated" two former planned communities "into a single planned community." *See* N.C. Gen. Stat. § 47F-2-121(a).

Notwithstanding its reliance on G.S. 47F-2-117(b), we conclude that the trial court properly dismissed the Association's counterclaims concerning the Clubhouse Dues dispute, though for a different reason, as explained below.

a. Clubhouse Dues

[4] The Association prayed for (1) a declaration that "the Association has no duty under the law to collect Clubhouse Dues from owners and that any such duty stated in the Declaration is null and void[,]" and (2) the repayment of "all Clubhouse Dues improperly collected and paid [to the Developer]."

The Association argues in its brief that the Planned Community Act does not authorize it to collect dues from its homeowners to pay to a third party for use of property that is not part of the Planned Community. The Association essentially argues that the Act, specifically N.C. Gen. Stat. § 47F-3-102(10),[11] only allows an association to assess dues for "common elements" and that the Clubhouse is *not* a common element.

We conclude that the Association's argument is unpersuasive for two reasons. First, N.C. Gen. Stat. § 47F-3-102, which enumerates certain powers enjoyed by planned community's associations, is not the sole source of authority for an association. Indeed, the Act states that *it is the declaration* of a planned community which "form[s] the basis for the legal authority for the planned community to act" so long as the declaration is "not inconsistent with the provisions of [the Act]." N.C. Gen. Stat. § 47F-2-103(a). And here, the 1999 Declaration has expressly authorized the Association to assess its homeowners the Clubhouse Dues.

We conclude that that the General Assembly did not intend N.C. Gen. Stat. § 47F-3-102 to *limit* the power of a planned community's association. Rather, its plain language – which begins with "[u]nless . . .

11. The Association did not plead or argue any other theory. For instance, it did not contend that the Declaration was valid but that the Association had the right to terminate its obligation to collect the Clubhouse Dues based on N.C. Gen. Stat. § 47F-3-105 (2015), which allows an association to terminate any contractual obligation put in place by a declarant that is not *bona fide* or is unconscionable to the owners within the planned community.

the declaration expressly provides to the contrary, the association may . . ." – indicates that the General Assembly intended for N.C. Gen. Stat. § 47F-3-102 to provide powers to an association *in addition* to those already provided to it by its declaration, provided that the declaration is silent regarding said powers. Further, the Association has not pointed to any other provision in the Act which prevents a declaration from authorizing an association to enter into a contract with a third party (here, the Developer) to provide an amenity for the homeowners and to assess the homeowners for the costs associated with the contract. Therefore, since the 1999 Declaration specifically authorizes the Association to assess its homeowners for the Clubhouse Dues, and since the Act does not proscribe the granting of this power to an association, we overrule the Association's argument.

Second, presuming that N.C. Gen. Stat. § 47F-3-102 is controlling, this section authorizes the Association to collect the Clubhouse Dues. For instance, N.C. Gen. Stat. § 47F-3-102(10) states that, unless otherwise prohibited by the declaration, a planned community association has the power to "[i]mpose and receive any payments, fees or charges" not only for the use of "common elements" but also "for services provided to lot owners[.]" Though the Clubhouse is not a "common element" of the Planned Community, see N.C. Gen. Stat. § 47F-1-103(4) (defining a common element as "any real estate within a planned community owned or leased by the association"), G.S. 47F-3-102 also empowers an association to assess dues for "services." And, here, the Developer's role of providing access to and maintaining a clubhouse amenity is a "service."

b. Real and Personal Covenants

[5] The Association argues that we are bound by *Midsouth Golf, LLC v. Fairfield*, 187 N.C. App. 22, 652 S.E.2d 378 (2007) and other cases to conclude that the obligations imposed in the 1999 Declaration for the payment of Clubhouse Dues are *personal* covenants rather than *real* covenants, and are therefore unenforceable by the Developer in this case. We disagree.

Midsouth Golf is one of three opinions from our Court involving a residential community and a golf course amenity owned by a third party. Those appeals dealt with covenants contained within declarations which essentially required the developer and its successors to maintain a golf course amenity for the homeowners and for the homeowners to pay dues for the amenity. In a series of three decisions, panels of our Court

held that (1) the covenant which created the homeowners' obligation to pay the dues was a personal covenant, and therefore, was unenforceable against those who bought homes from the original owners and (2) despite this holding, any successor to the developer had a continuing obligation to maintain the golf courses amenity, even if only one homeowner chose to continue paying the dues. *See id.*; *Fairfield v. Midsouth Golf*, 215 N.C. App. 66, 715 S.E.2d 273 (2011); *Waterford v. Midsouth Golf*, 215 N.C. App. 394, 716 S.E.2d 87 (2011). These three opinions from our Court are discussed in the opinion issued in a subsequent federal proceeding involving the bankruptcy of the successor to the developer who owned the golf course-amenity owner. *See In re Midsouth Golf*, 549 B.R. 156, 169 (2016). Of significance, bankruptcy judge noted that our Court, in determining that the association had the right to enforce the covenant, applied the law of contract, and not the law of real and personal covenants: "Those covenants specifically identify the property owners' association [] as an entity authorized to enforce the provisions therein against the property owner[.] As between those parties and in that context, the inquiry is a basic matter of contract law. Whether the [] covenant was 'real' or 'personal' was both immaterial to and wholly outside the scope of the [North Carolina Court of Appeals'] analyses." *Id.*

In the present action, the Developer has not sued the homeowners themselves to enforce any covenant. Indeed, the homeowners are not parties. Rather, the Developer has asserted claims against the Association to enforce the Association's obligation under the 1999 Declaration to pay money to the Developer. This obligation is contractual in nature, and whether this obligation is real or personal is irrelevant to our analysis, since the Association is the original party expressly obligated under the 1999 Declaration. *See id.*

We make no ruling regarding the obligation of the homeowners themselves to pay Clubhouse Dues to the Association, as they are not parties to this action. We only note that homeowners within a planned community are generally obligated to respect not only real covenants governing their property, but also to pay any dues which are assessed by their association.

2. Developer's Clubhouse Dispute Claims

Developer, through its entity which owns the Clubhouse, has asserted four claims against the Association relating to the Association's refusal to continue assessing Clubhouse Dues. Judge Pope granted the

Association's summary judgment motion on all four claims.[12] Developer appealed. We affirm in part and reverse and remand in part.

a. Breach of Contract and the Covenant of Good Faith and Fair Dealing

[6] The first claim asserted by the Developer was for breach of contract and breach of the covenant of good faith and fair dealing, based on the Association's decision not to honor its obligation in the 1999 Declaration to assess and remit Clubhouse Dues. We hold that the Developer met its burden to survive summary judgment; and, therefore, we reverse that portion of the order granting summary judgment on the claim.

The terms of the 1999 Declaration clearly establish obligations which are contractual in nature between the owner of the Clubhouse and the Association:

> Declarant shall grant to the Association and the [homeowners] a perpetual nonexclusive right to use the Clubhouse Use Facilities, and each Owner, in consideration thereof, shall pay the Clubhouse Dues to the Association, and the Association shall pay all of the Clubhouse Dues collected from Owners to Declarant.
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> . . . The Association shall bill and collect the Clubhouse Dues from each Owner on a current basis, and . . . shall pay the total collected amount of Clubhouse Dues to Declarant.

The language of the 1999 Declaration clearly obligates the Association to bill and collect Clubhouse dues and to pay the total collected amount of Clubhouse Dues to the Declarant. The fact that the original Declarant does not currently hold title to the Clubhouse because title was transferred to another Developer-controlled entity is irrelevant. The 1999 Declaration provides that its provisions and all of its covenants would be "binding upon Declarant, its successors and assigns[.]"

"When the language of a contract is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties

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12. Developer has made no argument on appeal regarding the trial court's grant of summary judgment on its claim for libel *per se*, and therefore we regard this claim as abandoned. *See* N.C. R. App. P. 21.

elected to omit." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962).

The Developer produced evidence tending to show that the Association sent a message to its homeowners that the Association "would no longer bill for or collect Clubhouse Dues," that monthly payments "would no longer include Clubhouse Dues," and that members of the Association were "not required" to belong to the Clubhouse and "may opt out if they so desire." The evidence clearly creates a genuine issue of fact regarding the Developer's breach of contract and good faith claims. Of course, at trial the Association may bring forth evidence that conflicts with the Developer's evidence or which shows that the provisions in the 1999 Declaration are not 'bona fide" or are "unconscionable." *See* N.C. Gen. Stat. § 47F-3-105.[13]

b. Civil Conspiracy and Unfair or Deceptive Acts or Practices

[7] The Developer asserted a claim for civil conspiracy against the Association and its members. In order to establish a claim for civil conspiracy, a party must allege (1) the existence of a conspiracy, (2) wrongful acts done by certain of the alleged conspirators in furtherance of that conspiracy, and (3) injury as a proximate result of the conspiracy. *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008). The doctrine of intra-corporate immunity provides that because "at least two persons must be present to form a conspiracy, a corporation cannot conspire with itself, just as an individual cannot conspire with himself." *State ex rel. Cooper v. Ridgeway*, 84 N.C. App. 613, 625, 646 S.E.2d 790, 799 (2007), *rev'd on other grounds*, *State ex rel. Cooper*, 362 N.C. 431, 666 S.E.2d 107 (2008).

Here, we conclude that the trial court properly granted summary judgment for the Association on Developer's civil conspiracy claim because the Association, as a corporation, cannot conspire with itself. *See id.* There is no allegation that the Association conspired with any third party regarding the Clubhouse Dues. We further affirm the trial court's grant of summary judgment dismissing the Developer's claim for

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13. We note that the Condominium Act provides that a condominium association may terminate *any* "contract or lease between the association and a declarant" *even if* the contract is not found to be unconscionable. N.C. Gen. Stat. § 47C-3-105. The General Assembly, though, did not see fit to include this additional protection for planned community associations in the Planned Community Act. Here, any dispute regarding the provisions of the 1999 Declaration is governed by the Planned Community Act, and not the Condominium Act, notwithstanding that there are condo units located within the Planned Community.

damages for unfair or deceptive acts or practices, as this claim is based on the alleged civil conspiracy.

C. Association Counterclaims

The third area of dispute challenged in this appeal concerns a number of counterclaims asserted by the Association against members of the Cornblum family for alleged self-dealing. We address each counterclaim in turn.

1. Breach of Fiduciary Duty

[8] In its third counterclaim, the Association sought damages for breach of fiduciary duty by Michael Cornblum, Carolyn Cornblum and the Cornblum-controlled entity which served as the declarant (the "Declarant") in the 1999 Declaration.[14] We affirm the dismissal as to the Association's counterclaim against the Declarant. However, we reverse as to Michael Cornblum and Carolyn Cornblum.

"A claim for breach of fiduciary duty requires the existence of a fiduciary duty." *Governors Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 247, 567 S.E.2d 781, 786 (2003).

We agree with the Developer that the trial court properly dismissed this counterclaim because its relationship with the Association was contractual. *See Highland Paving Co., LLC v. First Bank*, 227 N.C. App. 36, 43, 742 S.E.2d 287, 292-93 (2013) ("[P]arties to a contract do not thereby become each other's fiduciaries[.]"). A declarant is not required to put the interests of the association ahead of its own in every instance when it sets up a planned community, as generally would be required of a fiduciary. Indeed, a declarant is allowed to reserve rights to itself and enter into contractual relationships between itself and the association.

However, while serving as *directors* and *officers* of the Association, Michael and Carolyn Cornblum certainly *did* owe a fiduciary duty to the Association. *See Governors Club*, 152 N.C. App. at 248, 567 S.E.2d at 786-87 (citing *Underwood v. Stafford*, 270 N.C. 700, 703, 155 S.E.2d 211, 213 (1967) (stating that under North Carolina Law, "directors of a corporation generally owe a fiduciary duty *to the corporation*"); *see also Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983).

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14. The first two counterclaims concern the legal status of the condominium-style units addressed in section III.A. of this opinion.

N.C. Gen. Stat. § 55–8–30 requires a corporate director to discharge his or her duties as a director: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation. N.C. Gen. Stat. § 55-8-30(a)(1)-(3) (2015); *see also* N.C. Gen. Stat. § 55-8-42(a) (2015) ("An *officer* . . . shall discharge his duties . . . in a manner *the officer* reasonably believes to be in the best interests of the corporation.") (emphasis added). "Allegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1) (2003)." *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66–67, 614 S.E.2d 328, 335 (2005) (citing *Tyson v. N.C.N.B.*, 305 N.C. 136, 142, 286 S.E.2d 561, 565 (1982)); *see* N.C. Gen. Stat. § 1-52(1) (2015).

The Association's counterclaim alleges that Carolyn Cornblum was an officer until 2014 and that Michael Cornblum was a director until 2014. The Association makes a number of allegations which, if true, tend to show that the Cornblums acted in their own interests and not in the best interests of the Association within the applicable limitations period. Accordingly, we hold that the trial court improperly dismissed the Association's counterclaim for breach of fiduciary duty as to Michael and Carolyn Cornblum.

2. Unfair and Deceptive Trade Practices

[9] In its fourth counterclaim, the Association sought damages based on allegations that Michael Cornblum, Carolyn Cornblum, Madeline Cornblum and the Declarant committed unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 (2015). We affirm in part, and reverse in part.

Our Supreme Court has instructed that a claim under N.C. Gen. Stat. § 75-1.1 "does not extend to a business's internal operations, but rather extend to acts between a business with another business(es) *or* a business with a consumer(s). *White v. Thompson*, 364 N.C. 47, 52-53, 691 S.E.2d 676, 679-80 (2010). Here, as in *Thompson*, the bad acts alleged by the Association "did not occur in . . . dealings with [other market participants]." *Thompson*, 364 N.C. at 54, 691 S.E.2d at 680. The purported misconduct by the Cornblum family was alleged to have taken place while members of the Cornblum family were controlling directors of the Association. Even taken as true, most of the allegations regarding the actions of the Declarant and the members of the Cornblum family

are more properly classified as occurring within a single entity rather than "within commerce." *Id.*

We do note that some of the bad acts alleged by the Association deal with the Cornblum's marketing of the condo units in violation of North Carolina law. These acts were arguably "within commerce." However, none of the past or present condo unit owners are parties. Thus, we state no opinion and do not rule upon the issue of whether individual homeowners, who are not parties to this action, could state a valid Chapter 75 claim against the Cornblums.

Therefore, we conclude that the trial court properly dismissed the Association's claim for unfair and deceptive trade practices.

3. Breach of Covenant of Good Faith and Fair Dealing

In its fifth counterclaim, the Association sought damages based on an alleged breach of the covenant of good faith and fair dealing by the Declarant. To state a valid claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must plead that the party charged took action "which injure[d] the right of the other to receive the benefits of the agreement," thus "depriv[ing] the other of the fruits of [the] bargain." *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228-29, 333 S.E.2d 299, 305 (1985).

We conclude that the Association's fifth counterclaim should not have been dismissed. The counterclaim does allege a contractual relationship, established in the Declaration itself. The Association alleged that "[the Declarant] imposed upon the owners [within the Planned Community] a declaration whose terms and provisions must be in good faith and fair dealing." We conclude that this counterclaim does state a claim for which relief could be granted, and, on this point, we reverse the order of the trial court.

4. Accounting

[10] In its final counterclaim, the Association sought an equitable accounting of the Association's income and expenses and collection history during all periods of Declarant control. We dismiss this portion of the appeal as moot. We base our dismissal on the parties' agreement via a consent order that the Declarant would deliver all "books and records relating to the Association" in their custody or control. The consent order provided that these "books and records" would include financial records of the Association, including a schedule of all funds receivable for the payment of assessments. A determination on this counterclaim

would have no practical effect in light of the consent order. *See Roberts v. Madison Cnty. Realtors Ass'n, Inc.*, 344 N.C. 394, 398–99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

IV. Conclusion

We reverse Judge Wallace's order dismissing the Association's counterclaim seeking a declaration regarding the legal status of the Planned Community's condominium-style residences, and we direct the trial court on remand to enter judgment for the Association on this counterclaim, consistent with this opinion. We, however, affirm Judge Wallace's order dismissing the Association's counterclaim seeking reformation of the 1999 Declaration, based on the Association's failure to join all necessary parties as explained in this opinion. On remand, the trial court may, in its discretion, allow the Association for leave to amend to join necessary parties and to re-assert its reformation claim.

We affirm the trial court's order dismissing the Association's counterclaims relating to the Clubhouse dispute. We reverse the trial court's summary judgment on Developer's claim for breach of contract and breach of the covenant of good faith and fair dealing, and remand for further proceedings not inconsistent with this opinion. We affirm that summary judgment order as to the Developer's other claims.

We reverse Judge Pope's dismissal of the Association's third counterclaim for breach of fiduciary duty against Michael Cornblum and Carolyn Cornblum, and remand for further proceedings not inconsistent with this opinion. We dismiss the Association's appeal of Judge Pope's dismissal of its counterclaim seeking an accounting, as moot. Judge Pope's dismissal of the remainder of the Association's counterclaims in that order is affirmed.

AFFIRMED IN PART, DISMISSED IN PART, REVERSED IN PART, AND REMANDED.

Judges STROUD and TYSON concur.

FORBES v. CITY OF DURHAM

[255 N.C. App. 255 (2017)]

WINSLOW FORBES, Plaintiff
v.
CITY OF DURHAM, North Carolina, and JOSE L. LOPEZ, SR. in his individual capacity and in his official capacity as Chief of Police for the City of Durham, and THOMAS J. BONFIELD, in his individual capacity and in his official capacity as City Manager for the City of Durham, Defendants

No. COA16-964

Filed 5 September 2017

1. Employer and Employee—wrongful retaliation—summary judgment

The trial court properly granted summary judgement for the City of Durham in a claim for employment retaliation under Title VII by a police officer passed over for promotion. While the officer contended that his comments to the police chief about perceived racial discrimination by African American officers were protected activities that caused the adverse action of changing the hiring process and passing him over for promotion, there must be a direct link connecting the comments to the promotion decision that is more than speculation. Moreover, a non-retaliatory reason for the promotion decision could be demonstrated.

2. Employer and Employee—retaliation claim—42 U.S.C. § 1981

A retaliation claim for reporting acts of discrimination can be brought under 42 U.S.C. § 1981. Even though section 1981 does not explicitly include retaliation, precedent state that it is a an integral part of preventing racial discrimination.

3. Employer and Employee—retaliation—42 U.S.C. § 1981 and § 1983 claims

The trial court properly granted summary judgment for Durham a police officer's claim under 42 U.S.C. § 1983 that rose from his being passed over for promotion, allegedly in retaliation for mentioning the perception of racial discrimination by African-American officers to the police chief. Plaintiff did not direct the appellate courts to any policy or regulation that caused or encouraged the retaliation.

4. Employer and Employee—retaliation against police officer—city manager—summary judgment

Summary judgment was properly granted against a police officer on a retaliation claim against a city manager arising from

the police officer being passed over for promotion. The allegations and forecasted evidence did not support a claim against the city manager for the police chief's promotion decision that was made months before the conversation with the city manager.

5. Employer and Employee—retaliation—police chief—promotion decision

Summary judgment was properly granted for a police chief on claims under 42 U.S.C. § 1981 and 1983 by one of his officers who was passed over for promotion. Plaintiff lacked sufficient evidence of a connection between his protected actions and the decision to pass him over for promotion.

6. Employer and Employee—retaliation—being passed over for promotion

Summary judgment was properly granted for a police chief, a city manager, and the City of Durham on a claim under the North Carolina Constitution arising from plaintiff being passed over for promotion, allegedly in retaliation for reporting racial concerns. Plaintiff did not provide support for his argument that there was a claim available under Article I, Section 19 of the State Constitution.

Judge MURPHY concurs in the result only.

Appeal by plaintiff from order entered on or about 11 July 2016 by Judge Henry W. Hight in Superior Court, Durham County. Heard in the Court of Appeals 9 March 2017.

Edelstein & Payne, by M. Travis Payne and Sean Cecil, for plaintiff-appellant.

Kennon Craver, PLLC, by Joel M. Craig and Henry W. Sappenfield; and Office of the City Attorney, by Kimberly M. Rehberg, for defendant-appellees.

STROUD, Judge.

Plaintiff Winslow Forbes ("plaintiff") appeals from the trial court's order granting summary judgment for defendants City of Durham ("defendant City of Durham"), Jose L. Lopez, Sr. ("defendant Lopez"), and Thomas J. Bonfield ("defendant Bonfield") and dismissing all of his claims with prejudice. On appeal, plaintiff argues that he has demonstrated several genuine disputes of material facts and that the

trial court should not have granted summary judgment on any of his retaliation claims. After review, we disagree and find the trial court did not err in granting summary judgment on all of plaintiff's claims.

Background

Plaintiff joined the City of Durham Police Department in 1988. He was promoted to Corporal around 1997, Sergeant around 1999, and Lieutenant around 2001. Defendant Lopez became Chief of Police in 2007. Defendant Lopez promoted plaintiff to Captain in 2009, and a little more than a year later, on 13 August 2010, he appointed him to Assistant Chief.

Plaintiff was considered for a promotion to Deputy Chief on two occasions: first, in May 2012, when he and Assistant Chief Larry Smith were considered for an open Deputy Chief position. Defendant Lopez ultimately selected Assistant Chief Smith for the promotion. Plaintiff "believed that both he and [Assistant Chief] Smith were well-qualified candidates." Nevertheless, afterwards, plaintiff told defendant Lopez that "there were many black officers who were qualified for promotion, but Chief Lopez had consistently promoted non-black officers over equally or better-qualified black officers." Plaintiff also allegedly told defendant Lopez that "many black officers had a perception of discrimination[.]" Defendant Lopez "responded in a defensive and angry tone." Plaintiff alleged in his complaint that it appeared to him that defendant Lopez "was angry about the suggestion that even a *perception* of discrimination might exist."

Plaintiff alleged that after this conversation, defendant Lopez did not take any action to address either actual or perceived racial discrimination and that he then began treating plaintiff differently than similarly-situated white colleagues. For example, plaintiff described a situation involving a black male Lieutenant under his command and a white male subordinate officer who received a coaching and counseling memo from the Lieutenant for violating a department policy and then complained to a white male Sergeant in Internal Affairs. The Lieutenant told plaintiff he had previously been treated unfairly by this Sergeant and he was concerned he would once again be treated unfairly during this investigation. Plaintiff requested another Internal Affairs officer be assigned to this investigation; afterwards, defendant Lopez decided plaintiff would not be allowed to review the investigative file, in contrast to the typical process where each individual in the chain of command above the person under investigation can review the file and determine whether or not they agree with Internal Affairs' conclusions. Plaintiff told defendant Lopez he felt he was being treated differently than white commanding officers in similar circumstances.

In 2013, another Deputy Chief retired, leaving a position available. Plaintiff alleges that he was the only remaining candidate for promotion based on the Review Panel's assessments approximately six months earlier. Plaintiff alleges that "[t]he usual and customary practice of the Police Department has been to promote the next individual on the list of qualified applicants from the Review Panel, provided that the list is not more than eighteen months old." But on 18 February 2013, defendant Lopez informed plaintiff that he intended to conduct a new process for the open Deputy Chief position. "Plaintiff believes that [defendant] Lopez made this decision on the basis of race, and in retaliation for [p]laintiff's opposition to race discrimination within the Police Department."

Plaintiff filed a complaint with Human Resources on 28 February 2013, alleging race discrimination and retaliation by defendant Lopez. Plaintiff applied for the open Deputy Chief position and was interviewed by the Review Panel in March 2013. Defendant Lopez informed plaintiff on 21 March 2013 that he had selected Assistant Chief Anthony Marsh -- a black male -- for the Deputy Chief position over plaintiff. Plaintiff alleged in part that Chief Lopez "failed to promote him to Deputy Chief in retaliation for his opposition to race discrimination by Chief Lopez."

Plaintiff told defendant Lopez both via email and verbally that he believed the promotion process "had been unfair, discriminatory, and retaliatory." On 25 March 2013, defendant Lopez gave plaintiff a coaching and counseling memo in response to his claims of discriminatory and retaliatory practices. Plaintiff filed a supplemental complaint with Human Resources regarding the memo. Defendant City of Durham then hired a consultant to investigate plaintiff's allegations. Human Resources contacted plaintiff on 7 June 2013 and informed him that "the consultant found his allegations of race discrimination to be 'not substantiated' but had been 'unable to determine' whether retaliation had occurred."

Plaintiff further alleged that on 2 July 2013, defendant Lopez made a "racially offense remark in the presence of his Executive Committee and several other City employees." Defendant Lopez was preparing for a press conference regarding recent shootings in Durham; he pointed out that all of the recent shooting victims were African-American and had been involved in criminal activity. He also stated that all known suspects were African-American. "Plaintiff felt that this remark was offensive because the race of the victims should not be relevant to law enforcement officials." An Assistant Chief pointed out that one of the shooting victims was a black lawyer who was an innocent bystander and not involved in any criminal activity; defendant Lopez responded by stating that "the lawyer deserved to get shot because he was a public defender."

Plaintiff perceived this remark as racially motivated and highly offensive. On 16 July 2013, he met with defendant Bonfield, who was employed by the City of Durham as City Manager, and reported defendant Lopez's remark. Defendant Bonfield assured plaintiff he took the allegation seriously and that it would be investigated. Defendant Lopez held a press conference on 6 September 2013 and stated that he did not recall making the remark, but he could not be certain that he had not.

Plaintiff filed his complaint on or about 29 July 2014. Plaintiff's complaint contained several causes of action for race discrimination and retaliation, including: (1) under Title VII against defendant City of Durham; (2) under 42 U.S.C. § 1981 against defendant City of Durham and defendants Lopez and Bonfield in both their official and individual capacities; (3) under 42 U.S.C. § 1983 against defendant City of Durham and defendants Lopez and Bonfield in both their official and individual capacities; and (4) under the North Carolina Constitution against defendant City of Durham and defendants Lopez and Bonfield in their official capacities.

Defendants City of Durham and Bonfield jointly filed an answer, and defendant Lopez filed a motion to dismiss and answer of his own. On or about 29 May 2015, defendants filed a motion for summary judgment "as to all claims against them in this matter." The motion included an affidavit from defendant Lopez, and defendants argued:

> The pleadings in this matter, the attachments thereto, the deposition testimony, the discovery responses in this matter, and the affidavit [of defendant Lopez] . . . demonstrate the absence of a genuine issue of material fact and that [d]efendants are entitled to judgment as a matter of law dismissing all claims against them.

The trial court held a hearing on the motion on 14 June 2016 and entered an order on or about 11 July 2016 granting defendants' motion for summary judgment and dismissing plaintiff's claims with prejudice. Plaintiff timely appealed to this Court.

Discussion

I. Standard of Review

> On appeal from summary judgment, the applicable standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

> affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. We review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact.

Smith v. Harris, 181 N.C. App. 585, 587, 640 S.E.2d 436, 438 (2007) (citations, quotation marks, and brackets omitted).

Plaintiff argues that he has demonstrated genuine issues of material fact in relation to the pre-textual nature of defendants' justifications for the adverse actions at issue. We will address these issues in relation to each of the underlying claims for which plaintiff has raised arguments on appeal.

II. Retaliation claim under Title VII

[1] Plaintiff first argues that the trial court erred in dismissing his retaliation claim under Title VII against defendant City of Durham.[1] Under Title VII:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C.A. § 2000e-3(a).

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1. Plaintiff has not raised any issues on appeal in relation to the discrimination component of any of his claims; his appeal solely focuses on the retaliation component. Unfortunately, defendants' brief only addresses the discrimination component of this first claim, so it is entirely unhelpful with this first issue.

This Court has previously set forth the burden of proof in a claim for retaliation under Title VII:

> **A. Burden of Proof in Title VII Cases**
>
> According to the North Carolina Supreme Court, the claimant carries the initial burden of proof in Title VII cases. In addition, a prima facie showing of retaliatory discharge requires a plaintiff to show: (1) he engaged in some protected activity, such as filing an EEO complaint; (2) the employer took adverse employment action against plaintiff; and (3) that the protected conduct was a substantial or motivating factor in the adverse action (a causal connection existed between the protected activity and the adverse action). Petitioner must prove "but for" causation instead of "motivating factor" in his prima facie case of retaliatory acts in violation of Title VII.
>
> After plaintiff presents a prima facie case of retaliation, the burden shifts to the defendant to show it would have taken the same action even in the absence of protected conduct. Defendant must articulate a legitimate nondiscriminatory reason for its action. A legitimate reason overcomes the presumption of discrimination from plaintiff's prima facie showing if it has a rational connection with the business goal of securing a competent and trustworthy work force.
>
> If defendant shows a legitimate reason that overcomes the presumption, plaintiff then has to show that the reason was only a pretext for the retaliatory action. Therefore, a plaintiff retains the ultimate burden of proving that the adverse employment action would not have occurred had there been no protected activity engaged in by the plaintiff.

Employment Sec. Comm'n v. Peace, 128 N.C. App. 1, 9-10, 493 S.E.2d 466, 471-72 (1997) (citations, quotation marks, and brackets omitted), *aff'd in part, disc. review improvidently allowed in part, and dismissed in part*, 349 N.C. 315, 507 S.E.2d 272 (1998). *See also University of Texas Southwestern Med. Cntr. v. Nassar*, __ U.S. __, __, 186 L. Ed. 2d 503, 523, 133 S. Ct. 2517, 2533 (2013) ("Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e-2(m). This requires proof that

the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.").

In this case, plaintiff contends that the following constitute protected activities and meet the first element: the various occasions when plaintiff verbally raised concerns to defendant Lopez regarding perceived racial discrimination against African-American officers, including during the first week defendant Lopez became Chief of Police; the series of written complaints regarding discrimination and retaliation that plaintiff filed with Human Resources beginning in February 2013; the filing of an EEOC charge in August 2013; and the filing of plaintiff's complaint in this underlying matter in July 2014. Plaintiff argues that the adverse action was defendant Lopez's decision to have a new Review Panel process, instead of using the list generated by the prior Review Panel, and his promotion of Assistant Chief Marsh over plaintiff in March 2013. Accordingly, plaintiff argues that there are "at least material issues of fact that must go to the jury regarding whether the decision to not promote [plaintiff] constitutes retaliation." And plaintiff notes our prior case law holding that when the state of mind of the defendant is at issue, summary judgment is rarely proper. *See, e.g.*, V*aldese Gen. Hosp., Inc. v. Burns*, 79 N.C. App. 163, 165, 339 S.E.2d 23, 25 (1986) ("Summary judgment is rarely proper when a state of mind such as intent or knowledge is at issue."); *see also Robertson v. Hartman*, 90 N.C. App. 250, 253, 368 S.E.2d 199, 201 (1988) ("This Court has held that where there is a need to 'find facts' then summary judgment is not an appropriate device to employ, provided those facts are material." (Citation omitted)).

But before we even get to this portion of plaintiff's argument, we have to look at the bigger picture. Plaintiff is appealing from the trial court's order that granted defendants' motion for summary judgment and dismissed all of plaintiff's claims. In doing so, the trial court concluded that "there is no genuine issue of material fact" and that defendants were "entitled to judgment as a matter of law." The trial court dismissed plaintiff's claims for discrimination, and plaintiff has not challenged the trial court's ruling on these claims on appeal. Plaintiff only appeals the trial court's dismissal of his retaliation claims.

We agree with the trial court that there are not any genuine issues of material fact in this case. All parties seem to generally be on the same page regarding the events leading up to defendant Lopez's hiring decision when he selected Assistant Chief Marsh -- also a black male -- over plaintiff. The issue is whether that decision was motivated by a retaliatory basis. To determine that, we must apply the framework above.

Even assuming that plaintiff correctly identified protected activities and an adverse action on the part of defendant Lopez, as required for the first and second elements, plaintiff struggles to demonstrate a causal connection between the activities and the adverse action at issue. Many of the activities plaintiff mentions took place after defendant Lopez decided to have a new Review Panel and the hiring decision had been made. Defendant Lopez informed plaintiff that he intended to conduct a new process for the open Deputy Chief position on 18 February 2013 and informed plaintiff that he had selected Assistant Chief Marsh for the Deputy Chief position on 21 March 2013. Plaintiff's EEOC complaint and his underlying complaint in this matter were not filed until August 2013 and July 2014 respectively. Plaintiff cannot show how his filing of the EEOC complaints months later could have impacted defendant Lopez's hiring decision which had already been made. As for the series of written complaints plaintiff filed with Human Resources beginning in February 2013, defendant Lopez explained in his affidavit that he was not informed of the fact that plaintiff had filed anything with Human Resources until 27 March 2013, 37 days after he had announced the new Review Panel process and six days after he notified plaintiff that he had chosen Marsh for the position.

The only remaining protected activities that could have been tied to the hiring decision were the "multiple occasions [plaintiff] verbally raised with [defendant] Lopez what he and other African-American officers perceived to be racial discrimination on [defendant] Lopez's part." Plaintiff notes that such comments were even made during the first week defendant Lopez was employed as Chief, which would have occurred back in 2007 -- before defendant Lopez promoted plaintiff to Captain in 2009 and before defendant Lopez promoted him to Assistant Chief in 2010. Plaintiff has not, however, shown any direct link between his comments to defendant Lopez years and months prior to when defendant Lopez decided on how the promotion decision would be made and his decision to hire Assistant Chief Marsh rather than plaintiff for the Deputy Chief position. Any such connection must be more than mere speculation. *See*, *e.g.*, *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 237, 382 S.E.2d 874, 882 (1989) ("The direct causal connection between the protected activity and termination present in each of these cases is not evident in the case presently before the Court. This Court is not unmindful that circumstantial evidence is often the only evidence available to show retaliation against protected activity. Nevertheless, the causal connection must be something more than speculation; otherwise, the complaining employee is clothed with immunity for future misconduct and is 'better off' for having filed the complaint rather than

being no 'worse off.' " (Citations omitted)). Plaintiff failed to forecast sufficient evidence connecting his prior comments to defendant Lopez to the ultimate decision made to promote Assistant Chief Marsh.

Furthermore, even assuming that plaintiff can demonstrate that his verbal complaints of discrimination to defendant Lopez were connected to defendant Lopez's alleged adverse action of instituting a new Review Panel and not hiring him for the Deputy Chief position, defendant Lopez can demonstrate a non-retaliatory reason for the alleged adverse action, as Assistant Chief Marsh was also qualified for the Deputy Chief position. Defendant Lopez explained in his affidavit that since he had become Chief of Police, it had been his practice when filling open positions to use a promotion committee to consider and rate the candidates and then make the ultimate decision himself. He stated that he did not like to rely too much on seniority when making decisions, and that at the time he was deciding between plaintiff and Assistant Chief Marsh, the assessment panel rated both candidates as above average, but Marsh was rated slightly higher. The panel spoke highly of both candidates, but "were more complimentary of Marsh." While plaintiff has raised issue with some of defendant Lopez's alleged specific justifications for why he felt Marsh was better qualified than plaintiff -- including a claim that it "had to do with the day-to-day manner in which Chief Marsh presented himself and the work product he produced" -- plaintiff has not challenged the Review Panel's evaluation of Assistant Chief Marsh's qualifications as "above average" or that his rating was a bit higher than plaintiff's. Nor has plaintiff even alleged that the Review Panel itself made its evaluations improperly or with any sort of retaliatory motivation. Thus, since defendants have articulated "a legitimate nondiscriminatory reason" for the promotion of Marsh instead of plaintiff which "has a rational connection with the business goal of securing a competent and trustworthy work force," they have "overcome[ ] the presumption of discrimination from plaintiff's prima facie showing[.]" *Peace*, 128 N.C. App. at 10, 493 S.E.2d at 472 (citations and quotation marks omitted).

As noted above, plaintiff claims that even the decision to have a new Review Panel to evaluate candidates was retaliatory, in addition to the hiring decision itself. Plaintiff claims "[t]he usual and customary practice of the Police Department has been to promote the next individual on the list of qualified applicants from the Review Panel, provided that the list is not more than eighteen months old." Plaintiff also alleged in his complaint that this customary practice for handling promotions was part of a written policy created by defendant Lopez, yet also noted that while "[p]ursuant to said policy, a promotion list expires after eighteen

months, . . . it may be extended for a longer period of time by Defendant Lopez at his discretion." Thus, although this may have been a customary practice in the past, plaintiff has not presented any evidence that this practice was required by any official rules or policies adopted by the Police Department, or that defendant Lopez did not have full discretion to revise the policy -- which plaintiff acknowledges was created by defendant Lopez from the outset. Defendant Lopez has presented a "legitimate nondiscriminatory reason" for the use of the new Review Panel to evaluate candidates, and plaintiff does not suggest any sort of impropriety by the Review Panel. *Id.*

Since defendants have shown "a legitimate reason that overcomes the presumption, plaintiff then has to show that the reason was only a pretext for the retaliatory action. Therefore, a plaintiff retains the ultimate burden of proving that the adverse employment action would not have occurred had there been no protected activity engaged in by the plaintiff." *Id.* (citations, quotation marks, and brackets omitted). Plaintiff argues that the "justifications" given by defendant Lopez for his decision to promote Assistant Chief Marsh rather than plaintiff "are just not believable." We disagree. As noted above, Marsh's qualifications and the panel's evaluation of Assistant Chief Marsh and plaintiff are undisputed. Plaintiff can claim only that despite Assistant Chief Marsh's qualifications and the Review Panel's independent process of evaluating both plaintiff and Marsh, we should simply not "believe" that Lopez's hiring decision was not motivated by retaliation. Despite thousands of pages of deposition testimony and discovery, plaintiff cannot point to any evidence which shows that Lopez's decision "would not have occurred had there been no protected activity engaged in by the plaintiff." *Id.* (citation and quotation marks omitted). Plaintiff's forecast of evidence does not show any material factual dispute that would support a conclusion that the hiring decision would not have occurred "but for" retaliation. *See id.* at 9, 493 S.E.2d at 472.

III. 42 U.S.C. §§ 1981 and 1983 Retaliation Claims

[2] Next, plaintiff argues that the trial court should not have dismissed his retaliation claims against defendant City of Durham and defendants Lopez and Bonfield in their individual and official capacities under 42 U.S.C. §§ 1981 and 1983 because he asserted valid claims that should have been allowed to proceed to trial. Plaintiff notes in his brief that he "will accept for purposes of the summary judgment motion, that the Section 1981 and 1983 claims are merged[.]" Plaintiff notes further that while "[o]n its face, Section 1981 relates to racial discrimination in the making and enforcement of contracts . . . . it has been held to provide

a remedy against racial discrimination in employment." Additionally, plaintiff argues that "[e]ven though the language of Section 1981 does not expressly state that a claim for retaliation is covered, the Supreme Court has made clear that it is an integral part of preventing racial discrimination," and thus "a retaliation claim for reporting acts of discrimination can be brought under Section 1981." *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445, 170 L. Ed. 2d 864, 869, 128 S. Ct. 1951, 1954 (2008) ("The basic question before us is whether the provision [of 42 U.S.C. § 1981(a)] encompasses a complaint of retaliation against a person who has complained about a violation of another person's contract-related 'right.' We conclude that it does.").

a. Defendant City of Durham

[3] In order to succeed in a Section 1983 claim against defendant City of Durham, plaintiff would have to produce evidence of the City's direct culpability and causation; defendant Lopez's alleged discriminatory intent cannot be imputed to defendant City of Durham. *See, e.g.*, *May v. City of Durham*, 136 N.C. App. 578, 584, 525 S.E.2d 223, 229 (2000) ("[T]o make out a claim against a municipality directly, a plaintiff must do more than establish liability through respondeat superior, but must show that the 'official policy' of the municipal entity is the moving force of the constitutional violation." (Citation and quotation marks omitted)). Plaintiff does not meet this burden. Plaintiff has not directed this Court to any specific policy statement, ordinance, regulation, or other official policy of defendant City of Durham that caused or encouraged the alleged retaliation. Accordingly, we hold that the trial court did not err in granting summary judgment on plaintiff's claims against defendant City of Durham.

b. Defendant Bonfield

[4] Similarly, we hold that the trial court also did not err in dismissing plaintiff's Section 1981 and 1983 claims against defendant Bonfield in both his individual and official capacity. Plaintiff makes no specific arguments on appeal in relation to any of the defendants, and as to defendant Bonfield in particular any alleged retaliation was too far removed to be imputed in any way to him.

Plaintiff's only allegation related to defendant Bonfield in the complaint relates to his reaction to defendant Lopez's comment in July 2013, four months after the promotion decision occurred. Plaintiff met with defendant Bonfield on 16 July 2013 to report defendant Lopez's remark and defendant Bonfield "assured Plaintiff that he took such allegations seriously and would investigate the matter." Even assuming

the facts to be true -- and no one seems to dispute that this conversation occurred on that date -- these allegations and the forecasted evidence do not support any sort of Section 1981 or 1983 claim against defendant Bonfield for involvement in defendant Lopez's promotion decision that was made months before the conversation.

Plaintiff notes that defendant Bonfield "has authority to establish and implement policies and procedures for investigation and action with regard to complaints of unlawful employment actions toward City employees." He also claims that defendant Bonfield had "ultimate authority to override decisions made by Defendant Lopez, when such decisions are made for unlawful discriminatory or retaliatory reasons." But as discussed above, plaintiff has failed to forecast sufficient evidence to support his claim against defendant Lopez himself, so there is no showing of a need to override Lopez's decision. At most, plaintiff's evidence shows generally how defendant Bonfield would have been informed of complaints regarding defendant Lopez, but asserts nothing actionable by defendant Bonfield that could uphold a claim against him in this matter. We therefore find the trial court did not err in granting summary judgment on plaintiff's Section 1981 and 1983 claims against defendant Bonfield both in his individual and official capacity.

c. Defendant Lopez

[5] Finally, plaintiff argues that the trial court should not have dismissed his Section 1981 and 1983 claims against defendant Lopez, both in his individual and official capacities. Our analysis here ultimately mirrors that which we have explained above in relation to plaintiff's Title VII claims. *See*, *e.g.*, *Brewer v. Cabarrus Plastics*, *Inc.*, 130 N.C. App. 681, 686, 504 S.E.2d 580, 584 (1998) ("The models and standards developed in jurisprudence under Title VII of the Civil Rights Act of 1964 . . . also apply to claims under § 1981." (Citation omitted)). Plaintiff's claim cannot survive summary judgment because he both lacks sufficient evidence of a connection between his engagement in protected actions and defendant Lopez's decision to hire Assistant Chief Marsh over him -- the alleged adverse employment action -- and because defendant Lopez has given a legitimate, nondiscriminatory reason for his promotion decision that plaintiff cannot overcome or show is simply a pretext for discrimination.

IV. North Carolina Constitutional Retaliation Claim

[6] Finally, plaintiff argues that his retaliation claims under Article I, Section 19 of the North Carolina Constitution against defendant City of Durham and defendants Lopez and Bonfield in their official capacities should not have been dismissed.

Article I, Section 19 states:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

Plaintiff argues that this Court should apply the "same logic and rationale" that makes racial discrimination by a public entity illegal to the need to prevent retaliation, and thus "there is surely a claim for retaliation available under Article I, Section 19 of the Declaration of Rights [of the North Carolina Constitution.]" Plaintiff, however, fails to provide any further support for this claim, and we conclude that it fails for the reasons we have already stated above in relation to his Title VII and Section 1983 claims. Accordingly, we hold the trial court did not err in dismissing these claims.

Conclusion

In sum, we conclude that plaintiff has failed to demonstrate any genuine issues of material fact and that defendants are entitled to judgment as a matter of law as to all of plaintiff's retaliation claims. We hold that the trial court properly granted summary judgment in defendants' favor on all claims.

AFFIRMED.

Judge DILLON concurs

Judge MURPHY concurs in the result only.

CYNTHIA FRANK, EMPLOYEE, PLAINTIFF
v.
CHARLOTTE SYMPHONY, EMPLOYER, AND SELECTIVE INSURANCE COMPANY OF AMERICA, CARRIER, DEFENDANTS

No. COA17-211

Filed 5 September 2017

Workers' Compensation—symphony violinist—average weekly wage

Of the five methods of determining the average weekly wage of an injured symphony violinist, method five applied because none of the other statutory reasons were appropriate. The violinist was employed for 36 weeks in the year rather than 52 weeks; applying the methods intended for employment for less than 52 weeks would result in putting the violinist in a better position than before her injury or agreed by the parties to be inapplicable.

Appeal by plaintiff from an opinion and award entered 7 December 2016 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 23 August 2017.

Seth M. Bernanke for plaintiff-appellant.

Rudisill, White & Kaplan, P.L.L.C., by Garth H. White, for defendant-appellees.

TYSON, Judge.

Cynthia Frank ("Plaintiff") appeals from the Opinion and Award of the North Carolina Industrial Commission ("Commission"), which determined the amount of her average weekly wages and compensation rate. We affirm the Commission's Opinion and Award.

I. Background

Plaintiff was employed by the Charlotte Symphony Orchestra ("Defendant-Employer") as a violist. On 24 June 2012, Plaintiff filed a Form 18 ("Notice of Accident to Employer and Claim of Employee, Representative, or Dependent") with the Commission. She alleged sustaining a compensable injury and/or occupational disease to her right shoulder. Plaintiff listed her average weekly wages as "$760.00+" on the Form 18, and stated both the number of hours per day and the days

of the week she worked "varies." Plaintiff listed her date of injury as 15 December 2013.

Defendant-Employer and its insurance carrier (collectively, "Defendants") filed a Form 61 ("Denial of Workers' Compensation Claim"). Plaintiff's claim was heard before the deputy commissioner on 22 June 2015. Prior to the hearing, Defendants accepted Plaintiff's shoulder injury as compensable. The parties agreed the only issue to be determined by the deputy commissioner was the calculation of Plaintiff's average weekly wages.

The deputy commissioner issued her Opinion and Award and determined Plaintiff's average weekly wages to be $757.94, which produced a compensation rate of $505.32. Plaintiff appealed the determination of her average weekly wages to the Commission.

By Opinion and Award dated 7 December 2016, the Commission unanimously affirmed the deputy commissioner's determination of Plaintiff's average weekly wages and compensation rate. Plaintiff appeals.

II. Jurisdiction

Jurisdiction lies in this Court from opinion and award of the Commission pursuant to N.C. Gen. Stat. §§ 97-86 and 7A-27(b) (2015).

III. Average Weekly Wages

Plaintiff's sole argument on appeal asserts the Commission erred by applying the incorrect method under N.C. Gen. Stat. § 97-2(5) (2015) to calculate her average weekly wages. We disagree.

A. Standard of Review

This Court reviews an opinion and award of the Commission to determine whether the findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings of fact. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). However, "[t]his Court reviews the Commission's conclusions of law *de novo*." *McLaughlin v. Staffing Solutions*, 206 N.C. App. 137, 143, 696 S.E.2d 839, 844 (2004) (citation omitted).

"The determination of the plaintiff's 'average weekly wages' requires application of the definition set forth in the Workers' Compensation Act, [N.C. Gen. Stat. § 97-2(5)], and the case law construing that statute and thus raises an issue of law, not fact." *Swain v. C & N Evans Trucking Co.*, 126 N.C. App. 332, 335-36, 484 S.E.2d 845, 848 (1997).

B. Commission's Findings

No testimony was presented to the Commission as the parties stipulated to the facts:

1. Plaintiff has been employed as a violist with Defendant-Employer for 17 years.

2. Plaintiff's contracts for the 2012-2013 and 2013-2014 seasons and the referenced collective bargaining agreements for that period are stipulated. Wage printouts from the Defendant-Employer are stipulated. W-2 and contract from the Chautauqua Symphony are stipulated.

3. Defendant-Employer's regular season yearly runs from September through May. Each musician's individual contract specifies a weekly wage. In addition, there are additional payments available, such as "move up" pay, which compensates the musician for sitting in at a higher level for an absent colleague; broadcast pay, for when the concert is recorded; overtime for special or specific programs; and seniority pay. Plaintiff also received additional compensation through the Defendant-Employer for clinics she taught at local high schools.

4. Defendant-Employer operates a summer season, which usually runs 4 weeks in June and July. Participation in the summer season is optional for all musicians but, if a musician plays during the summer season, the musician is compensated at the weekly rate provided in the individual contract.

5. Rehearsals and concerts are called "services." Each regular season runs the number of weeks specified in the contract. Both the 2012-2013 regular season and the 2013-2014 regular season were 33 weeks. During the course of the regular season, there are three weeks that are designated as vacation weeks. There are no services scheduled during the off season. Any week that has no services scheduled and is not a designated vacation week is a layoff week. For all layoff weeks, musicians may file for unemployment checks from the N.C. Division of Employment

Security. Until recently, Defendant-Employer applied for unemployment on behalf of its musicians. If a musician elects not to participate in the summer season, the musician cannot receive unemployment during that four week period. During 2013, plaintiff collected 3 weeks of unemployment benefits at a weekly rate of $535.00 per week. These benefits were charged to Defendant-Employer.

6. The collective bargaining agreement expressly allows the musicians to have other employment as long as it does not interfere with performance of the contracted services. Even if it does conflict, there is a procedure by which the musician can request leave.

7. In the summer of 2013, Plaintiff played for Defendant-Employer for two weeks out of the four-week summer season. Plaintiff played all 33 weeks of the portions of the 2012-2013 season and 2013-2014 that fell in the calendar year 2013. Therefore, of the 52 weeks preceding Plaintiff's accepted date of injury, December 15, 2013, *Plaintiff performed services for Defendant-Employer a total of 36 weeks*. In the year prior to the injury date in this claim, the vacation weeks were December 24, 2012 through January 6, 2013 and March 4, 2013 through March 10, 2013. (emphasis supplied).

8. Plaintiff's gross wages from Defendant-Employer for the 52 weeks preceding Plaintiff's date of injury were $39,412.83, a figure which includes all compensation referenced in paragraph 3 above.

9. For several years, including 2013, Plaintiff has worked during the summers as a violist for the Chautauqua Symphony in New York state. The Chautauqua season begins in the first week of July and continues for eight weeks. Plaintiff's weekly wages for this job were set by contract at $1,080.00 gross compensation per week. They also paid her approximately $6,000.00 as a housing allowance for the season. Plaintiff's employment for the Chautauqua Symphony and Defendant-Employer did not overlap and was not concurrent.

C. Statutory Methods for Calculating Average Weekly Wages

N.C. Gen. Stat. § 97-2(5) governs the determination of an injured employee's average weekly wages:

> (5) Average Weekly Wages. – [1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by 52; [2] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. [3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. [4] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> [5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5) (bracketed numerals supplied).

The statute provides five possible and hierarchal methods for calculating the injured employee's average weekly wages. "[I]t is clear that this statute establishes an order of preference for the calculation method to be used[.]" *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123,

128, 532 S.E.2d 583, 586 (2000) (citation omitted). "The final, or fifth method, as set forth in N.C. Gen. Stat. § 97-2(5), may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods." *Id.* (citing *Wallace v. Music Shop, II, Inc.*, 11 N.C. App. 328, 331, 181 S.E.2d 237, 239 (1971)).

Here, the Commission rejected the first four methods as inapplicable or unjust under these facts, and calculated Plaintiff's average weekly wages by using the fifth, or final, method. *See* N.C. Gen. Stat. § 97-2(5). Plaintiff argues the Commission erred by employing this method to calculate her average weekly wages, and asserts the Commission should have employed the second method set forth in the statute.

D. Commission's Application of N.C. Gen. Stat. § 97-2(5)

The Commission explained its analysis and rejection of each of the first four statutory methods, and its choice and application of the fifth method as the most appropriate, which we review *de novo*. *See McLaughlin*, 206 N.C. App. at 143, 696 S.E.2d at 844.

Methods One and Two

" 'Average weekly wages' shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury . . . divided by 52[.]" N.C. Gen. Stat. § 97-2(5).

Method one only applies when an employee has worked for the employer at least 52 weeks prior to the injury, and "cannot be used when the injured employee has been working in that employment for fewer than 52 weeks in the year preceding the date of accident." *Conyers v. New Hanover Cty. Schools*, 188 N.C. App. 253, 258, 654 S.E.2d 745, 750 (2008). The parties stipulated Plaintiff was employed by the employer for only 36 weeks in the year preceding the date of her injury, and the Commission properly rejected method one to calculate Plaintiff's average weekly wages. *See id.*

Method two applies where the injured employee "*lost* more than seven consecutive calendar days at one or more times" during the 52 week period immediately preceding the date of injury. N.C. Gen. Stat. § 97-2(5) (emphasis supplied). In such event, "the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted." *Id.* Plaintiff asserts method two is the appropriate method to calculate her average weekly wages. We disagree.

The Symphony's rehearsal and performance season runs from September through May, and includes an optional summer season. Plaintiff argues method two applies because, although she stipulated she worked only 36 weeks during the relevant time period, her contract period was for a full year. Plaintiff asserts the 16 weeks when no services were performed for Defendant-employer should be considered "lost" under method two of N.C. Gen. Stat. § 97-2(5). We disagree.

Plaintiff relies upon this Court's decision in *Bond*. The plaintiff in *Bond* was injured during the course of his employment as a brick mason. *Bond*, 139 N.C App. at 124, 532 S.E.2d at 584. The plaintiff was a full time employee, but only worked when contract jobs were available and the weather was suitable. *Id.* at 125-26, 532 S.E.2d at 584. He did not work for seven or more consecutive days on more than one occasion during the 52 weeks preceding the injury. *Id.* at 126, 532 S.E.2d at 584.

In *Bond*, this Court explained the work available to the plaintiff was dependent upon demand and weather conditions, and the plaintiff was not required to work for days or weeks at a time. *Id.* at 129, 532 S.E.2d at 587. This Court further explained the plaintiff was not a "seasonal" employee, because "[a] seasonal employee or relief worker does not work full-time every week in the year." *Id.* The Court held the second, and not the fifth, method was appropriate for determining the plaintiff's average weekly wages, because "as a brick mason, plaintiff could be required to work every week, full-time by his employer." *Id.*

The facts of this case are distinguishable from those present in *Bond*. Unlike in *Bond*, Defendant-Employer in this case was unable to require Plaintiff to work for 52 weeks. Plaintiff performed services for Defendant-Employer pursuant to a contract, which contemplated 36 and not 52 weeks of work. Pursuant to contract, no rehearsals, concerts or "services" were scheduled for the "off season." Also, unlike in *Bond*, Plaintiff's contract clearly stated that no work was required from, or offered to, Plaintiff during that time.

Our precedent in *Conyers* is more directly on point and controlling. In *Conyers*, this Court determined whether the average weekly wages of a public school bus driver should be calculated with or without regard to the ten-week summer vacation period. *Conyers*, 188 N.C. App. at 257, 654 S.E.2d at 749.

In *Conyers*, the Court held that the plaintiff's employment extended for a period of less than 52 weeks prior to the injury. *Id.* at 258-59, 654 S.E.2d at 749. The plaintiff drove a school bus for only ten months of the year, was paid for only ten months of work, and was not hired or

obligated to work during the summer vacation period. *Id.* at 259, 654 S.E.2d at 750. The Court held the plaintiff was not employed for a 52-week period and rejected the first and second methods in the statute to calculate the plaintiff's average weekly wages. *Id.*

Again, and unlike in *Bond*, the employment in *Conyers* and in this case was for a fixed and definite time period of less than 52 weeks. Because Plaintiff's job was non-existent during a portion of the year, she did not "lose" time like the employee in *Bond*.

The application of method two requires the employee to have been employed for a period of 52 weeks preceding the injury, which Plaintiff stipulated she was not. The Commission properly rejected method two as the appropriate method to calculate Plaintiff's average weekly wages.

Method Three

Method three applies "[w]here the employment prior to the injury extended over a period of fewer than 52 weeks." N.C. Gen. Stat. § 97-2(5). In such event, the Commission follows "the method of dividing the earnings during that period by the number of weeks and parts thereof during the employee earned wages," provided the results are "fair and just to both parties." *Id.* Where the employment prior to the injury extended over a period of less than 52 weeks, the average weekly wages are calculated in the same manner as method two, with the distinction that the results must be "fair and just to both parties." *Id.*

Like in *Conyers*, Plaintiff's employment prior to the injury extended over a period of fewer than 52 weeks. After rejecting the first two methods of calculating the plaintiff's average weekly wages, the Court in *Conyers* analyzed the third method, but determined that the plaintiff's yearly salary would be nearly $5,000.00 more than her actual pre-injury wages, if she were permitted to divide her annual gross wages by the number of weeks she was actually employed. *Id.* at 259, 654 S.E.2d at 750. The Court rejected the third method, because "[t]he purpose of our Workers' Compensation Act is not to put the employee in a better position and the employer in a worse position than they occupied before the injury." *Id.*

Here, Plaintiff earned $39,412.83 while working 36 weeks during the 52-week time period preceding the injury. Dividing this amount by 36 results in an average weekly wage calculation of $1,094.80. The Commission determined this weekly wage amount results in annualized wages of $56,929.60, over $17,000.00 more than Plaintiff's actual pre-injury yearly wages. We are bound by *Conyers* to conclude the

application of method three would "put the employee in a better position" than prior to the injury and is not a "fair and just" method to calculate Plaintiff's average weekly wages. *See id.*

Plaintiff notes that the application of method three will always result in gross annualized wages which are higher than the result of method one. Plaintiff argues method three could never be regarded as "fair and just" to both parties and would never be used to calculate average weekly wages. *See R.J. Reynolds Tobacco Co. v. N.C. Dep't of Env't & Natural Res.*, 148 N.C. App. 610. 616, 560 S.E.2d 163, 168, *disc. review denie*d, 355 N.C. 493, 564 S.E.2d 44 (2002) ("[A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage." (citation omitted)).

Plaintiff proposes the Commission should have considered the "fairness" requirement of method three in light of her wage earning capacity. Plaintiff asserts the Commission should have taken into account her summer earnings from the Chautauqua Symphony in New York in order to determine whether the application of method three would result in a "windfall" to Plaintiff. The statute expressly excludes her earnings from outside employment and provides that average weekly wages "shall mean the earnings of the injured employee in the employment *in which he was working at the time of the injury*." N.C. Gen. Stat. § 97-2(5) (emphasis supplied).

We affirm the Commission's determination that applying method three does not produce "fair and just" results where Plaintiff's average weekly wages would be increase to over $17,000.00 more annually than Plaintiff's actual pre-injury yearly wages. Plaintiff's arguments are overruled.

Method Five

The parties agree method four is inapplicable to the circumstances at bar. The fifth, or final, method under the statute is to be used "for exceptional reasons" when the other methods "would be unfair to either the employer or employee." N.C. Gen. Stat. § 97-2(5). In such event, the Commission is to "resort to" a method which "will most nearly approximate the amount which the injured employee would be earning were it not for the injury." *Id.*

The Commission properly determined that exceptional reasons exist, which require the application of method five. None of the other four methods set forth in the statute are appropriate for calculation of

Plaintiff's average weekly wages. Plaintiff asserts her pre-injury average weekly wages were $1,094.80, yet acknowledges she was not actually paid this amount on a weekly basis for the 52 weeks prior to her injury and she specifically listed "$760.00+" as her average weekly wages on her Form 18 at the time of her injury.

The Commission calculated Plaintiff's average weekly wages by dividing Plaintiff's annual gross earnings with Defendant-Employer by 52, "because this method produces a result which most nearly approximates the amount Plaintiff would be earning with Defendant-Employer were it not for the injury."

In *Conyers*, this Court affirmed the Commission's application of the fifth method and explained: the "[p]laintiff [bus driver] earned $ 17,608.94 in the 52 weeks preceding the accident. Although she only worked approximately 40 of those weeks and was paid in 10 monthly paychecks, the compensation she collects for workers' compensation will be paid every week, including the weeks of her summer vacation." *Conyers*, 188 N.C. App. at 261, 654 S.E.2d at 751. Based upon *Conyers*, we affirm the Commission's use and application of the fifth method in the statute to calculate Plaintiff's average weekly wages. *Id.*; N.C. Gen. Stat. § 97-2(5). Plaintiff's arguments are overruled.

IV. Conclusion

The Commission properly concluded the application of the first four methods set forth in N.C. Gen. Stat. § 97-2(5) to determine Plaintiff's average weekly wages were inappropriate or unjust. The Commission properly determined that "exceptional reasons" existed to apply the fifth method, and applied the fifth method to "most nearly approximate the amount which the injured employee would be earning were it not for the injury." N.C. Gen. Stat. § 97-2(5).

Plaintiff has failed to show any error in the Commission's Opinion and Award. The Opinion and Award is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and STROUD concur.

GARDNER v. RINK

[255 N.C. App. 279 (2017)]

JAMES GARDNER AND JOAN GARDNER, PLAINTIFFS
v.
DOUGLAS W. RINK, GINGER RINK, RINK MEDIA, LLC, AND
THE RINK GROUP, INC., DEFENDANTS

No. COA16-948

Filed 5 September 2017

1. Judges—one judge overruling another—second summary judgment motion

A subsequent order by a second judge on a second summary judgment motion in the same case (one by defendants and one by plaintiffs) was vacated, leaving the first summary judgment order operative. Both parties moved for summary judgment on the same legal issue and, although plaintiffs argued that the second trial judge could rule on their motion because they supported it with different arguments, a subsequent motion for summary judgment may be ruled upon only when the legal issues differ.

2. Appeal and Error—two motions for summary judgment—second one vacated—appeal of first interlocutory

Where there were two motions for summary judgment on the same issues ruled on by different judges and the second was vacated on appeal, appeal of the first was interlocutory and was dismissed.

Appeal by defendants from orders entered 1 April 2016 by Judge Anna Wagoner and 26 April 2016 by Judge Robert C. Ervin in Catawba County Superior Court. Heard in the Court of Appeals 22 March 2017.

Homesley, Gaines & Dudley, LLP, by Christina Clodfelter, for plaintiffs-appellees.

Law Offices of Matthew K. Rogers, by Matthew K. Rogers, for defendants-appellants.

BERGER, Judge.

This appeal originated in a dispute over land on which an advertising billboard had been built. Douglas and Ginger Rink, Rink Media, LLC, and The Rink Group, Inc. (collectively "Defendants") appeal from two orders ruling on motions for summary judgment.

The first order, which was entered on April 1, 2016 by Judge Anna Wagoner ("April 1 Order"), partially granted and partially denied Defendants' motion for summary judgment. James and Joan Gardner's (collectively "Plaintiffs") unjust enrichment claim was dismissed, but Defendants' motion was otherwise denied because the trial court found genuine issues of material fact that precluded summary judgment on Plaintiffs' motion to set aside a lease on the land that is the subject of this dispute.

The second order, which was entered on April 26, 2016 by Judge Robert C. Ervin ("April 26 Order"), granted Plaintiffs' motion for summary judgment. Plaintiffs' motion to set aside the lease was granted, the lease was declared void, and Defendants' counterclaims for adverse possession, abuse of process, and unfair and deceptive trade practices were dismissed.

For the reasons set out below, we must vacate the April 26 Order, and dismiss the remainder of the appeal as interlocutory.

Factual & Procedural Background

Charles and Mark Alexander (collectively "Sellers") jointly owned 12.7 acres located in Denver, North Carolina (the "Property"). Charles Alexander partnered with Douglas Rink to develop and rezone the Property. In November 2002, Sellers and Douglas Rink made plans for Douglas Rink and his wife, Ginger, to buy the Property.

Prior to his purchase of the land, Douglas Rink made plans to build an advertising billboard on Sellers' Property. Before acquiring any ownership interest in the Property, Douglas and Ginger Rink entered into a ground lease agreement ("Lease") with The Rink Group, Inc., an entity owned and operated by Douglas and Ginger Rink. The Lease was recorded on May 14, 2003.

The Rink Group, Inc. was eventually dissolved, and Douglas and Ginger Rink formed Rink Media, LLC to manage and operate the billboard that had been built on the Property. Douglas and Ginger Rink did not acquire any ownership interest in the Property until March 26, 2003, when they purchased the Property from Sellers in a seller-financed transaction.

Douglas and Ginger Rink defaulted on their payments to Sellers. They therefore conveyed the property back to Sellers by general warranty deed on February 11, 2004. The deed made no reference to or reservation for the Lease. The Sellers then sold the Property to Plaintiffs on October 26, 2004. However, Rink Media, LLC continued to operate the billboard even after Plaintiffs purchased the Property.

On May 9, 2013, Plaintiffs filed their initial complaint against Douglas and Ginger Rink, and The Rink Group, Inc. for breach of contract and unjust enrichment, and also included a motion to set aside the Lease. The complaint was later amended to include all Defendants. Defendants filed a motion to dismiss all claims pursuant to Rule 12 of the North Carolina Rules of Civil Procedure. This motion was granted as to Plaintiffs' breach of contract claim, but denied for the two remaining claims.

On March 17, 2016, Defendants filed a motion for summary judgment seeking dismissal of Plaintiffs' claim of unjust enrichment and their motion to set aside the Lease, as well as a ruling in favor of Defendants' counterclaims. In the April 1 Order, the trial court granted Defendants' motion dismissing Plaintiffs' claim of unjust enrichment, but denied Plaintiffs' motion to set aside the Lease.

Subsequent to Defendant's March 17 motion, but prior to the April 1 Order, Plaintiffs had filed a separate motion for summary judgment on March 23, 2016 seeking to set aside the Lease and dismiss Defendants' counterclaims. The trial court, albeit a different judge than had ruled on the April 1 Order, granted Plaintiffs' motion for summary judgment in the April 26 Order.

Defendants timely appeal both the April 1 Order and the April 26 Order.

Analysis

[1] The trial court must grant a motion for summary judgment "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). "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Austin Maint. & Constr., Inc. v. Crowder Constr. Co.*, 224 N.C. App. 401, 407, 742 S.E.2d 535, 540 (2012) (citation and quotation marks omitted). "A genuine issue of material fact arises when the facts alleged . . . are of such nature as to affect the result of the action." *Id.* (citation and quotation marks omitted). If the moving party is the defendant, and he or she has made the required showing of no genuine fact issue, the burden shifts to the plaintiff to "produce a forecast of evidence demonstrating specific facts," opposed to mere allegations, by which he or she can "establish a *prima facie* case at trial." *Id.* at 407, 742 S.E.2d at 540 (citation and quotation marks omitted). An appeal of a trial court's decision to grant summary judgment is reviewed *de novo*. *Id.* at 408, 742 S.E.2d at 541.

Defendants argue that the trial court erred in the portion of the April 26 Order that granted Plaintiffs' summary judgment motion relating to their claim setting aside the Lease. However, a separate trial court had previously ruled on this same issue in the April 1 Order. Therefore, the relationship between the two trial court's rulings on summary judgment motions must be addressed because it is a jurisdictional issue, and therefore "can be raised at any time, even for the first time on appeal and even by a court *sua sponte*." *Cail v. Cerwin*, 185 N.C. App. 176, 181, 648 S.E.2d 510, 514 (2007), *disc. review denied*, 365 N.C. 75, 705 S.E.2d 743 (2011) (citation and quotation marks omitted).

> It is well-established that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

Id. (citation and quotation marks omitted). "[W]here one judge denies a motion for summary judgment, another judge may not reconsider . . . and grant summary judgment on that same issue." *Id.* at 182, 648 S.E.2d at 515 (citation and quotation marks omitted). A second motion will be appropriate only if different legal issues are presented than those raised by an earlier motion. *Id.* at 182, 648 S.E.2d at 514. "[I]t is immaterial whether a different party brings the second motion for summary judgment." *Id.* (citation omitted).

Here, the first trial court to address a motion for summary judgment granted Defendants' motion as to Plaintiffs' unjust enrichment claim in the April 1 Order. The trial court further ruled in that same order that there were genuine issues of material fact relating to Plaintiffs' motion to set aside the Lease, and therefore denied their motion on this issue. The second trial court to address a summary judgment motion in this case subsequently granted Plaintiffs' motion for summary judgment in the April 26 Order. This second order set aside the Lease declaring it void, and dismissed each of Defendants' counterclaims. The first trial court's ruling denying summary judgment on the legal issue of setting aside the Lease precluded the second trial court from later overruling its decision by granting summary judgment.

Plaintiffs contend that by supporting their motion to set aside the Lease with different arguments allowed the second trial court to rule on their motion. However, "the presentation of a new legal issue is distinguishable from the presentation of additional evidence, and only

when the legal issues differ between the first motion for summary judgment and a subsequent motion may a trial court hear and rule on the subsequent motion." *Id.* at 184, 648 S.E.2d at 516 (citations, quotation marks, and brackets omitted). Both parties moved for summary judgment on the same legal issue; it is irrelevant whether new evidence was introduced. Therefore, the April 26 Order granting Plaintiffs' motion for summary judgment as to their motion to set aside the Lease was entered in error and must be vacated, leaving the first trial court's order denying Defendant's motion operative.

[2] "[T]he denial of a motion for summary judgment is interlocutory and not immediately appealable unless it affects a substantial right." *Id.* at 185, 648 S.E.2d at 517 (citation, quotation marks, and brackets omitted). Here, as appellants, Defendants failed to argue any substantial right affected by the denial of their motion. This Court has previously held that

> [i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.

Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted). Because the portion of the April 26 Order granting summary judgment to Plaintiffs must be vacated, the April 1 Order denying summary judgment determines this issue. As the denial of summary judgment is interlocutory, and Defendants failed to argue that this order affects any substantial right, we will not address the remainder of the appeal and dismiss.

Conclusion

Because the trial court's April 26 Order improperly overruled a prior trial court's April 1 Order, the April 26 Order granting summary judgment as to Plaintiffs' motion to set aside the Lease and declaring the Lease void must be vacated, and the April 1 Order's denial of Defendants' motion is, therefore, operative. Consequently, because an appeal of the denial of a summary judgment motion is interlocutory, we must dismiss the remainder of the appeal.

VACATED IN PART, AND DISMISSED IN PART.

Judges CALABRIA and HUNTER, JR. concur.

IN RE FORECLOSURE OF ACKAH

[255 N.C. App. 284 (2017)]

IN THE MATTER OF THE FORECLOSURE UNDER THAT POWERS GRANTED IN CHAPTER 47F OF THE NORTH CAROLINA GENERAL STATUTES AND IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR ADDISON RESERVE AT THE PARK AT PERRY CREEK SUBDIVISION RECORDED AT BOOK 9318, PAGE 369, ET SEQ., WAKE COUNTY REGISTRY CONCERNING GINA A. ACKAH

No. COA16-829

Filed 5 September 2017

1. Liens—homeowners dues—foreclosure—notice

The superior court did not err by holding that a homeowner who was foreclosed upon by her homeowners association while she was out of the country was entitled to relief. The homeowners association did not exercise due diligence in giving notice in that it had reason to know the owner was not residing at the residence and only posted a notice on the door of the residence when certified mail was returned. Due diligence required that the homeowners association at least attempt notification through the email address which the owner had left with them.

2. Liens—foreclosure—relief

The superior court erred in the relief granted to a homeowner who was foreclosed upon for failure to pay homeowners dues where the homeowners association had not exercised due diligence in providing notice of the sale but had provided constitutionally sufficient notice. The superior court ordered that the foreclosure sale be set aside and the title restored to the debtor; however, N.C.G.S. § 1-108 favors a good faith purchaser at a judicial sale, and the superior court cannot order relief which affects the title to property which has been sold to a good faith purchaser with constitutionally sufficient notice. The owner was entitled to seek restitution from the homeowners association.

Judge MURPHY dissenting.

Jones Family Holdings, LLC ("Jones Family"), the high bidder at a foreclosure sale, appeals from an order entered 30 December 2015 by Judge Kendra Hill in Wake County Superior Court setting aside the sale and restoring title to the debtor. Jones Family also appeals from the order entered the same day by the Assistant Clerk of Wake County Superior Court returning possession of the real property to the debtor. Heard in the Court of Appeals 9 March 2017.

IN RE FORECLOSURE OF ACKAH

[255 N.C. App. 284 (2017)]

Law Office of Edward Dilone, PLLC, by Edward D. Dilone, for Appellant Jones Family Holdings, LLC.

Adams, Howell, Sizemore & Lenfestey, P.A., by Ryan J. Adams, for Respondent-Appellee Gina A. Ackah.

Bagwell Holt Smith P.A., by Michael R. Ganley, for Substitute Trustee Addison Reserve Homeowners Association, Inc.

This matter involves a dispute about a residential property (the "Property") located within a planned community in Wake County. The planned community is governed by an association (the "HOA"). The parties involved include Gina A. Ackah, who purchased the Property in 2005; the HOA, which attached a lien to the Property based on Ms. Ackah's failure to pay dues; and the Jones Family, who purchased the Property in 2015 at a public sale which had been ordered by the Clerk of Superior Court to enforce the HOA's lien.

There is no evidence that Ms. Ackah received actual notice of the proceeding before the Clerk which resulted in the order allowing the sale of her Property. Based on its conclusion that the notice to Ms. Ackah was inadequate, the superior court granted Ms. Ackah's motion for relief from the Clerk's order and ordered that the sale of the Property to the Jones Family be set aside, restoring title to Ms. Ackah. The same day, the assistant clerk entered an order returning possession of the Property to Ms. Ackah.

We hold that the HOA's notice to Ms. Ackah of the proceeding before the Clerk did not satisfy the requirements of Rule 4 of our Rules of Civil Procedure. Therefore, we conclude that Ms. Ackah was entitled to *some form* of relief from the Clerk's order which had authorized the public sale of her Property.

However, the superior court was constrained by N.C. Gen. Stat. § 1-108 from granting a form of relief to Ms. Ackah which affected the title of the Jones Family's – a good faith purchaser at the judicial sale ordered by the Clerk - to the Property. That is, by enacting G.S. 1-108, the General Assembly has chosen to favor the interests of the Jones Family over that of Ms. Ackah in the Property, where Ms. Ackah is otherwise entitled to relief from the order pursuant to Rule 60 of our Rules of Civil Procedure. G.S. 1-108 is not unconstitutional as applied to Ms. Ackah in this case since the HOA's notice to Ms. Ackah of the proceeding before the Clerk was *constitutionally* sufficient, notwithstanding that she did not receive actual notice or notice which complied with Rule 4.

Therefore, the type of relief available to Ms. Ackah from the Clerk's order was limited to restitution from the HOA. *See* N.C. Gen. Stat. § 1-108 (2015). Accordingly, we affirm in part and reverse and remand in part.

II. Background

Addison Reserve at the Park at Perry Creek is a residential planned community subject to the Planned Community Act codified in Chapter 47F of our General Statutes. The Perry Creek planned community is governed by the HOA, which is empowered to assess dues and attach a lien to any Perry Creek home if the owner becomes delinquent in paying HOA dues. *See* N.C. Gen. Stat. § 47F-3-116 (2015).

In 2005, Ms. Ackah purchased the Property, financing almost all of the purchase price with a loan secured by the Property. In 2012, Ms. Ackah moved to Africa, leasing her home during her absence. She did not inform the HOA of her move. She had her mail forwarded to her uncle's home in South Carolina.

In 2014, Ms. Ackah fell behind on her HOA dues. The HOA mailed several notices to the Property addressed to Ms. Ackah regarding the delinquency, all of which were forwarded to Ms. Ackah's uncle in South Carolina.

The HOA commenced foreclosure proceedings to enforce its statutory lien against the Property to recover the delinquent dues. The HOA sent *certified* letters addressed to Ms. Ackah to her mother's and uncle's addresses, notifying Ms. Ackah of the hearing set before the Clerk. These letters, however, were returned "unclaimed." The HOA then posted a notice of the hearing on the front door of the Property. Although the HOA had an email address for Ms. Ackah, the HOA did not notify Ms. Ackah by email of the proceeding to enforce its lien.

A hearing was held before the Clerk. Ms. Ackah was not represented at the hearing and claims that she never received *actual* notice of the hearing.

The Clerk ordered the Property sold to satisfy the HOA lien. The sale of the Property was held, and the Jones Family was the high bidder, with a bid of $2,708.52. In early 2015, the Property was deeded to the Jones Family, subject to any lien superior to the HOA's lien, which included the lien securing Ms. Ackah's mortgage.

Shortly after the sale, Ms. Ackah first learned of the proceeding and the public sale from her tenant after her tenant received a notice to vacate the Property from the Jones Family. Upon learning of the sale from her tenant, Ms. Ackah filed a motion in superior court pursuant to

Rule 60 for relief from the Clerk's order which had authorized the public sale of her Property. The superior court granted Ms. Ackah's Rule 60 motion and ordered that the sale to the Jones Family be set aside, thus restoring title to Ms. Ackah. The Jones Family has timely appealed.

III. Analysis

The superior court's 30 December 2016 order, which is the subject of this appeal, essentially did two things: it (1) stated that Ms. Ackah was entitled to relief under Rule 60(b) from the Clerk's order which had authorized the sale of her Property, and (2) ordered relief to Ms. Ackah by setting aside the sale to the Jones Family, thereby restoring title to Ms. Ackah. We address each issue in turn.

A. The Superior Court Was Authorized To Grant Relief From the Clerk's Order, Pursuant to Rule 60(b)

[1] We hold that the superior court did not err in concluding that Ms. Ackah was entitled to relief from the Clerk's order based on the HOA's failure to use "due diligence" to notify her of the proceeding as required by Rule 4 of our Rules of Civil Procedure. In order to enforce its statutory lien, the HOA was required to give Ms. Ackah notice of the hearing before the Clerk in a form which satisfied Rule 4. *See* N.C. Gen. Stat. § 47F-3-116 (c), (f). Rule 4 requires the use of "due diligence" in providing notice. N.C. Gen. Stat. § 1A-1, Rule 4 (2015).

We hold that in this case, the HOA did not use "due diligence" as required by Rule 4. Specifically, the HOA had Ms. Ackah's email address. The HOA attempted service by certified mail. The HOA had reason to know that Ms. Ackah was not residing at the Property as the HOA sent those letters to Ms. Ackah's mother and uncle. When the notice letters came back "unclaimed," Rule 4 due diligence required that the HOA at least attempt to notify Ms. Ackah directly through the email address it had for her rather than simply resorting to posting a notice on the Property. *See Chen v. Zou*, ___ N.C. App. ___, ___, 780 S.E.2d 571, 574 (2015) (due diligence requires emailing to a known email address before resorting to service by publication). And since the HOA failed to comply with Rule 4 in providing notice to Ms. Ackah, Ms. Ackah was entitled to relief from the Clerk's order pursuant to Rule 60.

B. The Superior Court Erred By Granting Ms. Ackah Any Form of Relief Which Would Affect the Jones Family's Title

[2] We hold that N.C. Gen. Stat. § 1-108 restricted the superior court in this case from granting Ms. Ackah any relief which affected the Jones Family's title in the Property.

The plain language of N.C. Gen. Stat. § 1-108 states that a court setting aside an order pursuant to Rule 60 may order relief in the form of restitution, but that the court cannot order any relief which affects the title to property which has been sold to a good faith purchaser pursuant to the order being set aside:

> If a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. . . .

N.C. Gen. Stat. § 1-108.

We note that N.C. Gen. Stat. § 1-108 may be unconstitutional *as applied* if the property owner being divested of her property has not received notice which is at least *constitutionally* sufficient. Our Supreme Court has held that a statute which allowed for the tax sale of a property without any attempted notice to the taxpayer/owner except by posting and publication was unconstitutional as applied, stating that the process "offends the fundamental concept of due process of law." *Henderson County v. Osteen*, 292 N.C. 692, 708, 235 S.E.2d 166, 176 (1977) (setting aside a tax sale of taxpayer's property where taxpayer did not receive notice which was constitutionally sufficient).

Here, there is no evidence that Ms. Ackah received actual notice or other notice sufficient under Rule 4. However, based on jurisprudence from the United States Supreme Court, we must conclude that the attempts by the HOA to notify Ms. Ackah were *constitutionally* sufficient. Specifically, a party need not use "due diligence" under the Constitution, but rather, as the United States Supreme Court held, notice is "constitutionally sufficient if it was reasonably calculated to reach the intended recipient when sent[.]" *Jones v. Flowers*, 547 U.S. 220, 220 (2006). The Court explained that constitutional "[d]ue process does not require that the property owner receive *actual* notice[.]" *Id.* at 226 (emphasis added). For instance, where notice sent by certified mail is returned "unclaimed," due process requires only that the sender must take *some* reasonable follow-up measure to provide other notice where it is practicable to do so. *Id.* The Court specifically held that where the owner no longer resides at the property, due process is satisfied if the notice is posted on the front door of the property, as it is reasonable that the owner's tenant would notify the owner of the posting:

> [A] reasonable followup measure[], directed at the possibility that [the owner] had moved as well as that he had simply not retrieved the certified letter, would have been to post notice on the front door, or to address otherwise undeliverable mail to "occupant." . . . Either approach would increase the likelihood that the owner would be notified that [s]he is about to lose [her] property[.] . . . It is [] true in the case of an owner who has moved: Occupants who might disregard a certified mail slip not addressed to them are less likely to ignore posted notice[.] . . . [T]here is a significant chance the occupants will alert the owner, if only because a change in ownership could well affect their own occupancy.

Id. at 235.

In the present case, the HOA posted a notice on the Property's front door after the HOA's certified letters were unclaimed. Therefore, the HOA's notice was *constitutionally* sufficient under *Jones*, notwithstanding that the notice did not satisfy the "due diligence" requirement of Rule 4. We note that the HOA did even more to notify Ms. Ackah than posting the notice on the Property: the HOA sent several letters by *regular mail* to Ms. Ackah indicating its intent to enforce the lien. *Id.* at 234 (holding that notice by regular mail is reasonable). It is certainly reasonable to assume that Ms. Ackah would reach out to her uncle where she had instructed her regular mail to be sent about any mail that had, in fact, been sent to her.

Accordingly, since the notice was constitutionally sufficient in this case, it is our duty to follow the policy decision made by our General Assembly, as set forth in N.C. Gen. Stat. § 1-108, which would favor the interests of the Jones Family, as a good faith purchaser at a judicial sale, ahead of the interests of Ms. Ackah in the Property. We note that the General Assembly's policy decision favoring the Jones Family is rational because it encourages higher bids at judicial sales, as explained by our Supreme Court in *Sutton v. Schonwald*, 86 N.C. 198, 202-04 (1882), and other opinions which are explained more fully below. We note that N.C. Gen. Stat. § 1-108 does not leave Ms. Ackah without a remedy. Indeed, in this case, N.C. Gen. Stat. § 1-108 allows Ms. Ackah to seek restitution from the HOA.

The dissent relies on a 1990 opinion from our Court to suggest that the superior court *did* have the authority to affect the Jones Family's title when it set aside the Clerk's order. Specifically, in *Cary v. Stallings*,

a panel of our Court held that N.C. Gen. Stat. § 1-108 allows a court to affect the title of property already sold when granting Rule 60 relief "if the court deems it necessary in the interest of justice." *Cary v. Stallings*, 97 N.C. App. 484, 487, 389 S.E.2d 143, 145 (1990).[1] However, our Court did not cite to any Supreme Court precedent in *Stallings*, and its holding otherwise conflicts with the plain language of N.C. Gen. Stat. § 1-108 and with precedent from our Supreme Court which has interpreted the statutory language contained in N.C. Gen. Stat. § 1-108. Therefore, we hold that we are not bound by *Stallings* but rather by North Carolina Supreme Court precedent referenced below.

Our Supreme Court has not had occasion to address the language in N.C. Gen. Stat. § 1-108 since our Court decided *Stallings* in 1990. However, prior to 1990, our Supreme Court stated on a number of occasions that where a court sets aside a judgment, the court may not enter an order which affects the title to property sold under that judgment to a good-faith purchaser, at least so long as the debtor received *constitutionally* adequate notice of the proceeding. For instance, in 1920, our Supreme Court considered a predecessor to N.C. Gen. Stat. § 1-108, a statute which stated as follows:

> . . . and if the defense be successful, and the [prior] judgment . . . shall have been collected, or otherwise enforced, such restitution may thereupon be compelled as the Court may direct, *but title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.*

White v. White, 179 N.C. 592, 599, 103 S.E. 216, 220 (1920) (emphasis added). In *White*, the defendant's land was sold at a judgment execution sale to a good-faith purchaser, allegedly without actual notice to the defendant. Our Supreme Court held that the defendant was *not* entitled to the return of his property, noting that "the title to the land was acquired by the plaintiff as a *bona fide* purchaser at the sale under execution, *and cannot be disturbed.*" *Id.* (emphasis added). The Court held that the notice to the defendant was not constitutionally defective, notwithstanding the fact that he did not receive actual notice. *Id.* at 599-600, 103 S.E. at 220.

In 1926, our Supreme Court considered the statutory predecessor to N.C. Gen. Stat. § 1-108, specifically focusing on the line from the statute:

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1. *Stallings* has been relied upon by panels of our Court in unpublished opinions. *See County of Jackson v. Moor*, 236 N.C. App. 247, 765 S.E.2d 122 (2014) (unpublished); *Zheng v. Charlotte Prop.*, 226 N.C. App. 200, 739 S.E.2d 627 (2013) (unpublished).

"Title to property sold under such judgment to a purchaser in good faith is not hereby affected." *Foster v. Allison Corp.*, 191 N.C. 166, 170, 131 S.E. 648, 650 (1926). In that case, the defendants sought to have a judgment set aside which had resulted in the sale of their property to a third party: "Counsel for defendants earnestly contends that in setting aside a judgment under [the precursor to N.C. Gen. Stat. § 1-108], a bona fide purchaser may obtain title and property be taken without [the defendants having their] day in court[.]" *Id.* at 170, 131 S.E. at 650-51. Our Supreme Court held that the statute did not violate the defendants' due process rights, as the court had jurisdiction over the property. *Id.*

In 1897, our Supreme Court stated that, based on a statutory predecessor to N.C. Gen. Stat. § 1-108, the title to real estate purchased at a judicial sale cannot be affected where a court determines later that there was some irregularity in the judgment. *Harrison v. Hargrove*, 120 N.C. 96, 106, 26 S.E. 936, 939-40 (1897). In its decision, our Supreme Court quoted *England v. Garner*, 90 N.C. 197 (1884), as follows:

> It is well settled principle and authority, that where *it appears by the record* that the Court had jurisdiction of the parties and the subject-matter of an action the judgment therein is valid, however irregular it may be, until it shall be reversed by competent authority; and although it be reversed, the purchaser of real estate or other property at a sale made under and in pursuance of such judgment, while it was in force and while it authorized the sale, will be protected. . . . [Where] the judgment is regular on its face, a purchaser of property under such a judgment or decree must be protected in his purchase, even though the judgment or decree be afterwards set aside on the ground that in point of fact service of summons had not been made[.]"

Hargrove, 120 N.C. at 105-06, 26 S.E. at 939 (emphasis in original).

On a number of occasions, our Supreme Court has stated that the policy behind the statutory language now found in N.C. Gen. Stat. § 1-108 is to encourage higher bids at judicial sales and to protect the integrity of title to property:

> The title acquired at a judicial sale of lands made by a court of competent jurisdiction, is not rendered invalid by reason of the reversal of the decree for irregularity in the proceedings, of which the purchaser could have no notice.

. . . .

> A contrary doctrine would be fatal to judicial sales and values of title derived under them, as no one would buy at prices at all approximating the true value of property, if he supposed that his title might, at some distant day, be declared void, because of some irregularity in the proceeding altogether unsuspected by him[.]
>
> . . . .
>
> Under the operation of this rule, occasional instances of hardship [] may occur, but a different one would much more certainly result in mischievous consequences, and the general sacrifice of property sold by order of the courts. Hence it is, that a purchaser who is no party to the proceeding, is not bound to look beyond the decree [allowing for the property to be sold], if the facts necessary to give the court jurisdiction appear on the face of the proceedings. If the jurisdiction has been improvidently exercised, it is not to be corrected at his expense, who had a right to rely upon the order of the court as an authority emanating from a competent source—so much being due to the sanctity of judicial proceedings.

Sutton v. Schonwald, 86 N.C. at 202-04; *see also Bolton v. Harrison*, 250 N.C. 290, 298, 108 S.E.2d 666, 671 (1959) ("Necessarily, purchasers of property, especially land, must have faith in and place reliance on the validity of judicial proceedings."); *Crockett v. Bray*, 151 N.C. 615, 617, 66 S.E. 666, 667 (1910)[2]; *Lawrence v. Hardy*, 151 N.C. 123, 129, 65 S.E. 766, 769 (1909)[3]; *Herbin v. Wagoner*, 118 N.C. 656, 661, 24 S.E. 490, 491 (1896).

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2. Our Supreme Court in *Crockett* recognized the General Assembly's purpose in enacting statutes like N.C. Gen. Stat. § 1-108 as follows: "The evident trend of enlightened legislation is to remove, before sale, all defects of title to property sold under judicial process. Its object is to have property sold under process of the courts, bring the highest price, and, as far as possible, to eliminate speculation in defective titles to property sold by its process. The courts have been liberal in construing this remedial legislation." *Crockett*, 151 N.C. at 617, 66 S.E. at 667.

3. Our Supreme Court in *Lawrence* reiterated the law: "Our law is properly solicitous of the rights of such a purchaser; and, while they are affected by the existence of certain defects apparent in the record, numerous and well-considered decisions with us sustain the position that only those defects which are jurisdictional in their nature are available as against his title." *Lawrence*, 151 N.C. at 129, 65 S.E. at 769.

In the present case, the Clerk entered an order detailing the validity of the lien on Ms. Ackah's property and stating that service was accomplished on Ms. Ackah "as provided by law." There was nothing in the order which would have alerted the Jones Family of any irregularities in the proceeding. They made their bid in good faith. And the application of N.C. Gen. Stat. § 1-108 is not unconstitutional as applied to Ms. Ackah in this case, as Ms. Ackah was afforded *constitutionally* sufficient notice. Therefore, although Ms. Ackah is entitled to relief from the Clerk's order based on the HOA's failure to use "due diligence" to notify her of the proceeding under Rule 4, N.C. Gen. Stat. § 1-108 limits the *type* of relief available to her in order to protect the interests of a good-faith purchaser of the Property; here, the Jones Family.

Even assuming that we are bound by our Court's 1990 decision in *Stallings*, reversal of the superior court's order affecting the Jones Family's interest in the Property is still warranted. Specifically, the superior court based its order on its determination that the interests of justice required that the sale be set aside primarily "due to the Property being sold at a substantially low price[.]" However, this determination is not supported by the superior court's own findings or the evidence. Specifically, the court based this conclusion on its finding that "[t]he purchase price [at the judicial sale] of $2,708.52 was significantly low, given Ackah's purchase price of $123,000 in 2005." The superior court ignored the fact that the Jones Family bought the Property *subject to* Ms. Ackah's first mortgage, which the court found was in the amount of $117,587.00 when it originated. And there is otherwise no finding regarding the actual value of the Property or the amount owed on the first mortgage at the time of the judicial sale. Therefore, the findings simply do not support the court's determination that the price paid by the Jones Family was "substantially low."

IV. Conclusion

The superior court properly determined that Ms. Ackah was entitled to some form of relief pursuant to Rule 60, as she did not receive notice which satisfied Rule 4 of the proceeding before the Clerk. However, because Ms. Ackah received constitutionally sufficient notice, the relief available to her was limited by N.C. Gen. Stat. § 1-108, which favors the rights of the Jones Family in the Property over that of Ms. Ackah. Therefore, we affirm in part, reverse in part and remand the superior court's 30 December 2015 order; and we reverse the 30 December 2015 order entered by the assistant clerk returning possession of the Property to Ms. Ackah. On remand, the superior court may enter an order not inconsistent with this opinion, which may include, for example, relief

for Ms. Ackah in the form of restitution from the HOA, as authorized by N.C. Gen. Stat. § 1-108.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judge STROUD concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

I agree with the Majority in so far as it holds that the HOA failed to provide Ackah with sufficient notice under Rule 4 of the North Carolina Rules of Civil Procedure of its intent to enforce its statutory lien against the Property. However, I disagree with the Majority's holding that N.C.G.S. § 1-108 (2015) barred the trial court from granting Ackah any relief that affected Jones Family's title in the Property, and therefore I respectfully dissent.

Jones Family maintains that the trial court lacked jurisdiction to enter its 30 December 2015 Order setting aside the foreclosure sale and putting Ackah back in possession of the Property, even if the HOA failed to comply with all procedural timelines and notices. Specifically, Jones Family contends there is a statutory prohibition against disrupting a good faith purchaser's title to property. I disagree.

Jones Family's contention is incorrect. In foreclosure proceedings, we have interpreted the final portion of section 1-108 of the North Carolina General Statutes not as an absolute bar to the disruption of a transfer of title pursuant to a final judgment, but rather to mean that, when a judgment to set aside an order for sale is entered pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, the judgment does not *automatically* affect title to the property at issue. *Town of Cary v. Stallings*, 97 N.C. App. 484, 487, 389 S.E.2d 143, 145 (1990). Instead, "title to such property *may* in fact be affected if the court deems it necessary in the interest of justice." *Id.* at 487, 389 S.E.2d at 145.

By way of example, in *Stallings* the defendant failed to pay the cost of improvements made in front of her property by the Town of Cary. *Id.* at 485, 389 S.E.2d at 144. Consequently, the Town of Cary foreclosed on its assessment lien against her property and eventually the property was sold to a good faith purchaser. *Id.* at 485-86, 389 S.E.2d at 144. As here, the defendant then filed motion to set aside the judgment pursuant to

Rule 60, which the trial court ultimately granted. *Id.* at 486, 389 S.E.2d at 144. On appeal, the good faith purchaser similarly argued that the trial court's order to set aside the final judgment should not have affected its purchase of the property. *Id.* at 486, 389 S.E.2d at 144-45. We upheld the trial court's determination that the defendant did not receive proper service of process and, for that reason, affirmed the trial court's resulting decision to set aside the order for sale, declare the Commissioner's Deed null and void, and put the defendant back in possession of the property. *Id.* at 487, 389 S.E.2d at 145. Therefore, pursuant to this Court's decision in *Stallings* and our Supreme Court's holding in *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), we must likewise recognize that "title to . . . property *may* in fact be affected if the court deems it necessary in the interest of justice[,]" *Stallings*, 97 N.C. App. at 487, 389 S.E.2d 145.

In reaching its conclusion, the Majority holds that we are not bound by *Stallings* and instead cites to precedent from our Supreme Court as the basis for its opinion. While I recognize that, "where there is a conflict between an opinion from this Court and one from our Supreme Court, we are bound to follow the Supreme Court's opinion," that rule is inapplicable to the instant case because the line of Supreme Court cases to which the Majority cites deals with predecessors to N.C.G.S. § 1-108 and are therefore not directly on point. *State v. Mostafavi*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (June 6, 2017) (No. 16-1233) (citations omitted). Furthermore, implicit in the binding effect of our holding in *Stallings* is the logic that, in deciding that case, we considered the decisions that came before it and rejected the application of the Majority's line of cases to N.C.G.S. § 1-108.

In sum, more than a quarter of a century ago, we rejected Jones Family's interpretation of N.C.G.S. § 1-108 in *Stallings* and the Supreme Court has not seen fit to disturb our holding. The trial court's order in the instant case is consistent with our precedent. I see no reason to conclude, as Jones Family suggests, that the trial court acted without jurisdiction in divesting it of the Property and I respectfully dissent from the Majority's holding embracing Jones Family's argument over binding caselaw.

IN THE MATTER OF L.W.S.

No. COA17-173

Filed 5 September 2017

Appeal and Error—preservation of issues—failure to object at trial—Indian Child Welfare Act

The issue of whether the trial court erred by failing to address an issue under the Indian Child Welfare Act was not preserved for appeal where it was not raised in the trial court.

Appeal by respondent-father from order entered 28 November 2016 by Judge Burford A. Cherry in Burke County District Court. Heard in the Court of Appeals 10 August 2017.

Chrystal S. Kay for petitioner-appellee Burke County Department of Social Services.

Julie C. Boyer for respondent-appellant father.

Poyner Spruill LLP, by Christopher S. Dwight for guardian ad litem.

BRYANT, Judge.

Where respondent never presented the issue that he now raises on appeal to the trial court and completely failed to meet his burden of showing the provisions of the Indian Child Welfare Act apply to this case, we affirm.

The Burke County Department of Social Services ("DSS") initiated the underlying juvenile case on 1 May 2015 when it filed a petition alleging L.W.S. ("Luke")[1] was an abused, neglected, and dependent juvenile. DSS obtained nonsecure custody of Luke that same day and retained custody of him throughout the case. After a hearing on 3 March 2016, the trial court entered an order adjudicating Luke to be an abused, neglected, and dependent juvenile. The court found that both respondent and Luke's mother had pending criminal charges of felony child abuse inflicting serious injury to Luke, that respondent and the mother had relinquished

1. A pseudonym is used throughout to protect the juvenile's privacy pursuant to N.C. R. App. P. 3.1(b) (2017).

their parental rights to two previous children, and that respondent and the mother had been involved in several past incidents of domestic violence in front of their children. The court ceased reunification efforts with respondent and Luke's mother and set the matter for a permanency planning hearing on 31 March 2016. In its order from the permanency planning hearing, the trial court set the permanent plan for Luke as adoption with a concurrent plan of custody or guardianship. Respondent was subsequently found guilty of felony child abuse and sentenced to a term of sixty to eighty-four months imprisonment.

On 1 August 2016, DSS filed a petition to terminate parental rights to Luke. As to respondent, DSS alleged grounds of abuse, neglect, failure to correct the conditions that led to Luke's removal from his home, failure to pay a reasonable portion of the cost of Luke's care while Luke was in DSS custody, abandonment, and that respondent had committed a felony assault against Luke that resulted in serious bodily injury. *See* N.C. Gen. Stat. § 7B-1111(a)(1)–(3), (7)–(8) (2015). DSS filed an amended petition for termination of parental rights on 22 August 2016, alleging the same grounds as the first petition but correcting the mother's name.

After a hearing on 27 October 2016, the trial court entered an order on 28 November 2016 terminating respondent's parental rights to Luke.[2] The court concluded all grounds alleged in the petition existed to terminate respondent's parental rights and that termination of his parental rights was in Luke's best interest. Respondent filed timely written notice of appeal from the trial court's order.

Respondent's sole argument on appeal is that the trial court erred in terminating his parental rights to Luke because it failed to address whether Luke was a member of a Native American tribe and whether the Indian Child Welfare Act applied to him. We disagree.

"The Indian Child Welfare Act of 1978 (hereinafter ICWA or Act) was enacted to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' " *In re A.D.L.*, 169 N.C. App. 701, 708, 612 S.E.2d 639, 644 (2005) (quoting 25 U.S.C.A. § 1902 (2005)).

> There are two prerequisites to invoking the requirements of ICWA. First, it must be determined that the proceeding

2. The court's order also terminated the parental rights of Luke's mother, but she is not a party to this appeal.

> is a "child custody proceeding" as defined by the Act. Once it has been determined that the proceeding is a child custody proceeding, it must then be determined whether the child is an Indian child.

Id. (internal citations omitted). " 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 U.S.C. § 1903(4) (2006).

> In any involuntary proceeding in a state court where the court knows or has reason to know that an Indian child is involved, and where the identity of the child's Indian parents or custodians or tribe is known, the party seeking the . . . termination of parental rights to[] an Indian child shall directly notify the Indian parents, Indian custodians, and the child's tribe by certified mail with return receipt requested of the pending proceedings and of their right of intervention.

25 C.F.R. § 23.11(a) (2011).[3] "The burden is on the party invoking [ICWA] to show that its provisions are applicable to the case at issue, through documentation or perhaps testimony from a tribe representative." *In re C.P.*, 181 N.C. App. 698, 701–02, 641 S.E.2d 13, 16 (2007) (citing *In re Williams*, 149 N.C. App. 951, 957, 563 S.E.2d 202, 205 (2002)).[4]

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3. On 14 June 2016, a new subpart, Subpart I, was added to the Department of the Interior's regulations implementing ICWA. See 25 C.F.R. §§ 23.101 *et seq.* (2017); *Indian Child Welfare Act Proceedings*, 81 Fed. Reg. 38,867 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23) (effective 12 December 2016) ("The final rules adds [sic] a new subpart to the Department of the Interior's (Department) regulations implementing . . . [ICWA], to improve ICWA implementation. The final rule addresses requirements for State courts in ensuring implementation of ICWA in Indian child-welfare proceedings and requirements for States to maintain records under ICWA."). Among other things, the newly-added Subpart I provides that "[t]he Indian Tribe of which it is believed the child is a member . . . determines whether the child is a member of the Tribe" and further provides that this determination "*is solely within the jurisdiction and authority of the Tribe* . . . ." 25 C.F.R. § 23.108(a)–(b) (2017) (emphasis added). Subpart I also provides that "[p]rior to ordering an involuntary . . . termination of parental rights, the court must conclude that active efforts have been made to prevent the breakup of the Indian family and that those efforts have been unsuccessful[,]" and that those "[a]ctive efforts must be documented in detail in the record." 25 C.F.R. § 23.120(a)–(b) (2017). However, because the order in the instant case was entered on 28 November 2016, before the effective date for new Subpart I (12 December 2016), Subpart I is not applicable to the instant case.

4. We note that, now, it seems to be the case that the burden has shifted to state courts to inquire at the start of a proceeding whether the child at issue is an Indian child, and, if so, the state court must confirm that the agency used due diligence to identify and work with the Tribe and treat the child as an Indian child unless and until it is determined otherwise. *See* 25 C.F.R. § 23.107(a), (b)(1)–(2) (2017).

In support of his argument on appeal, respondent directs this Court's attention to an identical sentence from two court reports prepared by a DSS social worker on 3 and 16 March 2016, which state: "[Respondent] indicated he is Cherokee on [Luke's] birth certificate. The Department contacted the tribe regarding [respondent's] claim and did not receive a response." The statement that respondent indicated he is Cherokee on Luke's birth certificate is, however, demonstrably untrue, as shown by the copies of Luke's birth certificate included in the record on appeal. Luke's birth certificate does not include any statement that either respondent or Luke are Cherokee and does not have a section in which a parent's or child's American Indian heritage, or lack thereof, could be listed. Moreover, although the order terminating respondent's parental rights is silent as to the applicability of ICWA, we note the trial court repeatedly found in its orders entered in the underlying juvenile case, including the initial adjudication and disposition order, that ICWA does not apply to this matter.

Respondent never presented the issue to the trial court that he now raises on appeal and completely failed to meet his burden of showing the provisions of ICWA apply to this case. *See Williams*, 149 N.C. App. at 956–57, 563 S.E.2d at 205 ("Equivocal testimony of the party seeking to invoke the Act, standing alone, is insufficient to meet this burden."); *see also In re A.R.*, 227 N.C. App. 518, 523–25, 742 S.E.2d 629, 633 (2013) (noting that a "mere belief" that a child is an Indian child covered under the ICWA, without more, does not meet a parent's burden of showing ICWA applies in a Chapter 7B proceeding, but "err[ing] on the side of caution by remanding for the trial court to determine the results of the . . . 'investigation' and to ensure that the ICWA notification requirements, if any, are addressed as early as possible"). Accordingly, this argument is overruled. Respondent does not otherwise challenge the trial court's order terminating his parental rights to Luke, and it is hereby affirmed.

AFFIRMED.

Judges HUNTER, JR., and MURPHY concur.

MALECEK v. WILLIAMS

[255 N.C. App. 300 (2017)]

MARC MALECEK, PLAINTIFF
v.
DEREK WILLIAMS, DEFENDANT

No. COA16-830

Filed 5 September 2017

1. Alienation of Affections—criminal conversation—due process—not offended

North Carolina's common law causes of action for alienation of affections and criminal conversation do not violate the Fourteenth Amendment. Adult individuals have a constitutionally protected interest in engaging in intimate sexual activities free of governmental intrusion or regulation, but the State has a legitimate interest in protecting the institution of marriage and deterring conduct that would cause injury to one of the spouses.

2. Alienation of Affections—criminal conversation—free speech—no violation

Defendant's rights to free speech and expression were not violated by claims for alienation of affections and criminal conversation where defendant and plaintiff's wife had an affair. An extra-marital relationship can implicate protected speech and expression, but theses torts exist for the unrelated reason of remedying the harms that result from breaking the marriage vows.

3. Alienation of Affections—criminal conversation—freedom of association—not violated

The First Amendment right to free association was not violated by the torts of alienation of affections and criminal conversation. Those torts did not prohibit all conceivable forms of association between a spouse and someone outside the marriage.

Appeal by plaintiff from order entered 11 May 2016 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 7 March 2017.

The Law Offices of J. Scott Smith, PLLC, by J. Scott Smith and Andrew Newman, for plaintiff-appellant.

Allman Spry Davis Leggett & Crumpler, P.A., by Kim R. Bonuomo, Joslin Davis, and Bennett D. Rainey, for defendant-appellee.

DIETZ, Judge.

This case concerns two common law causes of action—alienation of affection and criminal conversation—that permit litigants to sue the lovers of their unfaithful spouses. These laws were born out of misogyny and in modern times are often used as tools for enterprising divorce lawyers seeking leverage over the other side.

Defendant Derek Williams contends that these aging common law torts are facially unconstitutional because they violate individuals' First and Fourteenth Amendment rights to engage in intimate sexual activity, speech, and expression with other consenting adults.

As explained below, we reject this facial constitutional challenge. Claims for alienation of affection and criminal conversation are designed to prevent and remedy personal injury, and to protect the promise of monogamy that accompanies most marriage commitments. This sets these common law claims apart from the discriminatory sodomy law at issue in *Lawrence v. Texas*, 539 U.S. 558 (2003), which was not supported by any legitimate state interest and instead stemmed from moral disapproval and bigotry. Similarly, these laws (in most applications) seek to prevent personal and societal harms without regard to the content of the intimate expression that occurs in the extra-marital relationship. Thus, under *United States v. O'Brien*, 391 U.S. 367 (1968), these torts are constitutional despite the possibility that their use burdens forms of protected speech and expression.

Our holding is neither an endorsement nor a critique of these "heart balm" torts. Whether this Court believes these torts are good or bad policy is irrelevant; we cannot hold a law facially unconstitutional because it is bad policy. We instead ask whether there are any applications of these laws that survive scrutiny under the appropriate constitutional standards. As explained below, although there are situations in which these torts likely are unconstitutional as applied, there are also many applications that survive constitutional scrutiny. Thus, the common law torts of alienation of affection and criminal conversation are not facially unconstitutional. We reverse the trial court's order and remand for further proceedings.

Facts and Procedural History

Marc and Amber Malecek were a married couple. Ms. Malecek is a nurse. Defendant Derek Williams is a medical doctor at the hospital where Ms. Malecek works. In early 2015, Dr. Williams and Ms. Malecek began a sexual relationship.

Mr. Malecek discovered the affair and sued Dr. Williams for alienation of affection and criminal conversation. Dr. Williams moved to dismiss Mr. Malecek's claims under Rule 12(b)(6) of the Rules of Civil Procedure on the ground that North Carolina's common law causes of action for alienation of affection and criminal conversation are facially unconstitutional.

The trial court held a hearing on Dr. Williams's motion, accepted his constitutional arguments, and entered a written order granting his motion to dismiss. Mr. Malecek timely appealed.

Analysis

This Court reviews the grant of a Rule 12(b)(6) motion to dismiss *de novo*. *State v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016). A Rule 12(b)(6) motion "is properly granted where a valid legal defense stands as an insurmountable bar to a plaintiff's recovery." *Lupton v. Blue Cross & Blue Shield of N.C.*, 139 N.C. App. 421, 424, 533 S.E.2d 270, 272 (2000). Because the courts cannot permit a plaintiff to pursue a cause of action that is unconstitutional on its face, Dr. Williams's facial challenge to these common law torts is an appropriate subject for a Rule 12(b)(6) motion.

We begin by examining the elements of these common law claims. "A claim for alienation of affections is comprised of wrongful acts which deprive a married person of the affections of his or her spouse—love, society, companionship and comfort of the other spouse." *Darnell v. Rupplin*, 91 N.C. App. 349, 350, 371 S.E.2d 743, 744 (1988). To prevail on an alienation of affection claim, the plaintiff must prove (1) that the spouses were happily married and a genuine love and affection existed between them; (2) the love and affection was alienated and destroyed; and (3) the defendant caused the destruction of that marital love and affection. *Id.* at 350, 371 S.E.2d at 745.

Similarly, a claim for criminal conversation lies against a defendant who engages in sexual relations with a married person. "The elements of the tort are the actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture." *Johnson v. Pearce*, 148 N.C. App. 199, 200–01, 557 S.E.2d 189, 190 (2001).

In the trial court, Dr. Williams argued that both of these causes of action were facially unconstitutional under the First and Fourteenth Amendments. The trial court agreed and granted Dr. Williams's Rule 12(b)(6) motion without identifying the particular constitutional doctrine on which it relied. Because we review the grant of a Rule 12(b)(6)

motion to dismiss *de novo*, we must address all grounds on which Dr. Williams challenged these two common law claims.

I. Substantive Due Process

[1] Dr. Williams first argues that alienation of affection and criminal conversation offend the Due Process Clause of the Fourteenth Amendment by restraining one's liberty to have intimate sexual relations with another consenting adult. In support of this argument, Dr. Williams relies on the U.S. Supreme Court's decision in *Lawrence v. Texas*.

In *Lawrence*, the Supreme Court invalidated a Texas law criminalizing intimate sexual conduct between two people of the same sex. 539 U.S. 558, 578 (2003). The Texas statute was rooted in bigotry; it criminalized homosexual sex solely because some found it immoral or distasteful. As the Court observed, the Constitution does not permit a state to degrade the basic liberties of a group of its citizens on moral grounds. Gays, lesbians, and all other people who engage in homosexual sex "are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.* The Court thus invalidated the Texas law because it furthered "no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.*

We agree with Dr. Williams that *Lawrence* established (or reaffirmed) that adult individuals have a constitutionally protected interest in engaging in intimate sexual activities free of governmental intrusion or regulation. *Id.* at 567. Whatever the bounds of this protected right, it certainly extends to private sexual activities between two consenting adults. Moreover, a civil lawsuit between private parties constitutes "state action" for purposes of the Fourteenth Amendment when enforcement of that cause of action imposes liability for engaging in a constitutionally protected right. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). Thus, Dr. Williams correctly contends that a suit against him for alienation of affection and criminal conversation, based on his intimate sexual relationship with Ms. Malecek, implicates his Fourteenth Amendment rights.

But the Supreme Court also added an important caveat in *Lawrence*. It observed that the Fourteenth Amendment generally prohibits States from regulating private, consensual sexual activity "absent injury to a person or abuse of an institution the law protects." *Lawrence*, 539 U.S. at 567. It is well-settled that alienation of affection and criminal conversation seek to remedy an injury to a person. *Misenheimer v. Burris*, 360 N.C. 620, 624, 637 S.E.2d 173, 176 (2006). Moreover, although the

Supreme Court in *Lawrence* did not explain what it meant by an "institution the law protects," the institution of marriage seems an obvious choice. Marriage is, after all, perhaps the most important institution in human history. "The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations." *Obergefell v. Hodges*, __ U.S. __, __, 135 S. Ct. 2584, 2594 (2015). "Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations." *Id.*

Importantly, marriage is a commitment. Among the most central vows in a marriage is the promise of fidelity. *Id.* at 2608. In most marriages, this means a promise of monogamy; an agreement to share romantic intimacy and sexual relations only with one's spouse. Of course, not every marriage carries this commitment, but for those that do, society expects married couples to honor it. If they do not, injury results—personal injury to the still-faithful spouse, but also societal injury, because a broken marriage can mean the loss of all the benefits that a healthy marriage brings to society. *See id.* at 2595–97. Simply put, the State has a legitimate interest (indeed, a substantial interest) in protecting the institution of marriage, ensuring that married couples honor their vows, and deterring conduct that would cause injury to one of the spouses.

We thus turn to the critical question presented here: is the State's need to protect these interests sufficient to justify private tort actions that restrict one's right to engage in intimate sexual conduct with other consenting adults?

We hold that it is. The Supreme Court in *Lawrence* recognized a liberty interest in intimate sexual activity, but did not hold that it was a fundamental right. *Lawrence*, 539 U.S. at 578–79; *id.* at 605 (Scalia, J., dissenting). Instead, the Court applied what appears to be a robust form of rational basis review. *Lawrence*, 539 U.S. 558. Under that standard, instead of merely asking if a law is rationally related to some legitimate governmental interest, courts weigh the government's asserted interest against the right to individual liberty or equal treatment that the challengers contend is violated. *See United States v. Windsor*, __ U.S. __, __, 133 S. Ct. 2675, 2694–96 (2013); *Romer v. Evans*, 517 U.S. 620, 631–33 (1996); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 461–64, (1988); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *Plyler v. Doe*, 457 U.S. 202, 224–30 (1982). Laws that demean individuals because of lingering prejudices or moral disapproval typically are invalidated under this standard, but laws that further important state

interests without being rooted in bigotry or moral disapproval typically are upheld.

Alienation of affection and criminal conversation fall into the latter category. These causes of action do not demean the existence of any group of people. They apply evenly to everyone. Moreover, the State's interest in preserving these torts is strong. As explained above, these torts deter conduct that causes personal injury; they protect promises made during the marriage; and they help preserve the institution of marriage, which provides innumerable benefits to our society.[1]

To be sure, these common law torts are not the least liberty-restrictive means of vindicating the State's interests. For example, the State could invest in education to deter its citizens from cheating on their spouses. And, of course, these laws only impose liability on the third party. It arguably would be a greater deterrent to marital infidelity to impose liability on both the third party *and* the cheating spouse.[2]

If a higher level of scrutiny applied in this case (Dr. Williams wrongly contends that strict scrutiny should apply here) these less liberty-restrictive alternatives would doom the torts. But under the robust rational basis standard applied in *Lawrence* and similar cases, Dr. Williams cannot prevail unless he shows that these laws stem from lingering prejudice or moral disapproval that overshadows the State's other reasons for enacting them. Dr. Williams has not made that showing. Thus, under *Lawrence*, our State's common law causes of action for alienation of affection and criminal conversation do not violate the Fourteenth Amendment.

II. Freedom of Speech, Expression, and Association

[2] Dr. Williams next argues that alienation of affection and criminal conversation violate his rights to free speech, expression, and association guaranteed by the First and Fourteenth Amendments.

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1. Our analysis ignores those in "open" marriages where both spouses agree that they may engage in intimacy or sexual activity outside the marriage. When the spouses agree to an open marriage, this is a complete defense to claims of alienation of affection and criminal conversation. *See Barker v. Dowdy*, 223 N.C. 151, 152, 25 S.E.2d 404, 405 (1943); *Nunn v. Allen*, 154 N.C. App. 523, 536, 574 S.E.2d 35, 44 (2002).

2. North Carolina has a criminal law that could be used to prosecute unfaithful spouses but the State has chosen not to use it, at least in modern times. *See* N.C. Gen. Stat. § 14-184. This may be because many other applications of this criminal statute are plainly unconstitutional and the State has concerns that this application would be as well. *See Lawrence*, 539 U.S. at 578; *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at *1 (N.C. Super. Aug. 25, 2006) (unpublished).

We begin with Dr. Williams's challenge based on the First Amendment protection of speech and expression. Dr. Williams conceded at oral argument that the trial court found these causes of action facially unconstitutional. "In a facial challenge, the presumption is that the law is constitutional, and a court may not strike it down if it may be upheld on any reasonable ground." *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 539, 571 S.E.2d 52, 61 (2002). Thus, Dr. Williams cannot prevail on his facial challenge unless there is no reasonable set of circumstances in which these torts would be constitutional.

We agree with Dr. Williams that, even where the challenged causes of action are based solely on the existence of an extra-marital sexual relationship, they can implicate protected speech and expression. In the past, cases involving the regulation of sexual activity typically have been viewed as regulations of conduct, not speech or expression. For example, in a First Amendment case involving prostitution at an adult bookstore, the Supreme Court noted that "the sexual activity carried on in this case manifests absolutely no element of protected expression." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986).

But later cases suggest that sexual activity can carry an expressive message. For example, in *City of Erie v. Pap's A.M.*, the Court held that nude, erotic dancing involved expression that fell "within the outer ambit of the First Amendment's protection." 529 U.S. 277, 289 (2000). If using one's naked body to arouse another's sexual desire is a form of protected expression, it is difficult to understand why that expressive conduct would cease once the couple embraced, as opposed to staying at arm's length. Moreover, in *Lawrence*, the Supreme Court expressly acknowledged that one's sexuality "finds overt expression in intimate conduct with another person." 539 U.S. at 567. Thus, we agree with Dr. Williams that facing liability for engaging in intimate sexual relations with a married person can implicate the First and Fourteenth Amendment rights to free speech and expression.

But, as with the substantive due process claim discussed above, the mere fact that these common law claims can burden the right to free speech and expression does not mean they must be struck down. In most applications of these torts, the State is not concerned with the *content* of the intimate speech or expression that occurs in an extra-marital relationship. Instead, the State seeks to deter and remedy the harmful effects *that result* from acts that cause people to break their marriage vows, inflict personal injury on others, and damage the institution of marriage. Put another way, these torts may restrict certain forms of intimate speech or expression, but they do so for reasons unrelated to the content of that speech or expression.

Courts review laws that only incidentally burden protected expression under the test established in *United States v. O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Supreme Court held that a ban on burning draft cards did not violate the First Amendment because, although the law burdened the rights of citizens seeking to burn their draft cards in political protest, the government's interest in preventing people from destroying their draft cards was justified by reasons unrelated to the content of that political speech. *Id.* at 376–77. As the Court later explained, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This type of content-neutral law will be upheld if it "is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

These common law torts are facially valid under this standard. They further the State's desire to protect a married couple's vow of fidelity and to prevent the personal injury and societal harms that result when that vow is broken. As explained above, preventing these personal injuries and societal harms is a substantial governmental interest. Moreover, the State's interest is unrelated to the content of the protected First Amendment right. If the defendant's actions deprived a married person of the love and affection of his or her spouse, the State will impose liability regardless of what the defendant actually said or did. *Cf. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). Indeed, when spouses agree to an "open" marriage that permits extra-marital intimacy or sex, that is a defense to these claims, as is physical separation of the spouses when either spouse intends for the separation to remain permanent. *See* N.C. Gen. Stat. § 52-13 (2015); *Barker v. Dowdy*, 223 N.C. 151, 152, 25 S.E.2d 404, 405 (1943); *Nunn v. Allen*, 154 N.C. App. 523, 536, 574 S.E.2d 35, 44 (2002). This undermines Dr. Williams's argument that these laws target extra-marital intimacy or sex because the State disapproves of expressing that intimacy while married to someone else.

Simply put, these torts are intended to remedy harms that result when marriage vows are broken, not to punish intimate extra-marital speech or expression because of its content. And, because the availability of a tort action to the injured spouse provides both a remedy for that harm and a deterrent effect (one that benefits the State and society without punishing any speech or expression that does not cause these harms), the torts are narrow enough to survive constitutional scrutiny under the *O'Brien* test.

[3] Dr. Williams also argues that these torts are facially unconstitutional because they violate the First Amendment right to free association. The First Amendment "restricts the ability of the State to impose liability on an individual solely because of his association with another." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918–19 (1982). But these torts do not prohibit all conceivable forms of association between a spouse and someone outside the marriage. There are countless ways for one to associate with a married person, form meaningful relationships, and even share feelings and intimacy without incurring liability for alienation of affection or criminal conversation. Moreover, when Dr. Williams articulates the specific associational rights that he contends are impacted, his argument collapses back to arguments about rights to intimate speech and expression. For the reasons discussed above, the incidental burden on those rights does not render these torts facially unconstitutional.

We emphasize that our holding today does not mean that every application of these common law torts is constitutional. There may be situations where an as-applied challenge to these laws could succeed. Take, for example, one who counsels a close friend to abandon a marriage with an abusive spouse. But this case, as the parties concede, is not one of those cases. It was decided as a facial challenge on a motion to dismiss at the pleadings stage. In the future, courts will need to grapple with the reality that these common law torts burden constitutional rights and likely have unconstitutional applications. For now, we hold only that alienation of affection and criminal conversation are not facially invalid under the First and Fourteenth Amendments.[3]

Conclusion

For the reasons explained above, we reverse the trial court's order and remand this case for further proceedings.

REVERSED AND REMANDED.

Judges ELMORE and TYSON concur.

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3. Dr. Williams also argues that these torts violate rights to speech, expression, and privacy guaranteed by the North Carolina Constitution. Our State Supreme Court has interpreted these rights as co-extensive with the analogous rights in the U.S. Constitution. *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993); *In re Moore's Sterilization*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976). This Court has no authority to overrule our Supreme Court's interpretation of these state constitutional provisions.

JEFF MYRES, EMPLOYEE, PLAINTIFF-APPELLANT
v.
STROM AVIATION, INC., EMPLOYER, AND UNITED STATES FIRE INSURANCE/CRUM & FORESTER INSURANCE COMPANY, CARRIER, DEFENDANTS-APPELLEES

No. COA16-558

Filed 5 September 2017

Workers' Compensation—average weekly wage—per diem payments—in lieu of wages

The Industrial Commission did not err in a worker's compensation case in its determination of plaintiff's average weekly wage—specifically, the determination that per diem payments were in lieu of wages. This was a question of fact which was supported by the evidence, and the Court of Appeals was not free to conduct a de novo review.

Appeal by plaintiff from opinion and award entered 10 July 2015 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 9 March 2017.

Stanley E. Speckhard, PLLC, by Stanley E. Speckhard, for plaintiff-appellant.

Cranfill Sumner & Hartzog, LLP, by Jaye E. Bingham-Hinch, for defendant-appellees.

STROUD, Judge.

Plaintiff, Jeffery Myres appeals from the opinion and award of the Full Commission concluding that: (1) plaintiff's per diem payments were not made in lieu of wages, but were reimbursement for plaintiff's business-related living expenses; (2) plaintiff's average weekly wage was $340.62; and (3) plaintiff was not entitled to temporary total disability benefits from 20 July 2013 through 18 August 2013. Because the Commission's determination of plaintiff's average weekly wage was in accord with precedent of this Court, we affirm.

I. Background

Plaintiff suffered a compensable ankle injury while working for defendant-employer and the basic facts regarding his injury and

employment are uncontested. Plaintiff is a trained and licensed airplane mechanic with over 21 years of experience in the aviation and aerospace industry. At the time of his ankle injury, he worked for defendant-employer, Strom Aviation, Inc. ("Strom"). Strom is an employment agency providing contract labor or temporary staffing to companies in the aerospace and aviation industry. The parties stipulated that an employee-employer relationship existed between the plaintiff and defendant-employer. Plaintiff's ankle injury occurred on 22 April 2012 and he received medical treatment, including two surgeries. His doctor determined that he had a 25% permanent partial rating for his left ankle on 26 June 2013 and released him to full-duty work without restrictions. After working briefly through Strom at another location, Pat's Aircraft in Georgetown, Delaware, plaintiff stopped working due to ankle pain and as of 20 December 2013, he had not returned to work.

On 16 August 2013, plaintiff initiated a workers compensation claim for his ankle injury by filing a Notice of Accident to Employer and Claim of Employee, and on 12 December 2013 filed a Request that Claim be Assigned for Hearing. In their response, defendants disagreed with plaintiff's allegation of his average weekly wage and mileage reimbursement. On 31 December 2014, the deputy commissioner ultimately determined that "the per diem payments received by plaintiff were not made in lieu of wages, but instead were coordinated with a reimbursement for plaintiff's business-related living expenses; . . . plaintiff's average weekly wage upon which workers compensation benefits is calculated is $340.62."[1]

Plaintiff appealed to the Full Commission on 8 January 2015, and ultimately the Full Commission filed an opinion and award on 10 July 2015, denying plaintiff's Motion to Receive Additional Authority and agreeing with the deputy commissioner as to both the per diem payment and plaintiff's average weekly wage of $340.62. Plaintiff submitted a Motion to Reconsider on 29 July 2015, and defendants filed a Response to Plaintiff's Motion to Reconsider on 10 August 2015. Plaintiff's Motion to Reconsider was denied by the Full Commission on 28 January 2016. Plaintiff timely appealed to this Court on 11 February 2016.

On appeal, plaintiff challenges only the Commission's determination of his average weekly wage. Although he states in his brief in a general sense that some of the findings of fact are not supported by the evidence,

1. The deputy commissioner and Full Commission also found that "plaintiff was not entitled to temporary total disability benefits from July 20, 2013 through August 18 2013." Plaintiff has not made any argument regarding this part of the Commission's order on appeal, and thus we have not addressed it on appeal.

he does not specifically challenge any finding of fact other than Finding No. 14, which is the Commission's finding of ultimate fact that the per diem payments he received from Strom were not "paid in lieu of wages" and thus should not be used in the calculation of his average weekly wage. See *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951) ("An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts."). Plaintiff's general statements that certain evidentiary findings were not supported by the evidence, without any specific argument as to any particular finding, are simply not sufficient to allow appellate review. *See Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) ("Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission. Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." (citation and quotation marks omitted)). Since plaintiff's brief does not challenge any specific finding of fact other than finding 14, the other findings of fact are binding on appeal. *See id.* However, we also note that the other findings of fact mentioned by plaintiff are fully supported by the evidence. For example, several of the findings plaintiff mentions in his brief are simply summaries of certain IRS rules, and there is no question that those findings accurately reflect the IRS rules. We have reviewed all of the evidence, and the evidentiary findings upon which Finding No. 14 is based are fully supported by the record. Plaintiff's real argument is that the Commission should not have relied upon those IRS rules in its analysis, finding of ultimate fact, and conclusion of law.

II. Standard of Review

"The Commission has exclusive original jurisdiction over workers' compensation cases and has the duty to hear evidence and file its award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue." *Thompson v. STS Holdings, Inc.*, 213 N.C. App. 26, 20, 711 S.E.2d 827, 829 (2011). Our standard of review for an opinion and award from the Industrial Commission

> is limited to a determination of (1) whether its findings of fact are supported by any competent evidence in the record; and (2) whether the Industrial Commission's findings of fact justify its legal conclusions. The Industrial Commission's conclusions of law are reviewable de novo by this Court.

Moore v. City of Raleigh, 135 N.C. App. 332, 334, 520 S.E.2d 133, 136 (1999) (citation and quotation marks omitted). "The determination of whether an allowance was made in lieu of wages is a question of fact[.]" *Greene v. Conlon Constr. Co.*, 184 N.C. App. 364, 366, 646 S.E.2d 652, 655 (2007). Although the question of whether the per diem payments were made "in lieu of" wages may appear to be a legal conclusion subject to *de novo* review, prior cases have clearly established that this issue is an issue of fact. In *Greene*, this Court noted that the defendant's employer and insurance carrier argued that the Commission "erred by including plaintiff's per diem stipend in its calculation of plaintiff's weekly wage." *Id.* at 366, 646 S.E.2d at 654. This Court affirmed the Commission's inclusion of the per diem in the average weekly wage and noted:

> This issue is addressed by N.C. Gen.Stat. § 97–2(5) (2005), which provides in pertinent part that [w]herever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings. Defendants argue first that our common law precedent has not defined the meaning of the words in lieu of wages. We conclude that this phrase needs no special definition. Wages are commonly understood to be payment for labor or services, and in lieu of means instead of or in place of. Thus, allowances made in lieu of wages are those made in place of payment for labor or services.

Id. at 364, 646 S.E.2d at 652 (citation and quotation marks omitted). "The Commission's findings of fact may be set aside on appeal only where there is a *complete* lack of competent evidence to support them." *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995) (emphasis added).

III. Findings of Fact

The relevant evidentiary facts, as found by the Commission, regarding Plaintiff's employment are as follows:

> 2. Defendant-employer is an employment agency that provides contract labor and temporary staffing to companies in the aerospace and aviation industries, including Timco.
>
> 3. On 17 October 2011, plaintiff entered into an employment contract with defendant-employer to perform structural repair work for Timco.

4. Defendant-employer pays mechanics a straight time hourly wage and an overtime hourly wage, both of which are treated as taxable income. In addition, defendant-employer pays mechanics a non-taxable per diem amount. The per diem payment is intended to reimburse employees for the cost of living expenses while working away from home. Therefore, per diem is only available if the worksite is located more than 50 miles from the employee's permanent residence and the employee certifies that they are maintaining a temporary residence closer to the worksite. Per diem rates are set at a maximum weekly amount, and the amount of the payment is pro-rated if the employee works fewer than 40 hours in a week.

5. Pursuant to plaintiff's employment contract with defendant-employer, plaintiff was to be paid at a taxable "straight time rate" of $7.25 per hour, and an overtime rate of $20.50 per hour. The contract further reflects that plaintiff would be eligible to receive a maximum "per diem" amount of $530.00 per week, which equates to $13.25 per hour for a 40 hour work week. If plaintiff worked less than 40 hours during a week, his per diem earnings would be prorated based upon the $13.25 hourly rate. At the time he entered into the employment contract, plaintiff signed a certificate verifying that his permanent residence continued to be in Hertford, which is more than 50 miles from Timco's facility in Greensboro.

6. Plaintiff testified that he incurred expenses for campground fees, gas, vehicle maintenance, internet service and food, but he was not required to submit receipts to defendant employer to substantiate these expenses.

7. The Internal Revenue Service ("IRS") has established guidelines under which fixed per diem payments at or below the Government Services Administration ("GSA") maximum allowable amount provided to employees on a uniform, objective basis are deemed substantiated travel expenses without proof from employees of expenses incurred.

8. For an employer to have per diem rates deemed "substantiated," it must follow three rules: (1) the per diem must be paid with respect to ordinary and necessary business expenses incurred or reasonably anticipated to be

incurred; (2) the per diem must be reasonably calculated not to exceed the amount of the expenses or anticipated expenses; and (3) the per diem must be paid at or below the federal per diem rate found on the website.

9. Brian Lucker is defendant-employer's Chief Financial Officer. He testified, and the Full Commission finds, that defendant-employer established the maximum amount of per diem plaintiff received while working for defendant-employer at Timco by obtaining the maximum per diem rate listed on the GSA website for Greensboro ($994.00 per week at the time plaintiff entered into his contract with defendant-employer), and adjusting that amount down to $530.00 based upon an informal assessment of local living costs. Based upon this process, $530.00 is the amount of business expenses defendant-employer reasonably anticipated plaintiff would incur in connection with his work at Timco.

10. Where an employer follows the established federal guidelines regarding per diem rates, the IRS does not consider per diem payments made by that employer to be wages or compensation, and therefore, such per diem payments are not subject to employment or withholding taxes.

11. Plaintiff confirmed that his per diem was not taxable and that he did not include per diem payments in his income tax filings. Plaintiff also acknowledged that, while working for defendant-employer, his W-2 reflected straight time wages and overtime pay, but not his per diem payments.

12. Plaintiff testified that the other aviation related staffing agencies he has worked for paid him in the same manner as defendant-employer paid him, with a straight time hourly rate of $7.00 to $8.00, an overtime hourly rate, and a per diem rate. As with the W-2 plaintiff received in connection with his employment with defendant-employer at Timco, plaintiff testified that the W-2s plaintiff received from the other staffing agencies only reflected his taxable wages.

13. Vocational rehabilitation counselor Michael Fryar was retained by counsel for plaintiff in this matter. Mr. Fryar testified that it would be extremely difficult for defendant-employer and other staffing agencies to recruit mechanics

> if they paid minimum wage. Mr. Fryar ultimately opined that defendant-employer and other staffing agencies that pay a minimum hourly wage plus a per diem are paying the per diem in lieu of what other employers are paying as wages. Mr. Fryar further testified with respect to plaintiff specifically that the per diem compensation paid to plaintiff by defendant-employer for his work at Timco was paid in lieu of wages.[2]

The Commission's finding of ultimate fact which plaintiff challenges on appeal is as follows:

> 14. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that the method used by defendant-employer to calculate the rate of per diem paid to plaintiff adjusts for the work locale and conforms to the federally established guidelines for treating an employee's business expenses as deemed substantiated. Therefore, notwithstanding the opinions of Mr. Fryar, the Full Commission finds that the per diem payments received by plaintiff from defendant-employer were coordinated with plaintiff's actual business expenses and were not paid in lieu of wages. Accordingly, pursuant to the parties' stipulations in this case, plaintiff's average weekly wage is $340.62.

The Commission then concluded the following in Conclusion of Law No. 1:

> In calculating plaintiff's average weekly wage, the Commission must first determine what constitutes plaintiff's earnings. Regarding per diem payments, N.C. Gen. Stat. § 97-2(5) provides, "[w]herever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings." Per diem amounts set a fixed amount

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2. We note that some of the Commission's findings are recitations of testimony, but its ultimate finding resolves any uncertainty regarding which testimony the Commission found to be credible. But we encourage the Commission to avoid recitations of testimony in its findings if at all possible as this type of finding can lead to reversal and remand for clarification of findings if we are unable to determine which evidence the Commission found credible. *See People v. Cone Mills Corp.*, 316 N.C. 426, 442, 342 S.E.2d 798, 808 (1986) ("We, nevertheless, suggest to the Commission to make its findings in the form of declarations of facts rather than recitations of testimony.").

> regardless of actual employee expenses may be considered part of the employee's earnings. In the instant case, the per diem payments plaintiff received from defendant-employer were adjusted depending on locale, and were made subject to a policy in conformity with federal guidelines that allowed the payments to be treated as tax-deductible business expenses without further proof of actual expenses from the employee. The Full Commission therefore concludes that the per diem payments plaintiff received from defendant-employer were not made in lieu of wages, but instead were reimbursement for plaintiff's business-related living expenses.

(Citation and quotation marks omitted).

IV. Per Diem Payments

Unlike most worker's compensation cases, this case does not involve any issue regarding the compensability of plaintiff's injury, plaintiff's medical expenses, or plaintiff's relationship with the employer. The only issue on appeal is the amount of Plaintiff's "average weekly wages." Plaintiff argues that the Commission erred by calculating his "average weekly wages" based only upon his hourly rate and excluding his per diem payments, since he contends that the per diem payments are really paid "in lieu of wages" as defined by N.C. Gen. Stat. § 97-2(5). With the per diem payments, his hourly wages would be $20.50/hour; without it, they are $7.25/hour, or the federal minimum wage. We agree that it seems obvious that an aircraft mechanic with specialized training and over 20 years of experience would be paid far more than minimum wage. We also realize that it is to defendant's advantage to set up its compensation structure to make its employees' "average weekly wages" as low as possible to reduce any potential worker's compensation awards. For that matter, the arrangement is also advantageous to the employee, whose income tax burden is significantly lower if the per diem payments are not taxable income. The employee's problem with this pay structure arises only if he is injured on the job. Overall, it may not seem "fair and just to both parties" for the average weekly wage for an employee such as plaintiff, with many years of specialized experience in aviation mechanics, to have the same compensation rate as a teenager working at the drive-thru window of a fast food restaurant. But it is not this Court's role to weigh the policy considerations involved in how aircraft mechanics are paid and taxed, and we are constrained by precedent to hold that the Commission did not err in its determination.

Workers compensation payments are based upon the employee's "average weekly wages," which are defined by N. C. Gen. Stat. § 97-2(5), in pertinent part, as follows:

> (5) Average Weekly Wages. -- "Average weekly wages" shall mean the earnings of the injured employee in the employment in which the employee was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury. . . .
>
> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.
>
> Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings.

N.C. Gen. Stat. § 97-2(5). "The intent of [G.S. § 97-2(5)] is to make certain that the results reached are fair and just to both parties. . . . Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls the decision." *Larramore v. Richardson Sports, Ltd. Partners*, 141 N.C. App. 250, 255, 540 S.E.2d 768, 771 (2000) (citation and quotation marks omitted). Plaintiff contends that the Commission erred by its reliance upon its findings that defendant had followed "established federal guidelines" and that the IRS does not consider the per diem allowances to be wages or compensation (Findings of Fact 7, 8, 9, 10, and 14 and Conclusion of Law 1).

In *Thompson*, this Court addressed the same issue, for an "airframe and power plant mechanic" who was placed by STS Holdings, Inc. -- another staffing company like defendant-employer -- at TIMCO in the Greensboro location. 213 N.C. App. at 27, 711 S.E.2d at 828. He was also injured during his work at TIMCO. The plaintiff in *Thompson* raised several other issues, since he had worked with four other employers in addition to STS during the 52 weeks preceding his injury, but ultimately the Commission and this Court also had to consider whether the per diem payments should have been included in calculation of his average weekly wages. Just as in this case, the Commission determined Thompson's average weekly wage based only upon his hourly rate and excluded the per diem payments, which reduced his compensation rate dramatically, from $329.58 per week to $30.00 per week.

STS paid Plaintiff an hourly wage of $7.50 an hour for Plaintiff's work with TIMCO. If Plaintiff worked overtime hours for STS, Plaintiff would earn overtime wages. STS also disbursed additional monies to Plaintiff while Plaintiff was in its employ. Plaintiff received a per diem amount for living expenses under certain circumstances.

The Commission found as fact:

The per diem is paid as non-taxable, is set at differing amounts according to the costs of staying in any given location, and is meant to reimburse employees for cost of living expenses while they are on the road. The per diem is set as a maximum weekly amount, and is paid on a prorated basis if the employee works fewer than 40 hours in a particular week. Per diem payments are only available if a worksite is located greater than 50 miles from the employee's permanent residence and the employee certifies to [STS] that he is maintaining a temporary residence nearer to the worksite. The Commission further found that the method used by STS to calculate the per diem rate to be paid to an employee was determined by first consulting the maximum allowable rate as set forth on the federal Government Services Administration website. STS would then reduce that amount by twenty percent and make additional downward adjustments related to the local cost of living, if applicable. The Commission also found that Plaintiff received travel pay for certain jobs to help defray the cost associated with travelling to a jobsite. An officer for STS testified that travel pay is used to assist employees in travelling to the job and is paid as a business expense reimbursement. . . . [T]ravel pay is typically tied to a minimum stay at a particular work cite [sic], and if an employee does not meet the minimum stay, the travel pay is deducted from the employee's final check for that contract as a cost or wage advance. The Commission further found that STS would sometimes give an employee wage advances. These advances constituted advance pay for work an employee had not yet performed, but was expected to perform. These advances were "deducted from the employee's subsequent post-tax earnings." Finally, the Commission found that Plaintiff's

> "payroll records include[d] additional categories labeled 'RC' and 'RE.' However, the record of evidence [did] not include sufficient information for the . . . Commission to determine how, or whether, amounts listed in association with those categories may have influenced the wages earned by [P]laintiff." Based in part on these findings of fact, the Commission concluded that, while working for STS, Plaintiff's wages consisted exclusively of his hourly wage and overtime pay. The Commission further concluded that the per diem, travel expenses, wage advances, and the additional "RC" and "RE" amounts did not constitute payments made by STS to Plaintiff in "lieu of wages."

Id. at 28, 711 S.E.2d at 828. Thus, the *Thompson* Court was considering a payment structure which is essentially identical to plaintiff's in this case, for an essentially identical job, and even at the same worksite.

Just as plaintiff here argues, the *Thompson* plaintiff argued:

> the Commission erred in excluding *per diem*, travel pay, and wage advances from the calculation of Plaintiff's earnings while working for STS. Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings. The determination of whether an allowance was made in lieu of wages is a question of fact[.]

Id. at 34, 711 S.E.2d at 831 (citation and quotation marks omitted). The *Thompson* Court rejected this argument and stated:

> [O]ur review of the record shows that competent evidence exists in the record to support the Commission's findings of fact that those items were not advanced to Plaintiff in lieu of wages. Because some competent evidence exists supporting these findings of fact, they are binding on appeal—regardless of whether conflicting evidence might exist.

Id. at 34, 711 S.E.2d at 832.

Since "[t]he determination of whether an allowance was made in lieu of wages is a question of fact," *Greene*, 184 N.C. App. at 366, 646 S.E.2d at 655 (citations omitted), and since the evidentiary findings which support Finding No. 14 are not specifically challenged, we are not at liberty to conduct *de novo* review of the Commission's determination. We are also

constrained by *Thompson*, which presented essentially the same issue and even the same factual scenario, to hold that the Commission did not err by making its ultimate finding regarding calculation of plaintiff's average weekly wages.

Plaintiff also challenges the Commission's Conclusion of Law No. 1,

> In calculating plaintiff's average weekly wage, the Commission must first determine what constitutes plaintiff's earnings. Regarding per diem payments, N.C. Gen. Stat. § 97-2(5) provides, "[w]herever allowances of any character made to an employee in lieu of wages are specified part of the wage contract, they shall be deemed a part of his earnings." Per diem amounts set a fixed amount regardless of actual employee expenses may be considered part of the employee's earnings. In the instant case, the per diem payments plaintiff received from defendant-employer were adjusted depending on locale, and were made subject to a policy in conformity with federal guidelines that allowed the payments to be treated as tax-deductible business expenses without further proof of actual expenses from the employee. The Full Commission therefore concludes that the per diem payments plaintiff received from defendant-employer were not made in lieu of wages, but instead were reimbursement for plaintiff's business-related living expenses.

While this Court reviews the Commission's conclusions of law *de novo*, this review is "limited to whether the findings of fact support the Commission's conclusions of law." *Starr v. Gaston Co. Bd. Of Educ.*, 191 N.C. App. 301, 310, 663 S.E.2d 322, 328 (2008).

Some of plaintiff's arguments on appeal are based upon federal case law and reference to IRS guidelines regarding treatment of per diem payments, but none of those arguments were presented to the Full Commission. And since the Commission is not bound to define income in exactly the same way as the IRS or under exactly the same rules, it is unlikely that consideration of any additional information would have changed the result, particularly considering the similarity of the payment methods between this case and *Thompson*. Federal case law and IRS guidelines cannot overcome precedential rulings by North Carolina courts on this issue. The Commission's findings of fact fully support its conclusion of law and we therefore must affirm the order.

V. Conclusion

Because the Commission's finding of fact that the per diem payments were not made in lieu of wages and its conclusion of law is supported by the findings, we affirm the order and award.

AFFIRM.

Judges DILLON and MURPHY concur.

PATRICIA PINE, Employee, Plaintiff
v.
WAL-MART ASSOCIATES, INC. #1552, Employer, and
NATIONAL UNION FIRE INSURANCE CO.,
Carrier (CLAIMS MANAGEMENT, INC. Third-Party Administrator), Defendants

No. COA16-203

Filed 5 September 2017

1. Workers' Compensation—Parsons presumption erroneously applied—preponderance of evidence—additional medical conditions—causally related to workplace injury

Although the Industrial Commission erred in a workers' compensation case by applying the *Parsons* presumption to a medical condition not listed on an employer's admission of compensability form, the error did not require reversal where the Commission also found that plaintiff employee had proved by a preponderance of the evidence that her additional medical conditions were causally related to her workplace injury.

2. Workers' Compensation—expert opinions—competent evidence—injuries causally related to workplace accident

The Industrial Commission did not err in a workers' compensation case by concluding that the expert opinions supported competent evidence to prove plaintiff employee's neck, hand, and wrist injuries were causally related to her workplace accident. The Commission is the sole judge of the credibility of witnesses and the weight to be given to their testimony.

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendants from an Opinion and Award entered 10 November 2015 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 9 August 2016.

Doran Shelby Pethel and Hudson, P.A., by David A. Shelby, for Plaintiff-Appellee.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Holly M. Stott and M. Duane Jones, for Defendant-Appellants.

INMAN, Judge.

This appeal involves a commonly relied upon presumption in North Carolina workers' compensation law, which shifts from an employee to an employer the burden of proof for causation of an injury. At issue is whether the North Carolina Industrial Commission erred by applying this presumption, known as the *Parsons* presumption, to a medical condition not listed on an employer's admission of compensability form.

Wal-Mart Associates, Inc., employer, and National Union Fire Insurance Co., carrier, (collectively "Defendants") appeal from an Opinion and Award of the Full North Carolina Industrial Commission (the "Commission") awarding Patricia Pine, employee, ("Plaintiff") compensation for medical treatment for injuries to her neck, wrist, shoulder, hand, and left knee and ongoing disability payments.

Following an amendment to the North Carolina Workers Compensation Act by the North Carolina General Assembly, we hold that it was error for the Commission to apply the *Parsons* presumption in this case. However, the error does not require reversal because the Commission also found that Plaintiff had proved by a preponderance of the evidence that her additional medical conditions were causally related to her workplace injury, thereby satisfying her burden of proof absent the presumption. Accordingly, we affirm the Commission's Opinion and Award.

Factual and Procedural History

On 29 December 2011, while at work, Plaintiff tripped and fell face-forward over the bottom of a stairway ladder. As she fell, she extended her right arm to break the fall; her wrist hit the floor first, followed by her right shoulder area, her left knee, and her chest near her collarbone. One of Plaintiff's co-workers witnessed the fall and confirmed that Plaintiff complained of left knee and right hand, wrist, and shoulder pain.

Plaintiff, at the direction of her employer, went to Dr. Clifford Callaway, who diagnosed her with a shoulder sprain. Plaintiff followed up with Dr. Callaway several times throughout January 2012. Dr. Callaway updated his diagnosis to include a left knee sprain, a cervical strain, and a wrist sprain, and referred Plaintiff to Dr. James Comadoll, an orthopedic specialist.

Dr. Comadoll ordered an MRI of Plaintiff's right shoulder and diagnosed Plaintiff with a possible right rotator cuff tear and a left knee contusion. Plaintiff followed up with Dr. Comadoll within one month complaining of neck soreness and issues with range of motion. Dr. Comadoll ordered an EMG[1] to look for signs of nerve entrapment. The EMG showed Plaintiff suffered from carpal tunnel syndrome in her right wrist, so Dr. Comadoll performed a carpal tunnel release surgery. Because Plaintiff still complained of left knee pain, Dr. Comadoll ordered an MRI of Plaintiff's left knee, which showed a possible lateral meniscus anterior horn tear.

Dr. Comadoll referred Plaintiff to Dr. Michael Getter, a board-certified orthopedic surgeon who specializes in spinal surgery, for further evaluation of her continued complaints of numbness and pain in her upper extremities. Dr. Getter ordered a cervical MRI for Plaintiff, which showed degenerative disc disease causing stenosis compressing the nerve at C4-5, C5-6, and C6-7. Dr. Getter recommended surgery to decompress the nerve and to prevent progressive neurological problems and muscle atrophy.

At the request of Defendants, Plaintiff underwent additional medical examinations. Dr. Joseph Estwanik diagnosed Plaintiff with a partial full thickness tear of her right rotator cuff for which he recommended arthroscopic surgery. Dr. Louis Koman, a board-certified orthopedic surgeon with a certificate of subspecialty in hand surgery, diagnosed Plaintiff with a carpal boss, a traumatic sagittal band rupture, and cervical spine pathology that was causing some residual symptoms in her right upper extremity despite the carpal tunnel release.

Meanwhile, Plaintiff filed a Form 18, *Notice of Accident to Employer*, related to her fall at work, citing injuries to her "RUE, LLE, neck and any other injuries causally related." In response, Wal-Mart filed a Form 60, *Employer's Admission of Employee's Right to Compensation*, admitting

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1. An EMG, also known as an electromyogram, is "[a] graphic representation of the electric currents associated with muscular action." Stedman's Medical Dictionary 283110 (28th ed. 2014).

compensability for Plaintiff's claim with regard to the injuries suffered to her right shoulder and arm. Wal-Mart subsequently filed a Form 61, *Denial of Workers' Compensation Claim*, denying compensability for Plaintiff's cervical spine condition as "a new injury outside of her employment" and "unrelated to the original compensable injury."

Following a hearing before the Industrial Commission, deputy commissioner Kim Ledford issued an Opinion and Award concluding, as shown by the greater weight of competent medical opinion, that as a consequence of her workplace accident Plaintiff not only suffered the shoulder injury admitted by Wal-Mart, but also sustained injuries to her right wrist and left knee and aggravated her pre-existing cervical disc condition. Both parties appealed to the Full Commission.

Following additional proceedings, the Commission found, *inter alia*:

> 20. Based upon a preponderance of the evidence, the Full Commission places greater weight on the testimony of Dr. Callaway, Dr. Comadoll, Dr. Getter, and Dr. Koman, than that of Dr. Estwanik, and finds that Plaintiff's pre-existing cervical disc disease was aggravated by her fall at work on December 29, 2011. Additional medical treatment with Dr. Getter, including but not limited to surgery, is reasonable and necessary to effect a cure, give relief, or lessen the period of disability related to this injury.
>
> . . .
>
> 22. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's carpal tunnel syndrome and sagittal band rupture were caused by the December 29, 2011 injury by accident. The Full Commission further finds, by a preponderance of the evidence that Plaintiff's carpal boss was materially aggravated by the December 29, 2011 injury by accident. Additional medical treatment, including but not limited to surgery with Dr. Koman, is reasonable and necessary to effect a cure, give relief, or lessen the period of disability related to these injuries.

The Commission concluded that because Wal-Mart accepted as compensable Plaintiff's right shoulder injuries, a rebuttable presumption arose that Plaintiff's other medical conditions were causally related to the compensable injury. It then concluded:

> 3. Defendants failed to present sufficient evidence to rebut the presumption that Plaintiff's carpal tunnel syndrome, carpal boss, sagittal band rupture, dystrophic right hand symptoms, neck, and left knee problems are causally related to the December 29, 2011 injury by accident. *See Gonzalez v. Tidy Maids, Inc.*, 2015 N.C. App. LEXIS 138, 768 S.E.2d 886 (2015). . . .

The Commission awarded Plaintiff "all reasonable and necessary medical expenses which tend to effect a cure, give relief or lessen the period of Plaintiff's disability, incurred or to be incurred by Plaintiff for treatment of her right shoulder, left knee, right carpal tunnel syndrome, right sagittal band rupture, right hand dystrophic condition, right carpal boss, and neck injuries."

Defendants timely appealed.

Analysis

Defendants argue that the Commission acted under a misapprehension of the law when it relied on this Court's decision in *Wilkes v. City of Greenville*, __ N.C. App. __, __, 777 S.E.2d 282, 286 (2015) (citations omitted), *aff'd in part, aff'd as modified in part, and remanded by* __ N.C. __, 799 S.E.2d 838 (2017), and applied the presumption established by this Court in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), shifting to Defendants the burden of proving that Plaintiff's other injuries were not causally related to her right shoulder injury suffered in her fall at work. Defendants further assert that Plaintiff failed to meet her burden of proof without the *Parsons* presumption to establish a causal relationship between the injuries. We disagree.

A. Standard of Review

Appellate review of an opinion and award of the North Carolina Industrial Commission is "limited to determining: (1) whether the findings of fact are supported by competent evidence, and (2) whether those findings support the Commission's conclusions of law." *Reed v. Carolina Holdings*, __ N.C. App. __, __, 796 S.E.2d 102, 108-09 (2017) (citing *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006)). Findings of fact supported by competent evidence are binding on appeal, *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009), and unchallenged findings of fact are presumed to be supported by competent evidence, *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680 (2013). However, the Commission's conclusions of law are reviewed *de novo*. *McRae*

v. Toastmaster, Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). And "[w]hen the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citation omitted).

B. Parsons Presumption

[1] Defendants specifically challenge the Commission's Conclusions of Law Numbers 1 and 3 related to Plaintiff's neck, wrist, and hand injuries, asserting that the Commission misapplied the *Parsons* presumption to those medical conditions not previously admitted by Wal-Mart in its Form 60. This argument is supported by a recent statutory amendment, even though the amendment was enacted while this appeal has been pending. However, the error does not require reversal because the Commission made adequate findings that Plaintiff met her burden of proving causation without the presumption.

The North Carolina Workers' Compensation Act requires employers to provide medical compensation for the treatment of compensable injuries, including "additional medical compensation . . . directly related to the compensable injury" that is designed to effectuate a cure, provide relief, or lessen the period of disability. *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 135, 620 S.E.2d 288, 292 (2005) (internal quotation marks and citation omitted); N.C. Gen. Stat. § 97-25 (2015). "It is well established that an employee seeking compensation for an injury bears the burden of demonstrating that the injury suffered is causally related to the work-related accident." *Wilkes*, __ N.C. App. at __, 777 S.E.2d at 286.

Our Court has long held that once an employee obtained a compensation award for a workplace injury, if that employee seeks additional compensation for treatment of later developing medical conditions claimed to be causally related to the compensable injury, the Commission should presume "that the additional medical treatment is directly related." *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292; *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869. "The employer may rebut the presumption with evidence that the medical treatment is not directly related to the compensable injury." *Perez*, 174 N.C. App. at 135, 620 S.E.2d at 292. This presumption allows an employee to obtain additional compensation for medical conditions related to a compensable injury without having to re-litigate the issue of causation. *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869 ("To require [a] plaintiff to re-prove causation each time she seeks treatment for the very injury that the Commission

has previously determined to be the result of a compensable accident is unjust and violates our duty to interpret the [Workers' Compensation] Act in favor of injured employees.").

In *Parsons*, the plaintiff was working as a store clerk when two men entered the store and assaulted her, striking her in the forehead and shooting her four times with a stun gun. *Id.* at 540, 485 S.E.2d at 868. The Industrial Commission awarded the plaintiff compensation for her injuries, which were primarily frequent headaches. *Id.* at 540-41, 485 S.E.2d at 868-69. Eight months after the award, the plaintiff sought compensation for additional treatment of her headaches, but the Commission denied her claim because she " 'ha[d] not introduced any evidence of causation between her injury and her headache complaints at the time of the hearing' and . . . 'failed to meet her burden of proof for showing the necessity of continued or additional medical treatment.' " *Id.* at 541, 485 S.E.2d at 869. Our Court reversed the Commission's opinion and award, holding that "[i]n effect, requiring that [the] plaintiff once again prove a causal relationship between the accident and her headaches in order to get further medical treatment ignores th[e] prior award." *Id.* at 542, 485 at 869.

In *Perez*, this Court extended the *Parsons* presumption to instances in which the Commission had not directly ruled on compensability of an injury because the employer had admitted it by filing of a Form 60 and had paid compensation to the employee. *Perez*, 174 N.C. App. at 136, 620 S.E.2d at 293 ("As the payment of compensation pursuant to a Form 60 amounts to a determination of compensability, we conclude that the *Parsons* presumption applies in this context."). The *Perez* Court noted that "[t]he presumption of compensability applies to future *symptoms* allegedly related to the original compensable injury." *Id.* at 136-37 n. 1, 620 S.E.2d at 293 n. 1 (emphasis added) (rejecting the defendant's argument that the plaintiff suffered a different injury from the injury stated on the Form 60).

In *Clark v. Sanger Clinic*, 175 N.C. App. 76, 623 S.E.2d 293 (2005), this Court declined to extend the *Parsons* presumption to an injury that had not previously been deemed compensable by the Commission. The Court rejected the plaintiff's argument that the *Parsons* presumption applied to the plaintiff's compensation claim for degenerative arthritis after the plaintiff had obtained an award for a knee injury caused by an accident at work. *Id.* at 79, 623 S.E.2d at 296. The *Clark* decision emphasized in its holding the reasoning in *Parsons* that the presumption's purpose was to alleviate a plaintiff from having to re-prove causation for the

"very injury" the Commission determined compensable. *Id.* at 76, 623 S.E.2d at 296 (quoting *Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869).

In *Wilkes*, this Court again extended the *Parsons* presumption, holding that "the *Parsons* presumption applies even where the injury or symptoms for which additional medical treatment is being sought is not the precise injury originally deemed compensable." *Wilkes*, __ N.C. App. at __, 777 S.E.2d at 287 (citing *Carr v. Dep't of Health & Human Servs. (Caswell Ctr.)*, 218 N.C. App. 151, 156, 720 S.E.2d 869, 874 (2012)). The plaintiff in *Wilkes* suffered numerous physical injuries in a work related car accident, which his employer accepted as compensable. *Id.* at __, 777 S.E.2d at 284. After the employer began providing medical compensation for the plaintiff's physical injuries, the parties disagreed about the extent of the plaintiff's other injuries. *Id.* at __, 777 S.E.2d at 284. The plaintiff was seeking compensation for, *inter alia*, depression and anxiety, injuries which were not listed on his employer's Form 60. *Id.* at __, 777 S.E.2d at 285. Our Court held that the Commission erred by failing to apply the *Parsons* presumption "to his request for additional medical treatment and compensation for his complaints of anxiety and depression." *Id.* at __, 777 S.E.2d at 285.

After this Court heard Defendants' appeal in this case, our Supreme Court affirmed the holding in *Wilkes*[2] which applied the *Parsons* presumption to medical conditions not included on an employer's admission of compensability form, but alleged to be related to the compensable injury. *Wilkes* at __, 799 S.E.2d at 846 ("Accordingly, we conclude that an admission of compensability approved under [N.C. Gen. Stat.] § 97-82(b) entitles an employee to a presumption that additional medical treatment is causally related to his compensable injury.").

The General Assembly, however, promptly abrogated the Supreme Court's decision in *Wilkes* by amending N.C. Gen. Stat. § 97-82. 2017 N.C. Sess. Laws 2017-124. Section 1.(a) rewrites N.C. Gen. Stat. § 97-82(b) as follows:

> (b) If approved by the Commission, a memorandum of agreement shall for all purposes be enforceable by the court's decree as hereinafter specified. Payment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice,

2. The Supreme Court modified other aspects of this Court's decision in *Wilkes* unrelated to this appeal. *Wilkes*, __ N.C. at __, 799 S.E.2d at 848-51.

> shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury *as reflected on a form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d)* for which payment was made. *An award of the Commission arising out of G.S. 97-18(b) or G.S. 97-18(d) shall not create a presumption that medical treatment for an injury or condition not identified in the form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d) is causally related to the compensable injury. An employee may request a hearing pursuant to G.S. 97-84 to prove that an injury or condition is causally related to the compensable injury.* Compensation paid in these circumstances shall constitute payment of compensation pursuant to an award under this Article.

2017 N.C. Sess. Laws 2017-124, § 1.(a) (emphasis added). N.C. Gen. Stat. § 97-18(b) provides that an employer admits compensability by filing a Form 60 with the Industrial Commission, and N.C. Gen. Stat. § 97-18(d) provides that an employer can pay for an employee's medical treatment without admitting compensability by filing a Form 63.

Section 1.(b) of the Session Law amending N.C. Gen. Stat. § 97-82 provides that the intent of the General Assembly in amending the Workers' Compensation Act was "to clarify, in response to Wilkes v. City of Greenville, that an injury not identified in an award arising out of [N.C. Gen. Stat. §] 97-18(b) or [N.C. Gen. Stat. §] 97-18(d) is not presumed to be causally related to the compensable injury . . . ." 2017 N.C. Sess. Laws 2017-124, § 1.(b). The statutory amendment binds our decision in this case because Section 1.(c) provides that the statute applies to all claims "accrued or pending prior to, on, or after" the date on which the amendment became law. 2017 N.C. Sess. Laws 2017-124, § 1.(c).

The medical conditions Plaintiff seeks compensation for were not admitted by Wal-Mart because they were not listed on its admission of compensability form. Plaintiff's reliance on this Court's decision in *Wilkes* fails in light of the General Assembly actions. We therefore hold that the Commission's application of the *Parsons* presumption in this case was error. Generally, such an error would require a remand to the Commission for the application of the correct legal standard. However, as explained below, we instead affirm the Commission's Opinion and Award because it includes factual findings applying the correct legal standard to support its award. In other words, the Commission found an alternative factual basis for its award, which we affirm.

This Court's decision in *Wilkes* relied on *Carr* to apply the *Parsons* presumption to the plaintiff's claims for mental health conditions not listed on his employer's admission of compensability form. *Wilkes*, __ N.C. App. at __, 777 S.E.2d at 287. However, a closer reading of *Carr*, in light of the case before us, reveals that *Carr* differs from *Wilkes* in a manner dispositive to this case. In *Carr*, unlike in *Wilkes*, the Industrial Commission found separately that the plaintiff met her burden of proof for causation absent the *Parsons* presumption. *Carr*, 218 N.C. App. at 156, 720 S.E.2d at 874.

In *Carr*, the plaintiff was diagnosed with injuries to her left hand and her neck following a workplace accident. *Id.* at 152, 720 S.E.2d at 871-72. The defendant admitted the compensability of her left hand injuries, but denied the compensability of her neck injury. *Id.* at 153, 720 S.E.2d at 872. Before the Commission, the plaintiff presented testimony by a neurosurgeon who opined that her neck injury was causally related to the accident. *Id.* at 153-54, 720 S.E.2d at 872. In its Opinion and Award, the Commission discussed the *Parsons* presumption but also found that the plaintiff had met her burden of proof to establish that she had suffered the neck injury as a result of the same accident. *Id.* at 156, 720 S.E.2d at 874. This Court, affirming the Commission's award of medical compensation, held that "[a]though the Commission recited the *Parsons* presumption, it did not rely on it in finding the [plaintiff's] neck injury compensable." *Id.* at 156, 720 S.E.2d at 874. Nothing in the recent amendment to N.C. Gen. Stat. § 97-82 suggests that the General Assembly sought to alter our Court's holding in *Carr*.

This case is indistinguishable from *Carr*. Wal-Mart filed a Form 60 accepting compensability for Plaintiff's injuries to her "right shoulder/arm," but has denied compensability for her other medical conditions, specifically, aggravation of a pre-existing cervical disc disease, carpal tunnel syndrome, a sagittal band rupture, aggravation of carpal boss, left knee problems, and dystrophic right hand symptoms.

The Commission erred in apply the *Parsons* presumption in its Conclusions of Law. But the Commission also found that Plaintiff had proved by a preponderance of the evidence—the applicable standard of proof absent the Parsons presumption—that her additional injuries were causally related to her workplace accident and are therefore compensable. The Commission's Finding of Fact Number 20, quoted in full above, expressly states that "[b]ased upon *a preponderance of the evidence*, the Full Commission . . . *finds* that Plaintiff's pre-existing [condition] *was aggravated* by her fall at work . . . ." (emphasis added).

The Commission's Finding of Fact Number 22, quoted in full above, expressly states that "[b]ased upon *a preponderance of the evidence*, the Full Commission *finds* that Plaintiff's [medical conditions not admitted by Wal-Mart] *were caused* by . . . [her] accident." (emphasis added).

The Commission's use of affirmative language in these findings of fact indicates it placed the burden of proof on Plaintiff to demonstrate causation of her disputed additional medical conditions. By contrast, had the Commission placed the burden of proof on Defendants for these findings, the Opinion and Award would have stated that "the Full Commission *does not find* that Plaintiff's injuries were *not caused* by her accident."

The Commission's separate findings of fact determining causation are supported by competent evidence, as discussed *infra*, or unchallenged and thus presumed to be supported by competent evidence.[3] Accordingly, we hold that regardless of the Commission's discussion of the *Parsons* presumption in its Conclusions of Law, its Opinion and Award should be affirmed because the Commission found that Plaintiff proved by a preponderance of the evidence a causal relationship between her compensable injury by accident and the medical conditions for which she now seeks compensation.[4]

C. Causation

[2] Defendants do not challenge the Commission's Findings of Fact Numbers 20 and 22, quoted *supra*, in which the Commission found that Plaintiff proved causation of her additional medical conditions "[b]ased upon a preponderance of the evidence . . . ." Rather, Defendants challenge the Commission's Findings of Fact Numbers 14, addressing

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3. In addition to the challenged Findings of Fact Numbers 14 and 19, which are supported by competent evidence, the Commission's other unchallenged Findings of Fact Numbers 6, 7, 16, 20, and 22 support our affirmation of its Opinion and Award.

4. Our dissenting colleague, citing the North Carolina Rules of Appellate Procedure Rule 10, asserts that we may not "invent a non-explicit alternative basis to re-weigh or view the evidence in a manner to affirm the Award of the Commission, particularly where Plaintiff-Appellee has not cross-assigned as error the Commission's omission of an 'alternative basis in law' to support its Opinion and Award." Rule 10 states that "an appellee *may* list proposed issues on appeal . . . that deprived the appellee an alternative basis in law . . . ." N.C. R. App. P. 10(c) (2017) (emphasis added). Rule 10, however, further notes that "[a]n appellee's list of proposed issues on appeal shall not preclude an appellee frompresenting arguments on other issues in its brief." *Id.* Here, Plaintiff has presented in her brief to this Court the argument that "[t]he Full Commission made Findings of Fact based on the evidence presented and determined Plaintiff proved that her current conditions were causally related to the December 29, 2011 compensable injury."

Dr. Getter's causation opinion, and 19, addressing Dr. Koman's causation opinion. Defendants argue that the expert opinions relied upon by the Commission were unsupported by the record evidence, based on speculation and conjecture, and therefore are not competent evidence; Defendants assert that without this evidence, Plaintiff failed to prove that her neck, hand, and wrist injuries were causally related to her workplace accident. We disagree.

To be compensable under the Workers' Compensation Act, an injury must result from an accident "arising out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-2(6) (2015). When the primary injury has been shown to arise out of and in the course of employment, "every natural consequence that flows from the injury likewise arises out of the employment . . . ." *English v. J.P. Stevens & Co.*, 98 N.C. App. 466, 470, 391 S.E.2d 499, 501 (1990) (citations omitted). "Although the employment-related accident need not be the sole causative force to render an injury compensable, the plaintiff must prove that the accident was a causal factor by a preponderance of the evidence[.]" *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003) (internal quotation marks and citations omitted).

"There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Id.* at 167, 265 S.E.2d at 391 (citations omitted). This Court has further noted that "[w]hen expert opinion is based 'merely upon speculation and conjecture,' it cannot quality as competent evidence of medical causation." *Carr*, 218 N.C. App. at 154-55, 720 S.E.2d at 873 (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)). "Stating an accident 'could or might' have caused an injury, or 'possibly' caused it is not generally enough alone to prove medical causation; however, supplementing that opinion with statements that something 'more than likely' caused an injury or that the witness is satisfied to a 'reasonable degree of medical certainty' has been considered sufficient." *Carr*, 218 N.C. App. at 155, 720 S.E.2d at 873 (citations omitted).

In certain instances, expert medical testimony has been found to fall short of competent evidence where it is based on speculation

and conjecture. *Young*, 353 N.C. at 230, 538 S.E.2d at 915 ("[W]hen such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion."); *Dean v. Coach Co.*, 287 N.C. 515, 522, 215 S.E.2d 89, 94 (1975) (holding that "an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility." (citation omitted)). The Court in Young held that expert medical testimony based solely on the maxim "*post hoc*, *ergo propter hoc*"—which "denotes the fallacy of . . . confusing sequence with consequence"—does not rise to the necessary level of competent evidence. 353 N.C. at 232, 538 S.E.2d at 916 (alteration in original) (internal quotation marks and citations omitted). A careful review of that expert's testimony revealed that there were at least three alternative potential causes to the plaintiff's condition and that the doctor had performed no tests to rule them out. *Id.* at 231, 538 S.E.2d at 915. The expert's opinion of causation was entirely based upon the "*post hoc*, *ergo propter hoc*" fallacy, which he affirmed was "the only piece of information that relate[d] the [condition to the injury by accident]." *Id.* at 232, 538 S.E.2d at 916 (internal quotation marks omitted).

Here, Plaintiff presented various medical records and expert testimony from several of her treating physicians. Among those testifying was Dr. Louis Koman who stated that "[i]t was [his] opinion, within a reasonable degree of medical certainty" that Plaintiff's cervical arthritis and carpal boss were pre-existing conditions exacerbated by her 29 December 2011 fall. Dr. Koman also testified that Plaintiff's sagittal band rupture was "more likely than not" caused by the same fall. Dr. Michael Dennis Getter testified that Plaintiff's fall materially aggravated her condition and that the fall was most likely the cause of her current symptoms. Dr. James Comadoll testified that Plaintiff's fall exacerbated and materially aggravated her degenerative cervical condition.

Defendants challenge the Commission's findings as to Dr. Koman's opinion on the basis that his opinions were based on conjecture and speculation and not supported by the evidence in the record. Our review of Dr. Koman's deposition reveals key distinctions from the opinion testimony at issue in *Young*. Here, unlike in *Young*, there were no other potential causes of Plaintiff's injuries, and while Dr. Koman did rely on the maxim "*post hoc*, *ergo propter hoc*," his reliance was relevant and necessary. Dr. Koman testified that based on Plaintiff's medical history and a lack of any other potential cause, the fall was more likely than not the cause of Plaintiff's additional medical conditions. Dr. Koman testified that in reaching his opinion he "took a history, [he] reviewed the medical records[,] . . . did a physical exam, . . . x-rays, . . . [and]

diagnostic testing[,]" and "fit that all into [his] experience, the literature, the probabilities of what happened, [and] when and whether it was all consistent[.]" Because a full review of Dr. Koman's testimony demonstrates that his opinion was based on more than merely *post hoc*, *ergo propter hoc*, and went beyond a "could" or "might" testimony, we hold the Commission properly determined it to be competent evidence.

Defendants also challenge the causation opinion testimony by Dr. Getter, asserting that it relied on the assumption that Plaintiff's head was thrown about during the fall and that the evidence in the record does not support this fact. Dr. Getter testified that Plaintiff's symptoms were consistent with "some accident of some kind where your head is thrown back and forth on your neck like a flexion extension injury in a car, *falling down*, . . . falling down then having your head fall forward." (emphasis added). The Commission found, and Defendants do not challenge, that "she tripped and fell face-forward over the bottom of a stairway ladder." We hold that the record supports Dr. Getter's testimony and his reliance on the type of injuries that resulted in Plaintiff's symptoms. Accordingly, Dr. Getter's testimony was based on more than mere speculation and conjecture and was properly considered as competent evidence.

We do not agree with Defendants' contention that the opinions of Dr. Koman and Dr. Getter were so speculative as to render them incompetent. Their testimony along with the others cited by the Commission and the evidence contained in the record support the Commission's conclusion that the additional medical conditions complained of by Plaintiff were causally related to Plaintiff's fall.

It is not within the scope of our review to determine the weight given to testimony, as " 'the sole judge of the credibility of witnesses' and the weight given to their testimony" is the Commission. *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 129, 468 S.E.2d 283, 286 (1996) (quoting *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). The Commission explicitly "place[d] greater weight on the testimony of Dr. Callaway, Dr. Comadoll, Dr. Getter, and Dr. Koman, than that of Dr. Estwanik," in its determination of causation of the present injuries. We hold that the Commission's findings were supported by competent evidence, and that those findings support the Commission's conclusions of law.

Conclusion

While the Commission discussed the *Parsons* presumption in its Opinion and Award, the presumption was unnecessary for the

Commission's determination of causation. The record demonstrates competent evidence to support the Commission's factual findings that Plaintiff proved causation by a preponderance of the evidence, which support the Commission's conclusions of law that Plaintiff's medical conditions are causally related to her workplace injury and are therefore compensable. Accordingly, we hold in error that part of the Commission's Opinion and Award discussing the *Parsons* presumption and affirm the Commission's Opinion and Award.

AFFIRMED.

Judge BRYANT concurs.

Judge TYSON concurs in part, dissents in part, with separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

I fully concur with those portions of the majority's opinion, which hold it was reversible error for the Industrial Commission to apply the *Parsons* presumption in this case, based upon the General Assembly's recent amendment to the North Carolina Workers' Compensation Act, 2017 N.C. Sess. Laws 2017-124, § 1. The amendment was enacted after the Commission's Opinion and Award, but is expressly applicable because this appeal was pending after enactment. *See* 2017 N.C. Sess. Laws 2017-124, § 1.(c).

I respectfully dissent from the majority's determination that the Commission inherently found and concluded Plaintiff had met her burden to prove the medical conditions, for which she is seeking additional compensation, are causally related to her original and accepted compensable injury, without regard to the *Parsons* presumption. This conclusion is unsupported by the Commission's Findings of Fact or Conclusions of Law. The Industrial Commission's Opinion and Award, awarding Plaintiff additional compensation for injuries and conditions not listed or accepted by Defendants on the Form 60, is properly set aside and remanded. I respectfully dissent.

I. Standard of Review

This Court reviews an opinion and award of the Commission to determine "whether there is any competent evidence in the record to support the Commission's findings and whether those findings support

the Commission's conclusions of law." *Oliver v. Lane Co.*, 143 N.C. App. 167, 170, 544 S.E.2d 606, 608 (2001).

"[T]he Commission is the fact finding body. . . . [and] is the sole judge of the credibility of the witnesses and the weight to be given to their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (internal citations and quotation marks omitted). "Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary findings." *Starr v. Gaston Cty. Bd. of Educ.*, 191 N.C. App. 301, 304-05, 663 S.E.2d 322, 325 (2008).

The Commission's conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004). We all agree there is error in the Commission's Opinion and Award. "When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citation omitted).

II. *Parsons* presumption

As the majority's opinion notes, after this Court heard Defendants' appeal and the Supreme Court of North Carolina had issued its opinion in *Wilkes* on 9 June 2017, the General Assembly, less than three weeks later on 29 June 2017, amended and enacted N.C. Gen. Stat. § 97-82, to read:

> (b) If approved by the Commission, a memorandum of agreement shall for all purposes be enforceable by the court's decree as hereinafter specified. Payment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury as reflected on a form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d) shall not create a presumption that medical treatment for an injury or condition not identified in the form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d) is causally related to the compensable injury. An employee may request a hearing pursuant to G.S. 97-84 to prove that an injury or condition is causally related to the compensable injury. Compensation paid in these

> circumstances shall constitute payment of compensation pursuant to an award under this Article.

2017 N.C. Sess. Laws 2017-124, § 1.(a).

The General Assembly clearly stated its intent in 2017 N.C. Sess. Laws 2017-124 was "to clarify, in response to Wilkes v. City of Greenville, that an injury not identified in an award arising out of [N.C. Gen. Stat. §] 97-18(b) or [N.C. Gen. Stat. §] 97-18(d) is not presumed to be causally related to the compensable injury . . . ." 2017 N.C. Sess. Laws 2017-124, § 1.(b).

N.C. Gen. Stat. § 97-18(b) provides that an employer accepts as compensable the injuries listed on a Form 60 filed with the Industrial Commission. The General Assembly specified the amended N.C. Gen. Stat. § 97-82 applies to all claims "accrued or pending prior to, on, or after" the date on which the amendment became law. 2017 N.C. Sess. Laws 2017-124, § 1.(c). The amended statute applies to the Opinion and Award before us. *See id.*

The *Wilkes* decision, expressly referred to as the reason for the amendment in 2017 N.C. Sess. Laws 2017-124, and expressly relied upon by Plaintiff and the Commission, held that "the *Parsons* presumption applies even where the injury or symptoms for which additional medical treatment is being sought is not the precise injury originally deemed compensable." *Wilkes v. City of Greenville*, __ N.C. App. __, __, 777 S.E.2d 282, 287 (2015), *aff'd as modified*, __ N.C. __, 799 S.E.2d 838 (2017).

The rebuttable presumption in *Parsons* provides where a Plaintiff's injury has been proven to be compensable, it is presumed that additional medical treatment is directly related to the compensable injury, unless rebutted by the employer. *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 135-36, 620 S.E.2d 288, 292 (2005); *see Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997).

All of the original injuries Plaintiff listed were accepted by Defendants as compensable injuries. As such, Plaintiff was not required to meet her burden to prove these injuries arose in the course and scope of her employment, or that the original injuries by accident were causally related to her employment. *See Perez*, 174 N.C. App. at 136, 620 S.E.2d at 293 (determining *Parsons* presumption applied where employer admitted compensability for employee's injuries on Form 60); *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159, 542 S.E.2d 277, 281 (employer filing Form 60 pursuant to N.C. Gen. Stat. § 97-18(b) "will be deemed to have admitted liability and compensability"), *disc. review denied*, 353 N.C. 729, 550 S.E.2d 782 (2001).

I agree with the majority's conclusion that 2017 N.C. Sess. Laws 2017-124, which amended N.C. Gen. Stat. § 97-82, expressly abrogates and supplants this Court's and our Supreme Court's holdings in *Wilkes* that "an admission of compensability approved under [N.C. Gen. Stat.] § 97-82(b) entitles an employee to a presumption that additional medical treatment is causally related to his compensable injury." *Wilkes* at __, 799 S.E.2d at 846.

As the medical conditions for which Plaintiff is seeking compensation were not listed or accepted by Defendants in their Form 60, the majority's opinion correctly concludes the General Assembly's amendment of N.C. Gen. Stat. § 97-82 shows the Commission erred in applying the *Parsons* presumption to relieve Plaintiff of her burden of proof of causation. I also concur with the majority opinion's conclusion, correctly stating: "Generally, such an error would require a remand to the Commission for the application of the correct legal standard." *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685.

"When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Id.* at 158, 357 S.E.2d at 685 (citation omitted). This appeal is properly set aside and remanded to the Commission. *See id.*

III. Burden of Proof

In spite of this clear precedent and directive to set aside and remand, I must respectfully dissent from the majority's affirmation of the Commission's Opinion and Award "on alternative grounds." The Commission did not make factual findings and conclusions based thereon, independently of, and without consideration of the *Parsons* presumption, as extended by *Wilkes*. The Commission never imposed nor applied the correct legal standard upon Plaintiff, who bears the burden to prove causation. No "alternative basis" has been proven by Plaintiff nor stated by the Commission for this Court to properly affirm the Opinion and Award.

"Plaintiff must prove causation by a greater weight of the evidence or a preponderance of the evidence." *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (citation and internal quotation marks omitted), *aff'd*, 360 N.C. 54, 619 S.E.2d 495 (2005).

The majority's opinion asserts the Commission's error in applying the *Parsons* and *Wilkes* standard "does not require reversal because the Commission made adequate findings that P*laintiff met her burden of*

proving causation without the presumption." (emphasis supplied). The majority's implicit and erroneous determination that the Commission clearly placed the burden of proof on Plaintiff to prove causation is not supported by the Commission's findings of fact, to which we are bound. Such a conclusion is also directly contradicted by the Commission's unambiguous conclusions of law, which expressly cited and relied upon *Parsons* and *Wilkes*.

In its Opinion and Award, the Commission made, *inter alia*, the following Conclusions of Law:

> 1. On December 29, 2011, Plaintiff sustained a compensable injury by accident arising out of and in the course of her employment with Defendant-Employer. N.C. Gen. Stat. § 97-2(6). Defendants accepted liability for this injury on a Form 60, *Employer's Admission of Employee's Right to Compensation*, dated October 4, 2012, on which they indicated, for body part(s) involved, "Right shoulder/arm." In *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997) the Court held that where a Plaintiff's injury has been proven to be compensable, there is a presumption that the additional medical treatment is directly related to the compensable injury. *The Parsons presumption is a rebuttable presumption and Defendants have the burden of producing evidence showing the treatment is not directly related to the compensable injury. In order to rebut the presumption, Defendants must present expert testimony or affirmative medical evidence tending to show that the treatment Plaintiff seeks is not directly related to the compensable injury. Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 136-37, 620 S.E.2d 288, 293 (2005). *The Form 60 thus creates a rebuttable presumption that Plaintiff's other complaints are causally related to the December 29, 2011 injury by accident. See Wilkes v. City of Greenville*, 2015 N.C. App. LEXIS 826 (N.C. Ct. App. Oct. 6, 2015) (holding that the Parsons presumption applies even where the injury or symptoms for which additional medical treatment is being sought is not the precise injury originally deemed compensable).
>
> . . . .
>
> 3. *Defendants failed to present sufficient evidence to rebut the presumption* that Plaintiff's carpal tunnel

> syndrome, carpal boss, sagittal band rupture, dystrophic right hand symptoms, neck, and left knee problems are causally related to the December 29, 2011 injury by accident. *See Gonzalez v. Tidy Maids, Inc.*, 2015 N.C. App. LEXIS 138, 768 S.E.2d 886 (2015). However, *Defendants did rebut the presumption that Plaintiff's Dupuytren's condition is related to the December 29, 2011 injury by accident. Id.*

(emphasis supplied). Conclusions of Law 1 and 3 clearly indicate the Commission solely predicated its Opinion and Award for Plaintiff on the *Parsons* presumption and *Wilkes* being applicable to these facts, and unlawfully shifted the burden to rebut the presumption onto Defendants. We all agree the *Parsons* presumption, as extended by *Wilkes*, cannot apply here. The General Assembly's recent amendment to N.C. Gen. Stat. § 97-82 wholly abrogated *Wilkes v. City of Greenville*, __ N.C. __, 799 S.E.2d 838.

Because the Commission incorrectly relied upon *Wilkes* to apply the *Parsons* presumption to Defendants, and Defendants accepted liability for Plaintiff's original injury as compensable on their Form 60, Plaintiff has *never* been required to carry her burden to prove causation for *any* of her injuries, putatively arising from her 29 December 2011 workplace accident.

The majority opinion states, "The Commission also found that Plaintiff had proven by a preponderance of the evidence—the applicable standard of proof absent the *Parsons* presumption—that her additional injuries were causally related to her workplace accident and are therefore compensable." This notion misstates Plaintiff's burden of proof for the applicable standard of proof. The standard of proof is the "preponderance of the evidence," regardless of the applicability of the *Parsons* presumption. *See Adams*, 168 N.C. App. at 475, 608 S.E.2d at 361 (stating that causation must be proven by a preponderance of the evidence).

The *Parsons* presumption, rather than *changing* the standard of proof, instead *shifts* the burden to the employer to rebut the presumption that subsequent injuries and treatments are causally related to the original accepted injury for which compensation has been previously awarded. *See Parsons*, 126 N.C. App. at 542, 485 S.E.2d at 869 ("defendants now have the responsibility to prove the original finding of compensable injury is unrelated to [employee's] present discomfort").

Nowhere in the record or in the Opinion and Award did the Commission conclude Plaintiff has met her burden of proof to show

causation. As *Parsons* and *Wilkes* cannot apply to shift the burden to Defendants to rebut the presumption of causation, the Commission's conclusions clearly misapprehend the law as amended on Plaintiff's burden to prove causation. The Commission's misapprehension is clearly evident from the plain language of its Opinion and Award, which only refers to Defendants, *not Plaintiff*, as bearing the burden to rebut causation, and Defendants "failure" to present sufficient evidence to rebut the *Parsons* presumption on all of Plaintiff's injuries except for Plaintiff's Dupuytren's condition.

The majority's opinion mischaracterizes the Commission's Findings of Fact number 20 and 22 as showing the Commission placed and adjudicated the burden of proof on Plaintiff to establish causation of her additional medical conditions. Finding of Fact number 20, as quoted by the majority opinion, states "[b]ased upon a preponderance of the evidence, the Full Commission . . . finds that Plaintiff's pre-existing [condition] was aggravated by her fall at work." Finding of Fact number 22 states "[b]ased upon a preponderance of the evidence, the Full Commission finds that Plaintiff's [medical conditions not admitted by Wal-Mart] caused by . . . [her] accident." This language states the required standard of proof, but never states that Plaintiff had carried her burden of proof.

The majority's opinion construes the Commission's use of standard language in these two Findings of Fact as indicating the Commission alternatively placed the burden of proof on Plaintiff to show causation, despite its express reliance on *Parsons* and *Wilkes* to conclude and award for Plaintiff. The majority states "had the Commission placed the burden of proof on Defendants for these findings, the Opinion and Award would have stated that 'the Full Commission *does not find* that Plaintiff's injuries were *not caused* by her accident." I disagree.

The Commission's Findings of Fact do not indicate which party bore the burden of proof to show or rebut causation, especially in light of the unequivocal language of Conclusions of Law 1 and 3 expressly indicating the Commission allocated to Defendants the burden to rebut causation. Presuming, *arguendo*, that the Findings of Fact quoted by the majority tend to suggest the Commission alternatively placed the burden to prove causation upon Plaintiff, the language of the Commission's Conclusions of Law strongly indicate the Commission placed the burden to rebut causation upon Defendants. The Opinion and Award is wholly unclear upon which party the Commission placed, or considered as having, the burden of proof to show or rebut causation. As such, the Award must be set aside and remanded.

Interpreting the Commission's Findings of Facts even as the majority asserts, merely shows that it is unclear upon which party the Commission allocated the burden of proof of causation. Our precedents require us to set aside and remand to the Commission for a new hearing on causation with the burden of proof clearly placed on Plaintiff. *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685; *see In re C.B.*, 187 N.C. App. 803, 807, 654 S.E.2d 21, 24 (2007) (remanding case to trial court where burden of proof stated in trial court's order was ambiguous).

The majority's opinion *Carr v. Dep't of Health & Human Servs.* 218 N.C. App. 151, 720 S.E.2d 869 (2012), and asserts the Commission separately found Plaintiff had met her burden of proof for causation, absent the *Parsons* presumption and *Wilkes*. The majority's opinion proclaims *Carr* is "indistinguishable" from the case at bar. I disagree.

In *Carr*, the defendant argued the *Parsons* presumption did not apply when the plaintiff's injury was a wholly different injury from the one accepted by the defendant on the Rule 60 admission of compensability form. *Id.* at 156, 720 S.E.2d at 874. The Industrial Commission recited the *Parsons* presumption in its Opinion and Award. This Court in *Carr* determined that, regardless of whether the *Parsons* presumption applied, the Industrial Commission *did not rely on Parsons* in finding the plaintiff's new injuries causally related to the prior injuries the employer admitted were compensable. *Id.*

Carr is distinguishable from the case at bar for several reasons. First, the Court in *Carr* did not state the *Parsons* presumption was the *only* rule recited by the Commission, as here, in the Opinion and Award regarding the burden of proof, only that the Commission did recite it. *See id.* ("Although the Commission recited the *Parsons* presumption, it *did not rely on it* in finding the neck injury compensable." (emphasis supplied)).

Second, *Carr* is also clearly distinguishable by the fact N.C. Gen. Stat. § 97-82 had not been amended while the appeal was pending in that case. Here, the Commission was relying on the former version of N.C. Gen. Stat. § 97-82, and clearly and expressly upon *Wilkes'* interpretation that the statute at that time did not prohibit the *Parsons* presumption from applying when an employer admits compensability for different injuries on Form 60. *See* N.C. Gen. Stat. § 97-82(b)(2015), *amended by* 2017 N.C. Sess. Laws 2017-124.

The Commission's conclusions in the Opinion and Award are necessarily and expressly predicated on the former version of N.C. Gen. Stat. § 97-82(b) as interpreted by *Wilkes*. The Opinion and Award's

conclusions are wholly dependent upon the *Parsons* presumption, as extended by *Wilkes*, to apply after Wal-Mart admitted compensability for Plaintiff's previous injury on its Form 60 admission of compensability, but not liability for any of the injuries asserted here.

This salient fact, viewed in conjunction with the Opinion and Award only applying the *Parsons* presumption with regard to the burden of proof of causation, and stating Defendants bore the burden to rebut causation, contradicts the majority's assertion that the Commission, wholly independently of *Parsons*, alternatively placed and kept the burden of proof upon Plaintiff to prove causation.

We all agree the Opinion and Award clearly and unambiguously shows the Commission misapprehended the law by placing the burden to rebut causation upon Defendants. The required outcome here is to set aside the Award and remand. *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685 ("When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard.").

The Commission did not explicitly set forth any "alternative basis" to support its conclusions, and the Commission's conclusions explicitly invokes the *Parsons* presumption and *Wilkes* several times. None of the Commission's findings of fact state the Plaintiff has met her burden of proof on causation.

We cannot read into the Opinion and Award an alternative basis to prove Plaintiff met her burden of proof to show causation, when the Commission clearly and expressly placed the burden to rebut causation upon Defendants. *See Vaughan v. Carolina Indus. Insulation*, 183 N.C. App. 25, 34-5, 643 S.E.2d 613, 619 (2007) (affirming Commission's decision on an alternative basis explicitly stated in the Commission's conclusions of law when the primary basis was made on an error of law).

This Court cannot invent a non-explicit alternative basis to re-weigh or view the evidence in a manner to affirm the Award of the Commission, particularly where Plaintiff-Appellee has not cross-assigned as error the Commission's omission of an "alternative basis in law" to support its Opinion and Award. *See* N.C. R. App. P. 10(c) (appellee may cross-assign error to omission of trial court when omission raises "an alternative basis in law" for supporting the order of the trial court).

Plaintiff has not done so here, but attempts to assert an "alternative basis" after *Parsons* was unlawfully used to shift the burden to rebut upon Defendants. The Commission made no explicit findings or

conclusions to support the majority's affirmance on any other grounds, other than unlawfully under *Parsons* and *Wilkes*. This error requires the Opinion and Award to be set aside and remanded to the Commission. *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685 ("When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard").

IV. Dr. Koman's Testimony is Insufficient to Establish Causation of Plaintiff's Hand and Wrist Conditions

The majority's opinion views Dr. Koman's testimony regarding Plaintiff's hand and wrist conditions as competent evidence. I respectfully disagree. Even erroneously applying *Parsons* and *Wilkes*, the Commission's Conclusion of Law 3 states: "Defendants did rebut the presumption that Plaintiff's Dupuytren's condition is related to the December 29, 2011 injury by accident."

As the majority notes: for an injury to be compensable under the Workers' Compensation Act, the injury must result from an accident "arising out of and in the course of the employment[.]" N.C. Gen. Stat. §97-2(6) (2015). "There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Id.* (citations omitted). This Court has further noted that "[w]hen expert opinion is based 'merely upon speculation and conjecture,' it cannot qualify as competent evidence of medical causation." *Carr*, 218 N.C. App. at 154-55, 720 S.E.2d at 873 (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)). "Stating an accident 'could or might' have caused an injury, or 'possibly' caused it is not generally enough alone to prove medical causation; however, supplementing that opinion with statements that something 'more than likely' caused an injury or that the witness is satisfied to a 'reasonable degree of medical certainty' has been considered sufficient." *Id.* at 155, 720 S.E.2d at 873 (citations omitted).

Our Supreme Court held in *Young* that expert medical testimony based on the maxim "*post hoc*, *ergo propter hoc*" which means, "after this, therefore because of this" is "not competent medical evidence of causation." *Young*, 353 N.C. at 232, 538 S.E.2d at 916.

Dr. Koman's opinion relied upon the "*post hoc, ergo propter hoc*" fallacy in making his conclusions. Dr. Koman testified as follows:

> Q. Okay. So just to kind of clarify your opinion, are you saying that, since she did not have symptoms before the fall, and she has symptoms after the fall, therefore her - - whatever is causing her symptoms was caused by the fall?
>
> A. That's medicine. It may or may not be law, but that's medicine.
>
> Q. So does that mean yes, that's - -
>
> A. That means yes.
>
> . . . .
>
> Q. And so you found that the exacerbation of the [carpal boss] was caused by the fall. So my question is going to be the same as it was for the [sagittal] band. Is it your opinion that, because she didn't have - - well, I guess, how do you get that the fall caused the carpal tunnel boss?
>
> A. It's the absence of history that refutes that, and that's all.
>
> Q. What do you mean by absence of history?
>
> A. That there was no other event that I know of.
>
> Q. So back to that she didn't have any issues before the accident, she had issues after, therefore it was caused by the accident?
>
> A. Correct.
>
> Q. Okay.
>
> A. So you have to have evidence that something else happened that you can give me, and then I can actually answer whether it's, more likely than not, caused by that. In the absence of that, [*post hoc, ergo proctor hoc*] is the reason.

Dr. Koman's testimony clearly shows he solely relied on the "*post hoc, ergo propter hoc*" fallacy in concluding Plaintiff's carpal boss aggravation and sagittal band rupture were causally related to her fall on 29 December 2011. Dr. Koman's testimony is not competent evidence for Plaintiff to prove her carpal boss aggravation and sagittal band rupture were causally related to her accepted Form 60 injury. *Young*, 353 N.C. at 232-33, 538 S.E.2d at 916.

V. Conclusion

We all agree the *Parsons* presumption, as extended by *Wilkes*, cannot place or shift the burden upon Defendants to rebut that Plaintiff's new injuries were causally related to the compensable injury listed and admitted by Defendants on the Form 60. N.C. Gen. Stat. § 97-82(b)(2015), *amended by* 2017 N.C. Sess. Laws 2017-124.

To the extent the majority's opinion purports to affirm the Commission's Opinion and Award, independently of the *Parsons* presumption and *Wilkes*, Plaintiff was never required, and the Commission did not require, find, nor conclude Plaintiff had met her burden, to prove the medical conditions, are causally related to her original and admitted compensable injury. The majority's decision to affirm, despite the clear and acknowledged errors, is based upon a wholly unsupported alternative basis, not stated in the Opinion and Award. *See Ballenger*, 320 N.C. at 158, 357 S.E.2d at 685.

Dr. Koman's testimony is premised on the incompetent "*post hoc, ergo proctor hoc*" fallacy, and does not prove causation. *Young*, 353 N.C. at 232-33, 538 S.E.2d at 916. Testimony tending to show "an accident 'could or might' have caused an injury, or 'possibly' caused it' " is not evidentiary support. *Carr*, 218 N.C. App. at 155, 720 S.E.2d at 873.

Plaintiff bears the burden to prove causation. *See Adams*, 168 N.C. App. at 475, 608 S.E.2d at 361. The Opinion and Award is properly set aside and remanded to the Commission for Plaintiff to prove her new or additional injuries are causally related to her listed and accepted injuries on Form 60 by a preponderance of the evidence. Defendants do not bear any burden to rebut or show the absence of causation. 2017 N.C. Sess. Laws 2017-124, § 1. I respectfully dissent.

PREMIER, INC. v. PETERSON

[255 N.C. App. 347 (2017)]

PREMIER, INC., PLAINTIFF
v.
DAN PETERSON; OPTUM COMPUTING SOLUTIONS, INC.; HITSCHLER-CERA, LLC; DONALD BAUMAN; MICHAEL HELD; THE HELD FAMILY LIMITED PARTNERSHIP; ROBERT WAGNER; ALEK BEYNENSON; I-GRANT INVESTMENTS, LLC; JAMES MUNTER; GAIL SHENK; STEVEN E. DAVIS; CHARLES W. LEONARD, III; AND JOHN DOES 1-10, DEFENDANTS

No. COA16-1139

Filed 5 September 2017

Declaratory Judgments—summary judgment—right to receive annual earnout payments—stock purchase agreement

The trial court did not err in a declaratory judgment action by granting summary judgment in favor of plaintiff company and determining that it had not violated defendants' rights to receive annual earnout payments under a stock purchase agreement. Defendant stockholders failed to provide evidence of affirmative acts taken by the pertinent hospital sites to "subscribe to" or "license" SafetySurveillor (a software program generating automated alerts to notify users of health-related problems that require attention).

Judge DILLON concurring in separate opinion.

Appeal by Defendants from order entered 13 May 2016 by Judge Louis A. Bledsoe, III in Mecklenburg County Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 23 March 2017.

Moore & Van Allen PLLC, by J. Mark Wilson and Kathryn G. Cole, for Plaintiff-Appellee.

The Spence Law Firm, LLC, by Mel C. Orchard, III, and Tin, Fulton, Walker & Owen, PLLC, by Sam McGee, for Defendants-Appellants.

MURPHY, Judge.

Dr. Dan Peterson ("Dr. Peterson"); Optum Computing Solutions, Inc.; Hitschler-Cera, LLC; Donald Bauman; Michael Held; The Held Family Limited Partnership; Robert Wagner; Alek Beynenson; I-Grant Investments, LLC; James Munter; Gail Shenk; Steven E. Davis; Charles

W. Leonard, III; and John Does 1-10[1] (collectively "Defendants") appeal from an Order and Opinion granting Premier, Inc.'s ("Premier") motion for summary judgment; dismissing with prejudice Defendants' counterclaims for breach of contract, attorneys' fees, and recovery of audit expenses; and entering judgment for Premier on its claim for declaratory judgment upon determining that Premier had not violated Defendants' rights to receive annual earnout payments (the "Earnout Amount") under their Stock Purchase Agreement (the "Agreement"). After careful review, we affirm the trial court's decision.

Background

This is Defendants' second appeal in this case. Although a full recitation of the first appeal's facts and procedural history may be found in *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 755 S.E.2d 56 (2014) ("*Premier, Inc. I*"), we limit our discussion in this opinion to the facts and procedural history relevant to the issues currently before us.

On 29 September 2006, Premier acquired stock in Cereplex, Inc. ("Cereplex") by entering into a Stock Purchase Agreement with Defendants, former shareholders and stakeholders of Cereplex, under which Defendants were entitled to receive an annual Earnout Amount from Premier for five years after the date of the Agreement. Cereplex had developed software products, Setnet and PharmWatch, that provided web-based surveillance and analytic services for healthcare providers. After acquiring shares of Cereplex, Premier developed SafetySurveillor, a successor product that combined the functionalities of Setnet and PharmWatch into one software program which generates automated alerts to notify its users of health-related problems that require attention.

Pursuant to the Agreement, the annual Earnout Amount to which Defendants are entitled is calculated as "$12,500 for each Hospital Site where a Product Implementation occurs during the applicable 12-month period; excluding the first fifty (50) Hospital Sites where a Product Implementation occurs[.]" There has been "Product Implementation" when:

> a Hospital Site . . . has (A) *subscribed to or licensed* the Company's Setnet or PharmWatch product (or any derivative thereof, successor product, or new product that substantially replaces the functionality of either product),

1. The record contains a number of different names and spellings for certain individual defendants. However, pursuant to court practice, we use the above names and spellings listed on the order from which appeal is taken.

> whether such product is provided, sold, or licensed (for a charge or at no charge, or provided on a stand-alone basis or bundled with other products and/or services) to the applicable Hospital Site by Company (or its successor in interest), any affiliate of the Company or any reseller authorized by the Company, and (B) *completed any applicable implementation, configuration and testing* of the product so that the product is ready for production use by the Hospital Site.

(Emphasis added and omitted).

Following an audit of Premier's records, Defendants accused Premier of failing to report or include in the Earnout Amount certain Hospital Sites where there was Product Implementation. Specifically, Defendants alleged that single-event alerts[2] that were reported in the audit were indicative of Product Implementation. Ultimately, the audit indicated that SafetySurveillor software was utilized by over 1,000 Hospital Sites. However, Premier only recognized 263 Hospital Sites for purposes of the Product Implementation provision of the Agreement. Accordingly, Defendants informed Premier that they intended to sue for miscalculating the Earnout Amount to which Defendants were entitled and violating the terms of the Agreement.

On 19 January 2011, Premier preemptively filed an action in Mecklenburg County Superior Court seeking declaratory judgment that it had not breached the Agreement.[3] On 27 April 2011, Defendants filed an answer and counterclaims, alleging breach of contract and seeking recovery of damages, audit expenses, and attorneys' fees. On 30 August 2011, Premier filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, or, alternatively, a motion for summary judgment pursuant to Rule 56. On 11 December 2012, the trial court entered an Order and Opinion granting summary judgment in favor of Premier on its declaratory judgment claim as well as Defendants' counterclaims.

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2. A single-event alert refers to the notification the SafetySurveillor program sends to designated medical personnel to identify either (1) the potential presence of an infection that a patient acquired during their course of treatment in a healthcare facility or setting; or (2) a possible problem with the antibiotic therapy prescribed to a patient.

3. This matter was designated as a mandatory complex business case by the Chief Justice of the Supreme Court of North Carolina on 19 January 2011.

i. Premier, Inc. I

Defendants timely appealed the 11 December 2012 Order and Opinion. In the original appeal, Premier claimed that "for Product Implementation to occur, a Hospital Site must affirmatively take steps to subscribe to or license the SafetySurveillor" software, and that mere receipt of the product was not enough. *Premier, Inc. I*, 232 N.C. App. at 606, 755 S.E.2d at 60. Based on this assertion, Premier argued it had fully satisfied its obligations under the Agreement as it had made Earnout Amount payments for all of the Hospital Sites with which it had formal written subscription agreements, not including the first 50 Hospital Sites where Product Implementation occurred as allowed under the Agreement. *Id.* at 606, 755 S.E.2d at 60.

Conversely, Defendants asserted that the "subscribed to or licensed" component of Product Implementation is satisfied when Premier simply *provides* SafetySurveillor to a facility, a fact which would be evinced by the alerts fired from those facilities. *Id.* at 606, 755 S.E.2d at 60. Therefore, Defendants maintained "that Premier was not entitled to summary judgment because the . . . audit . . . indicated that Premier . . . 'provided' the SafetySurveillor program to over 1,000" Hospital Sites, which necessarily constitutes Product Implementation. *Id.* at 606, 755 S.E.2d at 60.

On 4 March 2014, we vacated the trial court's 11 December 2012 Order and Opinion and remanded the case for further proceedings. *Id.* at 610, 755 S.E.2d at 62. In doing so, we agreed with Premier and held that "the unmistakable meaning of the language the parties agreed upon in drafting the Agreement is that some affirmative act on the part of the Hospital Site is required" to show Product Implementation, and that mere provision of the software to Hospital Sites without more is insufficient. *Id.* at 607, 755 S.E.2d at 60. To conclude otherwise would be to read out of the Agreement the phrase "subscribed to or licensed." *Id.* at 607, 755 S.E.2d at 60.

However, we also recognized that the Agreement does not specifically require a formal written agreement. *Id.* at 609-10, 755 S.E.2d at 62. In that respect, although the firing of an alert is not dispositive, it is probative of the issue of Product Implementation. *Id.* at 609, 755 S.E.2d at 61. Simply put, we held that "the Agreement contemplates a mutual arrangement between Premier and the Hospital Site whereby Premier *agrees* to provide the SafetySurveillor product and the Hospital Site *agrees* to accept it and utilize its services." *Id.* at 608, 755 S.E.2d at 61 (emphasis added).

Pertinent to the instant appeal, we also concluded that interpreting the Agreement in this way did not resolve the case. *Id.* at 608, 755 S.E.2d at 60-61. Specifically, we held that "[w]hile we do not foreclose the possibility that summary judgment may ultimately be appropriate in this matter, we believe that such a determination cannot properly be made at the present time in light of the incomplete factual record that currently exists[,]" and therefore we remanded the case to the trial court for a fuller development of the factual record. *Id.* at 610, 755 S.E.2d at 62 (citation omitted). Further factual development was necessary to explore what affirmative acts, if any, were taken by the disputed Hospital Sites to obtain the SafetySurveillor product so that any such acts could be evaluated in accordance with our interpretation of the "subscribed to or licensed" language in the Agreement. *Id.* at 610, 755 S.E.2d at 62. Mandate issued on 24 March 2014.

ii. Case Activity on Remand

On remand, the parties submitted a joint Case Management Report in which they agreed that fact discovery would consist of two phases – fact witness depositions followed by written discovery. On 30 June 2014, the trial court entered an Amended Case Management Order that established the parties would have through 1 November 2014 to conduct fact discovery as contemplated by the Case Management Report.

On 31 October 2014, one day before the discovery deadline and 221 days after remand from this court, Defendants served their first set of interrogatories and requests for production of documents. On 21 November 2014, Premier filed a motion for protective order arguing that Defendants' discovery requests were untimely under Rule 18.8 of the North Carolina Business Court's General Rules of Practice and Procedure as they could not be answered within the trial court's deadline. However, the trial court, giving great deference to this Court's directive to develop more fully the factual record, ordered Premier to serve responses to Defendants' discovery requests. The parties subsequently engaged in written discovery and related document production to retrieve evidence of the requisite affirmative acts. Defendants did not conduct third party discovery, did not issue a single subpoena, nor did they produce evidence relating to interactions between Premier and the Hospital Sites in contention, or, as we noted in *Premier, Inc. I*, evidence of "affirmative acts [ ] taken by the facilities identified by Defendants to obtain the SafetySurveillor product[.]" *Id.* at 610, 755 S.E.2d at 62.

On 1 December 2015, Premier filed a motion for summary judgment which was heard on 26 February 2016. On 13 May 2016, the trial court

granted Premier's motion for summary judgment, dismissed with prejudice Defendants' counterclaims, and entered judgment in Premier's favor on its claim for declaratory judgment. In doing so, the trial court observed:

> [D]espite ample opportunity to develop a more complete factual record, Defendants have failed to bring forward evidence that any of the [Hospital Sites] took "affirmative acts . . . to obtain the SafetySurveillor product." [*Id.*] at 610, 755 S.E.2d at 62. Because the Court of Appeals has concluded that "the Agreement requires some affirmative act by a Hospital Site to subscribe to or license the SafetySurveillor product in order for Product Implementation to occur," *id.* [at 610, 755 S.E.2d at 62], Defendants cannot show that there was a Product Implementation at any [Hospital Site].

Defendants timely appealed to this Court.

Analysis

As the parties' depositions, affidavits, and other documents were filed under seal, the depth of our discussion and analysis in this opinion is somewhat limited; however, our review was exhaustive and we considered all of the documents and testimony under seal. *See e.g. Radiator Specialty Co. v. Arrowood Indemnity Co.*, ___ N.C. App. ___, ___, 800 S.E.2d 452, 456 (2017) (explaining the court's discussion and analysis is limited where the documents in the record were filed under seal).

The issue on appeal is whether Plaintiffs have forecast any evidence which would create a genuine issue of material fact that the Hospital Sites took affirmative acts as outlined in *Premier, Inc. I* to "subscribe to" or "license" SafetySurveillor. "Our standard of review of 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). The evidence presented must be "viewed in the light most favorable to the non-moving party," and all inferences must be drawn in favor of the non-movant. *Furr v. K-Mart Corp.*, 142 N.C. App. 325, 327, 543 S.E.2d 166, 168 (2001) (quotations omitted). 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.G.S. § 1A-1, Rule 56(c) (2015). If the movant can show an absence of a genuine issue of material fact, the burden then shifts to the non-movant to produce evidence to establish a genuine issue. *Jones*, 362 N.C. at 573, 669 S.E.2d at 576. We conclude that Premier has successfully

shown a complete lack of evidence regarding such affirmative acts, and that Defendants failed to provide evidence that the individual Hospital Sites, and not the Hospital Networks for which Defendants have already been compensated, took such affirmative acts.

Defendants first contend that the work of an Infection Preventionist to identify health related issues that will trigger alerts, coupled with the software's firing of alerts, constitutes an affirmative act taken by the Hospital Site to subscribe to SafetySurveillor. We have already held that firing of alerts alone is insufficient. *Premier, Inc. I*, 232 N.C. App at 609, 755 S.E.2d at 61.

According to the Law of the Case Doctrine, "an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal." *Creech v. Melnik*, 147 N.C. App. 471, 473-74, 556 S.E.2d 587, 589 (2001) (citation omitted).

In *Premier, Inc. I*, this Court determined that the firing of alerts and "the circumstances under which the product came to be received by these facilities is probative of the issue of whether the facilities did, in fact, meet the criteria for Product Implementation[,]" but that firing of alerts is not enough in and of itself. *Premier, Inc. I*, 232 N.C. App at 609, 755 S.E.2d at 61. The record during the first appeal was completely devoid of specific evidence concerning how these facilities received the software. *Id.* at 609, 755 S.E.2d at 61. Following an additional opportunity to take discovery on remand, the record remains devoid of any such evidence, and the Law of the Case Doctrine prohibits this Court from reconsidering this issue.

Defendants next contend that, for Premier to be compliant with the Health Insurance Portability and Accountability Act ("HIPPA"), a Business Associate Agreement ("BAA") must necessarily exist between the Hospital Site and Premier prior to any exchange of patient information. Based on this, Defendants ask us to accept that a BAA exists between Premier and every Hospital Site at issue. Defendants maintain that the signing of a BAA constitutes the requisite affirmative act taken by the Hospital Sites necessary to show that Product Implementation occurred. However, there is no record evidence that Premier is in fact HIPPA compliant. Defendants took no steps to obtain evidence of any specific BAA that may exist between Premier and the Hospital Sites. In fact, the record before this Court has over 2,000 pages, but there is only one "example" BAA in the record.

Even if we assume *arguendo* that Premier is HIPPA compliant, the exchange of information between Premier and the Hospital Sites alone does not necessarily prove that a BAA exists between Premier and that Hospital Site. Therefore, the HIPPA-compliant exchange of information between Premier and these Hospital Sites does not demonstrate the existence of an affirmative act that would trigger an Earnout Amount payment.

In *Premier, Inc. I*, we determined that "the unmistakable meaning of the language the parties agreed upon in drafting the Agreement is that some affirmative act on the part of the Hospital Site is required." *Premier, Inc. I*, 232 N.C. App. at 607, 755 S.E.2d at 60. The Agreement "contemplates a mutual arrangement between Premier and the Hospital Site whereby Premier agrees to provide the SafetySurveillor product and the Hospital Site agrees to accept it and utilize its services." *Id.* at 608, 755 S.E.2d at 61.

SafetySurveillor receives Protected Health Information ("PHI") transferred from the source site to the system operator. The transfer of PHI is governed by HIPPA. *See* 45 C.F.R. § 160 *et seq.* (2016). Although a Hospital Site may freely share information with other entities in the Hospital Network and remain HIPPA compliant, *see* 45 C.F.R. § 164.506(c)(5), a Hospital Site or Network must have a BAA in place with any third party in order to share data with that entity. 45 C.F.R. § 164.504(e)(2)(i)(B). It is possible for a BAA between a third party and the Hospital Network to provide for the free exchange of patient information between an individual Hospital Site and the third party, even when there is no BAA directly between them. *See generally* 45 C.F.R. §§ 164.502, 164.508. In such a scenario, the parent Hospital Network signs the BAA on *behalf* of the individual Hospital Sites. 45 C.F.R. § 164.502(a)(3). However, a Hospital Network signing on a Hospital Site's behalf is not demonstrative, as this Court previously held, of "the Hospital Site agree[ing] to accept [SafetySurveillor] and utilize its services." *Premier, Inc. I*, 232 N.C. App. at 608, 755 S.E.2d at 61.

In the instant case, the parties have provided evidence in the form of depositions, affidavits, and one example BAA between Premier and one Hospital Network. However, even with additional time for discovery, the denial of Premier's Motion for Protective Order, and specific instruction from this Court regarding the evidence needed, Defendants declined to take third-party discovery to determine whether even one of the Hospital Sites in dispute, and not the Hospital Networks, took any affirmative steps to *accept* SafetySurveillor. Since the record evidence only shows that the Hospital Networks signed the BAA *on behalf of* the Hospital Sites, and Defendants failed to produce evidence of acceptance

of SafteySurveillor *by* the Hospital Sites as required in *Premier*, *Inc. I*, the mere existence of a BAA does not prove that an affirmative action was taken by the Hospital Sites themselves. Even after having the opportunity to develop more fully the factual record on remand from this Court, Defendants have failed to demonstrate that they are entitled to an Earnout Amount on the basis of any of the disputed Hospital Sites. Accordingly, the trial court's grant of summary judgment in favor of Premier was appropriate.

Conclusion

Defendants failed to provide evidence of affirmative acts taken by the Hospital Sites at issue to "subscribe to" or "license" SafetySurveillor. Therefore, Premier is not required to provide an Earnout Amount to Defendants for the disputed Hospital Sites. Accordingly, for the reasons stated above, we affirm the ruling of the trial court.

AFFIRMED.

Judge STROUD concurs.

Judge DILLON concurs by separate opinion.

DILLON, Judge, concurring.

I concur based on the conclusion that we are bound by holdings of our Court in the first appeal of this case, reported at *Premier, Inc. v. Peterson*, 232 N.C. App. 601, 755 S.E.2d 56 (2014) (hereinafter "*Premier I*"). Specifically, we are bound by the narrow definition of "subscribe" only to mean "to agree to receive and pay for a periodical service[,]" (quoting Webster's Dictionary), and that the term connotes "an affirmative act by the recipient *prior* to receipt of the product or service." *Id.* at 608, 755 S.E.2d at 61 (emphasis added). We are also bound by the holding in *Premier I* that the evidence that had been "discovered" to that point in the litigation was *not* sufficient to create a genuine issue of fact, and remanded to give Defendant a chance to engage in discovery to uncover additional evidence. Defendant, however, has failed to point to any evidence that was "discovered" since the first appeal. Accordingly, we are compelled to affirm.

I note that in its definition of "subscribe," Webster's does not require an affirmative act which occurs *prior* to receipt of the product, as *Premier I* suggests. Webster's lists other definitions for "subscribe"

as well, such as to "sanction" and to "assent to." Here, I believe that the term "subscribe" is sufficiently ambiguous to include Hospital Sites within networks where the network had a contract with Premier but where the Hospital Site received the product, but then implemented the product – where the inputting of patient data and other acts to implement the product constitute affirmative acts of "Product Implementation" to constitute "sanction[ing]" and "assent[ing] to" the product. And perhaps the best evidence concerning the parties' intent in their use of the word "subscribe" was evidence of Premier's relationship with the Hospital Sites identified in Section 2(b)(iii) of the Disclosure Schedule of the agreement, in which the parties agreed where Product Implementation had occurred. For example, it would be interesting if some of the Sites that implemented the product which are listed as part of a network did not actually have a direct formal agreement with Premier but were included because they were part of a network which did have a formal agreement. But the record is silent on this issue.

LINNIE PRICE RUTLEDGE AND HUSBAND CHARLES RUTLEDGE, PLAINTIFFS
v.
LISA VIELE FEHER, MARSHA VIELE, DAVID VIELE JR., AND WIFE RACHEL VIELE, BEAU SKINNER AND WIFE, JOSEFINA SKINNER, BRIDGETT SKINNER OTERO AND HUSBAND, JEHIELL OTERO AND HELEN VIELE PRICE AND HUSBAND, GEORGE PRICE, LISA A. ADAMS AND HUSBAND, CHRISTOPHER ADAMS, PRANTAWAN JUSEE, AND BOB J. HOWELL, SUCCESSOR TRUSTEE OF THE DWIGHT A VIELE, SR. REVOCABLE TRUST U/A/D JULY 28, 2010, DEFENDANTS

No. COA16-1287

Filed 5 September 2017

1. Declaratory Judgments—general warranty deed—life estate—contingent remainder interest

The trial court did not err in a declaratory judgment action, involving a dispute over a general warranty deed conveying a life estate to the grantors' children and a future interest to certain of the grantors' grandchildren, by concluding that the grantor's two living grandchildren each held a contingent remainder interest in the subject property where they had to outlive the last of the living children in order for their title to the property to vest.

2. Declaratory Judgments—general warranty deed—life estate —future interest—class of grandchildren

The trial court did not err in a declaratory judgment action, involving a dispute over a general warranty deed conveying a life estate to the grantors' children and a future interest to certain of the grantors' grandchildren, by concluding that the class of grandchildren would not close and could not be determined until the death of the grantor's last living child (Price), and the individuals in which the remainder interest vested could not be established until the death of Price.

Appeal by Defendants David Viele, Jr. and wife, Rachel Viele; Beau Skinner and wife, Josefina Skinner; and Bridgett Skinner Otero from judgment entered 21 September 2016 by Judge Alan Z. Thornburg in Jackson County Superior Court. Heard in the Court of Appeals 24 May 2017.

McLean Law Firm, P.A., by Russell L. McLean, III, for Defendants-Appellants.

Scott Taylor, PLLC, by J. Scott Taylor, for Plaintiffs-Appellees.

MURPHY, Judge.

This case involves a general warranty deed conveying a life estate to the grantors' children and a future interest to certain of the grantors' grandchildren. One of the grantors' grandchildren, Linnie Price Rutledge, and her husband, brought this action, seeking a declaratory judgment as to their rights and interest in the subject property and an injunction prohibiting Defendants from transferring any ownership interest they have in the property.

Based on the language of the deed at issue, the trial court concluded that Plaintiff Linnie Price Rutledge and Defendant Lisa Viele Feher both hold a contingent remainder interest in the property. Further, the trial court concluded that the class of grandchildren will not close and cannot be determined until the death of Helen Viele Price, nor can the individuals in which the remainder interest vests be determined until the death of Helen Viele Price.[1] After careful review, we affirm the trial court's decision.

1. Helen Viele Price passed away between the entry of the trial court's judgment and the filing of the briefs to this Court.

Background

C.E. Viele and his wife Margaret Viele (collectively, the "Vieles") owned land in Jackson County (the "Property"). They had four children together: Dwight Allen Viele ("Dwight"), Charles E. Viele, Jr. ("Charles"),[2] Richard E. Viele ("Richard"), and Helen Viele Price ("Ms. Price"). The Vieles also had several grandchildren. Dwight had four children: Dwight Viele, Jr., David Viele, Sr., Terry Viele Skinner, and Lisa Viele Feher ("Lisa").[3] Richard had two children: Debra Viele and Richard Viele, Jr.[4] Ms. Price had one child: Linnie Price Rutledge ("Linnie").

On 12 October 1983, the Vieles executed a North Carolina General Warranty Deed (the "Deed") to the Property in which they retained a life estate for themselves and conveyed a life estate to their four children as well as a fee simple remainder interest to their grandchildren. In pertinent part, the precise language of the Deed reads:

> That [the Vieles] . . . have given, granted, bargained, sold and conveyed and by these presents do hereby give, grant, bargain, sell and convey unto [Dwight, Ms. Price, Charles, and Richard], subject to the exceptions, reservations and restrictions, if any, and together with any rights-of-way, if any, hereinafter state, a life estate, *said life estate to continue until the death of the last survivor of the four above-named children; and upon the death of the last of the four above-named children*, *fee simple title is to vest in our grandchildren*, *the living issue of the four above-named children*, all of that certain piece, parcel or tract of land, situate[d], lying and being in Jackson County, North Carolina, but reserving, however, unto Grantors, a Life Estate in said lands . . . .

(Emphasis added).

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2. Charles died in 1989 without marrying or having children.

3. Dwight died in 2011, and he was preceded in death by his son, Dwight Viele, Jr., who passed away in 1996 with no surviving spouse or children. David Viele, Sr., has since passed away and was survived by his wife, Marsha Viele, and his two children – David Viele, Jr., and Lisa Viele Adams. Terry Viele Skinner passed away in 2014, and she was survived by two children – Beau Skinner and Bridgett Skinner.

4. Before Richard died, he and his two children executed and recorded a quitclaim deed conveying any potential interest he had in the Property to his remaining siblings.

At the time of execution of the Deed, all seven of the named children and grandchildren were alive. According to Appellants' brief, C.E. Viele died in 1987 and Margaret Viele died in 2002.

Linnie and her husband, Charles Rutledge, (collectively, "Plaintiffs") commenced this action on 24 November 2014, seeking declaratory judgment and injunctive relief. Specifically, Plaintiffs sought a declaration of the parties' respective rights and obligations in the Property pursuant to the Deed, and they contended that "they are the persons with who[m] title vests upon the passing of Helen Viele Price." Accordingly, they requested that the trial court enjoin Defendants from transferring any ownership rights or interest in the Property. At the time, Ms. Price was the only living child of the Vieles, and Linnie and Lisa were their only living grandchildren. David Viele, Jr., Lisa Viele Adams, Beau Skinner, and Bridgett Skinner Otero were living great-grandchildren of the Vieles.

Plaintiffs filed an amended complaint on 18 February 2015, adding several parties not involved in the instant appeal.[5] In March of 2015, Ms. Price conveyed her life estate interest to Linnie. On 15 October 2015, Defendants David Viele, Jr., and his wife, Rachel Viele, Beau Skinner and his wife, Josefina Skinner, and Bridgett Skinner Otero (collectively, "Appellants") and husband, Jehiell Otero, filed an answer. The remaining Defendants did not respond and default judgments were entered against them.

The matter was scheduled for a non-jury trial and the participating parties entered 20 stipulations of fact to narrow the issues before the trial court. After considering the pleadings, stipulations, and the Deed, the trial court concluded:

> 1. Lisa Viele Feher and Linnie Price Rutledge each hold a contingent remainder interest in the subject property.
>
> 2. The class of grandchildren will not close and cannot be determined until the death of Helen Viele Price.

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5. Plaintiff brought this action against:

> "Lisa Viele Feher, Marsha Viele, David Viele, Jr. and wife, Rachel Viele, Beau Skinner and wife, Josefina Skinner, Bridgett Skinner Otero and husband, Jehiell Otero, Helen Viele Price and husband, George Price, Lisa A. Adams and husband, Christopher Adams, Prantawan Jusee, and Bob J. Howell, Successor Trustee of the Dwight A. Viele, Sr. Revocable Trust U/A/D July 28, 2010 [collectively, "Defendants"]."

> 3. The individuals in which the remainder interest vests cannot be established until the death of Helen Viele Price.

Appellants timely appealed.

Analysis

Appellants raise three issues on appeal: (1) whether the trial court erred in determining Linnie and Lisa hold a contingent remainder interest in the Property rather than a vested remainder subject to open or partial divesture; (2) whether the trial court erred in determining that the class of grandchildren cannot be determined until the death of Ms. Price; and (3) whether the trial court erred in determining that the individuals in which the remainder interest vests cannot be determined until the death of Ms. Price. As each of these issues overlap, we discuss them collectively.

We review a judgment entered after a non-jury trial to determine "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001)). In the instant case, neither party disputes the findings of fact made by the trial court, and, accordingly, they are binding on appeal. *Cape Fear River Watch v. N. Carolina Envntl. Mgmt. Cmm'n*, 368 N.C. 92, 99, 772 S.E.2d 445, 450 (2015) (quotation omitted). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal." (emphasis omitted)).

The outcome of the instant matter hinges on interpreting the language of the Deed, and therefore our analysis is rooted in the canons of construction outlined by our state's jurisprudence. In construing written conveyances of property, the court ultimately endeavors to determine and effectuate the intent of the parties based on the written language they used. *Strickland v. Jackson*, 259 N.C. 81, 83, 130 S.E.2d 22, 24 (1963); *see also Mercer v. Downs*, 191 N.C. 203, 205, 131 S.E. 575, 576 (1926) (holding that "the intent of the testator is paramount"). Explained more broadly by our Supreme Court nearly a century ago:

> Whatever the technicalities of the law may formerly have required in the construction of deeds, the modern doctrine does not favor the application of such technical rules as

> will defeat the obvious intention of the grantor—not the unexpressed purpose which may have existed in his mind, of course, but his intention *as expressed in the language he has employed*; for it is an elementary rule of construction that the intention of the parties shall prevail, unless it is in conflict with some unyielding canon of construction or settled rule of property, or is repugnant to the terms of the grant. *Such intention as a general rule must be sought in the terms of the instrument*; but if the words used leave the intention in doubt, resort may be had to the circumstances attending the execution of the instrument and the situation of the parties at that time . . . .

Seawell v. Hall, 185 N.C. 80, 82, 116 S.E. 189, 190 (1923) (emphasis added). Our Supreme Court also guided that, ordinarily, to construe a deed and determine the parties' intention, a court gathers the intention "from the language of the deed itself when its terms are unambiguous. However, there are instances in which consideration should be given to the instruments made contemporaneously therewith, the circumstances attending the execution of the deed, and to the situation of the parties at the time." *Smith v. Smith*, 249 N.C. 669, 675, 107 S.E.2d 530, 534 (1959)

On that basis, if "[t]he language of the deed [at issue is] clear and unequivocal, it must be given effect according to its terms, and we may not speculate that the grantor intended otherwise." *Cty. of Moore v. Humane Soc'y of Moore Cty., Inc.*, 157 N.C. App. 293, 298, 578 S.E.2d 682, 685 (2003) (citations and internal quotation marks omitted). "We must, if possible without resorting to parol evidence, determine the grantors' intent based on the four corners of the deed." *Simmons v. Waddell*, 241 N.C. App. 512, 524, 775 S.E.2d 661, 674 (2015) (citation omitted). Language that is otherwise clear will not be disturbed by punctuation; however, punctuation may be considered in deriving the intent of the parties. *Stephens Co. v. Lisk*, 240 N.C. 289, 293, 82 S.E.2d 99, 102 (1954) (citations omitted).

[1] Appellants contend that, as heirs of the Vieles' son Dwight, the Deed conveyed to them a vested remainder subject to partial divestment by after-born children rather than a contingent remainder interest at the moment of its creation. Their argument rests on *Buchanan v. Buchanan*, 207 N.C. App. 112, 698 S.E.2d 485 (2010), in which this Court stated,

> [A] remainder is vested, when, throughout its continuance, the remainderman and his heirs have the right to the immediate possession whenever and however the preceding

> estate is determined; or, in other words, a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estate; or, again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estate.

Id. at 118, 698 S.E.2d at 489 (citation omitted). Accordingly, Appellants claim that the Vieles' seven then-living grandchildren obtained a vested remainder subject to open or partial divesture at the moment of the Deed's execution and that the class of grandchildren intended to take pursuant to the Deed was therefore immediately ascertainable.

Plaintiffs counter that the plain language of the Deed instructs that title shall not vest in any grandchildren until the death of the last of the Vieles' children. To conclude that title vests at any point prior to the death of the last of the Vieles' living children would blatantly disregard the grantors' intent as expressed in the Deed. Furthermore, because title cannot vest until the last of the Vieles' children dies, the Vieles' living grandchildren have only a contingent remainder interest in the Property as they must outlive the last of the living children in order for their title to the Property to vest.

Hence, the dispute is whether the grandchildren's interest is vested or contingent.

> The distinction between a vested and a contingent remainder is the capacity to take upon the termination of the preceding estate. Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent. Only those who can answer the roll immediately upon the happening of the event acquire any estate in the properties granted.

Strickland, 259 N.C. at 84, 130 S.E.2d at 25 (citing *Wimberly v. Parrish*, 253 N.C. 536, 117 S.E.2d 472 (1960); *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1960); *Wachovia Bank & Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E.2d 578 (1952)) (citations omitted); *see also Hollowell v. Hollowell*, 107 N.C. App. 166, 174, 420 S.E.2d 827, 832 (1992) ("The triggering event for the passage or vesting of the contingent remainder in this case is the death of each of the two life tenants." (citation omitted)).

As outlined at length above, our ultimate objective in construing a deed is to effectuate the intent of the grantor as expressed through the language of the deed itself, and, in this case, the Vieles plainly stated

their desire that "upon the death of the last of the four above-named children, fee simple title is to vest in our grandchildren, the living issue of the four above-named children." Based on this language, it is clear that this is the type of case "[w]here those who are to take in remainder cannot be determined until the happening of a stated event" – the death of the last of the Vieles' children.[6] If a particular grandchild fails to survive the last of the Viele children, he does not take of the Property according to the express terms of the Deed. For that reason, the trial court correctly determined that Linnie and Lisa have contingent remainders, and we therefore affirm as to this issue.

[2] In regard to the overlapping second and third issues, our conclusion as to Linnie's and Lisa's contingent remainders dictates the outcomes of those issues as well. As Linnie's and Lisa's remainders are contingent, they do not vest until the happening of a triggering event. *See Strickland*, 259 N.C. at 84, 130 S.E.2d at 25 (recognizing that remainders are contingent if the remaindermen cannot be determined until the happening of a specified event). In this case, the language of the Deed specifies both when the class of remaindermen is to be identified and when title to the Property vests in those remaindermen. Specifically, the Deed pronounces, "and *upon the death of the last of the four above-named children*, fee simple title is to vest in our grandchildren, the living issue of the four above-named children[.]" (Emphasis added).

A plain reading of this text requires that the class of remaindermen will consist of the then-living grandchildren upon the death of the last surviving child, who we now know was Ms. Price, and that title to the Property vests in those grandchildren "upon the death" of that last surviving child. As such, we cannot conclude, as Appellants urge, that the trial court erroneously concluded "[t]he class of grandchildren will not close and cannot be determined until the death of Helen Viele Price,"

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6. We acknowledge our state Supreme Court's long-held precedent that, "where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue." *Starnes v. Hill*, 112 N.C. 1, 12, 16 S.E. 1011, 1014 (1893) (citation omitted). However, the Deed in this case is distinguishable as it did not simply convey the Property to the Viele's children for life, and then to such of the Vieles' grandchildren as should be living after the death of the last Viele child. Instead, as we have explained, the explicit language chosen by the Vieles declares that title is not to vest until the specified triggering event. Therefore, *Starnes* is inapplicable as it is in contravention of the Vieles' intent. *See Croxall v. Shererd*, 72 U.S. (5 Wall.) 268, 287, 18 L. Ed. 572, 579 (1866) (holding that a remainder will not be deemed contingent "when, *consistently with the intention*, it can be held to be vested" (emphasis added)).

and "[t]he individuals in which the remainder interest vests cannot be established until the death of Helen Viele Price." Accordingly, we also affirm as to these issues.

Conclusion

For the reasons stated above, the trial court correctly concluded: (1) Lisa Viele Feher and Linnie Price Rutledge each hold a contingent remainder interest in the subject property; (2) the class of grandchildren will not close and cannot be determined until the death of Ms. Price; and (3) the individuals in which the remainder interest vests cannot be established until the death of Ms. Price. Accordingly, we affirm the trial court's ruling.

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

STATE OF NORTH CAROLINA
v.
DARYL JONES, DEFENDANT

No. COA17-59

Filed 5 September 2017

Motor Vehicles—operating motor vehicle with open container—subject matter jurisdiction—citation not required to state all elements of charge

The trial court had subject matter jurisdiction in an operating a motor vehicle with an open container of alcohol (while alcohol remained in system) case even though a citation issued to defendant failed to state facts establishing each of the elements under N.C.G.S. § 20-138.7(a). A citation simply needs to identify the crime charged to comply with N.C.G.S. § 15A-302(c), and any failure of an officer to include each element of the crime in a citation is not fatal to the court's jurisdiction. Further, defendant was apprised of the charge against him and would not be subject to double jeopardy.

Judge ZACHARY dissenting.

STATE v. JONES

[255 N.C. App. 364 (2017)]

Appeal by defendant from judgment entered 15 June 2016 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 8 June 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Carole Biggers, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

BERGER, Judge.

Daryl Lamont Jones ("Defendant") appeals from the judgment entered following his conviction for operating a motor vehicle with an open container of alcohol while alcohol remained in his system. Defendant alleges the trial court lacked subject matter jurisdiction, arguing the citation issued to Defendant failed to state facts establishing each of the elements of the statutory offense. We disagree.

Factual & Procedural Background

On January 4, 2015, Officer Donnie Johnson with the Raleigh Police Department stopped a vehicle driven by Defendant on New Bern Avenue. Officer Johnson estimated Defendant's speed to be approximately sixty-five miles per hour in a forty-five mile-per-hour zone. Officer Johnson approached Defendant's vehicle and noticed an open can of beer in the center console of Defendant's vehicle. After determining Defendant was not impaired, Officer Johnson issued Defendant a citation for speeding and operating a vehicle with an open container of alcohol in the car, while alcohol remained in his system. The citation read as follows:

> The officer named below has probable cause to believe that on or about Sunday, the 04 day of January, 2015 at 10:16PM in [Wake] [C]ounty . . . [Defendant] did unlawfully and willfully OPERATE A MOTOR VEHICLE ON A STREET OR HIGHWAY AT A SPEED OF 62 MPH IN A 45 MPH ZONE. (G.S. 20-141(J1))
> *and* on or about Sunday, the 04 day of January, 2015 at 10:16PM in [Wake] [C]ounty . . . [Defendant] did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING. (G.S. 20-138.7(A))[.]

(Emphasis added). In addition, the officer's comments contained the following: "OPEN COORS LIGHT IN CENTER CONSOLE. HALF

CONSUMED, STILL WITH CONDENSATION ON IT. . . . PULLED OUT OF DONALD ROSS DR[.] AND SPED UP TO 62MPH. PURSUED FOR NEARLY 1/2 MILE BEFORE SLOWING DOWN [IN FRONT OF] WAKE MED."

Defendant was convicted of both offenses in District Court, and appealed the conviction to Superior Court. At trial in Superior Court, Defendant made a motion to dismiss the open container charge at the close of the State's evidence, arguing that the citation was "fatally defective" and the trial court lacked jurisdiction. Defendant asserted that the citation failed to include an essential element of an open container offense: operating a motor vehicle while on a public street or highway. The trial court, citing *State v. Allen*, ___ N.C. App. ___, 783 S.E.2d 799 (2016), denied Defendant's motion. The jury found Defendant guilty of the open container charge and not guilty of speeding. Defendant timely filed notice of appeal.

Analysis

The North Carolina Constitution states, "Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases." N.C. Const. art. I, § 22. A "valid indictment returned by a legally constituted grand jury" is required for a court to have jurisdiction. *State v. Yoes*, 271 N.C. 616, 630, 157 S.E.2d 386, 398 (1967) (citations and quotation marks omitted).

However, "[t]he General Assembly may . . . provide for other means of trial for misdemeanors, with the right of appeal for trial de novo." N.C. Const. art. I, § 24.

The Superior Court Division "has original general jurisdiction throughout the State *except as otherwise provided by the General Assembly*; and the General Assembly is authorized by general law to prescribe the jurisdiction and powers of the district courts." *State v. Wall*, 271 N.C. 675, 680, 157 S.E.2d 363, 366 (1967) (emphasis in original). The General Assembly has indeed delineated the jurisdiction and procedure for trial of misdemeanors in the district courts, and provided for the right of appeal of those matters for trial *de novo* in the superior courts.

North Carolina General Statute § 7A-270 (2015) provides that "[g]eneral jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of

Justice." The district court division has "exclusive, original jurisdiction" of misdemeanors, N.C. Gen Stat. § 7A-272(a) (2015), while superior courts, with limited exception, have "exclusive, original jurisdiction over all criminal actions not assigned to the district court division[.]" N.C. Gen Stat. § 7A-271(a) (2015).

Defendant was issued a citation for misdemeanor offenses and directed to appear in Wake County District Court. A citation directs a defendant to "appear in court and answer a misdemeanor or infraction charge or charges." N.C. Gen. Stat. § 15A-302(a) (2015). A law enforcement officer may issue a citation when he has probable cause to believe the individual cited committed an infraction or misdemeanor offense. N.C. Gen. Stat. § 15A-302(b) (2015). For a citation to be valid, it must:

> (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,
>
> (2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,
>
> (3) Identify the officer issuing the citation, and
>
> (4) Cite the person . . . to appear in a designated court, at a designated time and date.

N. C. Gen. Stat. § 15A-302(c) (2015).

The official commentary to Article 49, entitled Pleadings and Joinder, contains a primer on various criminal pleadings in North Carolina. N.C. Gen. Stat. ch. 15A, art. 49 official commentary (2015). The commentary notes that misdemeanor cases initiated by warrant or criminal summons require a finding of probable cause and a "statement of the crime." *Id.* It is the "statement of the crime" set forth in warrants and criminal summons that constitutes the "pleading" for misdemeanor criminal cases. *Id.* Citations, however, are treated differently. According to the commentary, a citation simply needs to identify the crime charged.

> It should be noted that the citation (G.S. 15A-302) requires only that the crime be "identified," less than is required in the other processes. This is a reasonable difference, since it will be prepared by an officer on the scene. *It still may be used as the pleading, but rather than get into sufficiency of the pleading in such a case the Commission simply gives the defendant the right to object and require a more formal pleading.* G.S. 15A-922(c).

Id. (emphasis added). *See also* N.C. Gen. Stat. § 15A-302 official commentary (2015) ("*[I]n certain circumstances* the citation can serve as the pleading upon which trial is based. See G.S. 15A-922 . . . ." (emphasis added)).

To the extent there was a deficiency in the citation, Defendant had the right to object to trial on the citation by filing a motion:

> A defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading. The prosecutor must then file a statement of charges unless it appears that a criminal summons or a warrant for arrest should be secured in order to insure the attendance of the defendant, and in addition serve as the new pleading.

N.C. Gen. Stat. §15A-922(c) (2015). The statement of charges, summons, or warrant may then be subjected to the scrutiny argued for by Defendant. However, a defendant must file his or her objection to the citation in the district court division.

The defendant in *State v. Allen*, ___ N.C. App. ___, ___, 783 S.E.2d 799, 799 (2016) was charged by citation with, among other offenses, transporting an open container of alcohol. Defendant was convicted by a jury and, on appeal, he argued that the citation failed to allege all essential elements of the offense, depriving the court of jurisdiction. *Id.* at ___, 783 S.E.2d at 800. This Court held that because the citation put the defendant on notice and met the statutory requirements of N.C. Gen. Stat. § 15A-302, his failure to object to the citation pursuant to N.C. Gen. Stat. § 15A-922(c) precluded his challenge to jurisdiction. *Id.* at ___, 783 S.E.2d at 801. The Court also stated:

> We acknowledge defendant is allowed to challenge jurisdiction for the first time on appeal. *See* N.C. R. App. P. 10(a)(1) (2015) ("[W]hether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal."). However, the ability to raise a jurisdictional challenge at any time does not ensure that the jurisdictional challenge has merit.
>
> Defendant argues that "[a] citation, like a warrant or an indictment, may serve as a pleading in a criminal case and must therefore allege lucidly and accurately all the essential elements of the [crime] . . . charged." However,

> defendant fails to direct our attention to any opinion from this Court or other authority equating the requirements for a valid citation with those of a valid indictment, and we find none. *Compare id.* § 15A-302(c) ("The citation must: (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved[.]"), *with id.* § 15A-644(a)(3) ("An indictment must contain: . . . (3) Criminal charges pleaded as provided in Article 49 of [Chapter 15A], Pleadings and Joinder[.]"); *see also State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (2003) ("An indictment, as referred to in [N.C. Const. art. I, § 22] . . . , is a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill. To be sufficient under our Constitution, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." (citation and quotation marks omitted)); *State v. Jones*, 157 N.C. App. 472, 477, 579 S.E.2d 408, 411 (2003) ("[A] citation is not an indictment[.]").

Id. at ___, 783 S.E.2d at 800-01.

Similarly, in *State v. Monroe*, 57 N.C. App. 597, 598, 292 S.E.2d 21, 21-22 (1982), the defendant argued that a jurisdictional defect existed for his charges of driving under the influence and driving while license revoked. Defendant filed a motion pursuant to Section 15A-922(c) in Superior Court. *Id.* This Court held that

> [h]ad defendant filed his motion prior to his trial at district court, the statute would indeed have precluded his trial on the citation alone. . . . [But] [o]nce jurisdiction had been established and defendant had been tried in district court, therefore, he was no longer in a position to assert his statutory right to object to trial on citation when he appealed to superior court.

Id. at 598-99, 292 S.E.2d at 22. S*ee also State v. Phillips*, 149 N.C. App. 310, 318, 560 S.E.2d 852, 857 ("[The] defendant's objection to trial by citation must be asserted in the court of original jurisdiction, in this case, the district court." (citation omitted)), *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002).

Defendant contends the trial court lacked jurisdiction to try him for a violation of N.C. Gen. Stat. § 20-138.7(a), and asserts that the citation

charging him failed to allege an essential element of that statutory offense. However, the citation issued to Defendant by Officer Johnson complied with the provisions of N.C. Gen. Stat. § 15A-302(c). The citation properly identified the crime of having an open container of alcohol in the car while alcohol remained in his system, charged by citing N.C. Gen. Stat. § 20-138.7(a) and stating Defendant had an open container of alcohol after drinking. Identifying a crime charged does not require a hyper-technical assertion of each element of an offense, nor does it require the specificity of a "statement of the crime" necessary to issue a warrant or criminal summons.

However, a citation charging the offense of driving with an open container after consuming must include additional information to be considered sufficient.

> (g) Pleading. — In any prosecution for a violation of subsection (a) of this section, *the pleading is sufficient* if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a motor vehicle on a highway or the right-of-way of a highway with an open container of alcoholic beverage after drinking.

N.C. Gen. Stat. § 20-138.7(g) (2015) (emphasis added). Pursuant to the Official Commentary to Article 49, issues concerning the sufficiency of pleadings in citations are to be addressed through a Section 15A-922(c) motion.

The citation at issue here satisfied the requirements of Section 15A-302, establishing jurisdiction in the District Court division. Defendant's concern regarding sufficiency of the offense charged in the citation required an objection to trial on the citation at the district court level. Because Defendant failed to file a motion pursuant to Section 15A-922(c), he was no longer in a position to assert his statutory right to object to trial on citation, or to the sufficiency of the allegations set forth in Section 20-138.7(g).

Even if, assuming *arguendo*, Defendant was not required to object, the failure to comply with N.C. Gen. Stat. § 15A-924(a)(5) by neglecting to allege facts supporting every element of an offense in a citation is not a *jurisdictional* defect.

Our state constitution requires an indictment to allege each element as a prerequisite of the superior court's jurisdiction. "Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment,

presentment, or impeachment." N.C. Const. art. I, § 22. Therefore, the constitution does not so require for a citation charging a misdemeanor to allege each element as a prerequisite of the district court's jurisdiction.

Our Supreme Court has held that "[every defendant] charged with a criminal offense has a right to the decision of twenty-four of his fellow-citizens upon the question of his guilt: first, by a grand jury [of twelve], and secondly, by a petit jury [of twelve][.]" *State v. Barker*, 107 N.C. 913, 918, 12 S.E. 115, 117 (1890) (citation and quotation marks omitted). That is, where the prosecutor elects to use an indictment, the superior court does not obtain jurisdiction to try a defendant unless a grand jury of twelve has first determined that probable cause exists that the defendant committed the crime. *See State v. Abraham*, 338 N.C. 315, 339, 451 S.E.2d 131, 143 (1994) ("It is well settled that a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." (citation and quotation marks omitted)). *See also State v. Thomas*, 236 N.C. 454, 458-61, 73 S.E.2d 283, 286-88 (1952). Further, our Supreme Court has instructed that "[t]o be sufficient under our Constitution, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003) (citations and quotation marks omitted).

In sum, if an indictment is returned by a grand jury without referencing each element, it cannot be said that the grand jury found probable cause that the defendant committed the crime charged – which, under our constitution where an indictment is used, is required to empower the superior court to try the defendant.

As mentioned above, citations differ from indictments. Our constitution does not require a grand jury to make a probable cause determination for misdemeanors tried in district court as a jurisdictional prerequisite. Therefore, any failure of a law enforcement officer to include each element of the crime in a citation is not fatal to the district court's jurisdiction. Moreover, the record establishes that Defendant was apprised of the charge against him and would not be subject to double jeopardy.

Defendant's contention of error is overruled.

NO ERROR.

Judge DILLON concurs.

Judge ZACHARY dissents with separate opinion.

ZACHARY, Judge, dissenting:

Defendant appeals from the judgment entered upon his conviction of operating a motor vehicle with an open container of alcohol in the passenger area of his car while alcohol remained in his system. On appeal, defendant argues that the trial court lacked subject matter jurisdiction over the charge because the citation that the State used as the criminal pleading did not state facts supporting the elements of this criminal offense, as required by long-standing appellate jurisprudence and the express language of N.C. Gen. Stat. § 15A-924 (2015). The majority opinion holds that a citation is not required to comply with the statutory requirements for all criminal pleadings, but need only meet the requirements of N.C. Gen. Stat. § 15A-302 (2015) for use of a citation as a form of process to secure defendant's attendance in court. Because I disagree with this conclusion, I must respectfully dissent.

Background

On 4 January 2015, a Raleigh police officer stopped a car driven by defendant, based upon the officer's estimation that defendant was exceeding the legal speed limit. When the officer approached defendant's car, he observed an open can of beer in the center console next to defendant. After determining that defendant was not impaired, the officer issued a citation that purported to charge defendant with speeding and with operating a motor vehicle with an open container of alcohol while alcohol remained in his system. Defendant was convicted of both offenses in district court and appealed to superior court for a trial *de novo*, where the jury returned a verdict finding defendant guilty of operating a motor vehicle with an open container of alcohol in the passenger area of the car with alcohol remaining in his system. Defendant noted an appeal to this Court.

Standard of Review

Defendant argues that the trial court lacked subject matter jurisdiction to try him for a violation of N.C. Gen. Stat. § 20-138.7(a) (2015), on the grounds that the citation that purported to charge him with this offense did not meet the requirements for a valid criminal pleading. "A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case." *State v. Haddock*, 191 N.C. App. 474, 476, 664 S.E.2d 339, 342 (2008) (citations omitted). "The subject matter jurisdiction of the trial court is a question of law, which this Court reviews *de novo* on appeal." *State v. Barnett*, 223 N.C. App. 65, 68, 733

S.E.2d 95, 98 (2012) (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted).

Preservation of Issue for Appellate Review

The majority opinion emphasizes the district court's general jurisdiction over the trial of misdemeanors, and the jurisdiction of our superior courts to conduct a trial *de novo* upon a criminal defendant's appeal from district court. Defendant has not challenged the trial court's general jurisdiction. However, "a trial court's general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action." *In re McKinney*, 158 N.C. App. 441, 447, 581 S.E.2d 793, 797 (2003) (citation omitted).

The majority opinion also discusses N.C. Gen. Stat. § 15A-952(c) (2015), which provides that a "defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading." The majority opinion appears to hold that by failing to file such a motion in district court, defendant has lost the right to challenge the trial court's subject matter jurisdiction. The majority opinion notes that defendant "contends [that] the trial court lacked jurisdiction to try him . . . when the citation charging him failed to allege an essential element" of the charged offense. The opinion then holds that "Defendant was required to raise any objection to trial on the citation at the district court level. Defendant's failure to object to proceeding by citation established jurisdiction in district court." This indicates that the majority opinion is holding that defendant has waived review of the issue of the trial court's subject matter jurisdiction to try him. However, it is axiomatic that:

> A court must have subject matter jurisdiction in order to decide a case. . . . As a result, subject matter jurisdiction may be raised at any time, whether at trial or on appeal, *ex mero motu*. "A party may not waive jurisdiction, and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking."

State v. Sellers, __ N.C. App. __, __, 789 S.E.2d 459, 465 (2016) (quoting *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 882 (2000) (other citations omitted) (emphasis added). Moreover, N.C. Gen. Stat. § 15A-1446(d) (2015) specifically provides that:

> Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division. . . . (4) The pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5).

To the extent that the majority opinion holds that defendant has waived his right to seek review of the issue of the trial court's subject matter jurisdiction, I believe this holding to be inconsistent with long-standing legal principles of our jurisprudence.

Requirements for a Valid Criminal Pleading in North Carolina

Defendant was charged in a two-count citation with two separate offenses. Defendant has not challenged the validity of the charge of speeding, for which the jury found him not guilty. The pivotal issue in this case is whether the second count of the citation met the requirements for a valid criminal pleading, thus giving the trial court subject matter jurisdiction over the charge of driving a motor vehicle on a public highway with an open container of alcohol in the passenger area of the car while alcohol remained in defendant's system. I would hold that, upon application of the plain language of the statutes governing criminal pleadings in North Carolina, the citation is invalid.

A criminal pleading is "[a]n indictment, information, or complaint by which the government begins a criminal prosecution." BLACK'S LAW DICTIONARY 8th Edn. 1190. The State charges a criminal offense in a pleading. N.C. Gen. Stat. § 15A-921 (2015) sets out the documents that may be used as the State's pleading in a criminal case in North Carolina, and states that "the following may serve as pleadings of the State in criminal cases:

(1) Citation.
(2) Criminal summons.
(3) Warrant for arrest.
(4) Magistrate's order . . . after arrest without warrant.
(5) Statement of charges.
(6) Information.
(7) Indictment.

The general requirements for all criminal pleadings are set out in N.C. Gen. Stat. § 15A-924(a) (2015), which states in relevant part that:

> (a) A criminal pleading must contain:
>
> (1) The name or other identification of the defendant[.]
>
> (2) A separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count.
>
> (3) A statement or cross reference in each count indicating that the offense charged therein was committed in a designated county.
>
> (4) A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date[.]
>
> (5) A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. . . .
>
> (6) For each count a citation of any applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. . . .

It is well established that "[N.C. Gen. Stat. §] 15A-924 codifies the requirements of a criminal pleading. A criminal pleading must contain, *inter alia* . . . '[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof[.]' " *State v. Saults*, 294 N.C. 722, 724, 242 S.E.2d 801, 803-04 (1978). The purpose of this requirement is:

> (1) [to provide] such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case.

State v. Greer, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). Thus, "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 41 L. Ed. 2d 590, 620 (1974).

"This constitutional mandate, however, merely affords a defendant the right to be charged by a lucid prosecutive statement which factually particularizes the essential elements of the specified offense. *See* G.S. 15A-924(a)(5)[.]" *State v. Sturdivant*, 304 N.C. 293, 309, 283 S.E.2d 719, 730 (1981). "N.C.G.S. § 15A-924 does not require that an indictment contain any information beyond the specific facts that support the elements of the crime." *State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 512 (1995).

"An indictment is invalid and prevents the trial court from acquiring jurisdiction over the charged offense if [it] 'fails to state some essential and necessary element of the offense of which the defendant is found guilty.' " *State v. McNeil*, 209 N.C. App. 654, 658, 707 S.E.2d 674, 679 (2011) (quoting *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998)). "Lack of jurisdiction in the trial court due to a fatally defective indictment requires 'the appellate court . . . to arrest judgment or vacate any order entered without authority.' " *State v. Galloway*, 226 N.C. App. 100, 103, 738 S.E.2d 412, 414 (2013) (quoting *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993)).

The vast majority of our appellate cases addressing the sufficiency of a criminal pleading arise in the context of indictments. However, N.C. Gen. Stat. § 15A-924 states the general requirement that a "criminal pleading" must contain certain information, and does *not* limit its application to a subset of the types of criminal pleadings listed in N.C. Gen. Stat. § 15A-921. In addition, the requirement that a criminal pleading must state facts supporting the elements of the charged offense has been addressed in cases in which a defendant's conviction was based on a criminal pleading other than an indictment. *See*, *e.g.*, *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984) (addressing the sufficiency of the factual allegations in a citation charging the defendant with impaired driving), *State v. Balance*, 218 N.C. App. 202, 720 S.E.2d 856 (2012) (applying the requirements of N.C. Gen. Stat. § 15A-924(a) to a misdemeanor statement of charges), and *State v. Camp*, 59 N.C. App. 38, 41-42, 295 S.E.2d 766, 768 (1982) (applying requirement that a criminal pleading must state facts supporting the elements of the charged offense to a warrant).

In sum, N.C. Gen. Stat. § 15A-921 expressly states that a citation may serve as the State's pleading in a criminal case, and N.C. Gen. Stat. § 15A-924(a)(5) requires that every criminal pleading must contain facts supporting each of the elements of the criminal offense with which the defendant is charged. There do not appear to be any appellate cases holding that N.C. Gen. Stat. § 15A-924 does not apply to a citation used

as the pleading in a criminal case. Under the plain language of these statutes, when a citation is used by the State as the pleading in a criminal case, it must -- like any other criminal pleading -- allege facts that support the elements of the offense with which the defendant is charged.

Discussion

Defendant was convicted of operating a motor vehicle with an open container of alcohol in the passenger area of the car while alcohol remained in his system, in violation of N.C. Gen. Stat. § 20-138.7(a) (2015). This statute provides that "[n]o person shall drive a motor vehicle on a highway or the right-of-way of a highway: (1) While there is an alcoholic beverage in the passenger area in other than the unopened manufacturer's original container; and (2) While the driver is consuming alcohol or while alcohol remains in the driver's body." The elements of this offense are that the defendant (1) drove a motor vehicle on a highway or right-of-way of a highway, (2) with an open container of an alcoholic beverage in the passenger area of the car, (3) while alcohol remained in the defendant's body.

The charging language of the citation issued in order to compel defendant's attendance in court states the following:

> The officer named below has probable cause to believe that on or about *Sunday*, the *04* day of *January 2015* at *10:16 p.m.* in the county named above you did unlawfully and willfully
>
> *OPERATE A MOTOR VEHICLE ON A STREET OR HIGHWAY AT A SPEED OF 62 MPH IN A 45 MPH ZONE. (G.S. 20-141(J1))*
>
> and on or about *Sunday*, the *04* day of *January 2015* at *10:16 p.m.* in the county named above you did unlawfully and willfully
>
> *WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING. (G.S. 20-138.7(a))*
>
> (Underlined script indicates information added by the law enforcement officer on a Uniform Citation Form).

The citation thus charges that on Sunday, 4 January 2015, defendant "did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING. (G.S. 20-138.7(a))." This sentence fragment fails to include a verb stating *what* defendant did "with an open container of alcohol." Specifically, it fails to allege that

defendant operated a motor vehicle on a public road or highway, or even that he "drove." Nor does the citation allege that the open container of alcohol was in the passenger area of defendant's car. The citation fails to allege facts that would support two of the three elements of the offense: that defendant drove on a public highway, or that he had an open container of alcohol in the passenger area of the car. As a result, the citation did not comply with the requirements of N.C. Gen. Stat. § 15A-924 and did not confer subject matter jurisdiction upon the trial court. The majority opinion reaches the contrary conclusion and holds that the citation was valid. After careful consideration of the reasoning supporting this holding, I am unable to agree.

Firstly, in its assessment of the validity of the citation, the majority includes notes made by the charging officer in a box below the charging language with the heading "Officer's Comments." No legal basis for including this language is set out in the opinion. Moreover, the "Officer's Comments" do not state that defendant was driving a motor vehicle upon a public road.

Secondly, the majority opinion appears to adopt the State's argument that we should read the language of the first count, which alleges that defendant operated a motor vehicle at a speed in excess of the legal speed limit, and then add only the word "and" from the second count (which alleges that "and on or about Sunday, the 04 day of January 2015 at 10:16 PM in the county named above you did unlawfully and willfully"), and by this means arrive at a reading of the citation stating that defendant "operated a motor vehicle" at an excessive speed "and" (omitting the words "on or about Sunday, the 04 day of January 2015 at 10:16 PM in the county named above you did unlawfully and willfully") "with an open container of alcoholic beverage after drinking." However, no authority is cited in support of this procedure, and "[i]t is settled law that each count of an indictment containing several counts should be complete in itself." *State v. Moses*, 154 N.C. App. 332, 336, 572 S.E.2d 223, 226 (2002) (internal quotation omitted). By the same measure, each count of a criminal pleading, such as a citation, containing several counts should be complete in itself.

The holding of the majority opinion that the citation issued in this case was valid is based primarily upon the language of N.C. Gen. Stat. § 15A-302 (2015). The opinion states that "[f]or a citation to be valid, it must contain" the information specified in N.C. Gen. Stat. § 15A-302(b). The flaw in this argument is that N.C. Gen. Stat. § 15A-302 is a statute contained in N.C. Gen. Stat. § 15A, Article 17, entitled "Criminal Process,"

which addresses the use of a citation as criminal *process*, and not as a *pleading*. The majority fails to acknowledge this issue or to articulate a basis for applying the requirements for use of a citation as a form of process, rather than the specific statutory criteria for use of a citation as a criminal pleading.

The Official Commentary to Article 17 states that "[c]riminal process includes the citation, criminal summons, warrant for arrest, and order for arrest. They all serve the function of requiring a person to come to court." This language is consistent with the definition of "criminal process" as "[a] process (such as an arrest warrant) that issues to compel a person to answer for a crime." BLACK'S LAW DICTIONARY, 8th Edn. 1242. The statutes in Article 17 govern the requirements for issuance of process requiring a defendant to appear in court and answer a criminal charge. For example, N.C. Gen. Stat. § 15A-301 (2015) states that:

> (a)(2) "Criminal process, other than a citation, must be signed and dated by the justice, judge, magistrate, or clerk who issues it. The citation must be signed and dated by the law-enforcement officer who issues it."
>
> (b) Warrants for arrest and orders for arrest must be directed to a particular officer, a class of officers, or a combination thereof, having authority and territorial jurisdiction to execute the process. A criminal summons must be directed to the person summoned to appear[.] . . . The citation must be directed to the person cited to appear.

Similarly, N.C. Gen. Stat. § 15A-302 sets out the requirements for the use of a citation as criminal *process*:

> (a) A citation is a directive, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges. (emphasis added).
>
> . . .
>
> (c) Contents. -- The citation must:
>
> (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,
>
> (2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,

> (3) Identify the officer issuing the citation, and
>
> (4) Cite the person to whom issued to appear in a designated court, at a designated time and date.
>
> (d) A copy of the citation shall be delivered to the person cited who may sign a receipt on the original which shall thereafter be filed with the clerk by the officer. . . .

The functions of a criminal pleading, which are discussed above, are fundamentally different from the purpose of criminal process, which is simply to secure the defendant's attendance in court. Notably, an indictment, which is the primary form of criminal pleading, is not included as a permissible type of criminal process. The majority opinion holds that "[f]or a citation to be valid" it need only comply with N.C. Gen. Stat. § 15A-302(c). However, the majority offers no basis upon which to ignore the express language of N.C. Gen. Stat. § 15A-924, which governs the requirements for all criminal pleadings, in favor of N.C. Gen. Stat. § 15A-302, which sets out the requirements for the use of a citation as criminal process.

I conclude that equating the requirements for process with those applicable to pleadings is a classic "apples to oranges" comparison. This position finds support in the language of the relevant statutes and in this Court's opinion in *State v. Garcia*, 146 N.C. App. 745, 553 S.E.2d 914 (2001). In *Garcia*, the defendant was served with an arrest warrant charging him with assault. On appeal, the defendant argued that the arrest warrant, although adequate to compel him to appear in court, failed to satisfy the requirements for a criminal pleading. We agreed, and held that:

> A warrant for an arrest "must contain a statement of the crime of which the person to be arrested is accused. No warrant for arrest . . . is invalid because of any technicality of pleading if the statement is sufficient to identify the crime." N.C.G.S. § 15A-304(c) (1999). <u>If the arrest warrant, however, is used as a criminal pleading</u> pursuant to N.C. Gen. Stat. § 15A-921(3), it must contain "[a] plain and concise factual statement . . . which . . . asserts facts supporting every element of [the] criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (1999).

Garcia, 146 N.C. App. at 746, 553 S.E.2d at 915 (emphasis added).

Given that (1) when used as criminal *process*, both warrants and citations must "identify the crime" charged; (2) N.C. Gen. Stat. § 15A-921 includes both warrants and citations as valid criminal pleadings; and (3) N.C. Gen. Stat. § 15A-924 requires that all criminal pleadings state facts supporting the elements of the offense with which the defendant is charged, I would conclude that the holding of *Garcia* is equally applicable to the instant case. I cannot agree that the criminal process requirements of N.C. Gen. Stat. § 15A-302, rather than the pleading requirements of N.C. Gen. Stat. § 15A-924, should determine the resolution of this case. *See also State v. Cook*, 272 N.C. 728, 731, 158 S.E.2d 820, 822 (1968) ("[T]he warrant fails to allege an essential element of the offense[.] . . . This defect is not cured by reference in the warrant to the statute.").

The majority opinion also notes this Court's opinion in *State v. Allen*, __ N.C. App. __, 783 S.E.2d 799 (2016). In *Allen*, the defendant was charged in a citation with a violation of N.C. Gen. Stat. § 18B-401(a) (2015), which makes it unlawful "for a person to transport fortified wine or spirituous liquor in the passenger area of a motor vehicle in other than the manufacturer's unopened original container." On appeal, the defendant argued that the trial court lacked jurisdiction to try him, on the grounds that the charging citation failed to allege an essential element of the offense. This Court held that the citation complied with the requirement of N.C. Gen. Stat. § 15A-302 that the citation "[i]dentify the crime charged." Apparently the charging citation was also used as the State's criminal pleading in *Allen*. However, *Allen* did not cite N.C. Gen. Stat. § 15A-924(b)(5) or address the requirements of that statute for all criminal pleadings. As a result, *Allen* is distinguishable from the present case.

Conclusion

The majority opinion holds that when a citation is used by the State as a criminal pleading, the law "does not require a hyper-technical assertion of each element of an offense[.]" However, our legislature enacted N.C. Gen. Stat. § 15A-921 and N.C. Gen. Stat. § 15A-924, and thereby determined the types of documents that may serve as a criminal pleading as well as the level of specificity required. These statutes plainly state that a citation may serve as the State's criminal pleading and that criminal pleadings must state facts supporting the elements of the charged offense. "This policy decision is within the legislature's purview," *Hest Techs., Inc. v. State of N.C. ex rel. Perdue*, 366 N.C. 289, 303, 749 S.E.2d 429, 439 (2012), and "[w]hen the language of a statute is clear and unambiguous, it must be given effect and its clear meaning

may not be evaded . . . under the guise of construction." *State v. Bates*, 348 N.C. 29, 34-35, 497 S.E.2d 276, 279 (1998) (citation and internal quotation marks omitted).

For the reasons discussed above, I conclude that the citation charging that defendant "unlawfully and willfully with an open container of alcoholic beverage after drinking" failed to state facts that would support the elements of the offense of operating a motor vehicle with an open container of alcohol in the passenger area of the car while alcohol remained in the defendant's system. Pursuant to N.C. Gen. Stat. § 15A-924(a)(5), all criminal pleadings, including citations, must allege facts that establish every element of the offense with which the defendant is charged. For this reason, I cannot agree with the holding of the majority opinion and must respectfully dissent.

STATE OF NORTH CAROLINA
v.
CHESSICA PETERS, DEFENDANT

No. COA17-91

Filed 5 September 2017

1. Appeal and Error—preservation of issues—failure to renew motion to dismiss after jury verdict—general motions at both close of State's evidence and all evidence

The State's argument in a delaying a public officer case that defendant failed to preserve review based on failure to renew a motion to dismiss after the jury rendered its verdict was without merit where defendant made general motions to dismiss at both the close of the State's evidence and at the close of all evidence.

2. Police Officers—delaying a public officer—motion to dismiss—sufficiency of evidence—wrongful deed

The trial court did not err by denying defendant's motion to dismiss the charge of delaying a public officer in a shoplifting case based on alleged insufficient evidence of a wrongful deed. Defendant produced an altered ID and knowingly stated that the erroneous number on the ID was accurate, thus causing an officer to spend more time locating records associated with defendant to continue the investigation.

3. Police Officers—delaying a public officer—motion to dismiss —sufficiency of evidence—intent—willfulness

The trial court did not err by denying defendant's motion to dismiss the charge of delaying a public officer in violation of N.C.G.S. § 14-223 in a shoplifting case based on alleged insufficient evidence of intent. An officer's testimony about his interactions with defendant at the time of her arrest gave rise to an inference that defendant willfully gave false information for the purpose of delaying the officer in the performance of his duties.

Appeal by defendant from judgment entered 2 September 2016 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 8 June 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Durwin P. Jones, for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.

BERGER, Judge.

Chessica Peters ("Defendant") appeals from judgment entered following her conviction for attempting to obtain property by false pretense, possessing or displaying an altered North Carolina driver's license, and delaying a public officer in the discharge of his duties. Defendant was sentenced as an habitual felon to 95 to 126 months in prison.

Defendant has only challenged her conviction for the Class 2 misdemeanor of delaying a public officer in violation of N.C. Gen. Stat. § 14-223 (2015). Specifically, Defendant contends the trial court erred by denying her motion to dismiss when the State failed to introduce sufficient evidence that she delayed a public officer or intended to delay a public officer. We disagree.

Factual & Procedural Background

On June 28, 2015, Larkin Anderson ("Anderson"), a loss prevention officer for Wal-Mart, Inc., Store 1027, ("Wal-Mart") observed a female enter Wal-Mart with two expensive, identical blenders. She approached the customer service counter, returned the two blenders for a refund, purchased two vacuum cleaners and two toys, and then exited the store. After she had loaded her purchased items into her vehicle, she handed Defendant her receipt and drove away.

Defendant then entered Wal-Mart, selected two vacuums and two toys identical to the ones purchased formerly. She proceeded to Wal-Mart's garden center exit with them, rather than returning to the general entrance through which she originally came. Defendant picked up an additional item and paid cash for it, and presented the cashier with the receipt that was given to Defendant in the parking lot. Defendant then left Wal-Mart through the garden center exit, without paying for the vacuums or the toys.

Anderson approached Defendant outside the doors of the garden center and confronted her about her apparent theft. Anderson asked Defendant to accompany him to the store's Asset Protection Office, and held her there until a law enforcement officer could arrive to investigate the incident.

Officer Parker Phillips ("Officer Phillips") of the Concord Police Department reported to the Wal-Mart as the investigating officer. Officer Phillips first attempted to identify Defendant by requesting an identification card ("ID"). Defendant produced a North Carolina ID that she gave to Officer Phillips. He stepped outside of the office, and radioed his dispatch officer asking for information related to the license number on Defendant's ID.

The dispatch officer reported that the name associated with the given ID number differed from the one listed on the ID. Officer Phillips returned to the office and asked Defendant if the numbers on the ID were correct, and Defendant confirmed that they were. Officer Phillips then asked Defendant if there were any additional numbers, as it appeared the ID had been altered. Defendant replied that there may have been an "8" missing from the end of the ID number. Officer Phillips asked if she was certain there were no other numbers missing, to which Defendant stated, "there's no other numbers, just an 8." Officer Phillips again requested the dispatch officer to check the ID number, now including the "8", and again was given a name that did not match the ID.

Officer Phillips then asked the dispatch officer to search using Defendant's name and date of birth. This search proved fruitful, and the dispatch officer reported that Defendant's ID number also included a "0". All other information on Defendant's ID – her name, date of birth, race, etc. – was correct. The dispatch officer also reported that Defendant had "a couple outstanding warrants." Officer Phillips then charged Defendant with resisting, delaying, or obstructing a public officer in the performance of his duties for "verbally giving an incorrect driver's license ID number."

Officer Phillips testified at trial that the delay in Defendant's identification could have been avoided had he initially requested a search using her name and birth date as the parameters. However, Concord Police officers are trained to search records by license number when doing so over their radios, and Officer Phillips followed this protocol.

On July 6, 2015, Defendant was indicted by a Cabarrus County grand jury for attempting to obtain property by false pretense, in violation of N.C. Gen. Stat. § 14-100 (2015); possessing or displaying an altered North Carolina driver's license, in violation of N.C. Gen. Stat. § 20-30(1) (2015); and willfully and unlawfully resisting, delaying, or obstructing a public officer in discharging or attempting to discharge a duty of his office, in violation of N.C. Gen. Stat. § 14-223 (2015). On August 17, 2015, Defendant was indicted as an habitual felon pursuant to N.C. Gen. Stat. § 14-7.1 (2015). Beginning on August 31, 2016, Defendant was tried before a jury, and found guilty of all charges on September 2, 2016. Defendant subsequently pleaded guilty to having attained habitual felon status. These convictions were consolidated into a single active sentence of 95 to 126 months in prison. Defendant gave timely notice of appeal at the close of her trial.

Analysis

[1] Initially, we must address the State's argument that Defendant failed to preserve her right to appeal the denial of her motion to dismiss for insufficiency of the evidence. Defendant allegedly failed preservation of her appellate rights when she did not renew her motion to dismiss after the jury rendered its verdict. "In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial." N.C.R. App. P. 10(a)(3) (2015).

In this case, Defendant made general motions to dismiss at both the close of the State's evidence, and at the close of all evidence. "A general motion to dismiss requires the trial court to consider the sufficiency of the evidence on all elements of the challenged offenses, [which] thereby preserv[es] the arguments for appellate review." *State v. Walker*, ___ N.C. App. ___, ___, 798 S.E.2d 529, 531, *disc. review denied*, ___ N.C. ___, 799 S.E.2d 619 (2017). The State's argument that Defendant failed to preserve her right to review is therefore without merit, and we proceed to Defendant's appeal.

Both of Defendant's issues asserted on appeal pertain to the denial of her motion to dismiss and the related allegations that the State introduced insufficient evidence of two elements required for a conviction

of delaying a public officer in the discharge of his duties pursuant to N.C. Gen. Stat. § 14-223. We review the denial of a motion to dismiss for insufficient evidence *de novo*. *State v. Bagley*, 183 N.C. App. 514, 526, 644 S.E.2d 615, 621 (2007) (citation omitted).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

"In making its determination, the trial court must consider all [competent] evidence admitted . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995) (citation omitted).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

Fritsch, 351 N.C. at 379, 526 S.E.2d at 455 (citations, emphasis, quotation marks, and brackets omitted).

N.C. Gen. Stat. § 14-223 proscribes not merely resisting an arrest, but includes any willful and unlawful resistance, delay, or obstruction of a public officer in the discharge of his or her duty. *State v. Newman*, 186 N.C. App. 382, 388, 651 S.E.2d 584, 588 (2007), *disc. review denied*, ___ N.C. ___, 667 S.E.2d 234 (2008) (citation omitted). Violation of this statute is a Class 2 misdemeanor. G.S. § 14-223 (2015). The essential elements of this 'resist, delay, or obstruct' charge are:

(1) that the victim was a public officer;

(2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;

(3) that the victim was discharging or attempting to discharge a duty of his office;

(4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and

(5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Washington, 193 N.C. App. 670, 679, 668 S.E.2d 622, 628 (2008), *appeal dismissed*, *disc. review denied*, ___ N.C. ___, 674 S.E.2d 420 (2009) (citation and brackets omitted). Section 14-223 has been interpreted by this Court to embrace as punishable the "failure to provide information about one's identity during a lawful stop[,]" but this Court also noted that "[t]here are, of course, circumstances where one would be excused from providing his or her identity to an officer[.]" *State v. Friend*, 237 N.C. App. 490, 493, 768 S.E.2d 146, 148 (2014), *disc. review denied*, ___ N.C. ___, 771 S.E.2d 308 (2015); *see also Roberts v. Swain*, 126 N.C. App. 712, 724, 487 S.E.2d 760, 768 (holding that a defendant's refusal to give his social security number to police officers could not be used as the basis for a resisting charge pursuant to N.C. Gen. Stat. § 14-223), *review denied*, 347 N.C. 270, 493 S.E.2d 746 (1997).

In the case *sub judice*, Defendant has only challenged the sufficiency of the evidence introduced by the State to prove element four, that she resisted, delayed, or obstructed an officer; and element five, that this conduct was intentional. We therefore must review whether sufficient evidence of both the wrongful deed and the requisite intent was introduced.

[2] The evidence tended to show that Defendant's conduct did delay Officer Phillips, satisfying element four. This is irrespective of Defendant's contention that Officer Phillips could have chosen other methods of investigation to confirm Defendant's information that would not have resulted in delay. Officer Phillips testified that he had requested Defendant's ID; Defendant voluntarily produced an ID with an altered identification number; he asked Defendant "if this was the correct number on the ID"; Defendant affirmed that it was, knowing that it was not. Defendant's production of an altered ID, coupled with her affirmation

that the number on the ID was accurate, caused Officer Phillips to spend more time than he would have otherwise to locate records associated with Defendant so that he could continue his investigation. Therefore, sufficient evidence was introduced for this element to allow resolution by the jury.

[3] The evidence also permitted a reasonable inference that Defendant had the requisite intent to delay and obstruct Officer Phillips, satisfying the intent requirement of element five. To establish guilt beyond a reasonable doubt, Section 14-223 requires that the State prove a defendant acted "willfully" when resisting, delaying, or obstructing a public officer in the discharge of his or her duties. To prove 'willfulness,' the State must introduce sufficient evidence that the defendant acted without justification or excuse, "purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 349, 141 S.E.2d 473, 474 (1965) (citation omitted). "Because willfulness is a mental state, it often must be inferred from the surrounding circumstances rather than proven through direct evidence." *State v. Crockett*, 238 N.C. App. 96, 106, 767 S.E.2d 78, 85 (2014), *aff'd*, 368 N.C. 717, 782 S.E.2d 878 (2016) (citation omitted).

When used in a criminal statute, 'willful' is to be interpreted as

> something more than an intention to do a thing. It implies the doing [of] the act purposely and deliberately, indicating a purpose to do it without authority – careless whether he has the right or not – in violation of law, and it is this which makes the criminal intent without which one cannot be brought within the meaning of a criminal statute.

State v. Moore, 240 N.C. App. 465, 478, 770 S.E.2d 131, 141, *writ denied*, *disc. review denied*, 368 N.C. 353, 776 S.E.2d 854 (2015) (citation omitted). "When intent is an essential element of a crime the State is required to prove the act was done with the requisite specific intent, and it is not enough to show that the defendant merely intended to do that act." *State v. Brackett*, 306 N.C. 138, 141, 291 S.E.2d 660, 662 (1982) (citation omitted).

Here, Officer Phillips testified that, from his law enforcement training, he knew that subjects being investigated for charges similar to those in this case would scratch numbers off of their identification cards. This was done so that, if apprehended by a retailer, when that retailer went to press charges against the subject it would be unable to identify him or her with the incomplete or incorrect number from their ID. That is exactly what

happened here when Officer Phillips attempted to run the incomplete information: the inability to properly identify Defendant. The jury could reasonably find from the evidence presented that Defendant intended to delay Officer Phillips by her failure to provide complete information.

Officer Phillips' testimony about his interactions with Defendant at the time of her arrest gives rise to an inference that Defendant was willful in the giving of false information, i.e., she intended to give a false statement for the purpose of delaying Officer Phillips in the performance of his duties.

Conclusion

Defendant received a fair trial, free from error. As explained above, the State introduced sufficient evidence of both Defendant's intent to delay and her actual delay of Officer Phillips in the performance of his duties. The trial court did not err in denying Defendant's motion to dismiss.

NO ERROR.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY NEAL PRINCE

No. COA16-1275

Filed 5 September 2017

1. Evidence—felony child abuse—nurse practitioner testimony—vouching for victim's credibility

The trial court did not commit plain error in a child abuse case by concluding a nurse practitioner's testimony relating the victim's disclosure about how his injuries occurred and who caused the injuries was not improper vouching. The nurse was describing her process of gathering necessary information to make a medical diagnosis, and further, there was no prejudice based on the overwhelming evidence of defendant's guilt, including the testimony of three eyewitnesses.

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

Defendant did not receive ineffective assistance of counsel in a child abuse case where defense counsel's "failure" to object to alleged improper vouching testimony was not objectionable and could not serve as the basis for a viable ineffective assistance of counsel claim.

Appeal by defendant from judgment entered 9 May 2016 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 8 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth N. Strickland, for the State.

Mark Montgomery for the defendant-appellant.

BRYANT, Judge.

Where an expert witness's testimony did not constitute improper vouching, the trial court did not err in admitting the testimony. Furthermore, defendant did not receive ineffective assistance of counsel where defendant's trial counsel failed to object to testimony that was admissible.

Perry,[1] the minor victim in this case, originally lived with his mother, father, sister Nancy,[2] and other siblings in New York. When the family split up, Perry, Nancy,and two other siblings moved to North Carolina to live with their aunt, cousins, and grandmother. After a while, his mother came to North Carolina and Perry and his siblings moved in with her.

When Perry was thirteen years old, his mother brought defendant Timothy Neal Prince into their home in Raleigh. According to Perry, defendant and his mother were in a relationship for about six months. At first, Perry thought defendant was "cool," but after a few days, defendant got upset and punched Perry's mother in the stomach and then punched Perry in the face. The next night, defendant got upset again and hit Perry's mother and threw a night stand at her. Perry was hit by the night

1. A pseudonym will be used for the minor child victim.

2. A pseudonym will also be used to refer to Perry's sister, who was fourteen years old at the time of trial.

stand when he tried to grab it. Perry was beaten by defendant on several other occasions, at least three times while trying to defend his mother.

On one occasion, defendant took Perry and his family to a cookout party. Defendant was drinking. At some point during the party, defendant asked Perry and defendant's niece to come outside. Defendant told Perry to hit his niece, which Perry refused to do. Defendant then told his niece to hit Perry, which she did. Then, defendant punched Perry in the face. Perry began crying and told a relative that defendant "remind[ed] [him] of [his] father." When defendant heard what Perry had said (Perry's father was abusive), defendant became angry and told Perry, Perry's mother, and Nancy to get in his truck.

At some point on the way home, defendant stopped at a highway exit and told Perry to get out of the truck. Defendant pulled Perry out of the truck and hit him with a bat several times. Perry took off running, and defendant tried to run Perry down with his truck. Eventually, defendant cornered Perry between the woods and the truck and said, "if you don't come out, I will hit you with this bat." Perry's mother was able to convince Perry to walk back and get in the truck. As they got close to home, defendant stopped the truck again, got out of the truck, and hit Perry with the bat. Then, defendant took a metal flashlight and hit Perry three times on the head. The third blow split Perry's "head open," and Perry had to wrap his head in his mother's shirt to avoid getting blood in defendant's truck.

Once at home, defendant told Perry, "I am going to shoot you through the head if this gets out[,]" presumably referring to the abuse he inflicted on Perry. Defendant also told Perry, "if anyone asks you, just say you fell off the bed, the bunk bed." At trial, Nancy testified that "we all lied. We lied to survive."

The next day, Perry's head was still bleeding and aching, and he was limping because of a hurt knee. When later asked why he had not told anyone at school, Perry said, "[b]ecause he, the defendant, had previously been to school and he said no matter where [he] was, if [Perry] told anyone about this, it didn't matter where [he] was, [defendant] would come and find [him] and do it again." Later, when Perry's mother took Perry to the emergency room, defendant was also present either in the treatment room or just outside the door, so Perry was afraid to tell the truth about how his injuries were sustained. Due to the injuries, staples were put in his head and his knee. Perry also had a cast put on his arm for a fracture to the elbow area, which was on for six weeks, followed by another cast.

Perry's mother also testified about a choking incident involving defendant and Perry. The mother did not observe the incident, but heard Perry cry out. According to Perry, defendant wrapped his arm around Perry's neck and choked him, such that Perry was unable to "really breathe" and he was "gasping for air." There was no injury Perry's mother could easily see, but the next morning Perry's eyes looked funny—the blood vessels in his eye were "popped open and bleeding"—so the mother took Perry to the hospital, where he was diagnosed with a form of asphyxiation.

When Perry's maternal aunt came over to the house shortly after Perry's ER visit where his arm was put in a cast, she continued to ask what happened until Perry finally told her that defendant had hit him with a bat. After consulting with family members, Perry's aunt called Child Protective Services ("CPS") that evening.

Initially, when a social worker came to the home, Perry's mother and sisters denied that anything had happened; defendant was present in the room during the social worker's visit. Eventually, however, Nancy told one social worker about what happened because she "couldn't deal with it anymore and [she] didn't want to see nobody hurt." Shortly thereafter, Perry and his siblings were removed from the home. At the time of trial, Perry was residing in a controlled facility in South Carolina receiving treatment for, several conditions, including PTSD and depression.

On 13 January 2014, an arrest warrant was issued for defendant for the offenses of (1) feloniously and intentionally inflicting serious bodily injury (broken arm and head and leg lacerations) on a child (Perry) who was under sixteen years old; and (2) unlawfully and willfully and feloniously assaulting the child and inflicting personal injury (causing subconjunctival hemorrhages by strangulation by placing an arm around Perry's neck and squeezing), in violation of N.C. Gen. Stat. § 14-318.4(a3) and 14-32.4(B). On 27 October 2014, an indictment was returned against defendant for felony child abuse inflicting serious bodily injury and assault by strangulation. Thereafter, a superseding indictment was issued for the same offenses.

The case came on for trial at the 2 May 2016 session of Wake County Criminal Court before the Honorable Graham Shirley, Superior Court Judge presiding. On 9 May 2016, the jury returned a verdict of guilty against defendant for felony child abuse inflicting serious bodily injury and a verdict of not guilty for strangulation.

Defendant was sentenced to 127 to 165 months imprisonment and ordered to undergo a substance abuse assessment, a mental health

assessment, other psychological assessments, as well as anger management or psychological counseling. Defendant entered notice of appeal in open court.

On appeal, defendant contends the trial court committed plain error in allowing a State's expert to vouch for the complainant's credibility. In the alternative, defendant argues he was denied effective assistance of counsel where counsel did not object to the improper vouching of the State's expert witness.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2017); *State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007). Plain error arises when the "error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]' " *State v. Lawrence*, 365 N.C. 506, 516–17, 723 S.E.2d 326, 333 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

A. Expert Vouching for the Truthfulness of a Witness

[1] "The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221, 456 S.E.2d 778, 784 (1995) (citing *State v. Ford*, 323 N.C. 466, 469, 373 S.E.2d 420, 421 (1988)). Indeed,

> [o]ur appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence. However, those cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness.

State v. Bailey, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) (internal citations omitted).

In the instant case, defendant made no objection at trial to the expert testimony given by Holly Warner ("Nurse Warner"), a nurse practitioner who worked with the Safe Child Advocacy Center in 2013. Now, on appeal, defendant claims it was plain error to allow Nurse Warner's testimony. We disagree.

After Perry was placed in foster care, he was evaluated by Nurse Warner. She reviewed his medical records from two emergency room visits, observed an interview he gave where he described two significant events involving physical abuse, and then spoke with Perry about injuries sustained in those events. She also took photos of the injuries, which were admitted into evidence at trial. Nurse Warner testified on direct in relevant part as follows:

> Q. . . . [W]hat, if anything, did [Perry] tell you about how he received those injuries?
>
> A. He told me that [defendant] hit him on the head and the arms and legs, was hitting him with a baseball bat and a flashlight.
>
> Q. At any point did you ask him about the history that was presented to the hospital, that is the bunk bed and hitting on various objects.
>
> A. Yes.
>
> Q. What did he say about that?
>
> A. He said that [defendant] went with him to the hospital to make sure that the hospital didn't know what happened.
>
> . . . .
>
> Q. And at some point, either yourself or with the interview, did [Perry] indicate to you how he received those injuries [to his eyes (the burst blood vessels)]?
>
> A. He did.
>
> Q. What did he say?
>
> A. He said that after school [defendant] came into [his] room screaming and yelling. [Defendant] was behind [him] with his arm around [his] neck. [He] felt like [he] could not breathe or swallow.
>
> [Perry] then says [defendant] left the room and he went to sleep. He reports when he woke up, [his] face was

> swollen and [he] had little red dots on [his] face and on [his] eyes.
>
> He says his mother and [defendant] took him to the hospital a few days later because the red spots in his eyes started turning yellow and [his] mom thought [he] had jaundice.
>
> . . . .
>
> Q. And with respect to [Perry], and in terms of the physical concerns he had described to you, did you come to some sort of medical diagnosis for that?
>
> A. Yes.
>
> Q. What was that?
>
> A. That the injuries were due to child physical abuse.

Here, Nurse Warner was relating what Perry told her about his injuries and what she observed during her evaluation of him before she gave a medical opinion based on her medical diagnosis that Perry was abused. When she related Perry's disclosure about how his injuries occurred and who caused the injuries, she was describing her process of gathering necessary information to make a medical diagnosis. Contrary to defendant's argument, she was not commenting on Perry's credibility.

On cross-examination, Nurse Warner testified that Perry "disclosed being abused by [defendant]," and that she took pictures of the injuries Perry told her were inflicted by defendant. When asked if she had anything "professionally to draw conclusions as to who perpetuated the physical abuse," Nurse Warner responded that she was not present when Perry was injured and that the "evidence [she] [had] is what the child reported and his reported history of the injuries were corroborated by his medical visits and injuries." Nurse Warner stated her professional opinion was that "the child's disclosure matche[d] the injuries he sustained," and "[w]hat the child said is the evidence. That is the evidence that we have." Nurse Warner did not state that Perry was believable, credible, or telling the truth. Thus, defendant's claim that Nurse Warner improperly vouched for Perry's credibility is not supported by her direct or cross-examination testimony. Accordingly, the trial court committed no error, and certainly no plain error, in allowing this testimony.

Even assuming *arguendo* the trial court erred, there is not a reasonable probability that the jury would have reached a different result had counsel objected at any point during Nurse Warner's testimony.

See Lawrence, 365 N.C. at 516–17, 723 S.E.2d at 333. Indeed, the evidence presented at trial of defendant's guilt was overwhelming: three eyewitnesses, including Perry, his mother, and his sister Nancy, testified in great detail about the injuries inflicted on Perry by defendant the night of the cookout, and hospital reports also documented the injuries, which included an injured head, knee, and fractured elbow. Defendant's argument is overruled.

B. Ineffective Assistance of Counsel

[2] In the alternative, defendant contends he was denied effective assistance of counsel when his trial counsel did not object to what defendant argues was improper vouching by an expert witness. Based on *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984), defendant would have to show counsel's actions were prejudicial to his defense. In other words, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* However, because we have concluded that Nurse Warner's expert testimony did not constitute improper vouching, there is no viable argument that the performance of defendant's counsel was deficient. Defense counsel's "failure" to object to testimony that was not objectionable cannot serve as the basis for a viable ineffective assistance of counsel claim. Accordingly, defendant was not denied effective assistance of counsel, and this argument is overruled.

NO ERROR.

Judges CALABRIA and STROUD concur.

STATE v. ROBINSON

[255 N.C. App. 397 (2017)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
CHARLES BERNARD ROBINSON, DEFENDANT

No. COA16-1213

Filed 5 September 2017

1. Appeal and Error—preservation of issues—abandonment of issue on appeal—failure to argue at trial

Although defendant contended that the trial court erred by denying his motion to suppress evidence seized during the search of a residence and the statements defendant made to officers during the search, defendant failed to preserve the issue where he either abandoned the argument by failing to address it on appeal or did not argue it at trial. Even assuming this issue was preserved, defendant did not show that the trial court erred in its assessment of the weight and credibility of the evidence.

2. Jury—jury instruction—actual possession—constructive possession—drugs

The trial court did not commit plain error by its instructions to the jury on actual and constructive possession where there was substantial evidence that defendant constructively possessed the items seized during the search, and defendant did not contest the sufficiency of that evidence. The possession distinction did not play a role in the outcome of the case where the question for the jury was whether to believe that defendant's sister-in-law planted the drugs and that his wife's brother was storing weapons in defendant's house.

Appeal by defendant from judgment entered 19 February 2016 by Judge R. Gregory Horne in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Martin T. McCracken, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.

ZACHARY, Judge.

Charles Bernard Robinson (defendant) appeals from the judgments entered upon his conviction of possession of cocaine with the intent to

sell or deliver and possession of a firearm by a felon, and from his plea of guilty to having attained the status of an habitual felon. On appeal, defendant argues that the trial court erred by denying his motion to suppress evidence, and committed plain error in its instructions to the jury on actual and constructive possession. After careful consideration of defendant's arguments, we conclude that the court did not err by denying his suppression motion, and that the court's instructions did not constitute plain error.

Background

On 26 June 2014, Detective C.T. Davis of the Charlotte-Mecklenburg Police Department applied for and was issued a search warrant authorizing him to search a house located at 3627 Corbett Street, in Charlotte, North Carolina. During the search, law enforcement officers seized two firearms, marijuana, and cocaine. Defendant was present during the search and made inculpatory statements to a law enforcement officer, admitting ownership of the firearms and the cocaine.

On 3 November 2014, defendant was indicted for possession of cocaine with the intent to sell or deliver, possession of marijuana, maintaining a dwelling for the purpose of keeping or selling controlled substances, possession of a firearm by a person previously convicted of a felony, and having attained the status of an habitual felon. Prior to trial, the State dismissed the charges of possession of marijuana and maintaining a dwelling for the purpose of keeping or selling controlled substances. On 6 November 2015, defendant filed a motion asking the court to suppress the evidence that was seized during the search of the Corbett Street residence and the statements defendant made to law enforcement officers during the search. Defendant alleged that the search warrant was not based upon probable cause and that the statements he made "were involuntary and made as the result of mental or psychological pressure[.]" Defendant was tried before the trial court and a jury beginning on 16 February 2016. Prior to trial, the trial court conducted a hearing on defendant's suppression motion, and orally denied defendant's motion to suppress evidence. The court entered a written order on 1 March 2016.

The State's evidence at trial tended to show, in relevant part, the following: Detective Todd Hepner of the Charlotte-Mecklenburg Police Department testified that he and several other officers executed the search warrant for the Corbett Street residence. When Detective Hepner entered the house, defendant was present, along with his wife, Armisher Glenn, and the couple's two children. In the master bedroom, Detective

Hepner and another officer found a .44 caliber revolver, a shotgun, cocaine, and marijuana. Detective Charlie Davis testified that on 26 June 2014 he obtained and executed a search warrant for the house located at 3627 Corbett Street, Charlotte. He described for the jury the process of searching the house and the items that were seized. After the contraband had been located and placed on the bed, defendant was brought into the bedroom by another officer and accurately identified the location within the bedroom where each of the items had been stored. Andrew Oprysko, a chemist for the Charlotte-Mecklenburg Police Department, testified as an expert in forensic chemistry that forensic testing had identified the material seized during the search of the Corbett Street house as cocaine.

Detective Sidney Lackey testified that while other officers were searching the house, he interviewed defendant. During this interview, defendant admitted that the cocaine, marijuana, and firearms discovered by the law enforcement officers belonged to him. The State accepted defendant's stipulation to the fact of his prior conviction of a felony for purposes of the charge of possession of a firearm by a felon.

Defendant also presented evidence at trial. Armisher Glenn testified that she was defendant's wife and that she had never known defendant to be in possession of cocaine or to sell drugs. Neither she nor defendant owned any firearms; however, Ms. Glenn's brother had asked to store two guns at her house and she assumed that these were the firearms seized by the police. In June of 2014, defendant and Ms. Glenn were separated due to marital difficulties; however, defendant sometimes visited the family home. On one occasion, Ms. Glenn's sister, Ms. Luba Hill, watched the children while defendant and Ms. Glenn went out to supper. Upon their return, defendant engaged in a conflict with his nephew, Ms. Hill's son. Assault charges were filed against defendant and his nephew, but were later dismissed. Ms. Hill remained angry at defendant after this altercation and made false reports about Ms. Glenn to the Department of Social Services. Ms. Hill's daughter, Kiarra Hill, testified about Ms. Hill's anger about the conflict between her son and defendant, and about statements her mother made in which she threatened to "get" an unnamed person. Candace Glenn testified that Armisher Glenn and Luba Hill were her daughters, and that Ms. Hill was very angry about the fight between defendant and Ms. Hill's son. At one point Ms. Hill was holding a "rock" of some substance and threatened to "get" defendant.

Defendant testified on his own behalf at trial. He denied owning firearms or cocaine or selling cocaine in 2014. Defendant testified about the fight between him and his nephew and about his belief that his arrest was the result of being "set up" by Ms. Hill. He was not aware that

there were drugs or firearms in the house on 26 June 2014. Although the contraband did not belong to him, defendant made inculpatory statements to Detective Lackey in order to prevent the police from arresting Ms. Glenn and placing his children in the custody of DSS. On cross-examination, defendant admitted to having prior criminal convictions, including a 2009 conviction for identity theft.

Following the presentation of evidence, the arguments of counsel, and the trial court's instructions, the jury returned verdicts finding defendant guilty of possession of cocaine with the intent to sell or distribute and with possession of a firearm by a convicted felon. Defendant then entered a plea of guilty to having the status of an habitual felon. The trial court sentenced defendant to concurrent sentences of 83 to 112 months' imprisonment for possession of a firearm by a felon, and 73 to 100 months' imprisonment for possession of cocaine with the intent to sell or deliver. Defendant gave notice of appeal in open court.

Standard of Review

Defendant argues that the trial court erred by denying his motion to suppress. "The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted).

Defendant also argues that the trial court erred by instructing the jury that it could find that he was in either actual or constructive possession of the firearms and cocaine in the house, on the grounds that there was no evidence to support a finding of actual possession. As defendant did not object to this instruction at trial, we review only for plain error. Under this standard, the defendant "must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Denial of Suppression Motion

[1] Defendant argues that the trial court erred by denying his motion to suppress the evidence seized pursuant to the search of the Corbett Street residence.[1] Defendant's motion also sought to suppress the statements

1. On appeal, the State argues that defendant lacked standing to challenge the search warrant, and that he failed to object at trial to the introduction of the evidence that was

defendant made to Detective Lackey at the time of the search; however, defendant has not pursued this argument on appeal and, accordingly, it is deemed to be abandoned. See N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). The sole basis of defendant's appellate argument that the trial court erred by denying his suppression motion is his contention that, when Detective Davis executed a sworn affidavit in support of his application for a search warrant, he made "a knowingly false statement that, if omitted, would render the search warrant insufficient to establish probable cause." However, at the trial level, defendant did not argue that the statements which Detective Davis included in the affidavit were made in bad faith or reckless disregard of the truth. As a result, defendant has not preserved this issue for appellate review. Moreover, even assuming, *arguendo*, that this issue were preserved, defendant has failed to show that the trial court erred by denying his motion to suppress.

It is well-established that:

> The requirement that a search warrant be based on probable cause is grounded in both constitutional and statutory authority. U.S. Const. amend. IV; N.C.G.S. § 15A-244 [(2015)]. Probable cause for a search is present where facts are stated which establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender. It is elementary that the Fourth Amendment's requirement of a factual showing sufficient to constitute "probable cause" anticipates a truthful showing of facts.

State v. Fernandez, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (citing *Franks v. Delaware*, 438 U.S. 154, 164-65, 57 L. Ed. 2d 667, 678 (1978)). However:

> There is a presumption of validity with respect to the affidavit supporting the search warrant. Before a defendant is entitled to a hearing on the issue of the veracity of the facts contained in the affidavit, he must make a preliminary showing that the affiant knowingly, or with reckless disregard for the truth, made a false statement in the affidavit. . . . A claim under *Franks* is not established merely by evidence that contradicts assertions contained

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seized during the search. We conclude that these arguments lack merit and do not require further discussion.

> in the affidavit, or even that shows the affidavit contains false statements. Rather, the evidence must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith.

Fernandez, 346 N.C. at 14, 484 S.E.2d at 358 (citations omitted).

The motion that defendant filed seeking the suppression of evidence seized pursuant to the execution of a search warrant for the Corbett Street house disputes the accuracy of two sections of the affidavit. First, defendant objects to the statement in the affidavit that he gave 3627 Corbett Street as his address "in April of 2013 during a domestic violence arrest." The incident to which this allegation refers was the altercation between defendant and his nephew, which resulted in both being charged with assault. At the hearing on his suppression motion, defendant argued that this was not a "domestic violence" arrest. In addition, during the hearing on his motion, the parties agreed that the arrest had actually taken place in May of 2014, rather than April, 2013. However, defendant neither disputed that at the time of his arrest he gave 3627 Corbett Street as his address, nor argued that these inaccuracies were made in bad faith or with a reckless disregard for the truth. Furthermore, defendant did not argue at the hearing or on appeal that the details of this arrest were important to the magistrate's determination that probable cause existed for the issuance of the search warrant.

Defendant's primary challenge was to the section of Detective Davis's affidavit concerning the use of a confidential and reliable informant, referred to in the affidavit as a "CRI." The affidavit states the following:

> In June of 2014, this applicant began utilizing a CRI to complete the investigation on Charles Bernard Robinson. This Applicant obtained a 2006 Mug shot photo of Charles Bernard Robinson and showed the photograph to the CRI. The CRI advised that Charles Bernard Robinson was known on the streets as "Red." The CRI confirmed that Charles Bernard Robinson sold crack cocaine and that he operated from the telephone number (704)-819-4383. This confirmed the information that was provided by the Crime Stoppers tipster.
>
> Within the past 72 hours this confidential and reliable informant has purchased "crack" cocaine from Charles Bernard Robinson at the residence located on 3627 Corbett Street under this Applicant's direct supervision.

> This Applicant has known this confidential informant for over (28) months. During this time, this informant has provided intelligence information regarding Drug distributors in the Charlotte area that this Applicant has verified to be true and factual. This informant has admitted to using and selling controlled substances in the past and is familiar with how they are packaged and sold on the streets of Charlotte. This informant has made purchases of controlled substances under this Applicant's direct supervision.

In his suppression motion, defendant states that he was not known by the street name Red, was not selling cocaine from the Corbett Street house, and had not sold crack cocaine "in the recent past." However, the suppression motion does not assert that these alleged inaccuracies were the result of bad faith, intentional misstatement, or reckless indifference to the truth. Instead, the thrust of defendant's suppression motion and of his argument before the trial court was that the allegations in Detective Davis's affidavit were insufficiently detailed to establish probable cause for the issuance of a search warrant. Defendant contends in the suppression motion that the information in the affidavit concerning the CRI's purchase of crack cocaine was "insufficient to reach the level of probable cause[.]" Defendant supports this assertion with quotations from *State v. Taylor*, 191 N.C. App. 587, 664 S.E.2d 421 (2008).

At the hearing on the suppression motion, defendant argued that the characterization of his arrest for assault as a "domestic violence" incident was misleading. Regarding the information in the affidavit about the controlled buy, defense counsel informed the trial court that "the case [he was] relying on" was *State v. Taylor*, cited above. Defendant's counsel discussed the holding of *Taylor* at length as it related to the level of detail required for an affidavit's description of a controlled buy of drugs. Defense counsel summarized his argument as follows:

> MR. CLIFTON: In this case, we've got the past 72 hours this confidential reliable informant has purchased crack cocaine from Charles Bernard Robinson at the residence located on 3627 Corbett Street under this affiant's direct supervision, and to me that just doesn't fit what *State v. Taylor* is calling for. It appears to me to be insufficient, and that's why I'm arguing this motion to suppress should be granted. There's nothing about the cocaine being turned over to the officer, and it doesn't even say in here that he saw him go into the house or make the buy. So in

> other words, to me, it does not meet the standards that are set out in *Taylor*. In *Taylor*, you know, the motion -- they affirmed the trial court's granting of the defendant's motion to suppress. This case is dated from 2008, which I believe this postdates all these cases that [the prosecutor] presented to you, so it just looks to me like there's not enough in this affidavit to lead to a finding of probable cause in order to go into somebody's house.

The prosecutor argued that the facts of *Taylor* were distinguishable, and then addressed the issue of whether the affidavit contained incorrect statements:

> MS. HONEYCUTT: As far as the other sub issue, incorrect information in the search warrant, I was referring to . . . the issue Mr. Clifton already addressed as far as the previous arrest at that location. . . . [*State v.*] *Fernandez* says that when a search warrant is issued on the basis of an affidavit containing false facts which are necessary to a finding of probable cause, the defendant has to prove by a preponderance of the evidence that the facts were asserted with knowledge of their falsity or reckless disregard for the truth. *Fernandez* also says that before the defendant is entitled to a hearing on the issue of the veracity of the facts contained in the affidavit, he has to make a preliminary showing that the affiant either knowingly or with reckless disregard for the truth made a false statement in the affidavit and that he must establish facts from which the finder of fact might conclude that the affiant alleged the facts in bad faith. . . . [T]he defendant hasn't made -- in any way established that the affiant was acting in bad faith when he alleged the incorrect date and that the defendant was arrested at this address.

Thereafter, defense counsel called defendant to testify about the facts set out in the affidavit. Defendant testified in detail regarding the altercation with his nephew, his living situation at the time of his arrest, and his lack of recent criminal activity. He also made a single, conclusory, statement about the controlled buy:

> MR. CLIFTON: Okay. All right, now the affidavit that Detective Davis filed states that the confidential informant bought cocaine from you three days before -- sometime in the three days before the search warrant was served. What do you have to say about that?

DEFENDANT: I say that's a lie.

MR. CLIFTON: Okay.

After hearing the testimony offered to support or challenge the issuance of a search warrant, the trial court asked defense counsel if he wished to be heard on the issue of Detective Davis's good faith in executing the affidavit, and defendant's attorney said he did not want to address the issue. The prosecutor then argued that defendant's bare denial did not establish bad faith, citing an unpublished case from this Court, *State v. Price*, __ N.C. App. __, __ S.E.2d __ (2005 N.C. App. Lexis 556) (unpublished):

> MS. HONEYCUTT: Your Honor, I'll just point out that in *State v. Price*, which is one of the first cases I handed up, it also addresses the issue of the defendant testifying as far as incorrect or false information in the affidavit. It specifically says in that case that the defendant's testimony that he didn't sell was mere contradictory evidence that doesn't show bad faith. In that case, the defendant took the stand and said he didn't sell to an informant, and the Court ruled that that was not enough to show bad faith on the facts of the affiant which is contradictory evidence to what was in the search warrant, and I would say that's what we have here.

In response to the prosecutor's argument, defendant's attorney did not contend that bad faith on the part of Detective Davis could be established on the basis of defendant's bare denial, and repeated that the basis for the suppression motion was the lack of detail in the affidavit:

> MR. CLIFTON: Okay. And, Your Honor, I understand that. I mean, I'm hanging my hat on the -- *State v. Taylor* basically. I don't know how we could get into it at trial where the State's going to say this happened, he's going to say no, there's no way that happened. That's not going to do any good, but certainly the *State v. Taylor* language, I think, does.
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> THE COURT: Thank you, Mr. Clifton.

On appeal, defendant limits his argument to the section of the affidavit concerning the purchase of crack cocaine by a CRI. Defendant contends that the issue of Detective Davis's bad faith was raised at the trial level and that defendant's statement at the hearing that these

allegations were "a lie" served to "establish" that the detective knowingly made false statements in the affidavit.

We have carefully reviewed defendant's suppression motion and the transcript of the hearing on the motion. We conclude that at no time did defendant argue that Detective Davis had knowingly made false statements in the affidavit or that he had acted in bad faith or in reckless disregard for the truth. Instead, defendant's suppression motion was based on a question of law: whether the allegations contained in the affidavit were sufficiently detailed to permit the magistrate to issue a search warrant upon a finding of probable cause. "This Court has long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). *See also State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988) (applying the "no swapping horses" rule where defendant relied on one theory at trial as basis for written motion to suppress and then asserted a different theory on appeal).

On appeal, defendant asserts that the "veracity" of Detective Davis's allegations in the affidavit was "before the trial court" at the hearing on his suppression motion. However, defendant has failed to identify any instances in which he argued before the trial court that Detective Davis had knowingly made false statements in the affidavit or had acted in bad faith.

Defendant also directs our attention to selected excerpts from Detective Davis's testimony at trial. During cross-examination, defense counsel attempted to ask the detective for the basis of the information about defendant's home address contained in the affidavit. The prosecutor objected, saying that they "had already dealt with the search warrant" and the trial court sustained the objection. In the absence of the jury, defense counsel brought up the issue of Detective Davis's good faith for the first time, and only as it related to the characterization of defendant's arrest as being for domestic violence:

> THE COURT: In terms of the second issue, I was going to allow you to make a proffer, if you wish, with regard to your question concerning the search warrant. Again, this being outside the presence of the jury. I sustained the objection but if you wish to be heard further regarding that outside the presence of the jury, I'm happy to hear it.

> MR. CLIFTON: It's my client's concern that it was done out of bad faith by Detective Davis. That sentence in the search warrant about it being a domestic violence connected to an arrest at this address. He sees that as a bad faith -- something put into the search warrant out of bad faith on the part of the detective, and that's why he wants me to bring it up.
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> . . .
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> MS. HONEYCUTT: Your Honor, I would say that the Court has already addressed the issue of bad faith. This is not a situation where the search warrant is in front of the jury and they're thinking that something is true that wasn't because of what's in that search warrant. They don't have that before them, and I think we've already addressed that issue.
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> THE COURT: All right. I have sustained the State's objection previously. I will continue with that same ruling, but it is on the record the basis by which the question is reserved for review.

On appeal, defendant contends that this dialogue establishes that Detective Davis's good faith in asserting that a CRI had made a controlled buy of cocaine "is properly before this Court." However, defense counsel's belated reference to the detective's "bad faith" in using the term "domestic violence" does not alter the fact that neither defendant's written motion nor his argument during the hearing on the suppression motion ever asserted that Detective Davis had made knowingly false statements regarding the controlled buy. We conclude that defendant's appellate argument, that the allegations in the affidavit concerning the purchase of cocaine by a CRI were knowingly false and made in bad faith, was not raised before the trial court and therefore was not preserved for appellate review.

Our conclusion on this question does not reflect a technical default, but an issue of fundamental fairness. On appeal, defendant stresses that Detective Davis "did not testify at the suppression hearing" and that "the State did not put on any evidence relating to the controlled buy." Appellate counsel argues that defendant's "uncontroverted testimony that he did not sell cocaine in the 72 hours before the search warrant was executed was evidence of bad faith." However, as discussed above, at the hearing on his suppression motion, defendant relied upon a *legal*

argument - that, even if the allegations in the affidavit were true, they were insufficient to establish probable cause for the issuance of a search warrant. Given that defendant did not argue at the hearing that Detective Davis had acted in bad faith, the State had no reason to offer testimony from the officer on the issue of his good faith. Moreover, the trial court was not asked to rule on this issue; in fact, when the prosecutor argued that defendant's conclusory statement that the affidavit was "a lie" did not establish bad faith, defense counsel conceded as much and stated that he was "hanging his hat" on the legal argument based on *State v. Taylor*.

Finally, we observe that even assuming that this issue were preserved, defendant has failed to show that he is entitled to relief. The sworn affidavit submitted by Detective Davis contained a comprehensive explanation of the basis for the application for a search warrant, including information as to (1) Detective Davis's extensive experience in law enforcement and specifically in the investigation of crimes involving controlled substances; (2) the tip received through the Crime Stoppers organization that included many details about defendant's drug dealing; (3) corroboration of defendant's address through investigative research; (4) the fact that defendant's prior criminal record included a 2001 conviction for possession of cocaine; (5) the basis of Detective Davis's belief that the CRI was a reliable informant, and; (6) the CRI's purchase of cocaine from defendant. Defendant's opposition to the affidavit consisted of a conclusory assertion that it was "a lie." It is axiomatic that:

> An appellate court's review of a trial court's order on a motion to suppress "is strictly limited to a determination of whether its findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." Because the trial court, as the finder of fact, has the duty to pass upon the credibility of the evidence and to decide what weight to assign to it and which reasonable inferences to draw therefrom, "the appellate court cannot substitute itself for the trial court in this task."

State v. Villeda, 165 N.C. App. 431, 437-38, 599 S.E.2d 62, 66 (2004) (quoting *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829 (2002), and *Nationsbank of North Carolina v. Baines*, 116 N.C. App. 263, 269, 447 S.E.2d 812, 815 (1994)).

In this case, the trial court found that the affidavit established that the CRI had purchased cocaine from defendant within 72 hours before

the issuance of the search warrant. Defendant objects to the use of the word "established," and argues that because defendant called the affidavit a lie, "the affidavit could not 'establish' evidence of its own truthfulness." Defendant contends that the trial court should have instead found only that the affidavit "stated" certain things. However, the trial court's use of the word "established" clearly indicates that the court is finding the statement to be accurate. In contrast, a court's recitation of what a witness or document "stated" does not constitute a finding of fact. *Moore v. Moore*, 160 N.C. App. 569, 571-72, 587 S.E.2d 74, 75 (2003) ("Recitations of the testimony of each witness do not constitute findings of fact by the trial judge[.]"). Furthermore, defendant has offered no reason why the trial court could not consider both defendant's testimony that the affidavit was "a lie" as well as the contents of the sworn affidavit, in order to make a determination of the facts.

For the reasons discussed above, we conclude that defendant failed to preserve for appellate review the argument that Detective Davis knowingly and in bad faith made false statements in the affidavit. We further conclude that, even assuming that this issue were preserved, defendant has not shown that the trial court erred in its assessment of the weight and credibility of the evidence.

Instructions on Possession

[2] Defendant also argues that the trial court erred by instructing the jury on both actual and constructive possession, on the grounds that there was no evidence to support an instruction on actual possession. We conclude that defendant is not entitled to relief on the basis of this argument.

At the close of all the evidence, the prosecutor requested that the trial court instruct the jury on both actual and constructive possession, and defense counsel agreed to this. Upon review of the printed copies of the instructions that the trial court intended to give the jury, defendant's attorney had no requests for changes. After the jury was instructed, defense counsel informed the trial court that he had no objections or requests for additions or modifications. We conclude that defendant did not object at trial to the instruction that he challenges on appeal.

"Because defendant did not object to the instruction as given at trial, we consider whether this instruction constitutes plain error. See N.C. R. App. P. 10(a)(4); see also *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012)." *State v. Juarez*, __ N.C. __, __, 794 S.E.2d 293, 299 (2016). The plain error standard requires a defendant to "demonstrate that a fundamental error occurred at trial. To show

that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (internal quotation omitted). "For plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict." *Juarez*, __ N.C. at __, 794 S.E.2d at 300 (citing *Lawrence*).

Our appellate courts previously held that it was *per se* plain error for a trial court to instruct the jury on a theory of the defendant's guilt that was not supported by the evidence. *See*, *e.g.*, *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986) ("[I]t would be difficult to say that permitting a jury to convict a defendant on a theory . . . not supported by the evidence is not plain error even under the stringent test required to invoke that doctrine.") However, in *State v. Boyd*, 222 N.C. App. 160, 167-68, 730 S.E.2d 193, 198 (2012), *reversed and remanded*, 366 N.C. 548, 742 S.E.2d 798 (2013), the jury was instructed that it could convict the defendant of kidnapping based upon a finding that the defendant had confined, restrained, or removed the victim. There was no evidence to support the theory that the defendant had removed the victim, and on appeal this Court held that the trial court's instruction constituted plain error. Judge Stroud, relying upon standard for plain error set out in *State v. Lawrence*, 365 N.C. 506, 723 S.E.2d 326 (2012), dissented:

> I do not believe that defendant has shown "that, absent the error, the jury probably would have returned a different verdict. Thus, he cannot show the prejudicial effect necessary to establish that the error was a fundamental error. In addition, the error in no way seriously affects the fairness, integrity, or public reputation of judicial proceedings." *See Lawrence*, [365] N.C. at [519], 723 S.E.2d at 335. The omission of approximately ten words relating to 'removal' from the above jury instructions would, under the facts of this particular case, make no difference at all in the result. Therefore, I would find no plain error as to the trial court's instructions as to second-degree kidnapping.

Boyd, 222 N.C. App. at 173, 730 S.E.2d at 201 (Stroud, J., dissenting). On appeal, the North Carolina Supreme Court, in a *per curiam* opinion, reversed for the reasons stated in the dissent. *State v. Boyd*, 366 N.C. 548, 548, 742 S.E.2d 798, 799 (2013). Thus, "under *Boyd*, a reviewing court is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the

jury relied on the inappropriate theory." *State v. Martinez*, __ N.C. App. __, __, 801 S.E.2d 356, __ (2017).

"To prove that a defendant possessed contraband materials, the State must prove beyond a reasonable doubt that the defendant had either actual or constructive possession of the materials." *State v. Loftis*, 185 N.C. App. 190, 197, 649 S.E.2d 1, 6 (2007) (citation omitted), *disc. review denied*, 362 N.C. 241, 660 S.E.2d 494 (2008). "A person has actual possession of a substance if it is on his person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use." *State v. Reid*, 151 N.C. App. 420, 428-29, 566 S.E.2d 186, 192 (2002) (citation omitted). "Constructive possession exists when the defendant, 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the narcotics." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)).

In the present case, Detective Davis testified without objection that he "had obtained a search warrant for the residence in reference to drugs being sold from the home" by defendant. When the law enforcement officers searched the Corbett Street house, defendant was present along with his wife and children. Detective Hepner and another officer searched the master bedroom, where they found a .44 caliber revolver, a shotgun, cocaine, and marijuana. During the search, defendant was interviewed by Detective Lackey, to whom he admitted owning the firearms and the cocaine. Defendant testified at trial that, although he and his wife were separated at the time of the search, he was at the house "pretty much on a daily basis," and when defendant was brought into the bedroom, he accurately pointed out where the drugs and firearms had been, indicating that he had been aware of their presence.

Defendant's defense at trial was that the contraband found in the house did not belong to him. Defendant's wife testified that the marijuana in the house belonged to her and that her brother had asked to store two firearms in the house. Defendant and his wife testified that defendant did not own guns or cocaine and did not sell drugs. In regard to the cocaine found in the house, defendant, his wife, and several other witnesses testified to circumstances in support of defendant's theory that his sister-in-law had planted the drugs in his house in revenge for a fight between defendant and his nephew.

We conclude that there was substantial evidence that defendant constructively possessed the items seized during the search, and defendant

has not contested the sufficiency of the evidence of constructive possession. We agree with defendant that there was no evidence that defendant was in actual possession of either the firearms or the narcotics seized from the house. These items were found in the master bedroom of the home, rather than on defendant's person. We conclude, however, that defendant has failed to show that it is "probable, not just possible, that absent the instructional error the jury would have returned a different verdict." *Juarez* at __, 794 S.E.2d at 300. The primary factual issue for the jury to resolve was whether to find defendant guilty based upon the State's evidence or to believe defendant's explanations for the presence of firearms and cocaine in the house. Simply put, the question for the jury was whether to believe that defendant's sister-in-law planted the drugs and that his wife's brother was storing weapons in defendant's house. We conclude without difficulty that the distinction between actual and constructive possession did not play a significant role in the jury's decision.

Conclusion

For the reasons discussed above, we conclude that the trial court did not err by denying defendant's suppression motion and did not commit plain error in its instructions to the jury. Defendant had a fair trial, free of reversible error.

NO ERROR.

Judges DILLON and BERGER, JR. concur.

STATE v. ROGERS

[255 N.C. App. 413 (2017)]

STATE OF NORTH CAROLINA
v.
MICAH PAUL ROGERS, DEFENDANT

No. COA16-1112

Filed 5 September 2017

Larceny—of a firearm—intent to permanently deprive

There was sufficient evidence to support the element of intent for the charge of larceny of a firearm where police found the stolen firearm in the spare tire well of defendant's vehicle and defendant feigned ignorance about the firearm.

Appeal by defendant from judgment entered 29 June 2016 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 19 April 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Regina T. Cucurullo, for the State.

William D. Spence for defendant-appellant.

BERGER, Judge.

A New Hanover County jury found Micah Paul Rogers ("Defendant") guilty of larceny of a firearm on June 29, 2016. Defendant appeals, asserting that the trial court erred in denying his motion to dismiss for insufficient evidence. We disagree.

Factual & Procedural Background

On August 19, 2015, Bianca Justafort ("Justafort") invited her boyfriend, Zachary Weber ("Weber"), and Defendant over to the home she resided in with Sue Marie Sachs ("Sachs"). Throughout the day, Justafort, Weber, and Defendant consumed alcohol, and Defendant made several remarks about the loaded pistol that he always carried with him. Around 9:00 p.m., Defendant passed out on Sachs' couch with the loaded pistol in his pants.

Earlier in the day, Sachs repeatedly asked Justafort and Weber to ensure that Defendant did not keep a loaded pistol in her house. In response to Sachs' request, Weber took the loaded pistol from Defendant while he was passed out and placed it in a cabinet. Sachs subsequently

took the pistol, removed the bullets, and placed the pistol in a camper she had parked in the yard.

Defendant woke up at approximately midnight and began searching for his pistol. Sachs told Defendant that his pistol was not in her home and that he needed to leave. Instead of leaving, Defendant continued searching for his pistol in Sachs' home and in his vehicle. Defendant began arguing with Sachs near the front gate of her home, and the verbal confrontation became physical. Defendant shoved Sachs to the ground and began yelling that he knew she had taken his pistol.

Fearing retaliation, Sachs went back into her home and retrieved her own pistol. She removed the clip before going back outside to confront Defendant and again demanded that he leave her property. Justafort and Weber did not know Sachs' pistol was unloaded and worried that Sachs would shoot Defendant. The two pushed Sachs, causing her to lose balance, at which time Defendant grabbed the unloaded pistol from Sachs' hands and fled the scene.

That same night, Sachs called 911 to report her firearm stolen. Officers with the Wilmington Police Department apprehended Defendant a few blocks from Sachs' home during the early morning hours of August 20, 2015. Officers searched his vehicle and discovered Sachs' pistol inside a latched spare tire well, covered by Defendant's personal effects. Police arrested Defendant for larceny of a firearm. When informed that he was being arrested for stealing Sachs' pistol, Defendant responded, "Whoa, whoa, whoa, whoa, what firearm? What gun? What gun?"

It was from this evidence that the jury convicted Defendant of larceny of a firearm. Defendant filed timely notice of appeal.

Standard of Review

It is well settled that a trial court's denial of a motion to dismiss based on insufficiency of the evidence is reviewed *de novo*. *State v. Marley*, 227 N.C. App. 613, 614, 742 S.E.2d 634, 635 (2013). When ruling on a motion to dismiss for insufficiency of the evidence, "the question for [this] Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant[] being the perpetrator of such offense." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). In reviewing challenges to the sufficiency of evidence, the evidence must be viewed in the light most favorable to the State, and all reasonable inferences are drawn in favor of the State. *Id.* at 596, 573 S.E.2d at 869 (citations omitted).

Evidence is substantial when it is sufficient to "persuade a rational juror to accept a conclusion." *Id.* at 597, 573 S.E.2d at 869 (citation omitted). It is not this Court's role to weigh the evidence; that is the task of the jury. *Id.* at 596-97, 573 S.E.2d at 869. Rather, if "more than a scintilla of competent evidence . . . support[s] the allegations" against a defendant, then the trial court's denial of a defendant's motion to dismiss must be upheld. *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958).

Analysis

"The essential elements of larceny [of a firearm] are: (1) taking the [firearm] of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the [firearm] permanently." *State v. Sheppard*, 228 N.C. App. 266, 269, 744 S.E.2d 149, 151 (2013) (citation omitted). Larceny of a firearm is a felony, regardless of the value of the weapon in question. N.C. Gen. Stat. § 14-72(b)(4) (2015).

As an initial matter, it must be noted that Defendant has only challenged the element of intent on appeal. Accordingly, Defendant has abandoned any argument relating to the other three elements of larceny of a firearm and the sole issue to be addressed by this Court is whether substantial evidence was introduced to support the conclusion that Defendant intended to permanently deprive Sachs of her pistol. *See* N.C.R. App. P. 28(b)(6) (2015).

"A man's intentions can only be judged by his words and deeds; he must be taken to intend those consequences which are the natural and immediate results of his acts." *State v. Smith*, 268 N.C. 167, 173, 150 S.E.2d 194, 200 (1966). "Intent is a mental [state that is] seldom provable by direct evidence. [Intent] must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) (citations omitted). Generally, where a defendant takes property from its rightful owner and keeps it as his own until apprehension, the element of intent to permanently deny the rightful owner of the property is deemed proved. *Smith*, 268 N.C. at 173, 150 S.E.2d at 200 (citation omitted). However, where a defendant takes property for his own "immediate and temporary use" without the intent to permanently deprive the rightful owner of his property, then he is not guilty of larceny but merely trespass. *Id.* at 170, 150 S.E.2d at 198 (citations omitted).

In the present case, Defendant claims that despite being apprehended by law enforcement with Sachs' pistol hidden in the spare tire well of his vehicle, the evidence was insufficient to support a finding that he intended to permanently deprive Sachs of her firearm at the time

of the taking. Defendant contends that the evidence only shows that he took the unloaded pistol from Sachs to prevent serious bodily injury to the Defendant. We disagree.

When viewed in a light most favorable to the State, sufficient evidence supported the inference that Defendant intended to permanently deprive Sachs of her pistol. Even assuming that Defendant initially secured possession of the pistol in an effort to prevent injury, the jury could infer that Defendant, a former marine, knew or should have known, upon handling the firearm, that it was not capable of discharging a projectile as it was unloaded. However, instead of returning the weapon once he realized it posed no threat to his safety, Defendant fled the scene with the pistol.

Moreover, after he was apprehended by police, Defendant never told the arresting officer that Sachs' pistol was in his vehicle or of his altercation with Sachs. When Defendant was informed that he was being arrested for stealing the pistol, which was found hidden beneath Defendant's personal effects in a latched spare tire well, he feigned ignorance and responded, "Whoa, whoa, whoa, whoa, what firearm? What gun? What gun?"

Defendant's attempt to conceal the firearm in the spare tire well of his vehicle and his subsequent comments to law enforcement after being apprehended provided sufficient evidence to support an inference that Defendant intended to permanently deprive Sachs of her pistol. Accordingly, the trial court did not err in its denial of Defendant's motion to dismiss at the close of evidence, and this contention of error is overruled.

Conclusion

The trial court's denial of Defendant's motion to dismiss for insufficiency of the evidence was proper because the evidence, when viewed in a light most favorable to the State, was sufficient for the jury to find that Defendant intended to permanently deprive Sachs of her firearm. Therefore, we conclude Defendant received a fair trial, free from error.

NO ERROR.

Judges ELMORE and INMAN concur.

STATE v. SEAM

[255 N.C. App. 417 (2017)]

STATE OF NORTH CAROLINA
v.
SETHY TONY SEAM, DEFENDANT

No. COA17-219

Filed 5 September 2017

Sentencing—first-degree murder—resentencing—lack of jurisdiction—Supreme Court mandate not issued

The trial court lacked jurisdiction to resentence a sixteen-year-old defendant in a first-degree murder case where the mandate from the N.C. Supreme Court had not been issued. The judgment was vacated and remanded for resentencing.

Appeal by the State of North Carolina from judgment entered 30 December 2016 by Judge Theodore S. Royster, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 10 August 2017.

Attorney General Joshua H. Stein, by Senior Deputy Attorney General Robert C. Montgomery, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellee.

BERGER, Judge.

The State of North Carolina appeals from judgment entered December 30, 2016, resentencing Sethy Tony Seam ("Defendant") for first degree murder committed November 19, 1997, when Defendant was sixteen years old. Pursuant to *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), Defendant was entitled to resentencing because his original, mandatory sentence of life without parole violated the Eighth Amendment of the U.S. Constitution. Our Supreme Court affirmed Defendant's right to be resentenced in *State v. Seam*, ___ N.C. ___, 794 S.E.2d 439 (2016). However, before the mandate issued from that Court, Superior Court Judge Theodore Royster ordered the resentencing of Defendant to occur one day before Judge Royster was to retire. Because the Supreme Court mandate had not issued, the trial court was without jurisdiction to enter judgment for Defendant. Therefore, we vacate the judgment and remand for resentencing.

Factual and Procedural Background

The facts of this case as previously stated by this Court are as follows:

> The State's evidence at trial tended to show that on the evening of 19 November 1997, defendant and Freddie Van [(Van)] walked to King's Superette in Lexington, North Carolina. They both entered the store around closing time when the store's proprietor, Mr. Harold King, Sr. (Mr. King), was squatting down in the rear of the store, fixing the beer cooler. Defendant and Van were standing in the middle of the store when Van pulled a .22 caliber pistol from the front of his pants and said, "Freeze, give me all of your money." As Van approached Mr. King from behind, Mr. King stood up and asked, "How much do you all want?" At this time, Van pointed the pistol at Mr. King's back and ordered him to the cash register at the front of the store. As Van and Mr. King were approaching the cash register, defendant also moved closer to the cash register. Suddenly, Van knocked Mr. King's glasses off, whereupon Mr. King turned around and punched Van in the mouth. An argument ensued and Van shot Mr. King three times, fatally wounding him. Defendant and Van attempted to open the cash register but were unsuccessful. They then ran from the store.

State v. Seam, 145 N.C. App. 715, 552 S.E.2d 708 (2001) (unpublished).

Defendant was convicted of first degree murder and attempted robbery in 1999, and sentenced to life in prison. Due to Defendant's age at the time of the murder and attempted robbery, Defendant filed a motion for appropriate relief in 2011 pursuant to *Miller*. In 2013, Defendant's motion was granted, and the trial court indicated that it would resentence Defendant at that time. The State objected, and resentencing was continued. Prior to resentencing, the State appealed the trial court's ruling.

On December 21, 2016, the North Carolina Supreme Court affirmed the trial court's decision on the motion for appropriate relief, and remanded the case for resentencing. The mandate, however, would not issue from that Court until January 10, 2017. Judge Royster scheduled a special session of superior court, one day before he was set to retire, for the resentencing of Defendant. Defendant filed a motion to expedite

the mandate on December 29, 2016, but it was summarily denied by the Supreme Court that same day.

Regardless of the mandate not being issued, Judge Royster held a resentencing hearing on December 30, 2016. The State objected to the hearing being held before the mandate had issued citing jurisdictional concerns. At the conclusion of the hearing Judge Royster entered a written order that included the following decree:

> 1. That the Resentence of defendant shall be not less than 183 months and not more than 229 months in the NORTH CAROLINA DIVISION OF ADULT PRISONS. Defendant's Record Level is I. Defendant's Disposition Range is Mitigated. Since Class A under Sentencing Grid for offenses committed on or after December 1, 1995, is unconstitutional, the Court used Class B1.

(Emphasis omitted). It is from this order that the State timely appealed.

Analysis

"When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C 173, 176, 273 S.E.2d 708, 711 (1981) (citations omitted). With limited exception, jurisdiction of the trial court "is divested . . . when notice of appeal has been given[.]" N.C. Gen. Stat. § 15A-1448(a)(3) (2015). "An appeal removes a case from the trial court which is thereafter without jurisdiction to proceed on the matter until the case is returned by mandate of the appellate court." *Woodard v. Local Governmental Employees' Retirement Sys.*, 110 N.C. App 83, 85, 428 S.E.2d 849, 850 (1993) (citations omitted). Unless otherwise ordered, a mandate issues "twenty days after the written opinion of the court has been filed with the clerk." N.C.R. App. P. 32(b).

Thus, the trial court was divested of jurisdiction until the mandate from the Supreme Court issued on January 10, 2017, and without authority to enter the December 30, 2016 judgment. We therefore vacate the judgment and remand for resentencing.

VACATED AND REMANDED.

Judges DILLON and ZACHARY concur.

STATE v. SHORE

[255 N.C. App. 420 (2017)]

STATE OF NORTH CAROLINA
v.
CHARLES AUGUSTUS SHORE, JR.

No. COA16-1243

Filed 5 September 2017

1. Evidence—expert witness testimony—sexual abuse—children delay disclosure of sexual abuse—reasons for delay—reliability test—Rule 702(a)

The trial court did not abuse its discretion in a child sex abuse case by allowing an expert witness in clinical social work specializing in child sexual abuse cases to testify that it was not uncommon for children to delay the disclosure of sexual abuse and by allowing the witness to provide possible reasons for delayed disclosures where the testimony satisfied the three-prong reliability test under N.C.G.S. § 8C-1, Rule 702(a). Defendant failed to demonstrate that his arguments attacking the principles and methods of the testimony were pertinent in assessing its reliability.

2. Constitutional Law—effective assistance of counsel—premature claim

Defendant's ineffective assistance of counsel claim in a child sex abuse case, based on his attorney eliciting evidence of guilt that the State had not introduced, was premature and dismissed without prejudice to his right to assert it during a subsequent motion for appropriate relief proceeding.

3. Appeal and Error—preservation of issues—failure to declare mistrial sua sponte—failure to object

Although defendant contended the trial court abused its discretion in a child sex abuse case by failing to declare a mistrial sua sponte after the victim's father engaged in a "pattern of abusive and prejudicial behavior" during defendant's trial, defendant failed to preserve this issue where he did not request additional action by the trial court, did not move for a mistrial, and did not object to the trial court's method of handling the alleged misconduct in the courtroom.

4. Criminal Law—trial court expression of opinion—denial of motion to dismiss in presence of jury—child sex abuse

The trial court did not impermissibly express an opinion on the evidence in a child sex abuse case by denying defendant's

motion to dismiss in the presence of the jury in violation of N.C.G.S. § 15A-1222 where defendant did not seek to have the ruling made outside the presence of the jury, did not object, and did not move for a mistrial on this issue.

Appeal by defendant from judgments entered 26 April 2016 by Judge Stanley L. Allen in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Margaret A. Force, for the State.

Hale Blau & Saad Attorneys at Law, P.C., by Daniel M. Blau, for defendant-appellant.

ARROWOOD, Judge.

Charles Shore ("defendant") appeals from judgments entered upon his convictions for statutory sexual offense of a person thirteen, fourteen, or fifteen years old, and for statutory rape of a person thirteen, fourteen, or fifteen years old. Based on the reasons stated herein, we dismiss in part and find no error in part.

I. Background

On 31 March 2014, defendant was indicted on the following charges: four counts of indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1; one count of statutory sexual offense of a person thirteen, fourteen, or fifteen years old in violation of N.C. Gen. Stat. § 14-27.7A(a); and three counts of statutory rape of a person thirteen, fourteen, or fifteen years old in violation of N.C. Gen. Stat. § 14-27A.

Defendant was tried at the 18 April 2016 criminal session of Mecklenburg County Superior Court, the Honorable Stanley Allen presiding.

The State's evidence tended to show that in 2012, H.M.[1] began living with her father. She was eleven years old at the time. H.M.'s father was living with Brandi Coleman ("Brandi") and defendant, who was Brandi's boyfriend. H.M. testified that after moving into the house, she spent time with defendant by jumping on the trampoline, watching sports, fishing, watching television, and playing video games. She described

1. Initials are used throughout this opinion to protect the identity of the juvenile and for ease of reading.

their relationship as "always friendly, really nice. Anything I ever needed when my dad wasn't around or Brandi wasn't around, he always helped me." In the summer of 2013, defendant's son moved into the house. H.M. shared a room with defendant's son and they became best friends.

In January 2014, after Brandi and defendant ended their relationship, defendant and defendant's son moved to a nearby apartment complex. H.M. testified that she saw defendant and defendant's son "all the time" after they moved, frequently visiting their apartment to "hang out." H.M. spent the night at their apartment more than once and slept in defendant's bed.

H.M. testified that one night, she was sleeping in defendant's bed when defendant got into his pajamas and crawled into bed with her. They "cuddled up together." H.M. testified that defendant's hands "slowly started to go down my side," defendant put his hands around the waistband of her pants, and then her shorts came off. Defendant's hands "entered" her underwear and defendant began touching H.M.'s vagina. Defendant got on top of H.M. and kissed her neck. H.M. told defendant that she was tired and defendant replied, "okay," gave her a hug, and the two fell asleep.

H.M. testified that she and defendant had vaginal intercourse on two occasions. One incident occurred when she spent a few nights at defendant's apartment during the weekend of 14 February 2014. On one of those nights, defendant and H.M. began kissing on the couch. They went into defendant's bedroom where defendant "crawled" on top of her, put his hand inside of her, and then put his penis inside of her. The next morning, defendant gave her a pill which he instructed her to take. The other occasion where defendant had sex with H.M. occurred in the same way except that defendant did not give her a pill to take.

H.M.'s father testified that he would check H.M.'s cell phone on a regular basis. On 22 February 2014, H.M.'s father was looking through H.M.'s cell phone when he noticed text messages from defendant. The messages included "Good morning, Baby[,] "Good morning, Beautiful[,]" and "Hello, Princess." H.M.'s father became very angry and threw the cell phone on the ground and the screen broke. H.M.'s father confronted H.M., asking if "anything ever happened between you and [defendant]" and H.M. replied, "yes." H.M.'s father proceeded to drive to defendant's apartment.

While H.M.'s father was gone, Brandi spoke with H.M. During the conversation, H.M. revealed that defendant had touched her in "her private areas" and that she and defendant engaged in sex.

Defendant was not at his apartment when H.M.'s father arrived. H.M.'s father called Brandi and she was able to convince him to return back to his house. At his house, H.M.'s father directly asked H.M. if she and defendant had ever had sex and H.M. replied, "yes, Dad[.]" H.M.'s father left his house again and went to defendant's apartment. Defendant was not home, so H.M. went to a nearby karate studio in search of defendant. As H.M.'s father walked up to the karate studio, defendant was walking out. H.M.'s father yelled, "you son of a b****, I'm here to kill you[.]" Defendant ran back inside the studio and came back outside with twenty men to protect him. H.M.'s father continued to scream at defendant, claiming that defendant had raped his daughter.

H.M.'s father had called the police earlier and the police arrived on the scene. Officer Thomas Gordon and Sergeant Grant Nelson, of the Matthews Police Department, testified that on 22 February 2014, they responded to a call at Scott Shields Martial Arts Academy. H.M.'s father informed the officers why he was angry and accused defendant of inappropriately touching H.M. Sergeant Nelson testified defendant "knew what we were there [in] reference to." After Sergeant Nelson explained to defendant that he was not under arrest, defendant told him of two different incidents that occurred with H.M. Defendant stated that one time, H.M. had sat on defendant's lap, grinding her bottom pelvic area into his pelvic area and grabbing his crotch area. Defendant told her to stop, but she continued. On another occasion, defendant was standing when H.M. approached him from behind and grabbed his crotch. Defendant again told her to stop, but she continued to grab him. H.M. then took defendant's hand and placed it down her pants. Defendant left his hand there for a minute and then pulled it out of her pants.

Kelli Wood ("Wood") testified as an expert in clinical social work, specializing in child sexual abuse cases. Wood testified that on 5 March 2014, she interviewed H.M. at Pat's Place Child Advocacy Center, a center providing services to children and their families when there are concerns that a child may be a victim of maltreatment or may have witnessed violence. A videotape of her interview was played for the jury with a limiting instruction that it should be received for corroborative purposes.

At the close of the State's evidence, the State dismissed one count of indecent liberties and one count of statutory rape.

Defendant testified that his relationship with H.M. was "[p]retty good" and they were like family. Defendant denied ever sitting on his couch and kissing H.M. and denied ever sleeping in his bed with H.M.

He also denied ever touching her sexually with his hands, using his mouth to touch her private parts, or having sexual intercourse with her. Defendant admitted that H.M. spent the night at his apartment on 14 and 15 February 2014, but testified that H.M. slept on the lower bunk bed one of the nights and slept on the couch the other night. He testified that on 15 February 2014, his girlfriend, Bridget Davenport, had spent the night with defendant in his bedroom. Defendant testified that on 16 February 2014, he was making lunch in the kitchen when H.M. walked up to him and grabbed his crotch. He backed away and told her "no, no. Inappropriate." H.M. giggled in response. Defendant further testified that on the same day, he was sitting in a recliner when H.M. sat on top of him. Defendant pushed H.M. off of him and told her that "it was very inappropriate, she couldn't do it, could not do that."

On 26 April 2016, a jury found defendant guilty of three counts of taking indecent liberties with a child, one count of statutory sexual offense of a person thirteen, fourteen, or fifteen years old, and one count of statutory rape of a person thirteen, fourteen, or fifteen years old. The jury acquitted defendant of one count of statutory rape.

Judgment was arrested as to the indecent liberties convictions. Defendant was sentenced to a term of 144 to 233 months for the statutory rape conviction and to a consecutive term of 144 to 233 months for the statutory sexual offense conviction.

Defendant was ordered to register as a sex offender upon release from imprisonment. The trial court further ordered that the Department of Adult Correction shall perform a risk assessment of defendant and will determine the need for satellite-based monitoring ("SBM").

Defendant gave oral notice of appeal in open court. Defendant also filed a petition for writ of certiorari to this Court, since the sex offender registration and SBM are civil in nature, and thus require written notice of appeal. N.C. R. App. P. 3(a) (2017); *State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010). Our Court granted defendant's petition for writ of certiorari on 21 July 2017 and we review the merits of his appeal.

II. Discussion

On appeal, defendant argues that: (A) the trial court erred by permitting the State to introduce unreliable expert testimony, in violation of Rule 702 of the North Carolina Rules of Evidence; (B) he received ineffective assistance of counsel where his attorney elicited evidence of guilt that the State had not introduced; (C) the trial court erred by failing

to declare a mistrial *sua sponte* after a State's witness engaged in a "pattern of abusive and prejudicial behavior" during defendant's trial; and (D) the trial court impermissibly expressed an opinion on the evidence by denying defendant's motion to dismiss in the presence of the jury, in violation of N.C. Gen. Stat. § 15A-1222. We address each argument in turn.

A. Expert Testimony Under Rule 702

[1] Defendant argues the trial court abused its discretion by allowing expert witness Wood to testify that it is not uncommon for children to delay the disclosure of sexual abuse and by allowing Wood to provide possible reasons for delayed disclosures. Specifically, defendant contends that Wood's testimony was unreliable because it was neither "based upon sufficient facts or data[,]" nor "the product of reliable principles and methods[,]" in violation of N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)-(2). While acknowledging that our Court has previously allowed analogous expert testimony, *see State v.* Carpenter, 147 N.C. App. 386, 556 S.E.2d 316 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 217, 560 S.E.2d 143, *cert. denied*, 536 U.S. 967, 153 L. Ed. 2d 851 (2002), he urges our Court to examine this issue in light of the General Assembly's 2011 amendment to Rule 702 of the North Carolina Rules of Evidence and the specific facts of his case.

Our Court reviews a trial court's admission of expert testimony pursuant to N.C. Gen. Stat. § 8C-1, Rule 702(a) for an abuse of discretion. *State v. Hunt*, __ N.C. App. __, __, 790 S.E.2d 874, 881, *disc. review denied*, __ N.C. __, 795 S.E.2d 206 (2016). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

In *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016), our Supreme Court confirmed that the most recent amendment of Rule 702 adopted the federal standard for the admission of expert witness testimony articulated in the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), line of cases. *See McGrady*, 368 N.C. at 884, 787 S.E.2d at 5. "By adopting virtually the same language from the federal rule into the North Carolina rule, the General Assembly thus adopted the meaning of the federal rule as well." *Id.* at 888, 787 S.E.2d at 7-8. Although Rule 702 was amended, our Supreme Court reasoned that "[o]ur previous cases are still good law if they do not conflict with the *Daubert* standard." *Id.* at 888, 787 S.E.2d at 8. While the amendment "did not change the basic structure of the inquiry" under Rule 702(a),

it "did change the level of rigor that our courts must use to scrutinize expert testimony before admitting it." *Id.* at 892, 787 S.E.2d at 10. "To determine the proper application of North Carolina's Rule 702(a), then, we must look to the text of the rule, [the *Daubert* line of cases], and also to our existing precedents, as long as those precedents do not conflict with the rule's amended text or with *Daubert*, *Joiner*, or *Kumho*." *Id.* at 888, 787 S.E.2d at 8.

The text of Rule 702, in pertinent part, provides:

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

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2016).

The *McGrady* Court held that:

> Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible. First, the area of proposed testimony must be based on "scientific, technical or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue." This is the relevance inquiry[.]
>
> . . . .
>
> Second, the witness must be "qualified as an expert by knowledge, skill, experience, training, or education." This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony. . . . Whatever the source of the witness's knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject?

. . . .

> Third, the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony [must be] based upon sufficient facts or data. (2) The testimony [must be] the product of reliable principles and methods. (3) The witness [must have] applied the principles and methods reliably to the facts of the case. These three prongs together constitute the reliability inquiry discussed in *Daubert*, *Joiner*, and *Kumho*. The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate[.]

McGrady, 368 N.C. at 889-90, 787 S.E.2d at 8-9 (internal citations, footnote, and quotation marks omitted).

In the present case, defendant does not dispute either Wood's qualifications or the relevance of her testimony. Defendant challenges the reliability of Wood's delayed disclosure testimony; whether her testimony met prongs (1) and (2) of the three-pronged reliability test.

"The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *Id.* at 890, 787 S.E.2d at 9. Regarding factors a trial court may consider in its determination of reliability, the *McGrady* Court explained as follows:

> In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593-94, 113 S.Ct. 2786. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho*, 526 U.S. at 147-49, 119 S.Ct. 1167. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the

reliability of expert testimony." *Id.* at 152. Those factors are part of a "flexible" inquiry, *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786, so they do not form "a definitive checklist or test," *id.* at 593, 113 S.Ct. 2786. And the trial court is free to consider other factors that may help assess reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150, 119 S.Ct. 1167.

The federal courts have articulated additional reliability factors that may be helpful in certain cases, including:

(1) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.

(3) Whether the expert has adequately accounted for obvious alternative explanations.

(4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

Fed. R. Evid. 702 advisory committee's note to 2000 amendment (citations and quotation marks omitted). In some cases, one or more of the factors that we listed in *Howerton* may be useful as well. *See Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (listing four factors: use of established techniques, expert's professional background in the field, use of visual aids to help the jury evaluate the expert's opinions, and independent research conducted by the expert).

Id. at 890-91, 787 S.E.2d at 9-10.

At trial, Wood testified that she had a bachelor's degree in sociology from Georgia State University and a master of social work from Clark Atlanta University. She had been a licensed clinical social worker for six

years. Wood was working as forensic interviewer at Pat's Place Child Advocacy Center. Wood testified that a forensic interview is a structured conversation with a child, allowing the child to be able to communicate in their own words, about a personal experience or something they had witnessed. She explained that the purpose of a forensic interview is to "elicit those details, and those details are either to refute the allegations that something may have happened to a child or a child may have witnessed something, or to support those allegations." She had approximately eleven years of forensic interviewing experience and over 200 hours of training in the field of forensic interviews of children suspected of being maltreated. Wood testified that she had obtained research-based knowledge of sexually abused children by reading research studies concerning the suggestibility of children, best types of questions to ask, how children develop and understand questions, and the process by which children provide disclosures. She continued to update her research in order to ensure she was utilizing the best practices. Wood testified that over her eleven years of experience, she had interviewed over 1,200 children, with 90% of those interviews focusing on sexual abuse allegations. She had also been qualified as an expert in child sexual abuse in Georgia over twenty times and once in North Carolina.

The State tendered Wood as an expert in the field of clinical social work, specializing in child sexual abuse and defendant objected. On *voir dire*, Wood testified that she had not conducted research in the delayed reporting of sexual assault cases by children, but had reviewed research on "delayed disclosures, reasons for delayed disclosures, as well as concerns that delayed disclosures could be false disclosures, and so I have reviewed on both sides of the concerns of delayed disclosures." When asked by defense counsel whether the claims of the research participants were determined to be true or false, Wood explained that the research she had reviewed were "already supposing that the participants are victims" and "they are just going by what the participants are saying." Wood testified that she was forming opinions based on her observations through the thousand-plus interviews she had conducted, as well as research she had reviewed. She estimated that she had read over twenty articles on delayed disclosures.

Ultimately, the trial court allowed Wood to testify as an expert in clinical social work, specializing in child sexual abuse cases. However, the trial court prohibited any testimony as to why, if at all, H.M. delayed in reporting the alleged abuse. The trial court stated as follows:

> THE COURT: Based on [] Miss Wood's education, she's a licensed clinical social worker, and having done forensic

> interviews of at least, approximately, over 1,200 children, 90 percent of those were focused on sexual abuse allegations, the Court will allow her to testify as a licensed clinical social worker with a specialization in child-sexual-abuse cases. And – however, despite that, the state has already said that they're not going to try to elicit testimony, and the Court will prohibit any testimony as to why, if at all, [H.M.] delayed in reporting, if she did, in reporting any potential inappropriate behavior, but just in general what Miss Wood has observed from child abuse, I'm sorry, sexual abuse from persons in the past.
>
> I think, [defense counsel], almost the exact question in State v. Dew, and then the quote: R.O says, however, the appellate courts in this jurisdiction have consistently allowed the admission of expert testimony, such as the witness in that case, which relies upon personal observations of professional experience rather than upon quantitative analysis.
>
> I think something like this would not be able to be, as you indicated, from empirical data or empirical testing, but I think that's going to go to the weight rather than to the admissibility so I'll deny the motion to the extent that she cannot testify as an expert, but I'll allow it to the extent that she cannot testify as to why anybody involved in this case may have delayed reporting any inappropriate behavior.

Wood later testified, amid objections from defendant, to the following:

> [THE STATE:] In your experience and in your survey of the research, is it uncommon for a child to delay disclosure of sexual abuse?
>
> [WOOD:] No.
>
> . . . .
>
> [WOOD:] No, it's not.
>
> [THE STATE:] What are some of the reasons that a child, based on the research and experience, in general, may delay disclosure?
>
> . . . .

> [WOOD:] There are numerous reasons. Some of them are due to fear: Fear of not being believed, fear of what others are going to say about them, fear of what the disclosure will do to the family, will it break the family up, fear that something will happen to the alleged perpetrator, fear that something will happen to the victim, fear that something will happen to the other family members if there's retaliation. Then, also, blame and self-guilt that they didn't do something to stop it, that they didn't run, that they didn't say something. Also, concern that if they tell, what will happen to their family. If this is – if the alleged perpetrator is a primary caregiver, will they have to begin to look for a new residence, will their brothers or sisters not be able to see their parent any further, and how will others in the family – will the other family members blame them for the destruction or the demise of the family; and so some of those are the reasons that children do not tell immediately.

Wood further testified that she had personally heard children express the same potential reasons for delayed disclosures that she had found in her research throughout her experience in forensic interviewing.

Defendant cross-examined Wood about whether the studies on delayed disclosures included false allegations of child sexual abuse. Wood replied that she had examined "both research that deal with children who have identified a positive disclosure and a negative disclosure, and they both do talk about delayed disclosures that is found in – throughout the research."

First, to be reliable, an expert's testimony must be based upon sufficient facts or data pursuant to Rule 702(a)(1). Defendant contends that Wood's testimony was unreliable because she had not conducted her own research and instead, relied on studies conducted by others. Defendant is essentially arguing that the trial court abused its discretion when it admitted Wood's expert testimony which was based upon her review of research on delayed disclosures, combined with professional experience. Upon thorough review, we hold that this contention directly conflicts with the meaning of Rule 702, the *Daubert* line of cases, and our existing precedent.

The Advisory Committee Notes to the federal rule state that subsection (a)(1) of Rule 702 "calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying 'facts or data.' The term 'data' is intended

to encompass the reliable opinions of other experts." Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments; *see Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374, 770 S.E.2d 702, 710 (citations omitted) (stating that the "requirement that expert opinions be supported by 'sufficient facts or data' means 'that the expert considered sufficient data to employ the methodology[]' " and that "experts may rely on data and other information supplied by third parties"), *disc. review denied*, 368 N.C. 284, 775 S.E.2d 861 (2015). Moreover, the Advisory Committee Notes provide as follows:

> Nothing in this amendment is intended to suggest that experience alone – or experience in conjunction with other knowledge, skill, training or education – may not provide a sufficient foundation for expert testimony. . . . In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.

Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments. The *Daubert* line of cases also stands for the proposition that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156, 143 L. Ed. 2d 238, 255 (1999).

The principle that experience alone or experience combined with knowledge and training is sufficient to establish a proper foundation for reliable expert testimony is in line with our previous holding in *Carpenter*. In *Carpenter*, our Court admitted analogous expert testimony under the prior version of Rule 702(a). The defendant in *Carpenter* argued that the trial court erred by admitting expert witness testimony from a licensed clinical social worker that "delayed and incomplete disclosures are not unusual in cases of child abuse[.]" *Carpenter*, 147 N.C. App. at 393, 556 S.E.2d at 321. The defendant asserted, *inter alia*, that the State had failed to establish that there was any scientific foundation for this opinion testimony and our Court rejected his argument. *Id.* Our Court reasoned as follows:

> Though she did not specifically cite supporting texts, articles, or data, [the expert witness] testified on *voir dire* that she was basing her conclusions on literature, journal articles, training, and her experience. Thus, a proper foundation was established for her opinion testimony. In her testimony, [the expert witness] explained general characteristics of children who have been abused. [The expert witness] testified that an abused child often delays

> disclosing the abuse and offered various reasons an abused child would continue to cooperate with an abuser. [The expert witness] did not testify as to her opinion with respect to [the victim's] credibility.
>
> Evidence similar to that offered by [the expert witness] has been held admissible to assist the jury. *See State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988) (finding expert testimony as to why a child would cooperate with adult who had been sexually abusing child admissible); *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 132 (1994) (concluding trial court did not err in admitting testimony describing general symptoms and characteristics of sexually abused children to explain the victim's behavior); *State v. Bowman*, 84 N.C. App. 238, 352 S.E.2d 437 (1987) (holding trial court was proper in admitting a doctor's testimony that a delay between the occurrence of an incident of child sexual abuse and the child's revelation of the incident was the usual pattern of conduct for victims of child sexual abuse). Thus, for the foregoing reasons we hold that the trial court did not abuse its discretion in admitting [the expert witness'] testimony.

Id. at 394, 556 S.E.2d at 321-22.

We find the circumstances in *Carpenter* and the case *sub judice* to be substantially similar. In *Carpenter*, our Court held that a proper foundation for the expert witness' testimony was established when the expert testified that her testimony was based on literature, journal articles, training, and experience. Likewise, Wood testified that her testimony on delayed disclosures was grounded in her 200 hours of training, eleven years of forensic interviewing experience, conducting over 1,200 forensic interviews with 90% of those focusing on sex abuse allegations, and reviewing over twenty articles on delayed disclosures. Wood, like the expert in *Carpenter*, testified about delayed disclosures in general terms and did not express an opinion as to the alleged victim's credibility. We hold that *Carpenter* is still good law as it does not conflict with the reliability requirements of the *Daubert* standard. *See McGrady*, 368 N.C. at 888, 787 S.E.2d at 8.

Based on the foregoing, Wood's testimony on delayed disclosures was clearly based upon facts or data sufficient to satisfy the first prong of Rule 702(a), and the trial court did not abuse its discretion in admitting this testimony.

Second, an expert's testimony must be the product of reliable principles and methods pursuant to Rule 702(a)(2). Defendant argues that Wood's testimony is not reliable because the research she relied upon was flawed in the following ways: they assumed participants were honest; they did not have any methods or protocols in place to screen out participants who made false allegations; and because there was no indication of how many participants might have lied, it was impossible to know the "error rate." Defendant also argues that when Wood provided a list of possible reasons why an alleged victim might delay disclosure, she did not account for the obvious alternative explanation that the abuse did not occur.

A careful review of the transcript establishes that these concerns were addressed throughout the examination and cross-examination of Wood and that Wood was able to provide detailed explanations for each.

During cross-examination by defense counsel on whether the research she had reviewed eliminated delayed disclosures that were based on false allegations of child sexual abuse, Wood testified, "I've looked at both research that deal with children who have identified a positive disclosure and a negative disclosure, and they both do talk about delayed disclosures that is found in – throughout the research." As to defendant's argument that the research assumed participants were honest, Wood explained that the research on delayed disclosures was not focused on making a determination of whether the alleged sexual abuse had in fact occurred:

> [WOOD:] . . . In the research they are – the researchers, from my understanding, at least the research that I have read, are not asking if it's true or false; they're taking from the – their methodology, they're asking, whether children or adults, to become participants if they have been victims, and so they're already supposing that the participants are victims.

Regarding defendant's argument that there were no methods or protocols in place to screen out participants making false allegations and thus, no way to obtain an error rate, Wood explained that there was not an identifiable method to ascertaining whether the participants were in fact sexually abused:

> [DEFENSE COUNSEL:] Okay. So they're supposing that they're victims but it's not ascertained.
>
> [WOOD:] It's not. Based on the participants, the participants are saying –

. . . .

> [DEFENSE COUNSEL:] Right. And so there's no digging down beneath the surface to see if those participants are being truthful about being abused.
>
> [WOOD:] You mean, like, are they making them take a lie detector test?
>
> [DEFENSE COUNSEL:] Or doing anything to find out if they're being truthful.
>
> [WOOD:] I don't know how else someone would find out the truth about child sexual abuse.
>
> [DEFENSE COUNSEL:] Exactly. So in these studies there's no way to know whether the participants who delayed reporting delayed reporting of a false occurrence or a true occurrence.
>
> [WOOD:] Well, I guess they are just going by what the participants are saying.

Wood's clarification demonstrated that obtaining the "known or potential rate of error" was not pertinent in assessing reliability based on the nature of delayed disclosures. *See McGrady*, 368 N.C. at 890, 787 S.E.2d at 9 (stating that the "precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony.").

When asked by defense counsel if the research Wood reviewed involved a scientific data or theory, Wood suggested that if one method would be the creation of a control group, an ethical question would be raised in the context of delayed disclosures: "it would be unethical to have a control group to abuse children and uncontrol group to not abuse children." She further explained that: "I think that the theories that I have found is, is that they took populations that the researchers have gathered in their research; and according to multiple research articles, some of those same theories cross all the research, is similar."

Lastly, in regards to defendant's argument that Wood did not account for alternative explanations of delayed disclosures, Wood's testimony reflected that she was identifying a non-exhaustive list of possible reasons:

> [THE STATE:] [] What are some of the reasons that a child, based on research and experience, in general, may delay disclosure?

. . . .

> [WOOD:] There are *numerous* reasons. *Some* of them are due to fear . . . . Then, also, blame and self-guilt . . . . Also, concern that if they tell, what will happen to their family . . . . and so *some* of those are the reasons that children do not tell immediately.

(emphasis added).

In sum, defendant has failed to demonstrate that his arguments attacking the principles and methods of Wood's testimony were pertinent in assessing the reliability of Wood's testimony on delayed disclosures. *See Kumho*, 526 U.S. at 150, 143 L. Ed. 2d at 251-52 (stating that the *Daubert* factors "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his [or her] testimony."). Accordingly, we hold that Wood's testimony was the product of reliable principles and methods sufficient to satisfy the second prong of Rule 702(a), and the trial court did not abuse its discretion in admitting this testimony.

B. Ineffective Assistance of Counsel

[2] In his second argument on appeal, defendant contends that he received ineffective assistance of counsel ("IAC") when his attorney elicited evidence of guilt that the State had not introduced. Specifically, defendant argues that while the State only elicited testimony from H.M. about one instance of sexual intercourse with defendant, defense counsel asked H.M. a leading question implying that she had sex with defendant on two occasions.

Defendant directs us to the following exchange that occurred during defense counsel's cross-examination of H.M.:

> [DEFENSE COUNSEL:] So the first weekend that my client, according to you, inappropriately touched you and put his hands in your vagina and actually, you said, had sexual intercourse with you, you didn't tell your dad, did you?
>
> [H.M.:] No
>
> . . . .
>
> [DEFENSE COUNSEL:] So how many times are you saying that my client had actually put his penis inside of you, how many different nights?
>
> [H.M.:] Two times.

In the present case, the record is not sufficiently complete to determine whether defendant's IAC claim has merit. *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) ("IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required . . . ."). "Trial counsel's strategy and the reasons therefor are not readily apparent from the record, and more information must be developed to determine if defendant's claim satisfies the *Strickland* test." *State v. Al-Bayyinah*, 359 N.C. 741, 753, 616 S.E.2d 500, 509-10 (2005), *cert. denied*, 547 U.S. 1076, 164 L. Ed. 2d 528 (2006). Accordingly, the claim is premature and we are obligated to dismiss it "without prejudice to the defendant's right to assert [it] during a subsequent MAR proceeding." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525.

C. Mistrial

[3] In his third argument, defendant contends that the trial court erred by failing to declare a mistrial *sua sponte* after H.M.'s father engaged in a "pattern of abusive and prejudicial behavior" during defendant's trial.

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

N.C. Gen. Stat. § 15A-1061 (2015). "It is well settled that a motion for a mistrial and the determination of whether defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion." *State v. McNeill*, 349 N.C. 634, 646, 509 S.E.2d 415, 422-23 (1998) (citation omitted), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999).

In the present case, defendant points to several instances of conduct by H.M.'s father which he contends disrupted the "atmosphere of judicial calm" to which he was entitled. The first instance occurred in October 2015 at defendant's original court date which was later rescheduled. The trial court judge had just informed the audience to "maintain proper courtroom decorum at all times." Thereafter, defense counsel informed the trial court as follows:

> [DEFENSE COUNSEL:] Your Honor, related to that, I would ask the Court not just in the courtroom, but outside the courtroom. This morning the alleged victim's father in a very loud voice made some derogatory comments to me about my client.

> And since we're going to have jurors, prospective jurors in that hallway during the course of jury selection and the trial itself, I would ask the Court to instruct him not to do that in the hallway because jurors are everywhere in this courthouse.

The trial court judge responded by stating:

> THE COURT: There is to be no contact; all right? And I expect that from everyone. Look, this is a – court's a place where trials are tried in the courtroom and not in the hallway. And I'm not going to have any type of intimidation by anybody take place, a witness, a party, the defendant, the victim. It's just not going to happen.
>
> And if it's reported to me that it does occur, you have been warned and I will deal with it appropriately; all right?

The second instance occurred in April 2016, prior to the commencement of jury selection:

> [DEFENSE COUNSEL:] Your Honor, one more thing. This is a security matter for the courtroom staff. I've been informed by [defendant] and his girlfriend, they are both present in court today, both are inside the courtroom, that [H.M.'s father] approached my client and said something to the effect of – pardon my French – but f*** with my daughter, I'm going to f*** with you then he was on the phone standing close enough that his comments could be heard on the phone saying if [H.M.'s] mother was still alive, [defendant] would be dead, and, finally, that I'm going to kill the motherf***er. So we had some of these issues six months ago when we started this trial, and they're popping up again, and I'm very concerned about him sort of threatening when they got here. And the police may be made aware of this later when we finish with court, but I just wanted the Court and staff to know about the security concerns that I have with my client and others.
>
> THE COURT: I appreciate you making the courtroom and the court officers aware of that. All right.

Defendant also points to several occasions during H.M.'s father's testimony where he was "admonished" by the trial court:

> THE COURT: If you know what [defense counsel is] asking, answer. If you don't, say you don't know.
>
> . . . .
>
> THE COURT: Listen to [defense counsel's] question.
>
> . . . .
>
> THE COURT: Sir, wait for the next question, please.
>
> . . . .
>
> [DEFENSE COUNSEL:] So going back to the morning that you discovered this on February 22nd, you speak to police at the scene of the karate studio, and then it's another couple weeks before Detective Bridges follows up and does anything?
>
> [H.M.'S FATHER:] Yeah. That's the good old Mecklenburg County court system, sir.
>
> THE COURT: Sir, if I have to keep admonishing you one more time –
>
> [H.M.'S FATHER:] I apologize.
>
> THE COURT: I'm going to – don't interrupt me. – about answering these questions directly, I'm going [to] exclude you from this trial and strike your testimony from the record, and you're going to be out in the hallway. Do you understand me?
>
> [H.M.'S FATHER:] Yes, sir.
>
> THE COURT: All right. Let's – I'm tired of this. Answer the lawyers' questions directly. Don't throw in editorial comments, don't threaten the lawyers or anybody else in this courtroom, and answer these questions, and let's move on with this. I'm sorry, [defense counsel.] Go ahead.

The record demonstrates that in each of these instances, defendant did not request additional action by the trial court, defendant did not move for a mistrial, and defendant did not object to the trial court's method of handling the alleged misconduct in the courtroom. Accordingly, defendant has not preserved this argument for appellate review. *See State v. McCall*, 162 N.C. App. 64, 70, 589 S.E.2d 896, 900 (2004) (holding that the defendant failed to preserve for appellate review a claim that the trial

court erred by failing to declare a mistrial *sua sponte* after it had been notified that individuals were making hand signals to the alleged victim, where defense counsel did not request further action by the trial court, the transcript did not indicate who was making the hand signals or what type of signals were given, and the defendant did not move for a mistrial or object to the trial court's handling of the alleged disruption); N.C. R. App. P. 10(a)(1) (2017) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

D. Trial Court's Ruling in Presence of Jury

[4] In his final argument on appeal, defendant asserts that the trial court impermissibly expressed an opinion on the evidence by denying defendant's motion to dismiss in the presence of the jury, in violation of N.C. Gen. Stat. § 15A-1222. Specifically, defendant argues that because the trial court's ruling was audible to the jury, the exchange was a "focal point" of the jury's short trip to the courtroom, and the jury was not made aware of the difference in the standards of proof necessary to survive a motion to dismiss as compared to obtaining a conviction, the trial court's ruling carried a substantial risk of prejudice. We are not convinced by defendant's arguments.

N.C. Gen. Stat. § 15A-1222 provides that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2015).

We find the holding in *State v. Welch*, 65 N.C. App. 390, 308 S.E.2d 910 (1983), to be controlling on this issue. The defendant in *Welch* argued that the trial court expressed an opinion, in violation of N.C. Gen. Stat. § 15A-1222, by summarily denying his motion to dismiss while in the presence of the jury. *Id.* at 393-94, 308 S.E.2d at 912. Our Court stated as follows:

> The record, however, does not affirmatively disclose that the ruling was in fact audible to the jurors. Defendant did not seek to have the ruling made out of the presence of the jury, nor did he object or move for mistrial on this account at trial. Generally, ordinary rulings by the court in the course of trial do not amount to an impermissible expression of opinion. *State v. Gooche*, 58 N.C. App. 582, 586-87, 294 S.E.2d 13, 15-16, *modified on other grounds*, 307 N.C. 253, 297 S.E.2d 599 (1982). At most the ruling here

> merely informed the jury that the evidence was sufficient to allow it to decide the case. On this record no prejudice to defendant appears.

Id. at 393-94, 308 S.E.2d at 912-13.

The circumstances found in *Welch* are analogous to those found in the present case. At the close of the State's evidence and outside the presence of the jury, defendant made a motion to dismiss the remaining charges. The trial court denied this motion. The next day, following the presentation of defendant's evidence, defendant renewed his motion to dismiss while the jury was present. Again, the trial court denied his motion. Defendant did not seek to have the ruling made outside the presence of the jury, he did not object, and he did not move for a mistrial on this account. Accordingly, we hold that defendant's argument is meritless.

DISMISSED IN PART; NO ERROR IN PART.

Judges ELMORE and DIETZ concur.

UNION COUNTY, PLAINTIFF
v.
TOWN OF MARSHVILLE, DEFENDANT

No. COA17-37

Filed 5 September 2017

1. Appeal and Error—interlocutory orders and appeals—wastewater disposal—substantial right—governmental immunity inapplicable

Defendant town's appeal from an interlocutory order dismissing some, but not all, of plaintiff county's claims made in its dispute over the disposal of wastewater was dismissed where the town failed to show a substantial right was affected since its defense of governmental immunity was inapplicable.

2. Appeal and Error—interlocutory orders and appeals—wastewater disposal—substantial right—possibility of inconsistent verdicts

Defendant town's appeal from an interlocutory order dismissing its counterclaims in its dispute with plaintiff county over the

disposal of wastewater was dismissed where the town failed to show a substantial right was affected since it never explained how its allegations of inconsistent verdicts could truly become realities.

Appeal by defendant from orders entered 24 and 27 October 2016 by Judge Robert C. Ervin in Union County Superior Court. Heard in the Court of Appeals 3 May 2017.

Erwin, Bishop, Capitano & Moss, PA, by J. Daniel Bishop and Scott A. Hefner, for plaintiff-appellee.

Turrentine Law Firm, PLLC, by Karlene S. Turrentine, and Stark Law Group, PLLC, by S.C. Kitchen, for defendant-appellant.

BERGER, Judge.

The Town of Marshville ("Defendant Town") appeals from two orders ruling on motions made in its dispute with Union County ("Plaintiff County") over the disposal of wastewater. The appealed orders are interlocutory, and Defendant Town must therefore establish grounds for appellate review. Interlocutory review of these orders is argued by Defendant Town to be proper because the orders affect the substantial rights of governmental immunity and the avoidance of the possibility of inconsistent verdicts, and these substantial rights would be lost without immediate review. Because Defendant Town is unable to establish that either ground for appellate review applies to the appealed orders, we dismiss as interlocutory.

Factual & Procedural Background

In 1978, Plaintiff County and Defendant Town entered into a contract under which the wastewater and sewage of Defendant Town was collected, transported, monitored, and treated in exchange for payment of the costs incurred by Plaintiff County to carry out these duties. Since 1981, when the municipal collection system became operational, the system has transported Defendant Town's sewage up to thirty miles to the treatment plant owned by the City of Monroe.

Federal law requires that a user charge system be implemented under which each user pays a proportional share of the costs of operations and maintenance, which includes necessary replacement of capital assets. The 1978 Contract implemented the payment structure used by the parties. In 1994, an agreement was reached extending the contract term until 2011. In the early 2000's, the system needed repair, to the point that

state regulators required corrective action to be taken by the County. Between 2005 and 2011, Plaintiff County spent more than $12 million in improving the system, although some of this cost was funded through federal grants.

In 2011, Plaintiff County notified Defendant Town that their contract term had ended. A new contract was proposed in 2012 to Defendant Town, but no agreement was reached. For several years both parties operated under the terms of the original contract. However, in 2014, Defendant Town ceased its payment of the required user fees for its use of the sewage system. It was for the collection of over $467,000.00 of unpaid fees owed by Defendant Town that Plaintiff County filed this lawsuit on April 11, 2016.

Defendant Town moved to dismiss the lawsuit, denying any obligation in contract or restitution. It also filed counterclaims asserting equitable ownership of the sewage system. Plaintiff County responded by formally revoking its permission for Defendant Town to discharge it sewage into the county system. It also amended its complaint to add claims, and it sought a preliminary injunction against Defendant Town to stop any further discharge into its system. The parties then cross-filed a motion to dismiss by Defendant Town and for judgment on the pleadings by Plaintiff County.

On October 7, 2016, a motions hearing was held in Union County Superior Court. Three orders were entered as a result of the hearing. First, on October 10, the trial court entered a preliminary injunction order requiring the Defendant Town to cease discharging sewage into the system. This injunction order was previously appealed, but the parties entered into a consent order causing that appeal to be moot and it was therefore dismissed. Then, on October 24, the trial court entered an order on the Plaintiff County's motion for judgment on the pleadings. In this order, the trial court granted in part and denied in part the motion, dismissing the Defendant Town's counterclaims for constructive and resulting trust and those labeled "Exclusive Emoluments" and "Clean Water Act." Finally, on October 27, the trial court entered an order granting in part and denying in part the Defendant Town's motion to dismiss, allowing a breach of contract claim to continue, but dismissing a separate breach claim and an unjust enrichment claim. It is from these last two orders that Defendant Town appeals.

Analysis: Grounds for Appellate Review

"The appeals process is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the

whole case for determination in a single appeal from the final judgment." *Stanford v. Paris*, 364 N.C. 306, 311, 698 S.E.2d 37, 40 (2010) (citation and quotation marks omitted).

North Carolina General Statutes Sections 1-277 and 7A-27 provide "that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Consumers Power v. Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974) (citations omitted). "An appeal is interlocutory when noticed from an order entered during the pendency of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy." *Peterson v. Dillman*, ___ N.C. App. ___, ___, 782 S.E.2d 362, 365 (2016) (citation omitted). "Accordingly, interlocutory appeals are discouraged except in limited circumstances." *Stanford*, 364 N.C. at 311, 698 S.E.2d at 40 (citations omitted).

> The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature. Thus, the extent to which an appellant is entitled to immediate interlocutory review of the merits of his or her claims depends upon his or her establishing that the trial court's order deprives the appellant of a right that will be jeopardized absent review prior to final judgment.

Richmond Cnty. Bd. of Educ. v. Cowell, 225 N.C. App. 583, 585, 739 S.E.2d 566, 568, *disc. review denied*, 367 N.C. 215, 747 S.E.2d 553 (2013) (citations and quotation marks omitted). "[T]he appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted).

This requirement that appellant establish a right to review is codified in our Appellate Rules. Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure requires that an appellant's brief include, *inter alia*:

> *A statement of the grounds for appellate review.* Such statement shall include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement must contain sufficient facts

> and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C.R. App. P. 28(b)(4) (2017).

[1] As grounds for appellate review of the first order dismissing some, but not all, of Plaintiff County's claims pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, Defendant Town asserts that the trial court erred in not dismissing Plaintiff County's remaining tort claims because governmental immunity shields it from liability. Generally, "[u]nder the doctrine of governmental immunity, a county or municipal corporation is immune from suit for the [torts committed by] its employees in the exercise of governmental functions absent waiver of immunity." *Estate of Williams v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (citations and quotation marks omitted).

However, governmental immunity has limits, and it is inapplicable here as a defense to the tort claims asserted by Plaintiff County.

> Governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions. Governmental immunity does not, however, apply when the municipality engages in a proprietary function. In determining whether an entity is entitled to governmental immunity, the result therefore turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature.
>
> We have long held that a "governmental" function is an activity that is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself. A "proprietary" function, on the other hand, is one that is commercial or chiefly for the private advantage of the compact community.

Id. at 199, 732 S.E.2d at 141 (citations, emphasis, quotation marks, and brackets omitted).

"The law is clear in holding that the operation and maintenance of a sewer system is a proprietary function where the municipality sets rates and charges fees for the maintenance of sewer lines." *Harrison v. City of Sanford*, 177 N.C. App. 116, 121, 627 S.E.2d 672, 676, *disc. review denied*, ___ N.C. ___, 639 S.E.2d 649 (2006) (citations omitted). *See also Bostic*

Packaging, Inc. v. City of Monroe, 149 N.C. App. 825, 829, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002) (in reversing summary judgment of claims dismissed on governmental immunity grounds, we held "defendant [town] is not immune from tort liability in the operation and maintenance of its sewer system"). Regardless of the clarity of North Carolina law, Defendant Town herein appeals to have this Court apply governmental immunity to claims that arose out of the operation of its sewer system. We decline to do so, and Defendant Town is, thus, unable to establish grounds for our interlocutory review because governmental immunity does not apply. We therefore dismiss this portion of the appeal.

[2] Defendant Town's second argument on appeal is not grounded in governmental immunity, but rather addresses the order dismissing its counterclaims as affecting its substantial right to avoid inconsistent verdicts. In attempting to establish grounds for our review of the second order, which ruled on Plaintiff County's motion for judgment on the pleadings pursuant to Rules 12(c) and (h)(2) of the North Carolina Rules of Civil Procedure, Defendant Town makes a circular argument. Defendant Town asserts that (1) the trial court erred in dismissing its counterclaims; (2) a successful appeal of the dismissal order based on the merits of the counterclaims could possibly create inconsistent verdicts; (3) the avoidance of inconsistent verdicts is a substantial right; (4) a substantial right establishes grounds for appellate review; and, therefore, (5) because there are grounds for appellate review, this Court should review the merits of the dismissed counterclaims.

To support its argument that immediate appeal from an otherwise un-appealable interlocutory order is proper, Defendant Town only cites *Hartman v. Walkertown Shopping Center*, in which we stated that "[t]he right to avoid the possibility of two trials on the same issues can be a substantial right. A judgment which creates the possibility of inconsistent verdicts on the same issue – in the event an appeal eventually is successful – has been held to affect a substantial right." *Hartman*, 113 N.C. App. 632, 634, 439 S.E.2d 787, 789, *disc. review denied*, 336 N.C. 780, 447 S.E.2d 422 (1994) (citations, emphasis, brackets, and ellipses omitted). However, the order appealed from in *Hartman* could have had the effect of bifurcating adjudication of "identical factual claims" into distinct, and potentially inconsistent, resolutions for different defendants, although similarly situated. *Id.* Our facts differ, and *Hartman* is inapplicable.

Although Defendant Town argues that, if its appeal is successful, there could be the potential for inconsistent verdicts on the issues

here, it never explains how these inconsistent verdicts about which it complains could truly become realities. This Court will not construct appellant's arguments in support of a right to interlocutory appeal. *Jeffreys*, 115 N.C. App at 380, 444 S.E.2d at 254 (citations omitted). This argument does not establish grounds for appellate review and we dismiss this portion of the appeal as well.

Conclusion

For the reasons given above, Defendant Town has not established grounds for appellate review for either challenged order. Therefore, this appeal is dismissed as interlocutory.

DISMISSED.

Judges ELMORE and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 SEPTEMBER 2017)

BOWDEN v. WASHBURN No. 16-1288	Harnett (16CVD1232)	Affirmed
BULLARD v. PRIME BLDG. CO., INC. No. 16-1279	Robeson (15CVS2084)	Affirmed
CARTER v. BARNES TRANSP No. 16-627	N.C. Industrial Commission (W69306)	Affirmed
DALY v. DALY No. 16-885	Lee (15CVD276)	Affirmed
EAGLE v. EAGLE No. 16-1315	Buncombe (14CVD3600)	Dismissed
FORTNER v. HORNBUCKLE No. 17-44	Swain (11CVS137)	No Error
HOLBERT v. BLANCHARD No. 17-134	Buncombe (12CVS2333)	Affirmed
IN RE A.J.S. No. 17-205	Forsyth (15JT15)	Affirmed
IN RE A.L.H. No. 16-1251	Catawba (15JT36)	Vacated and Remanded
IN RE A.M.S. No. 17-149	Edgecombe (15JT72)	Reversed
IN RE D.M.P. No. 17-297	Wake (15JT276)	Affirmed
IN RE G.M. No. 17-174	Wake (12JA313)	Affirmed
IN RE K.G.M. No. 17-304	Burke (09JT76)	Affirmed
IN RE M.H. No. 17-255	New Hanover (16JA232)	Vacated and Remanded
IN RE O.S.R. No. 16-958	Yadkin (11JB39)	Vacated in part and Remanded

IN RE S.S.T. No. 17-261	Burke (15JT100)	Affirmed
IN RE T.L.M. No. 17-189	Onslow (14JT22-23)	Affirmed in Part; Remanded in Part.
JACKSON v. CENTURY MUT. INS. CO. No. 16-997	Forsyth (14CVS7263)	Affirmed
KELLEY v. ANDREWS No. 17-20	Durham (13CVS5618)	Affirmed
KHASHMAN v. KHASHMAN No. 16-765	Mecklenburg (14CVS21105)	Affirmed
STATE v. ALLEN No. 16-1147	Union (12CRS52763-64)	No Error
STATE v. BATISTE No. 16-1186	Cumberland (14CRS59675)	Reversed
STATE v. BOOKER No. 16-1142	Cumberland (15CRS1623-27)	Vacated and Remanded
STATE v. BYRD No. 16-1025	Alamance (15CRS54988-89)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. CARLTON No. 17-36	Wilkes (15CRS51294) (15CRS527-28)	No Error
STATE v. CLEGG No. 17-76	Wake (14CRS202101)	No Error
STATE v. GOFF No. 17-34	Lenoir (15CRS1175) (15CRS50953) (15CRS51096) (15CRS668-71)	Affirmed
STATE v. McCOY No. 16-1099	Alamance (13CRS53245)	No error in part; vacated in part; remand in part.
STATE v. SMITH No. 17-93	Nash (14CRS54642) (15CRS1112)	Vacated in part, No error in part
STATE v. ST. CLAIR No. 16-1003	Washington (15CRS50180)	No Error

STATE v. TILGHMAN No. 17-27	New Hanover (15CRS4541) (15CRS52868-69)	Dismissed in Part; No Error in Part; No Plain Error in Part
ULI v. ULI No. 16-1301	Cabarrus (12CVD1023)	Reversed and Remanded

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