259 N.C. App.—No. 3 Pages 425-734

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 2, 2020

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

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OF
NORTH CAROLINA

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[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Sworn in 30 April 2019. [7]Sworn in 26 April 2019. [8]Retired 31 December 2016. [9]Retired 24 April 2017. [10]Appointed 1 August 2016. Term ended 31 December 2016. [11]Retired 31 December 2018. [12]Retired 31 December 2018. [13]Resigned 24 March 2019.

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COURT OF APPEALS

CASES REPORTED

Filed 15 May 2018

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

Interlocutory appeals—preliminary injunction—enforcement of county unified development ordinance—The Court of Appeals had jurisdiction to consider defendant county's interlocutory appeal from a preliminary injunction preventing the county from enforcing its unified development ordinance. **LeTendre v. Currituck Cty., 512.**

Interlocutory order—appellate jurisdiction—collateral estoppel not applicable—consent judgment—petition for certiorari—The Court of Appeals had jurisdiction where the Department of Transportation (DOT) appealed from a Rule 60(b) order in a condemnation case arising from a consent judgment in a highway improvement project. The order was interlocutory because it clearly contemplated further proceedings at trial on just compensation and collateral estoppel did not apply because this was not relitigation of the same issue. However, DOT's petition for certiorari was granted. **N.C. Dep't of Transp. v. Laxmi Hotels of Spring Lake, Inc., 610.**

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Custody—modification—visitation—temporary order—substantial change of circumstances not needed—The trial court did not err by entering an order modifying visitation in a child custody case without making sufficient findings showing a substantial change in circumstances where the initial order was a temporary custody order. The trial court stated in the original order that its findings would not be binding on the parties in future hearings; the conclusions were consistent with a temporary order; the order stated at one point that it was temporary; and it was clear from the plain language of the parties that it was entered without loss or other prejudice to the rights of the parties. **Marsh v. Marsh, 567.**

Support—capital gains—findings—A child support order did not contain sufficient findings to justify the use of a parent's past capital gains to calculate current, regular capital gains income. Capital gains are a highly variable type of income and income from past capital gains generally is a poor predictor of current, regular income from capital gains. If the trial court relies on past capital gains to calculate current, regular capital gains income, the court must establish that the party still owns capital assets of like kind to continue generating similar gains as in the past and that the party can reasonably be expected to continue realizing similar gains. **Kaiser v. Kaiser, 499.**

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Support—child therapy expenses—The trial court did not abuse its discretion in a child support case by denying defendant's request to recover past and future expenses for child therapy as part of the father's child support obligations. There was at least some competent evidence to support the trial court's finding that the mother created the need for the therapy. **Kaiser v. Kaiser, 499.**

Support—income of parent—fiance's payments—The trial court's findings in a child support case regarding amounts paid by the mother's fiance, a cohabitant, were not sufficient to categorize the fiance's payments as part of the mother's gross income. The trial court needed to resolve the conflicting evidence as to whether the payments were to help the mother in paying her own household expenses (maintenance), a sublease rental payment, or the fiance's share of the household expenses. Maintenance and rental income would be income to the mother, but the fiance's payment of his share of expenses would not be. **Kaiser v. Kaiser, 499.**

Support—income of parent—loan from parents—The trial court did not err in a child support case by not treating as income payments the father received from his parents. The father testified that these payments were loans he was obligated to repay. The trial court's general findings concerning the father's income, which impliedly rejected defendant's argument, were sufficient. **Kaiser v. Kaiser, 499.**

Support—parent's income—annual business income—The trial court's general findings were sufficient to support its calculation of a parent's business income despite defendant's argument that the trial court's calculation did not include the final months of the year. There was testimony that the prediction of income for the fourth quarter was speculative. **Kaiser v. Kaiser, 499.**

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Support—parties' gross income—While it is well established that child support obligations are determined by a party's actual income at the time the order is made, evidence of past income can assist the trial court in determining current income where income is seasonal or highly variable. What matters is why the trial court examines past income; the findings must show that past income was used to accurately assess current income. **Kaiser v. Kaiser, 499.**

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Rule 12(b)(6)—caveat—applicable—Although caveators argued that a caveat cannot be dismissed because N.C. courts have historically required that all caveat issues be tried by a jury, the Rules of Civil Procedure that have been applied to estate proceedings include those involving a disposition without a jury trial. Therefore, there is no absolute requirement for a jury trial in a will caveat. **In re Will of Hendrix, 465.**

Rule 60—consent judgment—timeliness of motion—The trial court did not abuse its discretion by setting aside a consent judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6) in a condemnation case arising from a highway improvement project. Although the Department of Transportation (DOT) contended that the motion to set aside was not timely filed because the consent judgment could only be set aside based on fraud, mutual mistake, duress, or undue influence pursuant to Rule 60(b)(3), which has a one-year time limitation, facts illustrative of fraud and misrepresentation do not mean that the trial court is limited to apply only those facts as grounds for relief. Relief may be appropriate pursuant to Rule 60(b) if those facts are accompanied by circumstances that justify relief from the judgment. The motion must then be brought within a reasonable time, which was done here. **N.C. Dep't of Transp. v. Laxmi Hotels of Spring Lake, Inc., 610.**

CONSTITUTIONAL LAW

Double jeopardy—after mistrial for hung jury—voluntary dismissal by State—reprosecution—Where defendant's murder trial was declared a mistrial due to jury deadlock and the State subsequently filed a section 15A-931 voluntary dismissal of the murder charge, the State's reprosecution of defendant for the same offense four years later violated the constitutional prohibition against double jeopardy. While the hung-jury mistrial did not terminate the initial jeopardy, the State's voluntary dismissal did terminate the jeopardy and was functionally tantamount to an acquittal. **State v. Courtney, 635.**

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Basis for—inverse condemnation—not claim to restrain—In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals noted that plaintiff's complaint alleged that defendant county had taken her property by inverse condemnation but that the preliminary injunction was not and could not have been based upon this claim, because inverse condemnation is a claim for monetary compensation and not a claim to restrain defendant from taking some action. **LeTendre v. Currituck Cty., 512.**

INSURANCE

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Consent—condemnation of land—motion to set aside—just compensation— The trial court did not abuse its discretion by setting aside a consent judgment under N.C.G.S. § 1A-1, Rule 60(b)(6) in an action arising from a condemnation for a highway improvement project. Extraordinary circumstances existed to support, and justice demanded, the setting aside of the judgment; the record was replete with evidence to support the trial court's conclusion that the Department of Transportation did not adequately inform the landowner of the extent of the taking. These were not two entities negotiating at arm's length and just compensation was constitutionally required. **N.C. Dep't of Transp. v. Laxmi Hotels of Spring Lake, Inc., 610.**

JURISDICTION

Subject matter—administrative law judge's final decision—judicial review— The trial court properly dismissed, for lack of subject matter jurisdiction, a petition for judicial review of an administrative law judge's final decision in a contested case involving an employee's dismissal from a state university. Sections 7A-29(a) and 126-34.02(a) provided a legally sufficient method for obtaining judicial review by direct appeal to the Court of Appeals, and the plain language of section 150B-43 prohibited petitioner from seeking judicial review in the superior court. **Swauger v. Univ. of N.C. at Charlotte, 727.**

LACHES

Enforcement of zoning ordinance—conduct of officials—In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals noted that plaintiff homeowner's complaint alleged that defendant's enforcement of its UDO was barred by laches but that the preliminary injunction was not based upon this claim. Plaintiff would not have been entitled to a preliminary injunction on the basis of a likelihood of success on her laches claim because a municipality cannot be estopped from enforcing a zoning ordinance based on the conduct of its officials. **LeTendre v. Currituck Cty., 512.**

LARCENY

Doctrine of recent possession—sufficiency of evidence—possession of stolen property—Defendant's mere possession of stolen property by briefly transporting it in her truck approximately two weeks after it was alleged to have been stolen was not sufficient evidence to support her convictions for breaking and entering and larceny after breaking and entering under the doctrine of recent possession, where the State failed to demonstrate defendant's possession was to the exclusion of all persons not party to the crime. **State v. McDaniel, 682.**

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Foreclosure sale—reinstatement of loan—third-party bidder—standing—A third-party bidder lacked standing to appeal an order setting aside a foreclosure sale where the mortgagors reinstated their loan and cured their default within the 10-day upset bid period and the substitute trustee returned the bidder's deposit. The bidder was not a real party in interest to the underlying property or deed of trust. **In re Foreclosure of Menendez, 460.**

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Permanent loan modification agreement—preconditions—time-is-of-the-essence payment—In an action to enjoin a foreclosure sale, plaintiff mortgagor failed to allege sufficient facts to show that a permanent loan modification agreement was binding upon defendant mortgagee parties, so the trial court properly dismissed her contractual claims pursuant to Rule of Civil Procedure 12(b)(6). Plaintiff's complaint showed that she failed to make a time-is-of-the-essence payment that was required to make the permanent loan modification agreement become effective. **McDonald v. Bank of N.Y. Mellon Tr. Co., 582.**

NEGLIGENCE

Sufficiency of pleading—car wash—breach of duty of care—dumping of hazardous materials—Plaintiff properly pleaded a claim for negligence by alleging that defendant's employee owed a duty of care in the use of plaintiff's car wash, the employee breached that duty by dumping diesel fuel in the car wash drain system, and caused harm to plaintiff's property. **ABC Servs., LLC v. Wheatly Boys, LLC, 425.**

PRETRIAL PROCEEDINGS

Motions practice—local rules—trial judge's discretion to deviate—In a civil case involving littering, trespass to property, and negligence, the trial court did not abuse its discretion by hearing defendant's 12(b)(6) motion to dismiss on the day of trial despite defendant's failure to strictly adhere to local rules regarding motions, where plaintiff had sufficient advance notice of the motion, filed with defendant's answer over a year before the motion hearing. **ABC Servs., LLC v. Wheatly Boys, LLC, 425.**

PROBATION AND PAROLE

Revocation—sufficient basis—clerical error—While the trial court made a clerical error by checking a box on the revocation form referring to multiple violations of probation, only one of which could be an independent basis for revocation pursuant to statute, it was clear from the court's rendition and order as a whole that the court properly based revocation on the commission of a criminal offense and not the other two violations of failure to pay court indebtedness and probation supervision fees. **State v. Sharpe, 699.**

SATELLITE-BASED MONITORING

Mandatory lifetime SBM—Fourth Amendment search—reasonableness— The trial court erred by determining the State met its burden of showing the imposition of lifetime satellite-based monitoring (SBM) was reasonable under the Fourth Amendment as to this defendant where the State failed to present any evidence of its need to monitor defendant or the procedures actually used to conduct SBM in unsupervised cases such as defendant's. While parolees and probationers have significantly diminished expectations of privacy as a result of their legal status, unsupervised offenders such as defendant, although statutorily determined to be recidivist sex offenders, have a greater expectation of privacy than supervised offenders. **State v. Grady, 664.**

SEARCH AND SEIZURE

Knock and talk doctrine—back door—The trial court erred in denying defendant's motion to suppress where law enforcement officers violated his Fourth Amendment right against unreasonable searches by approaching the back door of an apartment to perform a knock and talk. Although the officers had observed their confidential informant using the back door on several occasions to purchase illegal drugs from the occupants of the apartment, the permission granted by a resident to certain individuals to use a door other than the front entrance does not automatically extend to members of the public, including law enforcement. **State v. Stanley, 708.**

Motorist stopped in roadway—unmarked police car—no seizure without submission to show of authority—A law enforcement officer's activation of his blue lights fifteen seconds after defendant inexplicably stopped her vehicle in the middle of the road did not constitute a seizure where the officer was in an unmarked car, defendant had not violated any laws prior to stopping, and there was no evidence defendant knew or reasonably believed the individuals in the unmarked car were law enforcement. The evidence did not indicate defendant submitted to a show of authority until after a subsequent high-speed car chase, which ended when another law enforcement vehicle impeded defendant's progress. **State v. Turnage, 719.**

Traffic stop—extended—reasonable suspicion—In a case arising from a traffic stop and drug charges, the trial court's findings supported its conclusion that the officer observed a sufficient number of "red flags" *before* issuing a warning citation

N.C.G.S. § 153A-340 and thus were not shielded from zoning under the statutory farm exemption. The legislature's 2017 amendment to section 153A-340 which added a definition of "agritourism" served to clarify existing law, not alter it, and proved instructive to the Court of Appeals in its evaluation of the type of activities exempt from zoning. The Court of Appeals determined that the specified commercial shooting activities at issue, even when done on a bona fide farm and in preparation for the hunt, did not fit within traditional notions of hunting and thus did not constitute "agritourism" so as to be exempt from zoning. **Jeffries v. Cty. of Harnett, 473**

Unified development ordinance—definition of single family detached dwelling—validity—In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner's claim that the UDO violated the zoning enabling statute was an improper basis for the preliminary injunction. Plaintiff's argument regarding structural dependency misconstrued the UDO, and the UDO's definition of a single family detached dwelling did not impose an arbitrary restriction on her ability to use her property. **LeTendre v. Currituck Cty., 512.**

Unified development ordinance—due process—arbitrary and capricious—In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her claim that the UDO was unconstitutionally arbitrary or capricious as applied to her. The zoning ordinance was within the scope of the county's police power, and it protected the natural environment of a remote portion of the Outer Banks and the people who lived there. The limited interference with plaintiff's use of her property was reasonable, and plaintiff's trouble was created by her decision to build on a certain area of her lot that required a Coastal Area Management Act permit (in addition to compliance with the UDO). **LeTendre v. Currituck Cty., 512.**

Unified development ordinance—due process—vagueness—In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her claim that the UDO was unconstitutionally vague to the extent it required the wings of her home to be structurally dependent. Plaintiff's argument incorrectly assumed that the UDO required structural dependency, and the UDO plainly prohibited more than one principal structure per lot, while allowing accessory structures. **LeTendre v. Currituck Cty., 512.**

Unified development ordinance—equal protection—building permit—In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her equal protection claim because there was no forecast of evidence that defendant county applied its zoning ordinance in a manner that treated plaintiff differently from other property owners in the same district. **LeTendre v. Currituck Cty., 512.**

Unified development ordinance—layout of interior rooms—validity—In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner's claim that the UDO violated N.C.G.S. 153A-340(l)

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

ABC SERVICES, LLC d/b/a TAYLOR'S QUICK LUBE & CAR WASH, Plaintiff
v.
WHEATLY BOYS, LLC d/b/a WHEATLY BOYS TIRE & AUTOMOTIVE, Defendant

No. COA17-981

Filed 15 May 2018

1. Pretrial Proceedings—motions practice—local rules—trial judge's discretion to deviate

In a civil case involving littering, trespass to property, and negligence, the trial court did not abuse its discretion by hearing defendant's 12(b)(6) motion to dismiss on the day of trial despite defendant's failure to strictly adhere to local rules regarding motions, where plaintiff had sufficient advance notice of the motion, filed with defendant's answer over a year before the motion hearing.

2. Torts, Other—sufficiency of pleading—littering—definition of litter receptacle—car wash drain system

Plaintiff's claim for littering was properly dismissed by the trial court after it concluded that plaintiff's car wash drain system, into which defendant's employee dumped a large quantity of diesel fuel, constituted a litter receptacle pursuant to N.C.G.S. § 14-399 (deposits in which do not qualify as trespass).

3. Trespass—sufficiency of pleading—customer—conduct exceeding scope of invitation

Plaintiff properly pleaded a claim for trespass to property by alleging that defendant's employee exceeded the scope of his invitation to be a customer of plaintiff's car wash by dumping a large quantity of hazardous materials on the property.

4. Negligence—sufficiency of pleading—car wash—breach of duty of care—dumping of hazardous materials

Plaintiff properly pleaded a claim for negligence by alleging that defendant's employee owed a duty of care in the use of plaintiff's car wash, the employee breached that duty by dumping diesel fuel in the car wash drain system, and caused harm to plaintiff's property.

Appeal by Plaintiff from order entered 1 February 2017 by Judge Benjamin G. Alford in Carteret County Superior Court. Heard in the Court of Appeals 20 February 2018.

Harvell and Collins, P.A., by Russell C. Alexander and Wesley A. Collins, for the Plaintiff.

Wheatly, Wheatly, Weeks, Lupton & Massie, P.A., by Claud R. Wheatly, III, for the Defendant.

DILLON, Judge.

ABC Services, LLC ("Plaintiff"), brought this action claiming that an employee of Wheatly Boys Tire & Automotive ("Defendant") damaged its car wash facility when the employee dumped a large quantity of diesel fuel into a drain at the facility during the process of washing Defendant's truck. The trial court dismissed Plaintiff's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiff appeals, contending that the trial court abused its discretion in reviewing Defendant's motion to dismiss *sua sponte* and without notice to Plaintiff, and thereafter erred by dismissing Plaintiff's claims despite the presence of a dispute over material facts. After reviewing the information before the trial court, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Background

In December 2014, an individual (the "Employee") employed by Defendant drove a company vehicle, a truck with an off-road diesel holding tank, into a washing bay at a car wash in Beaufort owned by Plaintiff. The Employee began washing the vehicle's holding tank, dumping the residue and its remaining contents into the car wash's drainage system. The Employee continued for 15-20 minutes before a car wash employee asked him to stop.

Following this incident, a smell of diesel wafted from the drain. Witnesses reported seeing a dark, greasy liquid inside the drain. Plaintiff ultimately hired an outside cleaning company to dispose of the drain's contents in an environmentally appropriate manner.

Ten months after the incident, in October 2015, Plaintiff filed a complaint against Defendant seeking recovery of its cleaning costs. Defendant filed an answer which contained a Rule 12(b)(6) motion to dismiss. Sometime later, before trial began, the parties stipulated to a Pre-Trial Order identifying motions in limine as the only motions pending before the court.

On 30 January 2017, the trial court heard the motions in limine and then empaneled a jury. The next day, immediately before trial was to begin, the trial court elected to hear Defendant's Rule 12(b)(6) motion. The trial court granted Defendant's motion to dismiss as to all of Plaintiff's claims. Plaintiff appeals.

II. Analysis

A. Judicial Adherence to Local Rules

[1] Plaintiff argues the trial court improperly heard and subsequently granted Defendant's Rule 12(b)(6) motion to dismiss with respect to each of Plaintiff's claims. Specifically, Plaintiff views the trial court's *sua sponte* review of the motion as an abuse of discretion creating unfair surprise. Further, it is Plaintiff's view that its Complaint sufficiently pleaded each of its claims. We look first to the trial court's decision to consider the motion to dismiss on the day of trial.

Generally, a trial court is free to consider a motion to dismiss at any time before trial begins. N.C. R. Civ. P. 12(h)(2) ("A defense of failure to state a claim upon which relief can be granted . . . may be made . . . at the trial on the merits."). However, motions practice must adhere to the particular rules of the reviewing jurisdiction. *Forman & Zuckerman, P. A., v. Schupak*, 38 N.C. App. 17, 20, 247 S.E.2d 266, 269 (1978) (citing *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959)); N.C. Gen. Stat. § 7A-34 (2015) ("The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly.").

North Carolina District 3B, where the present matter was brought, requires in its local rules that dispositive motions must be noticed to all parties at least fifteen (15) days prior to trial. Local Calendaring Rules, Jud. Dist. 3B Superior Court Division Case Management Plan, Rule 2.1. Additionally, in District 3B, all Rule 12 dispositive motions must be accompanied by a supporting memorandum or else are deemed abandoned. Rule 6.8. Failure to provide appropriate notice may lead to unfair surprise to the nonmoving party, *see State v. Alston*, 307 N.C. 321, 331, 298 S.E.2d 631, 639 (1983); but pretrial orders may be modified as late as trial to prevent manifest injustice. N.C. R. Civ. P. 16; *see Harold Lang Jewelers, Inc. v. Johnson*, 156 N.C. App. 187, 189, 576 S.E.2d 360, 361 (2003).

A trial court does have the discretion to modify or avoid the application of a jurisdiction's local rules. N.C. Gen. R. Prac. Super. and Dist. Ct. 2(d); *Young v. Young*, 133 N.C. App. 332, 333, 515 S.E.2d 478, 479 (1999). In exercising this discretion, the trial court must be careful to give proper regard to the purpose of the applicable local rules. *Id.* We therefore review a judge's discretionary decision to act outside the prescription of local rules for an abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.").

Here, the trial court issued a discovery scheduling order requiring each party to serve notice of its dispositive motions at least fifteen (15) days prior to trial. Defendant included its Rule 12(b)(6) motion to dismiss in its initial answer, but failed to serve any notice of or any memorandum supporting the motion fifteen (15) days before trial began. Rather, the trial court judge chose to exercise his discretion and hear Defendant's motion to dismiss on the day of trial.

Plaintiff acknowledges that this issue has been previously decided by our Court in *Harold Lang Jewelers, Inc., v. Johnson*, 156 N.C. App. 187, 576 S.E.2d 360 (2003), but contends that the case before us is distinguishable. In *Johnson*, the trial court issued a pretrial order stating that there were no motions pending before the court that needed to be addressed before trial. *Id.* at 189, 576 S.E.2d at 361. Still, the trial court elected to hear a dispositive motion on the day of trial. *Id.* This Court explained that the nonmoving party could not feign unfair surprise because the pending motion was "first presented in [the moving party's] answer." *Id.* Plaintiff contends that *Johnson* is distinguishable because in the present case, although Defendant presented its motion to dismiss in its answer, Plaintiff pleaded only that Defendant had failed to state a claim. The language of the motion was bare, unlike the detailed motion in *Johnson*. However, our Court in *Johnson* also held that the trial court's consideration of the pending motion was proper because Rule 16 of the Rules of Civil Procedure states that a pretrial order may be "modified at trial to prevent manifest injustice." *Id.*

We find *Johnson* instructive in this case. Here, Defendant placed Plaintiff on notice of the existence of its motion to dismiss when it filed an answer in December 2015, over a year before the motion was heard at trial. The trial court judge had the discretion to avoid the local rules concerning pretrial orders and to modify the terms of any pretrial orders at trial. The local rules serve to ensure that all parties are on notice of trial proceedings and that nothing new is raised at trial for the first time. We conclude that the trial court did not abuse its discretion in considering Defendant's Rule 12(b)(6) motion because Plaintiff had notice of the pending motion to dismiss.

B. Sufficiency of the Pleadings

In its complaint, Plaintiff brought three claims for relief: (1) intentional and/or reckless littering; (2) trespass to property; and (3) negligence and/or gross negligence. Generally, appellate review of a trial court's grant of a 12(b)(6) motion to dismiss is *de novo*. *Wray v. City of Greensboro*, ___ N.C. ___, ___, 802 S.E.2d 894, 898 (2017). "[T]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015). A claim is rightfully dismissed when: "(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." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784-85, 618 S.E.2d 201, 204 (2005). The sufficiency of the pleadings setting forth each claim is considered below.

1. Littering

[2] Section 14-399 of the North Carolina General Statutes creates both criminal liability and a cause of action where a party disposes of litter in an improper location:

> No person, including any . . . organization, . . . shall intentionally or recklessly throw, scatter, spill or place or intentionally or recklessly cause to be blown, scattered, spilled, thrown or placed or otherwise dispose of any litter upon any public property or private property not owned by the person within this State or in the waters of this State . . . except:
>
> (1) When the property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and the person is authorized to use the property for this purpose; or
>
> (2) Into a *litter receptacle* in a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of the private or public property or waters.

N.C. Gen. Stat. § 14-399(a) (2015) (emphasis added); N.C. Gen. Stat. § 14-399(e) (defining a violation of section 14-399(a) in an amount exceeding 500 pounds and/or for a commercial purpose as a felony); N.C. Gen. Stat. § 14-399(h) (authorizing a court to award damages to a party injured by a felonious violation of section 14-399(a)).

Under the statute, "litter" means "garbage, rubbish, trash, refuse, . . . or discarded material in any form resulting from . . . commercial . . . operations," N.C. Gen. Stat. § 14-399(i)(4). "Commercial purposes" refers to litter discarded by an entity, or its employees, "conducting business for economic gain." N.C. Gen. Stat. § 14-399(i)(2a).

The trial court dismissed Plaintiff's claim brought under this statute because it concluded, as a matter of law, that the car wash drain into which the Employee cleaned out his vehicle was "a litter receptacle of some sort." We agree.

Here, Plaintiff's complaint alleged that the Employee "dumped the contents of a one thousand gallon off-road diesel holding tank in Plaintiff's car wash drain system," that the amount dumped exceeded 500 pounds and was dumped for commercial purposes, and that Plaintiff sustained injuries as a result. While its claim thoroughly tracks the statutory scheme for pleading a claim under N.C. Gen. Stat. § 14-399 and presents all facts necessary for a claim thereunder, its claim also discloses facts that necessarily defeat it.

Specifically, we conclude that Plaintiff's car wash drain system qualifies as a "litter receptacle" as contemplated by N.C. Gen. Stat. § 14-399(a). We note that the term "litter receptacle" is not defined within Section 14-399, or another neighboring statute.[1] However, we have previously stated that our General Assembly intended to encompass a "broad range of containment vessels" by using the word "receptacle."[2]

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1. Littering statutes in other states codify "litter receptacle," e.g., (1) Virginia: " 'Litter receptacle' means containers acceptable to the Department for the depositing of litter." Va. Code Ann. § 10.1-1414 (2017); (2) Ohio: " 'Litter receptacle' means a dumpster, trash can, trash bin, garbage can, or similar container in which litter is deposited for removal." Ohio Rev. Code. Ann. § 3767.32.(D)(3) (2016); (3) Rhode Island: " 'Litter receptacle' means those containers adopted by the department of environmental management and which may be standardized as to size, shape, capacity, and . . . , as well as any other receptacles suitable for the depositing of litter." R.I. Gen. L. § 37-15-3(6) (2014). While these definitions are in no way binding on this Court, we find them persuasive here.

2. Our review of the case law reveals only two additional cases referencing the definition of "litter receptacle" under North Carolina law: *State v. Rankin*, ___ N.C. App. ___, ___, 809 S.E.2d 358 (2018) and *State v. Mather*, 221 N.C. App. 593, 728 S.E.2d 430 (2012). Each of these cases discusses *Hinkle's* definition of "litter receptacle" only insofar as it is used to understand what language constitutes the definition of a crime, and offers no guidance on what is considered a "litter receptacle." *Rankin*, ___ N.C. App. at ___, 809 S.E.2d at 362-63; *Mather*, 221 N.C. App. at 601, 728 S.E.2d at 435.

State v. Hinkle, 189 N.C. App. 762, 767, 659 S.E.2d 34, 37 (2008). And, as a private dumpster holds litter in a contained location for some time until it can be removed, so too a car wash's drainage system collects and stores waste cleaned from its customers' vehicles until it can be removed at a later date. *See id.*

Plaintiff attempts to distinguish this case from *Hinkle* because the latter was decided in a criminal context.[3] However, we hold that the General Assembly intended for the term "receptacle" as used in N.C. Gen. Stat. § 14-399 to have the same meaning whether the statute was being applied in a criminal context or a civil context.[4]

2. Trespass

[3] We hold that Plaintiff's complaint does properly state a claim for trespass. A claim for trespass to property requires three elements: "(1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized entry by defendant; and (3) damage to plaintiff." *Fordham v. Eason*, 351 N.C. 151, 153, 521 S.E.2d 701, 703 (1999).

The design and use of a property can implicitly authorize an individual's presence as a lawful visitor, but an authorized presence may become unauthorized if the individual's conduct exceeds the scope of his or her invitation. *Smith v. VonCannon*, 283 N.C. 656, 660, 197 S.E.2d 524, 528 (1973) ("One who enters upon the land of another with the consent of the possessor may, by his subsequent wrongful act in

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3. Plaintiff appears to take issue with the possibility that the ultimate holding in *Hinkle* be applied to this case. The *Hinkle* Court found that the prosecution had failed to prove its case-in-chief because it did not present evidence showing that the private dumpster was not a litter receptacle, or otherwise a litter receptacle presenting a risk of overflow into property or waters. *Hinkle*, 189 N.C. App. at 769, 659 S.E.2d at 38. We do not hold here that it was necessary for Plaintiffs to plead that the car wash drain did not fall into a category described by N.C. Gen. Stat. § 14-399(a)(2), as this would improperly raise the notice pleading standard. Rather, we simply hold that the car wash drain is a "litter receptacle."

4. We note that Plaintiff's complaint alleges that Defendant's actions were "a violation of the Oil Pollution and Hazardous Substance Control Act." N.C. Gen. Stat. § 143-21A (2015). Plaintiff argues this point more thoroughly in its reply brief on appeal. However, Plaintiff's claims for relief and jury demand in its complaint refer only to N.C. Gen. Stat. § 14-399, trespass to property, and negligence. It may be that Defendant's actions constitute liability under N.C. Gen. Stat. § 143-21A, but that issue is not properly before us on appeal. *Parrish v. Bryant*, 237 N.C. 256, 260, 74 S.E.2d 726, 729 (1953) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount [on appeal][.]"); *see State v. Forte*, 360 N.C. 427, 438, 629 S.E.2d 137, 145 (2006).

excess or abuse of his authority to enter, become liable in damages as a trespasser.").

Plaintiff does not dispute that Defendant's entry onto Plaintiff's property was authorized. Indeed, Plaintiff operates a car wash business that is open to the public and invites the public to use its facilities. Plaintiff, however, contends that Defendant's presence became a trespass when the Employee allegedly intentionally dumped hundreds of pounds of diesel fuel, a hazardous material, into the car wash drain. Though Plaintiff's car wash drain is a litter receptacle designed to accept refuse and Defendant, (through the Employee) is a customer contemplated by Plaintiff's business, a jury could determine that Plaintiff's invitation to use its facilities to clean vehicles did not extend to an invitation to dump a large quantity of hazardous materials on its property. Therefore, we conclude that Plaintiff has stated a claim for trespass.

3. Negligence

[4] Plaintiff also pleads that Employee acted negligently in dumping the diesel fuel, resulting in damage to Plaintiff's property. Where an individual acts without the intent to cause harm to property, but actually and proximately causes harm by breaching his or her legal duty of care, the individual may be liable for negligence. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013).

Here, Plaintiff alleged essentially that the Employee had a duty of care in its use of Plaintiff's property and that the Employee caused damage to the car wash drain by failing to adhere to that duty. We conclude that the allegations in the Complaint are sufficient to state a claim for negligence.

III. Conclusion

We hold that Plaintiff's complaint failed to allege facts that constitute littering under N.C. Gen. Stat. § 14-399. We further hold that Plaintiff sufficiently pleaded facts to sustain its claims for trespass and for negligence. We, therefore, affirm the trial court's dismissal of Plaintiff's claim for damage under N.C. Gen. Stat. § 14-399, and reverse its dismissal of Plaintiff's claims for trespass and negligence. We remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Chief Judge McGEE and Judge TYSON concur.

LARRY BROOKS, Employee, Plaintiff
v.
CITY OF WINSTON-SALEM, Employer, SELF-INSURED, Defendant

No. COA17-1208

Filed 15 May 2018

Workers' Compensation—injuries—arising out of employment—idiopathic conditions

Where a city employee experienced uncontrollable coughing while smoking an e-cigarette in a city vehicle during his lunch break, exited the vehicle, and then passed out and injured his back falling on the cement curb, the Industrial Commission properly denied his workers' compensation claim. The employee's injury resulted solely from his own actions and idiopathic conditions (elevated blood sugar, elevated blood pressure, and coughing) rather than any condition of his employment.

Appeal by plaintiff from opinion and award entered 19 July 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 April 2018.

Oxner + Permar, PLLC, by Kathy Stewart, for plaintiff-appellant.

Spilman Thomas & Battle, PLLC, by Kevin B. Cartledge, for defendant- appellee.

DAVIS, Judge.

In this appeal, we revisit the issue of when an employee's injury is deemed to have arisen out of his employment under the North Carolina Workers' Compensation Act. Larry Brooks appeals from an opinion and award of the North Carolina Industrial Commission denying his claim for workers' compensation benefits. Because we conclude that Brooks' injury occurred solely as a result of his own idiopathic condition rather than due to conduct traceable to his employer, we affirm.

Factual and Procedural Background

In October 2015, Brooks was employed by the City of Winston-Salem (the "City") as a Senior Crew Coordinator in the Utilities Department. He supervised a team of four employees who were performing water and sewer line repairs throughout Winston-Salem. The City allowed Brooks and the other employees on his team to take two 15-minute breaks and one 30-minute lunch break each day. As the supervisor of the group, Brooks was "responsible for deciding whether and when breaks would be taken, and [was] responsible for the crew during breaks."

On 22 October 2015, Brooks was with his crew working at a job-site. At some point during the day, Brooks and the other employees decided to take a lunch break at a nearby Sheetz gas station. Brooks ate his lunch in the City's truck while the other employees sat at a table outside the gas station. After he finished eating his meal, Brooks briefly joined the group at the table and then entered the gas station for the purpose of purchasing cigarettes.

Inside the gas station, Brooks decided to buy an e-cigarette, a type of cigarette he had never previously smoked. He returned to the City's truck after making the purchase and began smoking the e-cigarette while sitting inside the vehicle. At all relevant times, the City maintained a "[t]obacco [f]ree" policy, which provided that "[s]moking cigarettes or e-cigarettes inside City vehicles or on City property [wa]s prohibited . . . ."

As Brooks "ignited and inhaled the e-cigarette," he began coughing "uncontrollably." In order to get some fresh air, he opened the vehicle's door and stepped out of the truck while continuing to cough. Brooks then "passed out and fell to the ground." He landed on the cement curb, causing injury to his right hip, back, and head.

Brooks was diagnosed by Dr. Dahari Brooks, a board-certified orthopedist, with "L3, L4 transverse process fractures." Due to these injuries, he was assigned light duty work restrictions, which prevented him from returning to work in his prior position.

The City filed a Form 19 (Employer's Report of Employee's Injury) on 29 October 2015 and a Form 61 (Denial of Workers' Compensation Claim) on 19 November 2015. On 28 December 2015, Brooks filed a Form 18 (Notice of Accident), alleging that "[w]hen [he] stepped out of his truck he passed out (from e-cig) causing him to fall to the ground injuring his back."

On 13 July 2016, a hearing was held before Deputy Commissioner Michael T. Silver. Brooks and Julie Carter, a risk manager working for the City, each provided testimony. Depositions were later taken of Dr. Brooks and Phillip Kelley, a physician's assistant who had treated Brooks following his injury.

On 21 November 2016, the deputy commissioner issued an opinion and award determining that "[Brooks'] injuries were not the result of an injury by accident arising out of and in the course of employment . . . ." Brooks appealed to the Full Commission.

On 19 July 2017, the Full Commission issued an opinion and award affirming the deputy commissioner's decision and denying Brooks' claim for benefits. On 31 July 2017, Brooks filed a timely notice of appeal.

Analysis

Appellate review of an opinion and award of the Industrial Commission is typically "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and quotation marks omitted). "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is also evidence that would support a contrary finding. The Commission's conclusions of law, however, are reviewed *de novo*." *Morgan v. Morgan Motor Co. of Albemarle*, 231 N.C. App. 377, 380, 752 S.E.2d 677, 680 (2013) (internal citations omitted), *aff'd per curiam*, 368 N.C. 69, 772 S.E.2d 238 (2015).

In its opinion and award in the present case, the Commission made the following pertinent findings of fact:

> 1. On October 22, 2015, [Brooks] was employed by [the City] as a Senior Crew Coordinator in the Utilities Department. In that capacity, [Brooks] was a working supervisor over a crew of five, including himself, which performed water and sewer line repairs throughout the city.
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> 2. [Brooks'] work day started at 7:30 a.m. and was scheduled to end at 4:00 p.m., although he "worked over a lot." [Brooks] and his crew were entitled to take two 15-minute breaks and one 30-minute lunch break each day. While it is unclear from the record whether these were paid or unpaid breaks, [Brooks] was, as the supervisor, responsible for deciding whether and when breaks would be taken, and responsible for the crew during breaks.
>
> 3. On October 22, 2015, [Brooks] reported to work at 7:30 a.m., spoke to his supervisor to get his daily assignment, and then left out at approximately 8:00 a.m. with his crew in one of [the City]'s trucks to travel to that day's job site. Later that day, [Brooks] and his crew

decided to take their lunch break at a Sheetz gas station which was located in close proximity to where they were working. [Brooks] ate his lunch in the truck, while his co-workers sat at a table outside the gas station. [Brooks] testified that they probably took more than 30 minutes for lunch, but they had not taken their 15-minute break that morning. [Brooks] finished eating his meal in the truck, joined his crew briefly, and then went into the gas station to purchase cigarettes. [Brooks] purchased an electronic cigarette (or e-cigarette) which he usually does not smoke. [Brooks] then walked back to [the City]'s truck, got inside, and began to smoke the e-cigarette. Smoking cigarettes or e-cigarettes inside City vehicles or on City property is prohibited by [the City]'s Tobacco Free Policy. When [Brooks] ignited and inhaled the e-cigarette, "it just cut off [his]wind," and he began coughing uncontrollably. "Out of instinct," he opened the door and stepped out of the truck to get some air, all the while continuing to cough. After he had stepped out of the truck and while he was standing on the ground, coughing uncontrollably, [Brooks] passed out and fell to the ground. [Brooks] did not fall from the truck onto the ground.

4. EMS was called to the scene and [Brooks'] vital signs were taken. According to EMS records, [Brooks] had a blood pressure of 194/120 and a blood sugar level of 312, both of which are extremely elevated readings.

5. [Brooks] declined EMS transport to the emergency room and, instead, a co-worker took him to Novant Health Urgent Care & Occupational Medicine, where he was seen by Phillip Kelley, P.A. for injury to his right hip, back and head. [Brooks] informed Mr. Kelley that he had passed out after smoking an e-cigarette. [Brooks'] blood pressure remained elevated at 182/112, which Mr. Kelley testified is "very, very high" and constitutes "grade three hypertension," the highest grade there is. [Brooks] also informed Mr. Kelley that he was a known diabetic, but that he had been out of his medication since April. Mr. Kelley advised [Brooks] that he should be seen at the emergency room for further work-up regarding his syncope and extremely elevated blood pressure and blood sugar readings. [Brooks] refused,

telling Mr. Kelley that he thought he had been off his diabetes medication for too long and that he would be ok once he started taking them again. Mr. Kelley renewed [Brooks'] diabetes medication and discharged him against medical advice with the following diagnoses: "syncope, unspecified syncope type; contusion, back, right, initial encounter; diabetes type 2, uncontrolled; acute post-traumatic headache, not intractable; shortness of breath; glucosuria; elevated blood pressure reading without diagnosis of hypertension."

6. On October 22, 2015, [Brooks] completed a City of Winston-Salem Accident/Incident Report in which he described the accident as follows: "I developed a cough so hard I pass (sic) out standing. Free fell backwards onto a curb hurting backside back and head. More so my back cause it landed on curb." In his answers to interrogatories, [Brooks] described his injury as follows: "While sitting in the truck smoking an E-cig I started to choke. I got out to get air but I was coughing so much I passed out. I fell backwards on the cement curb causing my lower back and head to strike the ground."

7. On December 28, 2015, after [the City] had denied [Brooks'] claim, [Brooks] filed a Form 18 *Notice of Accident to Employer and Claim of Employee*, *Representative*, *or Dependent* in which he described the accident as follows: "When Employee stepped out of his truck he passed out (from e-cig) causing him to fall to the ground injuring his back."

8. [Brooks] was diagnosed with L3, L4 transverse process fractures and came under the care of Dr. Dahari Brooks, a board-certified orthopedist, who assigned light duty work restrictions which preclude [Brooks] from returning to work in the position he was performing on the date of the injury. As of the date of the hearing before the Deputy Commissioner, [Brooks] remained out of work but still employed by [the City].

9. Extremely elevated blood sugar levels and blood pressure readings, such as those exhibited by [Brooks] at the time of his injury, can cause someone to pass out. In addition, when someone coughs so much that they

> become light-headed, they can pass out from a vasovagal response. Dr. Brooks testified that he thought it was a combination of these three things, and that "they probably all contributed to it."
>
> 10. [Brooks'] fall on October 22, 2015 was an unexpected and unforeseen occurrence. However, based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that [Brooks'] fall on October 22, 2015 was caused by idiopathic conditions, to wit: extremely elevated blood pressure and blood sugar levels and vasovagal response triggered by uncontrolled coughing, and that no risk attributable to his employment combined with the idiopathic conditions to cause [Brooks'] accident. [Brooks] did not fall from a height or hit his head on a piece of work equipment. There is no evidence that [Brooks'] working conditions contributed to his fall and injury. Moreover, there is nothing in the record to suggest that [Brooks] would not have fallen because of his idiopathic conditions had he been standing in his back yard or leaving a convenience store on the weekend. Therefore, while [Brooks'] accident occurred in the course of his employment, it did not arise out of his employment.

Based on these findings of fact, the Commission concluded that "because no risk or hazard incident to [Brooks'] employment duties combined with his idiopathic conditions to contribute to his injuries, his accident did not arise out of his employment and is therefore not compensable."

Brooks does not challenge the portions of the Commission's findings explaining how the 22 October 2015 accident occurred. Therefore, these findings are binding on appeal. *See Allred v. Exceptional Landscapes, Inc.*, 227 N.C. App. 229, 232, 743 S.E.2d 48, 51 (2013) ("Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." (citation omitted)).

Brooks' primary argument is that the Commission erred as a matter of law by failing to conclude that his fall arose out of his employment. Under the Workers' Compensation Act, an injury is compensable if the claimant proves three elements: "(1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment." *Hedges* *v. Wake Cty. Pub. Sch. Sys.*, 206 N.C. App. 732, 734, 699 S.E.2d 124, 126 (2010) (citation and quotation marks omitted), *disc. review denied*, 365 N.C. 77, 705 S.E.2d 746 (2011).

Our Supreme Court has held that "[a]n injury is said to arise out of the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment." *Taylor v. Twin City Club*, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963) (citation omitted). "Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, we are bound by those findings." *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988) (citation and quotation marks omitted).

"An idiopathic condition is one arising spontaneously from the mental or physical condition of the particular employee." *Philbeck*, 235 N.C. App. at 128, 761 S.E.2d at 672. We have consistently held that "[w]hen the employee's idiopathic condition is the sole cause of the injury, the injury does not arise out of the employment." *Mills v. City of New Bern*, 122 N.C. App. 283, 285, 468 S.E.2d 587, 589 (1996) (citation omitted). However, "[t]he injury does arise out of the employment if the idiopathic condition of the employee combines with risks attributable to the employment to cause the injury." *Billings v. Gen. Parts, Inc.*, 187 N.C. App. 580, 586, 654 S.E.2d 254, 259 (2007) (citation, quotation marks, brackets, and emphasis omitted), *disc. review denied*, 362 N.C. 233, 659 S.E.2d 435 (2008).

Brooks argues that this case is similar to those in which our courts have upheld an award of workers' compensation benefits to an employee who suffers an injury from an idiopathic condition while operating a vehicle for work-related purposes. *See, e.g.*, *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 556, 117 S.E.2d 476, 478 (1960) (plaintiff blacked out and crashed into pole while driving vehicle to run errand for employer); *Billings*, 187 N.C. App. at 587, 654 S.E.2d at 259 (plaintiff suffered "syncopal episode (i.e., blackout) while operating defendant-employer's truck, after which time the truck ran off the road, hit a light pole, and flipped over"); *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 373, 616 S.E.2d 403, 410 (2005) (plaintiff was traveling for job-related purposes and blacked out while driving vehicle), *appeal dismissed*, 360 N.C. 288, 627 S.E.2d 464 (2006). These cases, however, are materially distinguishable on their facts from the present case.

Where the relationship between a plaintiff's employment and his injury is too attenuated, our Supreme Court has held that the injury does not arise out of the plaintiff's employment. We find particularly instructive our Supreme Court's decision in *Vause v. Vause Farm Equipment Company*, 233 N.C. 88, 63 S.E.2d 173 (1951). In *Vause*, the plaintiff had previously suffered from epileptic convulsions for many years and could "feel one of these seizures when it was coming on." *Id.* at 93, 63 S.E.2d at 177. The plaintiff realized he was about to have a seizure "while driving a pick-up truck in the course of his employment to the home of a customer for the purpose of servicing a tractor . . . ." *Id.* at 89, 63 S.E.2d at 173.

Upon feeling "faint and ill[,]" the plaintiff "pulled the truck over to the side of the road and parked, then opened the door on his left, threw his feet outside, and lay down on the seat of the truck with his head on the side opposite from the steering wheel, and immediately suffered an epileptic seizure that caused him to lose consciousness." *Id.* When he regained consciousness, the plaintiff was "hanging to the steering wheel with his hands; his body was outside of the truck with one foot on the running board and the other dangling [to the] side of it." *Id.* at 89-90, 63 S.E.2d at 173. The plaintiff suffered various injuries as a result of the incident. *Id.* at 90, 63 S.E.2d at 173.

The plaintiff filed a workers' compensation claim, and the Commission determined that his injury had arisen out of his employment. *Id.* On appeal, our Supreme Court reversed the Commission's award of benefits, ruling that the injury was not caused by the plaintiff's employment. *Id.* at 98, 63 S.E.2d at 181. In so holding, the Court stated as follows:

> Conceding that, as found by the Commission, the plaintiff in being required to drive the truck to perform his work, was (thereby) subjected to a peculiar hazard, even so the evidence here discloses no causal connection between the operation of the truck and the injury. The evidence here shows that the plaintiff felt the epileptic seizure coming on. He pulled the truck off the road, parked it, and lay down on the seat in a place of apparent safety, with all of the ordinary dangers of his employment suspended and in repose. We perceive in this evidence no showing that any hazard of the employment contributed in any degree to the unfortunate occurrence. The evidence affirmatively shows that it was solely the force of his unfortunate seizure that moved him from his position of safety to his injury. The

> cause of the fall is not in doubt. It is not subject to dual inferences. All of the evidence shows that the cause of the plaintiff's fall was independent of, unrelated to, and apart from the employment. . . . The chain of cause and effect clearly leads in unbroken sequence from the plaintiff's unfortunate physical seizure, brought on by a pre-existing infirmity, to his injury. The award below can be sustained only by disregarding the epileptic seizure as a cause of the injury and by starting in the chain of causation at the point of the fall. To say that the injury was caused by the fall, and thus eliminate from consideration the epileptic seizure as the cause of the fall is not in accord with the fundamental principles by which the law fixes and determines the cause and effect of events. Any such process of reasoning, in effect, would strike out of the Workmen's Compensation Act the provision which requires that an injury to be compensable shall arise out of the employment.

Id. at 98, 63 S.E.2d at 180-81 (internal citation and quotation marks omitted).

We are further guided by the Supreme Court's decision in *Bartlett v. Duke University*, 284 N.C. 230, 200 S.E.2d 193 (1973), which involved a decedent who had been employed by Duke University as a construction administrator and was traveling to Washington, D.C. in order to recruit a maintenance engineer. *Id.* at 231, 200 S.E.2d at 194. During his trip, he had dinner with a friend at a restaurant in a nearby town. *Id.* While eating shish kebab at the restaurant, the decedent "aspirated a chunk of meat and immediately became unconscious." *Id.* He never regained consciousness and died two months later. *Id.* at 231, 200 S.E.2d at 194.

The decedent's widow filed for workers' compensation benefits. The Commission awarded benefits, concluding that the decedent's death "resulted from an injury by accident arising out of and in the course of his employment . . . ." *Id.* Our Supreme Court reversed the award, holding that the death did not arise out of the employment because "[t]here [wa]s no causal relationship between choking on a piece of steak and the employment of decedent, even though he was eating while he was on the job." *Id.* at 235, 200 S.E.2d at 196 (citation and quotation marks omitted). The Court held that

> the conditions of his employment had no bearing on the fact he choked to death. His injury resulted entirely from an unintentional but self-inflicted mishap. There is no

> evidence whatever that the choking was induced by any business activity.

Id. at 235, 200 S.E.2d at 196 (citations and quotation marks omitted).

These same principles apply to the present case. Brooks was on his lunch break at a gas station. After parking his employer's truck, he ate his meal in the truck and then went into the gas station to purchase cigarettes. When he returned to the truck, he inhaled an e-cigarette, began coughing, stepped out of his truck, passed out, and fell on the cement curb. While admittedly Brooks would not have been at the gas station but for his job, his fall was not traceable to the conditions of his employment. Rather, Brooks' own actions and his idiopathic condition were the sole forces causing his injuries. He chose to purchase an e-cigarette, return to the truck, smoke the cigarette, and ultimately step outside of the truck to get fresh air. None of these actions were required by his employment or served to benefit his employer.[1] Thus, no hazard related to Brooks' employment with the City contributed to his injury. *See Vause*, 233 N.C. at 98, 63 S.E.2d at 180.

In his final argument, Brooks contends that the Commission should have employed the "unexplained fall" doctrine based on these facts. "Unexplained falls . . . are differentiated in our case law from falls associated with an idiopathic condition of the employee." *Philbeck*, 235 N.C. App. at 128, 761 S.E.2d at 672. Brooks contends that it is unknown whether his injury was actually caused by his idiopathic condition or, alternatively, whether it was attributable to his employment. *See id.* ("When a fall is unexplained, and the Commission has made no finding that any force or condition independent of the employment caused the fall, then an inference arises that the fall arose out of the employment." (citation and quotation marks omitted)). Here, however, the Commission *did* expressly find that Brooks' idiopathic condition was the sole cause of his fall. Thus, the "unexplained fall" doctrine is inapplicable on these facts. *See id.* ("Unlike a fall with an unknown cause — where an inference that the fall had its origin in the employment is permitted — a fall connected to an idiopathic condition is not presumed to arise out of the employment." (citation and quotation marks omitted)).

Because Brooks' fall resulted from his own idiopathic condition and was not caused by a hazard of his employment, the Commission

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1. Indeed, as noted earlier, the City's policies prohibited its employees from smoking in a City vehicle.

properly concluded that the injury did not arise out of his employment. Thus, his injury was not compensable under the Workers' Compensation Act.

Conclusion

For the reasons stated above, we affirm the Commission's 19 July 2017 opinion and award.

AFFIRMED.

Judges INMAN and MURPHY concur.

GEA, INC., VALARIA DeVINE and LESLIE FARKAS, Plaintiffs
v.
LUXURY AUCTIONS MARKETING, INC. and JEREMY LeCLAIR, Defendants

No. COA17-1055

Filed 15 May 2018

1. **Appeal and Error—interlocutory order—discovery sanctions—substantial right**

   In litigation arising from a business dispute, the trial court's interlocutory order imposing sanctions for discovery violations, dismissing all defenses, and entering default against defendants on each claim was immediately appealable because it affected a substantial right.

2. **Discovery—inference—lesser sanctions considered**

   The Court of Appeals inferred from the record that the trial court considered lesser sanctions before striking defenses and entering default judgment since the trial court only entered more severe sanctions after reviewing plaintiffs' relatively conservative request. Further, the trial court is presumed to have acted correctly in the absence of evidence to the contrary, and defendant did not provide the Court of Appeals with a transcript of the hearing.

3. **Discovery—scope of motion to compel—compliance**

   The trial court did not abuse its discretion in determining defendant failed to comply with a discovery order that required the production of all computers used in the business operations, which by its language included defendant's personal laptop. The discovery order was also violated by defendant's failure to provide the login credentials to the server; the requirement that the server be available for inspection required more than the mere production of the server itself.

4. Discovery—abuse of discretion—compliance—credibility

The trial court did not abuse its discretion when it found defendant's representation not credible that neither he nor any other of his business's agents knew the login credentials to the server which was required to be produced under a discovery order. The trial court's determination was a necessary part of its review of the motion to show cause whether or not defendant was capable of complying with the order.

5. Discovery—compliance—personal laptop—privacy concern

The trial court did not abuse its discretion in imposing sanctions for defendant's failure to produce his personal laptop where sufficient evidence showed the laptop contained both personal and business information related to plaintiff's pending claims and would lead to the discovery of admissible evidence and where defendant testified at his deposition he would refuse to turn over his laptop even if ordered to do so, indicating his contempt for the discovery process. Privacy concerns were adequately addressed by the discovery order, which set bounds for the use of defendant's personal information. Nor did the trial court abuse its discretion in declining to conduct an in camera review of the laptop where the request was not timely sought and privacy protections were included in the order compelling discovery.

Appeal by defendants from order entered 10 July 2017 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 March 2018.

No brief filed for plaintiffs-appellees.

Law Offices of Paul Vancil, by Paul Vancil, for defendants-appellants.

ZACHARY, Judge.

Defendants Luxury Auctions Marketing, Inc. and Jeremy LeClair appeal from the trial court's order imposing sanctions against Luxury and LeClair (together, "Luxury") for failing to comply with a discovery order of the court. We affirm.

Background

The litigation at issue arose out of a business dispute between Luxury and plaintiffs GEA, Inc., Leslie Farkas, and Valaria DeVine (together, "GEA"). Ms. DeVine formed GEA and the company 4K&D roughly seventeen years ago as luxury residential auction companies. Ms. DeVine's companies were highly successful, in part due to (1) GEA's ownership of valuable trademarks, (2) GEA's ownership of 47 registered domain sites, and (3) a large customer database that GEA and Ms. DeVine had assembled over the years. In January 2016, Ms. DeVine hired Mr. LeClair as 4K&D's Director of Operations.

On 25 April 2016, Ms. Devine's husband, Leslie Farkas, formed Luxury. Luxury was formed "to generate new listings for auction and to market the properties that were placed under contract for auction." Five days after Luxury was formed, 4K&D sold all of its tangible assets—specifically, equipment, furniture, and office fixtures—to Luxury.

Shortly after his hire, Mr. LeClair became aware that Ms. DeVine and Mr. Farkas were interested in selling their businesses, and approached them about the possibility of purchasing the companies. The parties entered into a period of discussions and negotiations, culminating in the agreement of Ms. DeVine and Mr. Farkas to sell Luxury to Mr. LeClair. Ms. DeVine and Mr. Farkas retained ownership of GEA.

The parties executed Luxury's sale on 8 August 2016. The sale took the form of a Stock Purchase Agreement, by which Mr. Farkas sold all of his shares in Luxury to Mr. LeClair. GEA then issued revocable, non-exclusive, ten-year licenses to Luxury in certain trademarks, software, and intellectual property. Pursuant to the licenses, Luxury could transact business under GEA's trademark, could use GEA's registered domain site, and could access GEA's valuable customer database. Ms. DeVine and Mr. Farkas agreed to allow Mr. LeClair to defer the entire purchase price by making annual payments over the ten-year term of the agreement. Among other payment provisions, Luxury "agreed to pay 10% of each gross commission received by [Luxury] for the first ten years of the agreement, . . . for [the] revocable, non-exclusive license Agreement."

Conflict arose between the parties shortly after the purchase, which ultimately led to Luxury filing a complaint against GEA on 3 November 2016. GEA answered and asserted eleven counterclaims against Luxury. Luxury thereafter voluntarily dismissed its claims against GEA, leaving only GEA's counterclaims pending before the trial court.

GEA's counterclaims set forth an array of complicated factual allegations against Mr. LeClair and Luxury and asserted causes of action for, *inter alia*, unpaid royalties and license fees, improper use and transfer of a software license and the customer database, conversion of computers and other GEA property, trademark infringement, conversion, and harassment.

Much of the information pertaining to GEA's counterclaims, and the proof thereof, was alleged to be stored in the various company computers and individual computers used by Luxury's employees[1]. However, after LeClair acquired Luxury, LeClair moved Luxury's offices and, according to GEA, "took all the computer equipment, hard drives, printers, copiers, related equipment and numerous files containing business and personal information having nothing to do with [Luxury]." Accordingly, GEA served Luxury with a discovery request on 1 March 2017 for inspection of the computers and equipment.

At Mr. LeClair's 8 May 2017 deposition, however, Luxury's counsel informed GEA that Mr. LeClair destroyed the computers after the litigation had commenced. Mr. LeClair testified to the following at his deposition:

> Q. Do you recall Mr. Farkas making a demand for the return of his personal computer?
>
> A. I do.
>
> . . .
>
> Q. Where is that computer today?
>
> A. That computer has been discarded.
>
> Q. Where was it discarded?
>
> A. I believe the Mecklenburg recycling, whatever it's called, recycling, trash dump.
>
> . . .
>
> Q. Did you discard the computer?
>
> A. I did.
>
> . . .
>
> Q. How many computers did you move from the [office]?

1. The parties dispute the ownership of these computers.

> A. I don't have a specific number, but the majority of the computers, if not all.
>
> Q. There was a server, correct?
>
> A. Yes.
>
> . . .
>
> Q. What about the laptops used by [Luxury], where are those?
>
> A. What about them? Those have been discarded as well.
>
> . . .
>
> Q. Have all of the computers transported from [the office] been discarded?
>
> A. Yes.

Mr. LeClair also testified that he knew that GEA sought "return of these computers as part of [the] claims in the litigation":

> Q. You knew that they--that my clients were seeking this--the return of these materials, correct?
>
> MR. VANCIL: 'These materials' being what?
>
> BY MR. LANDRUM:
>
> Q. The return of these computers, correct?
>
> A. *I know they were seeking them*; but whether they were--you know, they were owned by LAMI, so whether they were seeking them or not, that's just a . . . *These were our computers owned by us and we had the right to do with them as we pleased.*
>
> Q. But you knew that these items were disputed in the litigation, correct?
>
> A. Not by us. I mean, we--well, excuse me, I understand that--*I understand that there was a dispute based on what they had stated versus what we had stated*, yes, I agree with that, yes.
>
> . . .
>
> Q. . . . *You knew that Ms. DeVine was requesting the return of those computers, correct?*

> A. I also knew that Ms. DeVine was requesting millions of dollars in damages, so, you know, *whatever she was requesting or wanted, to me, at that point, you know, wasn't really a concern.*

In addition, Mr. LeClair repeatedly stated, "I am definitely 100 percent not agreeing to inspect my personal laptop, so you'll have to discuss that with my counsel."

GEA thereafter filed a motion to compel discovery, "specifically the inspection of computers pursuant to Rule 34" of the North Carolina Rules of Civil Procedure, dated 10 May 2017. GEA maintained that Luxury

> ha[s] refused to permit the inspection and, in fact, now claim[s] to have destroyed the computers subject to the Rule 34 request. [GEA] move[s] for an order compelling inspection of the computers or any copies or backups thereof or, in the alternative, [GEA] move[s] for an order compelling a sworn certification from [Luxury] that no such copies or backups exist and for sanctions for the destruction of the computers, or any copies or backups thereof.

Luxury responded that even though Mr. LeClair discarded the computers, he had "made copies of the files on the discarded computers, and those files are available for inspection on the hard drives in Mr. LeClair's possession." Mr. LeClair had also kept one computer (the "Accounting Computer") and a large Server, which Mr. LeClair averred were available for inspection by GEA.

On 12 June 2017, the trial court entered an order (the "12 June Order") regarding GEA's motion to compel[2]. The 12 June Order provided that

> [Luxury] shall make available for inspection the server, the accounting computer, any other computer hardware equipment which is the subject of this action, still existing, as well as all downloaded and stored contents and data from all computers which were destroyed or disposed of by [Luxury]. Unless otherwise agreed by the parties, this shall occur within twenty (20) days from May 18, 2017.

The parties met for the inspection on 7 June 2017. According to GEA,

> Based on deposition testimony, [GEA] expected [Luxury] to produce for inspection the following computers

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2. The trial court orally rendered the same order on 15 May 2017.

> known to remain in existence: (1) [the] Server; (2) . . . the "Accounting Computer"; (3) two portable external hard drives created by former employees . . . (the "Employee Backups"); (4) backups of computers created by Jeremy LeClair (the "LeClair Backups"); and (5) a laptop used by Mr. LeClair to conduct [Luxury] business (the "LeClair Laptop").

Luxury produced for inspection the Accounting Computer, the Employee Backups, and the Server. However, Luxury did not produce the LeClair Backups or the LeClair Laptop, and the Server could not be inspected without certain login credentials. GEA requested the Server's login credentials, but Mr. LeClair maintained that he did not know the username or password and that the company's IT employee could not remember them. GEA has since been unable to access the Server. Nonetheless, Luxury has repeatedly requested the return of the reportedly inaccessible server.

On 23 June 2017, GEA filed a Motion to Show Cause to Avoid Contempt, claiming that Luxury had refused to comply with the 12 June Order in that Luxury had (1) failed to provide access to the Server, (2) failed to produce LeClair's backups, and (3) failed to produce LeClair's laptop. In its motion, GEA requested that Luxury "be sanctioned severely for their reprehensible conduct . . . , [and that] the Court should enter default as to [GEA's] conversion claim, permit [GEA] to keep the Server, and order [Luxury] to pay [GEA's] reasonable expenses, including attorney's fees[.]"

The trial court heard GEA's motion to show cause on 28 June 2017. The trial court orally granted GEA's motion and gave Luxury ten days within which to produce the Server's password, Mr. LeClair's laptop, and any other computers or backups in Luxury's possession. The trial court ordered that Luxury be sanctioned if it failed to make such production by 10 July 2017. On 3 July 2017, Luxury filed a Request for Approval to File Motion for Reconsideration and a "Time-Sensitive Motion for *In Camera* Review" of Mr. LeClair's laptop.

By 10 July 2017, Luxury had not provided the Server's login credentials or Mr. LeClair's laptop. Accordingly, the trial court reduced its 28 June bench ruling to writing (the "10 July Order"). The trial court's 10 July Order denied Luxury's request for reconsideration and *in camera* review, found Luxury to be in violation of the 12 June Order, and affirmed the sanctions. Per the 10 July Order, if by noon of that day Luxury had not complied with the production requirements, "as a sanction for their noncompliance[,]" the trial court ordered that "all of [Luxury's] defenses in this action be stricken and that judgment by default enter in [GEA's] favor and against [Luxury] as to all of [GEA's] claims, with only the issues of injunctive relief and damages remaining for further hearing and/or trial."

Luxury filed a Notice of Inability to Comply with Court's Order on 11 July 2017. Luxury insisted that it was unable to comply with the 10 July Order because it did not have the login credentials to the Server. Luxury also maintained that it could not produce Mr. LeClair's personal laptop because of privacy concerns and the trial court's refusal to conduct an *in camera* review. Luxury filed a notice of appeal on 11 July 2017, and a motion to stay the 10 July Order on 13 July 2017. This Court granted a stay on 14 July 2017.

On appeal, Luxury argues that the trial court committed a variety of errors in its 10 July Order, including that it abused its discretion (1) by failing to consider less drastic sanctions than striking all of Luxury's defenses and entering default; (2) by failing to impose less drastic sanctions; (3) by ordering Luxury to produce the Server password, an impossibility; (4) by finding that Luxury violated the 12 June Order; (5) by ordering production of Mr. LeClair's personal laptop in violation of his right to privacy; (6) by denying the "Time-Sensitive Motion for *In Camera* Review"; (7) by making an erroneous finding as to Mr. LeClair's credibility and by making a finding as to his credibility in the first instance; and (8) by denying Luxury's Request for Approval to File Motion for Reconsideration. We consider each of Luxury's arguments as relevant to the discussion below.

Discussion

I. *Grounds for Appellate Review*

[1] The trial court's 10 July Order that imposed sanctions against Luxury is interlocutory. *Vick v. Davis*, 77 N.C. App. 359, 360, 335 S.E.2d 197, 198 (1985). However, the sanctions struck all defenses and entered default against Luxury on each of GEA's claims. "Orders of this type have been described as affecting a substantial right." *Essex Group, Inc. v. Express Wire Servs.*, 157 N.C. App. 360, 362, 578 S.E.2d 705, 707 (2003) (citing *Clark v. Penland*, 146 N.C. App. 288, 291, 552 S.E.2d 243, 245 (2001)). Accordingly, the trial court's order is immediately appealable. *Id.*; *see also Vick*, 77 N.C. App. at 360, 335 S.E.2d at 198 ("[A] party may appeal from an order imposing sanctions by striking his defense and entering judgment as to liability.") (citation omitted); N.C. Gen. Stat. § 1-277(a) (2017); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2017).

II. Rule 37(b)

Rule 37(b) of the North Carolina Rules of Civil Procedure grants trial judges the authority to impose sanctions on a party for failure to comply with a discovery order. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2017). Rule 37(b)(2) provides:

> **(2) Sanctions by Court in Which Action is Pending**—If a party . . . fails to obey an order to provide or permit discovery, . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;
>
> c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> d. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination[.]
>
> . . .

N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2017).

It is axiomatic that "[o]ne of the primary purposes of the discovery rules is to facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit" so as to permit the receiving party to adequately prepare her case. *American Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888, *disc. review denied*, 297 N.C. 304, 254 S.E.2d 921 (1979) (citations omitted). This necessarily includes "the narrowing and sharpening of the basic issues and facts that will require trial." *Id.* (citations omitted). The objectives of Rule 37(b) focus " 'not on gamesmanship, but on expeditious handling of factual information before trial so that the critical issues may be presented at trial unencumbered by unnecessary or specious issues[.]' " *F.E. Davis Plumbing Co. v. Ingleside West Associates*, 37 N.C. App. 149, 152, 245 S.E.2d 555, 557 (1978) (quoting *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976)). "Rule 37 contemplates that these objectives can be accomplished only if the court has the means and power to compel recalcitrant parties to abide by the rules of discovery." *F.E. Davis Plumbing Co.*, 37 N.C. App. at 153, 245 S.E.2d at 557. Accordingly, trial courts are vested with broad discretion in ordering sanctions under Rule 37(b). *American Tel. & Tel. Co.*, 39 N.C. App. at 727, 251 S.E.2d at 888 (citations omitted).

Not only is the decision to impose Rule 37(b) sanctions within the sound discretion of the trial court, but so too is the choice of Rule 37(b) sanctions to impose. *Brooks v. Giesey*, 106 N.C. App. 586, 592, 418 S.E.2d 236, 239 (1992) (citing *Roane-Barker v. Southeastern Hospital Supply Corp.*, 99 N.C. App. 30, 36, 392 S.E.2d 663, 667 (1990), *disc. review denied*, 328 N.C. 93, 402 S.E.2d 418 (1991)). This Court will not overturn a trial court's imposition of sanctions under Rule 37(b) absent a showing of abuse of that discretion. *Id.* "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

A.

[2] First, Luxury argues that the trial court erred because it failed to make findings of fact and conclusions of law that it considered lesser sanctions than the striking of defenses and entry of default. We find no error.

Rule 37 does not limit a trial court's determination of the appropriateness of imposing a particular Rule 37(b) sanction. Nevertheless, our courts have held that "if the trial court chooses to exercise the option of striking a party's defenses or counterclaims, it must do so after considering lesser sanctions." *Clawser v. Campbell*, 184 N.C. App. 526, 531, 646 S.E.2d 779, 783 (2007) (citing *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 251, 618 S.E.2d 819, 828 (2005) and *Goss v. Battle*, 111 N.C. App. 173, 176, 432 S.E.2d 156, 159 (1993)). A failure to consider lesser sanctions may constitute an abuse of discretion. However, formal findings of fact and conclusions of law stating that the trial court considered lesser sanctions are not required in order to sustain an order's validity in every instance. "[T]his Court will affirm an order for sanctions where 'it may be inferred from the record that the trial court considered all available sanctions' and 'the sanctions imposed were appropriate in light of the party's actions in the case.' " *In re Pedestrian Walkway Failure*, 173 N.C. App. at 251, 618 S.E.2d at 828 (quoting *Hursey*, 121 N.C. App. at 179, 464 S.E.2d at 507) (alteration omitted).

In the instant case, it can be inferred from the record that the trial court considered lesser sanctions and that the sanctions imposed were appropriate. In its Motion to Show Cause to Avoid Contempt, GEA explicitly requested the lesser sanction of entry of default solely as to GEA's conversion claim. This was a conservative request. While the various computers at issue and the information contained therein were the subject of GEA's conversion claim, the hardware also contained information that was highly material to, and necessary for, the prosecution of GEA's additional claims. In addition, the actions taken by Luxury's agents and the attitude evinced by LeClair, apparently in high dudgeon, make more severe sanctions suitable and fitting. Accordingly, while GEA requested lesser sanctions, the trial court clearly considered GEA's request and nevertheless determined that more severe sanctions were warranted under the circumstances. We also note that the trial court gave Luxury the opportunity to avoid the sanctions altogether by complying with the terms of the 12 June Order within ten days.

Moreover, "it is generally the appellant's duty and responsibility to see that the record is in proper form and complete and this Court will not presume error by the trial court when none appears on the record to this Court." *King v. King*, 146 N.C. App. 442, 445-46, 552 S.E.2d 262, 265 (2001) (quotation marks and citation omitted). Instead, "[w]here the record is silent on a particular point, we presume that the trial court acted correctly." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 488, 586 S.E.2d 791, 795 (2003) (citation omitted).

Here, Luxury has not provided this Court with a transcript of the hearing. Thus, not only may it be inferred from the record that the trial court considered lesser sanctions, but we may also "presume that the trial court acted correctly" where Luxury has failed to provide a transcript of the hearing. *E.g.*, *Clawser*, 184 N.C. App. at 531, 646 S.E.2d at 783 ("An examination of the transcript reveals that the trial court did not consider any lesser sanctions[.]).

B.

[3] We next address Luxury's argument that the trial court erred in its 10 July Order when it found Luxury and Mr. LeClair in violation of the 12 June Order.

The 10 July Order found that

> Defendant LeClair has not produced his personal laptop computer described in [GEA's] Motion to Show Cause and Defendants LeClair and [Luxury] have not produced all backups and other computers and devices, if any, in either of their possession, custody or control. Accordingly, Defendants LeClair and [Luxury] are found to be in violation of this Court's June 12, 2017 Order mandating that they "shall make available for inspection the server, the accounting computer, any other computer hardware equipment which is the subject of this action, still existing, as well as all downloaded and stored contents and data from all computers which were destroyed or disposed of by Defendants. Unless otherwise agreed by the parties, this shall occur within twenty (20) days from May 18, 2017."

Luxury maintains that Mr. LeClair's personal laptop was not subject to GEA's motion to compel or the subsequent 12 June Order. Accordingly, Luxury argues that the trial court erred when it found Luxury to be in violation of the 12 June Order on those grounds. Luxury further asserts that the trial court erred when it found Luxury to be in violation of the 12 June Order because Luxury *had* produced everything described in that order. We find no such error.

Our review of the record suggests that the 12 June Order did in fact mandate the production of Mr. LeClair's personal laptop. The 10 May 2017 deposition testimony reveals that the 12 June Order's reference to the "equipment which is the subject of this action" not only meant the "Luxury-owned" computers that were removed from the office and still in existence, but also the computers that had been used in relation to Luxury's operations overall. This included the personal laptops of various employees, including Mr. LeClair. Moreover, after referencing the "equipment which is the subject of this action," the 12 June Order explicitly addressed the handling and protection of Mr. LeClair's personal information, thus making it clear that the order included Mr. LeClair's laptop. Accordingly, we are not persuaded that the failure of the 12 June Order to specifically mention Mr. LeClair's laptop relieved Luxury of its production.

Nevertheless, Luxury unequivocally violated the provisions of the 12 June Order even assuming, *arguendo*, that Mr. LeClair's personal laptop was not subject to the Order. The trial court ordered that Luxury "shall make available for inspection the server[.]" Luxury insists that it complied with the order because it "produced the server." However, the production of the Server was useless, as its access required login credentials that Luxury maintained it could not provide. We conclude that because the 12 June Order required not only that Luxury produce the Server, but that it make the Server "*available for inspection*," the trial court did not abuse its discretion when it concluded that Luxury violated the 12 June Order.

C.

Next, Luxury contends that the trial court erred "by failing to impose less drastic sanctions, all available and all more appropriate, than stricken defenses and entry of default judgment." The essence of Luxury's argument is that the trial court abused its discretion because it imposed the sanctions without regard to Luxury's inability to provide the Server's login credentials or to Mr. LeClair's privacy interests in his personal laptop. These arguments are not persuasive.

i. The Server

[4] Luxury first maintains that it "does not have the server password, as it repeatedly told the trial court, under oath, and demonstrated by its inability—not refusal—to provide it. The July 10 Order requires the impossible."

The trial court made the following finding pertaining to the Server in its 10 July Order:

> 1. The Court FINDS, pursuant to Defendant LeClair's deposition testimony and otherwise, that LeClair intentionally destroyed or physically disposed of computers and materials at issue in this case. On the basis of Defendant LeClair's destruction or physical disposal of certain computers and materials, the Court FINDS as not credible LeClair's assertion that he does not possess the password(s) and other credentials necessary to access [the Server]. Though the parties dispute ownership of the Server, the Server shall not be returned to [Luxury] unless provided for by further disposition of this Court.

The trial judge is the sole authority of the weight and credibility that should be given to the parties' testimony and evidence. *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994).

> "Issues of witness credibility are to be resolved by the trial judge. It is clear beyond the need for multiple citation

> that the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence." *Smithwick v. Frame*, 62 N.C. App. 387, 392, 303 S.E.2d 217, 221 (1983). "The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980).

Id. at 357, 446 S.E.2d at 25.

Despite Luxury's insistence, the trial court made clear that it did not find it credible that neither Mr. LeClair nor any other of Luxury's agents knew the login credentials to the Server. The trial court did not abuse its discretion simply because it declined to accept Luxury's allegations to the contrary. In that it was the province of the trial court to determine the credibility of Luxury's contentions on this point, we conclude that the trial court did not abuse its discretion when it ordered that Luxury be sanctioned if it did not provide the Server's login credentials.

Notwithstanding the trial court's discretion as to determinations of credibility, Luxury further argues that the trial court erred when it made any finding as to credibility. In support of this argument, Luxury cites *Lee v. Shor* for the proposition that "[i]t is well established that the court should not resolve an issue of credibility or conduct a 'trial by affidavits' at a hearing on a motion for summary judgment[.]" 10 N.C. App. 231, 235, 178 S.E.2d 101, 104 (1970). While the present case does not involve a motion for summary judgment, Luxury "submits that a ruling as to credibility in a dispositive context—either summary judgment or entry of default—is error[.]" We are not persuaded.

Not only has Luxury failed to provide this Court with authority to support the applicability of *Lee* to the present case, but we conclude that no such extension is warranted under the circumstances. The issue at hand in the 10 July Order was whether or not to impose *sanctions*. In ruling on GEA's motion to show cause, the trial court was required to determine whether Luxury was truly incapable of complying with the 12 June Order or whether Luxury personnel had in fact misrepresented their lack of knowledge of the password to the Server. Therefore, credibility was not only relevant, but was itself in issue. Moreover, in *Lee*, we reversed the trial court's summary judgment order on the basis of the affidavits provided because "[a] careful examination of defendants' affidavits disclose[d] that . . . they do not cover all of the facts which would be material to a determination of the controversy and thus would not adequately support the motion." *Id.* at 236, 178 S.E.2d at 104. Here, however, Luxury personnel simply insisted that they did not know the Server's password. There was nothing further for the trial court to resolve other than whether that assertion was believable.

Accordingly, we find no error in the trial court's finding as to Mr. LeClair's credibility.

ii. LeClair Laptop

[5] Additionally, Luxury argues that the trial court erred when it ordered sanctions against Luxury if it did not produce Mr. LeClair's personal laptop. Luxury maintains that this requirement is "a violation of Mr. LeClair's right of privacy," and that such a violation could have been easily avoided by an *in camera* review of the laptop, which the trial court refused to conduct.

Despite the personal nature of certain information, "[u]nder the rules of discovery . . . , a party may obtain discovery concerning any unprivileged matter as long as it is relevant to the pending action and is reasonably calculated to lead to the discovery of admissible evidence." *Spangler v. Olchowski*, 187 N.C. App. 684, 693, 654 S.E.2d 507, 514 (2007) (citation omitted). Whether to conduct an *in camera* inspection is within the trial court's discretion. *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 736, 294 S.E.2d 386, 387 (1982) (citations omitted).

In the instant case, while Mr. LeClair's personal laptop may indeed include, as Luxury calls it, "needless" personal information, we find sufficient evidence in the record to suggest that Mr. LeClair's personal laptop also contained information related to GEA's pending claims and would lead to the discovery of admissible evidence.

The relevant information that could have been found on Mr. LeClair's laptop was not limited to Luxury's or GEA's business matters. For instance, GEA's harassment claim contained allegations concerning Mr. LeClair's personal Facebook postings and defamatory e-mails sent to the *Times* and *The Wall Street Journal*. Thus we are not persuaded by Luxury's claim that any personal information on the laptop would have been entirely irrelevant to GEA's pending actions. In any event, the possibility of unveiling "purely personal" information would have been outweighed by the potential for uncovering material that was relevant. Mr. LeClair testified that he used his personal laptop for Luxury's business matters. Additionally, largely at issue in GEA's claims—including its accounting claim—was the housing of stolen intellectual property. There is no indication that the housing of any such stolen property would be limited solely to the business computers.

Furthermore, the extent of any harm caused by the revelation of personal information would have been circumscribed by the trial court's 12 June Order, which explicitly set the bounds for the use of Mr. LeClair's personal information. That order stated, in pertinent part, that

> [a]ny information, content or data obtained from the inspection [that] is Jeremy LeClair's personal information . . . shall be used solely for purposes of this case . . . and disclosed only (a) to the parties, their counsel, their experts or trial witnesses, (b) at trial as necessary, or (c) in response to any statute or court/governmental order. The [personal] [i]nformation will be returned to Jeremy LeClair within fourteen (14) days of final disposition . . . and not retained by the Plaintiffs.

(emphasis added).

This Court is also concerned by the attitude exhibited by Mr. LeClair. At his deposition, Mr. LeClair repeatedly stated that he would refuse to produce his personal laptop, and continued to so refuse even after the court ordered him to do so in its 10 July Order, thus showing his contempt for the discovery process overall.

Accordingly, we conclude that the trial court did not abuse its discretion when it ordered that Luxury be sanctioned unless Mr. LeClair produced his personal laptop for inspection.

We are also not convinced that the trial court abused its discretion when it declined to conduct an *in camera* review of the laptop. On 3 July 2017, Luxury filed a "Time-Sensitive Motion For *In Camera* Review And Request For Telephone Hearing." The motion requested that the *in camera* review be conducted prior to 10 July 2017, which was just seven days later. Luxury in essence asked the trial judge to clear his schedule and sort through the laptop's extensive supply of files in order to determine which information was and was not relevant to the pending claims. The trial court did not abuse its discretion when it refused to do so, particularly given the expedited nature of the request and the privacy protections that the trial court afforded to Mr. LeClair in its 12 June Order. Luxury's motion for *in camera* review should have been filed shortly after the *initial* discovery request, on 1 March 2017, or at the latest, after the 12 June order, rather than on 3 July 2017, after the 23 June 2017 motion to show cause was filed by GEA.

Accordingly, we conclude that the trial court did not err when it ordered the production of Mr. LeClair's personal laptop and denied Luxury's motion for a time-sensitive *in camera* review.

* * *

In view of the above, we conclude that the trial court did not err when it struck Luxury's defenses to GEA's counterclaims, entered default against Luxury, and denied Luxury's Request for Reconsideration. As discussed in Section II *supra*, a determination of the appropriateness of particular sanctions is within the sound discretion of the trial judge. "Striking of defenses or counterclaims is an appropriate remedy, and is within the province of the trial court." *Clawser*, 184 N.C. App. at 531, 646 S.E.2d at 783 (citing *Jones v. GMRI, Inc.*, 144 N.C. App. 558, 565, 551 S.E.2d 867, 872 (2001)). Such sanctions "are well within the court's discretion in cases involving an abuse of discovery rules by one party." *Kewaunee Sci. Corp. v. Eastern Sci. Prods.*, 122 N.C. App. 734, 738, 471 S.E.2d 451, 453 (1996) (citing *Roane-Barker*, 99 N.C. App. at 36, 392 S.E.2d at 667). In the instant case, we find no such abuse of discretion.

Conclusion

For the reasons contained herein, the trial court's 10 July 2017 order is

AFFIRMED.

Judges HUNTER, JR. and DIETZ concur.

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM JASON V. MENENDEZ AND ANN C. MENENDEZ, IN THE ORIGINAL AMOUNT OF $244,980.00, DATED MAY 13, 2016 AND RECORDED ON MAY 13, 2016 IN BOOK R 7813 AT PAGE 1531, GUILFORD COUNTY REGISTRY CURRENT OWNER(S): JASON V. MENENDEZ AND WIFE ANN C. MENENDEZ TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA17-1341

Filed 15 May 2018

Mortgages and Deeds of Trust—foreclosure sale—reinstatement of loan—third-party bidder—standing

A third-party bidder lacked standing to appeal an order setting aside a foreclosure sale where the mortgagors reinstated their loan and cured their default within the 10-day upset bid period and the substitute trustee returned the bidder's deposit. The bidder was not a real party in interest to the underlying property or deed of trust.

Appeal by Respondent from order entered 4 August 2017 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 17 April 2018.

Brown, Faucher, Peraldo & Benson, PLLC, by Drew Brown, for Respondent-Appellant Beach Capital Partners, LLC.

Hutchens Law Firm, by Claire L. Collins and Hilton T. Hutchens, Jr., for Petitioner-Appellee Quicken Loans.

Brock & Scott, PLLC, by Renner St. John, for Petitioner-Appellee Trustee Services of Carolina, LLC.

The Law Offices of Charles Winfree, by R. Robert El-Jaouhari, for Petitioner-Appellees Jason V. Menendez and Ann C. Menendez.

HUNTER, JR., Robert N., Judge.

Beach Capital Partners, LLC ("Respondent") appeals the trial court's order denying the appeal of the order to set aside foreclosure sale. Respondent contends its rights were "fixed" at the end of the 10-day upset bid period, and this Court should therefore order the trial court to instruct the clerk of court to confirm the sale and order Petitioner Trustee Services of Carolina, LLC ("Substitute Trustee") to convey property to Respondent. However, because Petitioners Jason C. Menendez and Ann C. Menendez ("Petitioners Menendez") reinstated their loan and cured their default prior to the conclusion of the 10-day upset bid period, and because the Substitute Trustee returned Respondent's deposit, Respondent is left without any further remedy. We conclude Respondent is not a real party in interest to the contract between Petitioners Menendez and Petitioner Quicken Loans ("Petitioner Quicken") and the Substitute Trustee, and therefore Respondent does not have standing to pursue this action. Accordingly, we grant Petitioners' motion to dismiss Respondent's appeal.

I. Factual and Procedural Background

This action originates with a loan agreement for $244,980.00 entered into by Petitioners Menendez on 13 May 2016. Petitioners Menendez secured a loan through a deed of trust on property located at 5715 Bayleaf Lane, Greensboro, North Carolina. The trustee at this time was Petitioner Quicken.

On 28 November 2016, Petitioner Quicken appointed Substitute Trustee under the Deed of Trust. On 2 December 2016, the Substitute Trustee filed a Notice of Hearing Prior to Foreclosure of Deed of Trust. This initiated a power of sale foreclosure proceeding against Petitioners Menendez pursuant to N.C. Gen. Stat. § 45-21.16 *et seq.*

On 31 January 2017, the Guilford County Assistant Clerk of Court entered an order allowing the Substitute Trustee to proceed with the foreclosure sale. On 28 February 2017, the Substitute Trustee held a foreclosure sale where Respondent was the highest bidder, with a bid of $190,100.00.

Less than 10 days later, on 6 March 2017, and prior to the confirmation of the sale, Petitioners Menendez reinstated their loan by making a $20,000.00 payment to Petitioner Quicken. On 7 March 2017, Petitioner Quicken notified the Substitute Trustee the Petitioners Menendez had reinstated their loan, and requested the rescission and setting aside of the foreclosure sale. On 17 March 2017, the Substitute Trustee filed a Motion to Set Aside the Foreclosure Sale and Report of Sale with Guilford County Superior Court. On 20 March 2017, the Guilford County Assistant Clerk of Court entered an Order to Set Aside the Foreclosure Sale and Report of Sale.

On 16 March 2017, the Substitute Trustee returned Respondent's deposit made at the foreclosure sale by sending a refund check to Respondent via UPS. Respondent received the check on 17 March 2017. On 21 March 2017, the Substitute Trustee mailed a Withdrawal of Notice of Hearing/Termination to the court and the Petitioners Menendez. The Substitute Trustee also filed the Withdrawal of Notice/Termination with the Guilford County Clerk of Court's Office on 24 March 2017.

On 1 June 2017, Respondent filed a Notice of Appeal of the Clerk's order setting aside the foreclosure sale. On 4 August 2017, the trial court entered an order denying the appeal of the order setting aside the foreclosure sale. On 31 August 2017, Respondent filed its notice of appeal to this Court.

II. Standard of Review

"Standing is a necessary prerequisite to the court's proper exercise of subject matter jurisdiction." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001). " 'If a party does not have standing to bring a claim, a court has no subject matter jurisdiction[.]' " *Woodring v. Swieter*, 180 N.C. App. 362, 366, 637 S.E.2d 269, 274 (2006) (quoting *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005)). Whether a party has standing is a question of law which we review *de novo*. *Indian Rock Ass'n v. Ball*, 167 N.C. App. 648, 650, 606 S.E.2d 179, 180 (2004). The issue of standing may be raised for the first time on appeal and by this Court's own motion. *Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010).

III. Analysis

Respondent contends since its rights were "fixed" at the conclusion of the 10-day upset bid period, this Court should order the trial court to instruct the clerk of court to confirm the sale and order the Substitute Trustee to convey title and property to Respondent. We disagree.

"Every claim must be prosecuted in the name of the real party in interest[,] *Goodrich v. Rice*, 75 N.C. App. 530, 536, 331 S.E.2d 195, 199 (1985) (citation omitted), and, by extension, "[a] party has standing to initiate a lawsuit if he is a 'real party in interest.' " *Slaughter v. Swicegood*, 162 N.C. App. 457, 463, 591 S.E.2d 577, 582 (2004) (citations omitted). "A real party in interest is a party who is benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject-matter of the litigation." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (quoting *Parnell v. Nationwide Mut. Ins. Co.*, 263 N.C. 445, 448-49, 139 S.E.2d 723, 726 (1965)). "Thus, the real party in interest is the party who by substantive law has the legal right to enforce the claim in question." *Id.* at 337, 441 S.E.2d at 445.

In this case, Respondent is not the real party in interest. In a foreclosure pursuant to power-of-sale, a third party bidder has no interest in the underlying property or in the deed of trust pursuant to which that property is offered for sale. Therefore, the third party bidder has no legal right to force a forfeiture in satisfaction of the deed of trust. Foreclosure pursuant to power of sale is not a judicial proceeding, but rather a contractual proceeding with an overlay of judicial oversight. *See In re Lucks*, 369 N.C. 222, 225, 794 S.E.2d 501, 504 (2016) ("Non-judicial foreclosure by power of sale arises under contract and is not a judicial proceeding."). Chapter 45 of our General Statutes provides this judicial oversight, and does not "alter the essentially contractual nature of the remedy." *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 858 (1993) (citations omitted).

Foreclosure under Chapter 45 pursuant to power of sale does not create new rights in the underlying property or the deed of trust in third parties, including the third party bidder. Chapter 45 does create fixed rights of a third party bidder at the end of the 10-day statutory upset bid period. *See* N.C. Gen. Stat. § 45-21.27, 45-21.29A (2017). However, those rights are between the third party bidder and the trustee, and are not rights in the underlying property or the deed of trust. *Sprouse v. N. River Ins. Co.*, 81 N.C. App. 311, 316, 344 S.E.2d 555, 559 (1986). In *Sprouse*, this Court stated:

> The deed of trust results in legal title to the property being in the trustee. In a foreclosure title remains in the trustee until he conveys it to the high bidder. Title does not pass before the conveyance. . . . The high bidder is not entitled to an order of possession until payment of the purchase price. . . . This is consistent with the general rule: The sale is executed only by the delivery of the deed. The prior proceedings amount merely to a contract of sale. Therefore the only rights that are "fixed" upon expiration of the 10-day period are the contractual rights of the high bidder to delivery of the deed upon tender of the purchase price and of the trustee to hold the bidder liable for that price.

Id. at 316, 344 S.E.2d at 559 (internal citations and quotation marks omitted). Until the purchase price is paid in full by the high bidder, the only duty of the trustee is to return the deposit on the bid. In fact, there is no contract, and the high bidder has no contractual right for delivery of the subject property, until the high bidder tenders the full purchase price. *Id.* at 316, 344 S.E.2d at 560.

A deed of trust creates the trustee's rights and duties, and a trustee to a deed of trust only stands in a fiduciary relationship with the creditor and debtor. If there is a high bidder at a foreclosure proceeding, the trustee's only obligation to that bidder is to tender the deed upon payment of the purchase price. *Sprouse* at 316, 344 S.E.2d at 559. Respondent has not cited any language from the Deed of Trust or pointed to any case or statute which would create additional duties or obligations for the trustee to the high bidder.

In accordance with the terms of the Deed of Trust and pursuant to N.C. Gen. Stat. § 45-21.16, the notice of sale in this case provided the necessary details of the sale, and expressly stated the remedies and rights of the high bidder if the trustee was unable to convey title to the property. The contents of the notice of foreclosure sale in the instant proceeding expressly provide if the trustee is unable to convey the property, the third party bidder's sole remedy is the return of the deposit. The "Notice of Foreclosure Sale" provides:

> If the trustee is unable to convey title to this property for any reason, the sole remedy of the purchaser is the return of the deposit. Reasons of such inability to convey include, but are not limited to . . . reinstatement of the loan without the knowledge of the trustee. . . . The purchaser will have no further remedy.

This notice of foreclosure sale was mailed to all interested parties, published in local newspapers, and posted at the designated location in the courthouse to put the public on constructive notice of the terms of the sale. The Substitute Trustee was also required to cry the sale at the designated location and time, and required to read the contents of the notice of foreclosure sale out loud even if there were no potential bidders present.

In this case, Respondent was present at the foreclosure sale since the Report of Sale shows Respondent was the high bidder at the time of sale. Not only did Respondent have constructive notice of the contents of the "Notice of Foreclosure Sale" and the terms contained therein, but Respondent had actual notice of the rights of the purchaser because Respondent was present when the Substitute Trustee called for bids on 28 February 2017.

Respondent placed a bid and tendered a deposit of $9,505.00 at the sale, and proceeded to wait for the upset bid period to expire and for the sale to confirm. However, as expressly provided in the "Notice of Foreclosure Sale," and pursuant to the terms of the Deed of Trust and

Chapter 45, the Substitute Trustee was unable to convey title because Petitioners Menendez reinstated the loan. The "Notice of Foreclosure Sale" also provides the high bidder's sole remedy is the return of the deposit. Accordingly, Respondent received its deposit ten days after Petitioners Menendez cured the default. The Substitute Trustee owes no further duty to Respondent.

A third party bidder's rights, whether or not they are "fixed" pursuant to N.C. Gen. Stat. §§ 45-21.27 and 45-21.29A, cannot alter the rights of the parties to the Deed of Trust underlying a power-of-sale foreclosure. Those rights cannot be controlled by third party bidders in a power-of-sale foreclosure, and a third party bidder has no standing to force a forfeiture by prosecuting the rights of others. Because we conclude Respondent does not have standing to maintain this action, we grant Petitioners' motion to dismiss.

DISMISSED.

Judges BRYANT and CALABRIA concur.

IN THE MATTER OF THE WILL OF MARGUERITE TRAVERSE HENDRIX,
AMY HENDRIX WEBER AND MAUREEN TRAVERSE COLLINS, PETITIONERS
v.
JANET MARTIN TANTEMSAPYA, ET. AL., RESPONDENTS

No. COA17-281

Filed 15 May 2018

1. Civil Procedure—Rule 12(b)(6)—caveat—applicable

Although caveators argued that a caveat cannot be dismissed because N.C. courts have historically required that all caveat issues be tried by a jury, the Rules of Civil Procedure that have been applied to estate proceedings include those involving a disposition without a jury trial. Therefore, there is no absolute requirement for a jury trial in a will caveat.

2. Wills—caveat—holographic—modifications to typewritten will—Rule 12(b)(6)

A caveat claim based on a holographic codicil to a typewritten will did not state a valid clam where the handwritten notations had no meaning apart from the typewritten provisions of the earlier will.

Appeal by caveators from order entered 10 October 2016 by Judge Susan E. Bray in Superior Court, Forsyth County. Heard in the Court of Appeals 6 September 2017.

The Law Offices of Jason E. Taylor, by Gary W. Jackson and Lawrence B. Serbin, for petitioners-caveators-appellants.

Bell, Davis & Pitt, P.A., by William K. Davis, Alan M. Ruley, and Andrew A. Freeman, for respondent-appellees.

STROUD, Judge.

The Caveators appeal from the trial court's order dismissing their will caveat under North Carolina Rule of Civil Procedure 12(b)(6). Because the alleged codicil upon which the caveat was based is not a valid holographic codicil on its face, we affirm.

I. Background

On 26 July 2016, Amy Hendrix Weber and Maureen Traverse Collins, caveators, filed a caveat to the will of Marguerite Traverse Hendrix dated 1 September 2011 ("2011 Will"). The Caveators are two of about twelve named beneficiaries under the 2011 Will. Ms. Hendrix died on 7 June 2016, and her will entered probate on 24 June 2016. Ms. Weber and Ms. Collins alleged that portions of the 2011 Will should be set aside because the decedent had executed a holographic codicil to it on 13 November 2012. The Caveators alleged that the decedent had revoked some provisions of the 2011 Will and modified others, including removing Brenner Children's Hospital as a beneficiary. A copy of the alleged codicil was attached to the complaint.

The alleged codicil was a copy of the typewritten 2011 Will with some handwritten notations and markings through some portions of the typewritten text. At the top of the first page of the alleged codicil is a handwritten note "UPDATE Nov 13, 2012[,]" and under this a mark which could be the decedent's initials. After the date, the handwritten notations are nearly illegible, but we will assume for purposes of considering the motion to dismiss that they say what the Caveators alleged. The caveat does not include any allegation regarding when and where the alleged codicil was found.

Brenner Children's Hospital moved to dismiss under North Carolina Rule of Civil Procedure 12(b)(6).[1] On 10 October 2016, the trial court

1. Other named beneficiaries under the 2011 Will also filed responses, including

granted Brenner Children's Hospital's motion to dismiss the caveat with prejudice. The Caveators appeal.

II. Motion to Dismiss

On appeal, the Caveators argue that the trial court erred in dismissing their caveat under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The Caveators contend that Rule 12(b)(6) is not applicable to caveat proceedings, but even if it were, they contend the alleged codicil shows the decedent's intent and meets the statutory requirements for a holographic codicil, so they "are entitled to have a jury hear evidence that the requirements for a valid holographic instrument are satisfied."

A. Applicability of Rule 12(b)(6) to Caveat

[1] Caveators argue that a caveat cannot be dismissed because North Carolina courts have historically required that all caveat issues be tried by a jury. The Caveators cite several cases stating the general proposition that " 'on the issue raised by caveat, as provided by the statute, the issue must be tried by a jury and not by the judge.' *In re Hine's Will*, 228 N.C. 405, 410, 45 S.E.2d 526, 529 (1947)[.]" But the Rules of Civil Procedure still apply to caveat proceedings. *See generally In re Will of Durham*, 206 N.C. App. 67, 76, 698 S.E.2d 112, 120-21 (2010). In *Will of Durham*, this Court discussed the applicability of the Rules of Civil Procedure in estate proceedings at length, noting that the caveator's argument that the Rules of Civil Procedure did not apply "is understandable given certain language that appears in our prior decisions," but determined that North Carolina Rule of Civil Procedure 11 applied to estate proceedings:

> The North Carolina Rules of Civil Procedure govern the procedure in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute. The phrase all actions and proceedings of a civil nature is inclusive of, but not exclusive to, civil actions; the phrase is broad and encompasses different types of legal actions, not solely those initiated with a complaint. According to N.C. Gen. Stat. § 1–393, the Rules of Civil Procedure and the provisions of this Chapter on civil procedure are applicable to special proceedings, except as otherwise provided. A proceeding for the revocation of previously-issued letters testamentary initiated pursuant to N.C. Gen. Stat. § 28A–9–1 constitutes

a motion to dismiss, but the trial court's order was based upon Brenner Children's Hospital's motion and only the Caveators and Brenner Children's Hospital have filed briefs on appeal.

> a special proceeding. As a result, an estate proceeding is a proceeding of a civil nature in which a Superior Court Judge has the authority to impose sanctions pursuant to N.C. Gen. Stat. § 1A–1, Rule 11.

206 N.C. App. at 76-77, 698 S.E.2d at 120–21 (citations, quotation marks, ellipses, and brackets omitted).

Although *Durham* specifically addressed Rule 11, *see id.*, and not Rule 12, other cases have applied other Rules of Civil Procedure to estate proceedings, including dismissal by summary judgment under Rule 56 and directed verdict under Rule 50. *See, e.g.*, *Matter of Will of Allen*, ___ N.C. App. ___, 801 S.E.2d 380 (2017), *disc. review allowed*, ___ N.C. ___, ___ S.E.2d ___ (2018) ; *see also In re Will of Mason*, 168 N.C. App. 160, 165-66, 606 S.E.2d 921, 924-25 (2005) (noting that a caveat may be addressed by summary judgment and directed verdict). Dismissal upon summary judgment or directed verdict is also a disposition without a jury trial, so there is no absolute requirement for a jury trial in a will caveat. *See generally id. Will of Allen*, explained, "A caveat is an in rem proceeding and operates as an attack upon the validity of the instrument purporting to be a will. Summary judgment may be entered in a caveat proceeding in factually appropriate cases." *Will of Allen*, ____ N.C. App. at ___, 801 S.E.2d at 383 (citations, quotation marks, and brackets omitted). We therefore conclude that Rule 12(b)(6) applies to caveat proceedings just as it does to other civil proceedings.

B. Sufficiency of Caveat

[2]

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

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428–29 (2007) (citations and quotation marks omitted).

The Caveators argue that they "expect that Appellees will contest the 2012 Codicil on the grounds that the instrument is not entirely in Decedent's handwriting and that those portions which are type-written are essential to discern the meaning of the handwritten words." And appellee does make exactly this argument. The alleged holographic codicil is decedent's 2011 Will with some handwritten notations. The Caveators claim that the notations clearly show the decedent's intent so they should be given effect, even if they must be read in conjunction with the typewritten document to have any meaning, claiming that appellee's argument is based "upon a hyper-technical interpretation of the applicable statute." Perhaps appellee's argument is "hyper-technical[,]" but it is also the law as set forth by both this Court and our Supreme Court. *See Will of Allen*, ___ N.C. App. at ___, 801 S.E.2d at 383–85.

Will of Allen also addressed handwritten notations on a typewritten will which the decedent had previously executed, and this Court summarized the "Requirements for a Holographic Codicil to a Typewritten Will":

> A codicil is a supplement to a will, annexed for the purpose of expressing the testator's after-thought or amended intention. The mere making of a codicil gives rise to the inference of a change in the testator's intention, importing some addition, explanation, or alteration of a prior will.
>
> The statutory requirements for partial revocation or change to a will are found in N.C. Gen. Stat. § 31-5.1 (2015), which states in relevant part that a written will, or any part thereof, may be revoked only (1) by a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills. The manner provided for the execution of a holographic will is set out in N.C. Gen. Stat. § 31-3.4 (2015), which provides in pertinent part as follows:
>
> (a) A holographic will is a will
>
> (1) Written entirely in the handwriting of the testator but when all the words appearing on a paper in the handwriting of the testator are sufficient to constitute a valid holographic will, the fact that other words or printed matter appear thereon not in the handwriting of the testator, and not affecting the meaning of the words in such handwriting, shall not affect the validity of the will, and
>
> (2) Subscribed by the testator and
>
> (3) Found after the testator's death among the testator's valuable papers or effects.

Our Supreme Court has held that in some circumstances an addenda in the handwriting and over the signature of the testatrix written on the face of the typewritten attested will may be upheld as a holograph codicil thereto. However, our appellate jurisprudence has established specific requirements for a valid holographic codicil to a will. N.C. Gen. Stat. § 31-3.4(a)(1) states that the fact that other words or printed matter appear in a holographic will not in the handwriting of the testator, and not affecting the meaning of the words in such handwriting, shall not affect the validity of the will. *Goodman* applied this rule to a holographic codicil to a typewritten will:

> While the derivative and applied meaning of the word holograph indicates an instrument entirely written in the handwriting of the maker, this would not necessarily prevent the probate of a will where other words appear thereon not in such handwriting but not essential to the meaning of the words in such handwriting. <u>But where words not in the handwriting of the testator are essential to give meaning to the words used, the instrument will not be upheld as a holograph will</u>.

In *Goodman*, the testatrix added and signed the following handwritten words to her typewritten will: "To my nephew Burns Elkins 50 dollars" "Mrs. Stamey gets one-half of estate if she keeps me to the end"; and "My diamond ring to be sold if needed to carry out my will, if not, given to my granddaughter Mary Iris Goodman." Because the effect of these additions to the testatrix's will could be determined without reference to any other part of her will, our Supreme Court held that the handwritten notes on the testatrix's will constituted a valid holographic codicil:

> The additional words placed by her on this will written in her own handwriting and again signed by her are sufficient, standing alone, to constitute a valid holograph will; that is, the legacy of $ 50 to Burns Elkins, the devise of one-half of her estate to Mrs. Stamey, and the bequest of the diamond ring to Mary Iris Goodman are sufficiently expressed to constitute a valid disposition of property to take effect after death.

> However, where the meaning or effect of holographic notes on a will requires reference to another part of the will, the holographic notations are not a valid holographic codicil to the will. For example, in *In re Smith's Will*, 218 N.C. 161, 10 S.E.2d 676 (1940), the decedent's will was duly probated as a holographic will. Thereafter, the decedent's widow submitted for probate a purported codicil or supplemental will that included both typewritten and holographic elements. Our Supreme Court held that:
>
> > The paper writing presented 6 March, 1939, was improvidently admitted to probate in common form. An examination of the instrument leads us to the conclusion that it was not in form sufficient to be entitled to probate as a holographic will. Words not in the handwriting of the testator are essential to give meaning to the words used.

Id. (emphasis in original) (citations, quotation marks, ellipses, and brackets omitted). In *Will of Allen*, this Court ultimately determined,

> the words of the handwritten notation are not sufficient, standing alone, to establish their meaning. In order to understand the notation, it is necessary to incorporate or refer to the contents of Article IV to which the note refers. As discussed above, our appellate jurisprudence establishes that a holographic codicil is invalid if words not in the handwriting of the testator are essential to give meaning to the words used. We conclude that under binding precedent of our Supreme Court, the handwritten notation does not constitute a valid holographic codicil to the will.

Id. at ___, 801 S.E.2d at 385 (citation, quotation marks, and brackets omitted).

Here, the handwritten notations are almost entirely illegible, but for purposes of Rule 12(b)(6) review, we have assumed they say what the Caveators allege. *See Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428–29. But even if we make this assumption as to the content of the notations, the handwritten notations are still not sufficient, standing alone, to establish their meaning. The notations must be read along with the typewritten provisions of the 2011 Will to have any meaning. Accordingly,

> our appellate jurisprudence establishes that a holographic codicil is invalid if words not in the handwriting of the testator are essential to give meaning to the words used. We

> conclude that under binding precedent of our Supreme Court, the handwritten notation does not constitute a valid holographic codicil to the will.

Id.

Appellee alleges four other reasons the alleged caveat was properly dismissed, including the lack of any allegation of where the codicil was found and a lack of a subscription by the testator, both requirements under North Carolina General Statute § 31-3.4 (2015) for a valid holographic will, but we need not address those arguments since we have already determined that the caveat fails to state a valid claim because the handwritten notations have no meaning apart from the typewritten provisions of the 2011 Will. *See* N.C. Gen. Stat. § 31-3.4; *see also Will of Allen*, ___ N.C. App. at ___, 801 S.E.2d at 383-385. Because the handwritten notations on the alleged holographic codicil are not sufficient standing alone to "give meaning to the words used" *id.*, ___ N.C. App. at ___, 801 S.E.2d at 384, the caveat fails to state "a claim for which relief can be granted[,]" *Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428, and we affirm the trial court's order.

III. Conclusion

Because the alleged holographic codicil failed to meet the requirements of North Carolina General Statute § 31-3.4, the caveat was properly dismissed, and we affirm the trial court's order.

AFFIRMED.

Judges ELMORE and TYSON concur.

[259 N.C. App. 473 (2018)]

KENT JEFFRIES, Petitioner, and LYNWOOD HARE, FRANCES L. HARE, BOBBIE LEWIS JEFFRIES, and THOMAS GLENN FINCH, Intervening Petitioners

v.

COUNTY OF HARNETT, Respondent, and DRAKE LANDING, LLC, WILLIAM DAN ANDREWS, and LINDA ANDREWS, Intervening Respondents

No. COA17-729

Filed 15 May 2018

1. Appeal and Error—preservation of issues—decision-making boards—petition for writ of certiorari

Petitioners challenging a determination that certain hunting and shooting activities constituted "agritourism" and thus were exempt from countywide zoning failed to perfect an appeal from one of several orders of the county board of adjustment by not filing any objections or otherwise complying with the petition filing requirements of N.C.G.S. § 160A-393(c) necessary to seek review of quasi-judicial decisions of decision-making boards. The trial court properly concluded that petitioners were procedurally barred from challenging the specified order for the first time at the certiorari review hearing and did not err in affirming that order.

2. Appeal and Error—preservation of issues—procedural posture

The Court of Appeals rejected petitioners' argument that a decision of the county board of adjustment they were procedurally barred from challenging should have been reviewed on the merits due to being in the same procedural posture as an earlier board decision that was reviewed by the trial court. The postures were procedurally different because petitioners unambiguously expressed their intent to appeal the earlier decision and lodged specific, written objections to that decision prior to the hearing in the trial court.

3. Zoning—farm exemption—definition of agriculture—shooting activities

The trial court properly concluded that various shooting activities did not constitute "agriculture" under N.C.G.S. § 106-581.1 or "bona fide farm purposes" under N.C.G.S. § 153A-340 and thus were not shielded from zoning under the statutory farm exemption. The legislature's 2017 amendment to section 153A-340 which added a definition of "agritourism" served to clarify existing law, not alter it, and proved instructive to the Court of Appeals in its evaluation of the type of activities exempt from zoning. The Court of Appeals determined that the specified commercial shooting activities at issue, even when done on a bona fide farm and in preparation for the hunt, did not fit within traditional notions of hunting and thus did not constitute "agritourism" so as to be exempt from zoning.

4. Appeal and Error—record on appeal—failure to include ordinance—subject to dismissal—mootness

Intervening-respondents' arguments that the trial court misinterpreted a county unified development ordinance (UDO) to require a nexus between the farming activities and the shooting activities on their land were dismissed because the parties failed to include the UDO in the record on appeal and because the Court of Appeals' resolution of the appeals from two other orders rendered the arguments moot.

Judge MURPHY concurs in result only.

Appeal by petitioners from order entered 10 March 2017 by Judge C. Winston Gilchrist, and appeal by respondents from orders entered 17 March 2014 by Judge C. Winston Gilchrist and 24 July 2012 by Judge Tanya T. Wallace, in Harnett County Superior Court. Heard in the Court of Appeals 27 November 2017.

Troutman Sanders LLP, by Gavin B. Parsons, for petitioner-appellant and petitioner-appellee Kent Jeffries, and for intervening-petitioner-appellants and intervening-petitioner-appellees Lynwood Hare, Frances L. Hare, Bobbie Lewis Jefferies, and Thomas Glenn Finch.

No brief filed for respondent-appellee, Harnett County.

Bryant & Ivie, PLLC, by John Walter Bryant and Amber J. Ivie, for intervening-respondent-appellees and intervening-respondent-appellants Drake Landing, LLC, William Dan Andrews, and Linda Andrews.

ELMORE, Judge.

William Dan Andrews and Linda Andrews own and operate Drake Landing, LLC (collectively, "intervening-respondents"), a recreational hunting and shooting enterprise operating in Harnett County. William Dan Andrews is also the sole proprietor of Andrews Farms, a bona fide commercial crop farm. Drake Landing operates a controlled hunting preserve and a variety of other commercial shooting activities on several acres of property it leases from Andrews Farms. Drake Landing has never obtained conditional-use permits to operate its hunting preserve or the other shooting activities on the basis that these activities constituted "agritourism" and were thus exempt from countywide zoning. Petitioner Kent Jeffries and intervening-petitioners Frances L. Hare, Bobbie Lewis Jeffries, and Thomas Glenn Finch (collectively, "petitioners") own residential property adjacent to or near Drake Landing. This case arose from Jeffries' request that the local zoning authority determine whether thirteen different shooting activities offered at Drake Landing constituted agritourism and were thus exempt from countywide zoning, including a conditional-use permitting requirement. After several hearings and hearings on remand before the Harnett County Board of Adjustment ("Board"), the superior court entered multiple orders on the matter, three of which are on appeal.

First, intervening-respondents appeal from a 2012 superior court order that remanded a 2011 Board decision with instructions to allow petitioners to present evidence to satisfy their burden of establishing that Drake Landing's shooting activities were unrelated to Andrews Farms' farming operations and were thus not shielded from zoning regulation under the statutory farm exemption. On appeal, intervening-respondents assert the superior court misinterpreted the zoning ordinance and our General Statutes by concluding that a nexus must exist between the shooting activities and the farming operations, because the shooting activities constitute agritourism and no such nexus is required for agritourism activities to be shielded by the farm exemption from countywide zoning.

Second, intervening-respondents appeal from a 2014 superior court order that reversed in part a 2013 Board decision, in which the court concluded under its *de novo* interpretation of the statutory farm exemption that shooting activities involving continental shooting towers, 3D archery courses and ranges, sporting clays, skeet and trap ranges, rifle ranges, and pistol pits were not as a matter of law activities intended by the legislature to be shielded from zoning regulation, even when performed on bona fide farm property, and even when done in preparation for the rural activity of hunting. The 2014 order also remanded the case to the Board with instructions for it to issue adequate findings and conclusions to support its determination that the remaining challenged activity—Drake Landing's operation of its controlled hunting preserve for domestically raised game birds—constituted a zoning-exempt agritourism activity. On appeal, intervening-respondents assert the superior court misinterpreted our General Statutes by concluding these other shooting activities were not “agriculture” in the form of “agritourism” but, instead, were “nonfarm purposes” as a matter of law, and were thus subject to zoning regulation.

Third, petitioners appeal from a 2017 superior court order that affirmed a 2016 Board decision entered on remand from the 2014 order. In its 2016 decision, the Board determined that Drake Landing’s operation of its hunting preserve was shielded from zoning under the statutory farm exemption. In its 2017 order, the superior court acknowledged that intervening-respondents filed the only petition for *certiorari* review of the 2016 Board decision, and that intervening-respondents conceded they raised no issue with that decision. The order also indicated the superior court judge refused to consider petitioners’ challenges to the Board’s 2016 decision because they failed to timely perfect an appeal from, or to raise any written objections to, the Board’s decision as required under N.C. Gen. Stat. § 160A-393. The superior court thus affirmed the 2016 Board decision. On appeal, petitioners assert the superior court misinterpreted our General Statutes by not concluding that operating a controlled hunting preserve is excluded from the definition of “agritourism” because it amounts to a “nonfarm purpose” as a matter of law and is thus subject to countywide zoning. Petitioners contend, alternatively, that even if operating a controlled hunting preserve is not precluded as a matter of law from the definition of “agritourism,” the Board’s determination that Drake Landing’s particular controlled hunting preserve operation is zoning-exempt was not supported by substantial, competent evidence in the whole record and was thus arbitrary and capricious. Petitioners also contend the superior court erred by failing to adequately review the merits of the Board’s 2016 decision, since it refused to address their challenges to that decision.

After careful review, we affirm the 2014 and 2017 orders. We dismiss intervening-respondents’ challenges to the 2012 order because they failed to include in the appellate record the Harnett County Unified Development Ordinance (UDO), upon which they primarily rely to challenge that order, and because our dispositions of petitioners’ appeal from the 2017 order and of intervening-respondents’ appeal from the 2014 order renders moot any remaining challenges to the 2012 order.

I. Background

William Dan Andrews is the sole proprietor of Andrews Farms, an undisputed bona fide farm. Andrews Farms owns over 2,000 acres of property and its agricultural operation currently consists of harvesting and producing crops, including, *inter alia*, tobacco, pine straw, soybeans, timber, and grain sorghum. Since the 1990s, a tract of around 240 acres of Andrews Farms' property has been licensed as a controlled hunting preserve, and fowl such as pheasants and chukars have been domestically raised on the property for hunting purposes.

Around 2005, William Dan Andrews and his wife, Linda Andrews, established Drake Landing, a recreational hunting and shooting enterprise that operates on leased property from Andrews Farms. Drake Landing began its business by taking over the hunting preserve operation. Over time, however, Drake Landing added clay target throwers and other parts of the range to offer its patrons additional shooting activities beyond that of the early morning duck hunts and the afternoon pheasant, chukar, and quail hunts. According to the Board's unchallenged finding on the matter, Drake Landing uses over 2,000 acres of Andrews Farms' property to operate its hunting preserve but only about 100 to 120 acres to operate the other shooting activities.

In November 2010, petitioner Kent Jeffries, an adjacent property owner and the president of the North Harnett Property Rights Association, Inc. ("Property Rights Assoc."), wrote the Harnett County Planning Department to inquire as to whether the following shooting activities offered at Drake Landing constituted "agritourism" and were thus exempt from countywide zoning: (1) "hunting preserves"; (2) " 'continental tower shoots' for pheasant"; (3) "3-D archery courses and archery shooting ranges"; (4) "sporting clays and sporting clay courses"; (5) "skeet and trap ranges and other shotgun shooting stations"; (6) "pistol shooting pits and pistol shooting ranges"; (7) "rifle shooting ranges"; (8) "concealed carry handgun training"; (9) " 'Three Gun' firearms competitions"; (10) "IDPA (International Defensive Pistol Association) competitions, both sanctioned and non-sanctioned"; (11) "shotgun competitions, both sanctioned and non-sanctioned"; (12) "other forms of firearms competitions"; and (13) "corporate events hosted on an agritourism farm . . . ."

On 18 January 2011, the zoning authority responded by letter in which it concluded (1) hunting preserves constitute agritourism; (2) continental tower shoots and (3) 3D archery courses and ranges, as "activities related to . . . methods and weapons customarily used in the act of hunting in North Carolina," constituted agritourism; (4) sporting clays, (5) trap ranges, and (6) shotgun shooting stations constitute agritourism "when used 'in preparation for the hunt' "; (7) pistol pits and (8) rifle ranges, when "used to educate, enhance or assist in marksmanship skills for the purpose of hunting in a traditional manner . . . would be considered a related use to the agritourism activity" because those training activities were "considered 'preparing for the hunt' "; and (9) corporate events involving these agritourism activities were similarly zoning-exempt. However, the zoning authority concluded, "concealed carry handgun courses, firearms competitions such as three gun and IDPA," and "tactical type training [were] not viewed as a form of agritourism."

Jeffries, individually and as president of the Property Rights Assoc., appealed the zoning authority's determinations to the Harnett County Board of Adjustment ("Board"). After a hearing, the Board entered an order on 9 May 2011 upholding the zoning authority's agritourism conclusions as to each activity on the basis that petitioners failed to show reversible error in the zoning authority's decision ("2011 Board Decision").

On 10 October 2011, Jeffries filed a petition in the superior court for *certiorari* review of the 2011 Board Decision. He argued in relevant part that he was prevented at the Board hearing from presenting evidence to establish that there was no nexus between Drake Landing's shooting activities and Andrews Farms' farming operations. Later, Drake Landing, William Dan Andrews, and Linda Andrews were allowed to intervene in the case. After the *certiorari* review hearing, the superior court entered an order on 24 July 2012 remanding the matter to the Board ("2012 Order"). In its 2012 Order, the superior court concluded that petitioners "were denied the opportunity to demonstrate facts consistent with their appeal to the Board of Adjustment" and thus remanded the 2011 Board Decision and instructed the Board "to determine for each activity from which Petitioners appealed whether Petitioners can demonstrate the requisite lack of connectivity between the shooting activities and farming activities on the premises of Drake Landing" and to allow petitioners "concerning each disputed activity, to offer evidence concerning the scope, size, hours of operation, number of persons involved, traffic, etc. and relation to shooting activities and farming activities as well as enterprise."

After the ordered remand hearing, the Board issued a decision on 11 March 2013, again upholding the zoning authority's agritourism conclusions ("2013 Board Decision"). In its 2013 Board Decision, the Board concluded that (1) "[h]unting preserves are agritourism" and concluded further that, "as used in preparation for the hunt," so were the following activities: (2) "Continental Tower shoots," (3) "3D Archery courses and ranges," (4) "Sporting Clays," (5) "Skeet and Trap shooting and ranges," (6) "Rifle Ranges," and (7) "Pistol Pits." The Board also concluded that (8) "Corporate Events" constituted agritourism "when used with hunting preserves or farming activities."

On 10 April 2013, Jeffries petitioned the superior court for *certiorari* review of the 2013 Board Decision. Later, adjacent residential property owners Bobbie Lewis Jeffries, Lynwood W. Hare, Frances L. Hare, and Thomas Glenn Finch were allowed to intervene in the case. After the *certiorari* review hearing, the superior court reversed in part and remanded in part the 2013 Board Decision by order entered 17 March 2014 ("2014 Order").

In its 2014 Order, the superior court remanded the Board's determination as to the (1) hunting preserve and reversed the Board's conclusions that (2) "continental shooting towers," (3) "3D archery courses and ranges," (4) "sporting clay," (5) "skeet and trap ranges," (6) "rifle ranges," (7) "pistol pits," and (8) corporate events involving these shooting activities were shielded from zoning regulation under the statutory farm exemption. Under a *de novo* review of the farming exemption statutes, the superior court concluded as a matter of law that those shooting activities were neither "agriculture" under N.C. Gen. Stat. § 106-581.1 nor "bona fide farm purposes" under N.C. Gen. Stat. § 153A-340. Rather, the superior court concluded, those activities were "non-farm purposes" under N.C. Gen. Stat. § 153A-340(b), "even when conducted on property which otherwise qualifies as a bona-fide farm or when conducted in connection with or 'in preparation for' hunting" and were thus subject to zoning. It also concluded, alternatively, that under the whole-record test, the Board's decision was not supported by "substantial competent evidence in the whole record" because "[a]ll of the competence evidence in the record establishes that the activities are in fact non-farm uses which are subject to county zoning." However, the superior court remanded the matter in part with instructions for the Board to issue "findings of fact and conclusions of law on [Drake Landing's] operation of [its] 'hunting preserve.' "

On 4 April 2014, intervening-respondents filed notices of appeal from the 2012 and 2014 Orders. This Court subsequently allowed petitioners' motion to dismiss those appeals on the basis that the orders were interlocutory. *See* Order, *Jeffries v. Hare*, No. 14-1022 (N.C. App. Jan. 30, 2015) (dismissing appeals).

After remand from the 2014 Order, the Board issued a decision on 12 October 2015 in which it concluded that, because Drake Landing possessed a valid controlled hunting preserve license from the North Carolina Wildlife Resources Commission, its property was thus categorically exempt from zoning ("2015 Board Decision").

On 13 November 2015, intervening-respondents, not petitioners, petitioned the superior court for *certiorari* review of the 2015 Board

Decision. In its petition, intervening-respondents conceded they raised no issue with the 2015 Board Decision and requested relief in the form affirming that decision so they could refile their appeals from the 2012 and 2014 Orders. After a hearing, the superior court reversed the 2015 Board Decision by order entered 2 June 2016 ("2016 Order"). In its 2016 Order, the superior court concluded that possessing a controlled hunting preserve license did not categorically exempt Drake Landing's property from countywide zoning regulation, and it again remanded the matter with instructions for the Board to issue findings and conclusions to "address the specific activities, if any, which the Board finds to constitute a 'hunting preserve' and whether, and why, such activities are 'agritourism' within the meaning of the applicable North Carolina General Statutes."

After the ordered remand hearing, the Board issued a decision on 3 August 2016 with detailed findings and conclusions supporting its determination that Drake Landing's particular controlled hunting preserve operation was exempt from zoning ("2016 Board Decision"). In its 2016 Board Decision, the Board concluded in relevant part that

> controlled hunting preserves for domestically raised game birds, like those at Drake Landing and Andrews Farms, are exempt from any and all Harnett County zoning ordinances[ ] . . . because hunting preserves like those at Drake Landing and Andrews Farms are operated on a bona fide farm, constitute a bona fide farm purpose under both N.C. Gen. Stat. § 153A-340(b)(2) and N.C. Gen. Stat. § 106-581.1, and are considered agritourism under N.C. Gen. Stat. § 99E-30.

On 1 September 2016, intervening-respondents, not petitioners, petitioned the superior court for *certiorari* review of the 2016 Board Decision. In its petition, intervening-respondents again conceded they raised no issue with the 2016 Board Decision and requested relief in the form of affirming that decision, and again explained that they "intend[ed] to refile their appeal[s from the 2012 and 2014 Orders], which was previously dismissed by the Court of Appeals as interlocutory, and file[d] this Petition for Writ of Certiorari out of an abundance of caution in order to preserve their right to appeal." Petitioners never filed a petition for *certiorari* review of the 2016 Board Decision, moved to intervene as "petitioners" to intervening-respondents' petition, nor filed any responsive pleading in which they lodged any objections or requested any relief from that decision; rather, the first objection petitioners raised to the 2016 Board Decision occurred at the *certiorari* review hearing initiated by intervening-respondents' petition. After the hearing, the superior court affirmed the 2016 Board Decision by order entered 10 March 2017 ("2017 Order").

In its 2017 Order, the superior court indicated that it refused to address the merits of any challenge to the 2016 Board Decision raised by petitioners for the first time at the *certiorari* review hearing. The superior court concluded that petitioners failed to timely preserve their objection to that decision because they failed to comply with N.C. Gen. Stat. § 160A-393(c)'s requirement of filing a petition for *certiorari* review, in which petitioners were required to state the grounds upon which they contended the Board erred and to state the relief they sought from the 2016 Board Decision, and because petitioners failed to file any "form of written objection or request from relief" from that decision. The superior court also acknowledged that intervening-respondents stated in their petition they raised no issue with the 2016 Board Decision and sought relief in the form of affirming that decision "solely to preserve their appellate rights with respect to prior rulings of the Superior Court." Accordingly, the superior court concluded that intervening-respondents were entitled as a matter of law to prevail on the issues properly before it and thus affirmed the 2016 Board Decision.

Intervening-respondents appeal the 2012 and 2014 Orders; petitioners appeal the 2017 Order.

II. Review Standards

On *certiorari* review of a county zoning board of adjustment's quasi-judicial decision, "the superior court sits as an appellate court," *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 189, 689 S.E.2d 576, 585 (2010) (citation and quotation marks omitted), and is tasked with the following:

> (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Cary Creek Ltd. P'ship v. Town of Cary, 207 N.C. App. 339, 341–42, 700 S.E.2d 80, 82–83 (2010) (citation omitted). The superior court should apply *de novo* review to a petitioner's allegation of error implicating one of the first three enumerations and whole-record review to the last two. *See*, *e.g.*, *Four Seasons Mgmt. Servs.*, *Inc. v. Town of Wrightsville Beach*, 205 N.C. App. 65, 75, 695 S.E.2d 456, 462 (2010) ("If a petitioner contends the Board's decision was based on an error of law, '*de novo*' review is proper. However, if the petitioner contends the Board's decision was not supported by the evidence or was arbitrary and capricious, then the reviewing court must apply the 'whole record' test." (citation and quotation marks omitted)).

"We review a superior court's *certiorari* review of a [county] zoning board's quasi-judicial decision to determine whether the superior court: (1) exercised the appropriate scope of review and, if appropriate, (2) decide whether the court did so properly." *NCJS*, *LLC v. City of Charlotte*, ___ N.C. App. ___, ___, 803 S.E.2d 684, 688 (2017) (citation and internal quotation marks omitted).

III. Petitioners' Appeal

[1] On appeal from the 2017 Order, petitioners contend the superior court erred by affirming the 2016 Board Decision because (1) as a matter of law, operating a controlled hunting preserve does not constitute the "bona fide farm purpose[ ]" of "agritourism" under the statutory farm exemption but instead constitutes a "nonfarm purpose" under N.C. Gen. Stat. § 153A-340(b)(1), that is thus subject to countywide zoning regulation; or, alternatively, (2) even if a hunting preserve is not excluded as a matter of law from the definition of agritourism, the Board's decision was not supported by sufficient evidence in the whole record because petitioners presented substantial, competent evidence that Drake Landing's hunting preserve is wholly unrelated to Andrews Farms' farming operations, and that the scale of Drake Landing's hunting preserve operation is such that it amounts to a "nonfarm purpose" subject to zoning regulation. Petitioners also argue (3) the superior court failed to adequately review the 2016 Board Decision because its 2017 Order affirming that decision was based not on the merits of the 2016 Board Decision but merely on procedural grounds.

As a threshold matter, intervening-respondents contend that petitioners failed to preserve any objection to the 2016 Board Decision because they never filed a petition for *certiorari* review of that decision, nor filed any responsive pleading in which they raised an issue with, or requested any relief from, the 2016 Board Decision. Thus, intervening-respondents argue, the superior court properly affirmed the 2016 Board Decision based upon the issues properly before it. We agree.

In its 2017 Order, the superior court made the following unchallenged, and thus binding, factual findings:

> 1. On September 1, 2016, Intervening Respondents . . . filed a "Petition for Writ of Certiorari" from the [2016 Board Decision] finding the "hunting preserve" . . . to be agritourism and exempt from county zoning.
>
> 2. In their petition, Intervening Respondents expressly stated that their petition was filed solely to preserve their appellate rights with respect to prior rulings of the Superior Court. Intervening Respondents further stated that they "did not appeal the most recent determination of the Board of Adjustment" regarding their hunting preserve.
>
> 3. Intervening Respondents' Petition did not in any way object to, or allege any error in, the [2016 Board Decision].
>
> 4. Neither Petitioner Kent Jeffries nor any Intervening Petitioners filed a petition for writ of certiorari from the [2016 Board Decision]. Jeffries and Intervening Petitioners have not filed any written objection or request for relief from the [2016 Board Decision], nor have they asserted in any writing filed with this court, by pleading or Correspondence, the grounds upon which they contend any error was made nor requested any relief from the most recent decision of the Board of Adjustment.
>
> 5. Mr. Jeffries and Intervening Petitioners did not file any Answer in response to the petition of [intervening-respondents] and did not request any alternative relief.
>
> 6. Intervening Respondents objected at the February 21, 2017 hearing to the court considering any contentions of error now made by Kent Jeffries or Intervening Petitioners because such parties did not file any form of written objection.
>
> 7. North Carolina General Statute 160A-393(c), made applicable to county boards of adjustment by N.C. General Statute 153A-349, provides:
>
>> An appeal in the nature of certiorari <u>shall</u> be initiated by filing with the superior court a petition for writ of certiorari.

> The petition shall:
>
> (2) Set forth the grounds upon which the petitioner contends that an error was made . . . .
>
> (4) Set forth the relief the petitioner seeks.

(emphasis added)

8. Mr. Kent Jeffries and Intervening Petitioners have not complied with the requirements of N.C. General Statute 160A-393 for timely preserving their objection to the [2016 Board Decision] and for seeking relief from such order.

9. Drake Landing, LLC, William Dan Andrews and Linda Andrews are entitled, as a matter of law, to prevail on the issues now before the court.

N.C. Gen. Stat. § 153A-393 (2017) governs appeals in the nature of *certiorari*. Upon issuing a writ for *certiorari* review of a board decision, the superior court "shall hear and decide all issues raised by the *petition*[,]" *id.* § 160A-393(j) (emphasis added), and "shall ensure that the rights of *petitioners* have not been prejudiced[,]" *id.* § 160A-393(k)(1) (emphasis added). Following its review, the superior court "may affirm the decision, reverse the decision and remand the case with appropriate instructions, or remand the case for further proceedings." *Id.* § 160A-393(l).

Here, intervening-respondents filed the only petition for *certiorari* review of the 2016 Board Decision in which they contended the Board made no error in its decision and sought relief in the form of affirming that decision. Petitioners, contrarily, never filed a petition for *certiorari* review of that decision and, consequently, never set forth any grounds upon which they contended the Board erred, nor requested any relief from the 2016 Board Decision; petitioners never moved to intervene as a "petitioner" for the *certiorari* review hearing on the 2016 Board Decision, *see* N.C. Gen. Stat. § 160A-393(h); nor did petitioners file any responsive pleading in which they raised any objection to that decision, *see id.* § 160A-393(g) (permitting but not requiring a party to file a responsive pleading). Indeed, although the 2016 Board Decision was entered and mailed to petitioners on 3 August 2016, petitioners lodged no formal objection to that decision until the 21 February 2017 *certiorari* review hearing initiated solely by intervening-respondents' petition.

Accordingly, because the only petition for *certiorari* review of the 2016 Board Decision was filed by intervening-respondents, in which they conceded they raised no issue with that decision and requested relief in the form of affirming that decision, and because petitioners neither lodged any written objections to the 2016 Board Decision, requested any alternative form of relief, nor moved to intervene as a "petitioner," the superior court properly determined that the 2016 Board Decision did not prejudice the petitioning party's rights, and it thus did not err by affirming the 2016 Board Decision based upon intervening-respondents' petition.

Further, although petitioners attempted to challenge the 2016 Board Decision for the first time at the *certiorari* review hearing, the superior court properly refused to address the merits of their arguments on procedural grounds.

"[A]n appeal is not a matter of absolute right, but the appellant must comply with the statutes and rules of Court as to the time and manner of taking and perfecting his appeal." *Hirschman v. Chatham Cty.*, ___ N.C. App. ___, ___, 792 S.E.2d 211, 216 (2016) (citations and quotation marks omitted); *see also id.* at ___, 792 S.E.2d at 213 (holding that the superior court properly dismissed a petition for *certiorari* review of a board decision where the petitioner failed to name the conditional-use permit applicant as a respondent as required under N.C. Gen. Stat. § 160A-393(e) and thus failed to perfect his appeal, reasoning that this noncompliance deprived the superior court of jurisdiction to review the merits of the board decision). Under N.C. Gen. Stat. § 160A-393, to perfect an appeal from a zoning board's decision, a party with standing must file a petition in the superior court for *certiorari* review of that decision, which "shall[ ] . . . [s]et forth the grounds upon which the petitioner contends that an error was made" and "[s]et forth the relief the petitioner seeks." *Id.* §§ 160A-393(c)(1), (c)(4). "Our appellate courts have consistently held that the use of the word 'shall' in a statute indicates what actions are required or mandatory." *Hirschman*, ___ N.C. App. at ___, 792 S.E.2d at 213; *see also id.* at ___, 792 S.E.2d at 213–16 (holding that a non-conditional-use-applicant seeking *certiorari* review of a board decision never perfected an appeal because he failed to comply with N.C. Gen. Stat. § 160A-393(e)'s requirement that such a petitioner "shall . . . name th[e] applicant as a respondent . . . .").

Here, petitioners failed to comply with subsection 160A-393(c)'s petition filing requirements and thus never perfected an appeal from the 2016 Board Decision. Further, petitioners never moved to intervene as a "petitioner" to intervening-respondents' petition for *certiorari* review of the 2016 Board Decision, nor did they file any responsive pleading, raise any written objection, or request any relief from that decision. *Cf. Durham Cty. v. Addison*, 262 N.C. 280, 283, 136 S.E.2d 600, 603 (1964)

("The decision of the Board of Adjustment is not subject to collateral attack." (citation omitted)); *Wil-Hol Corp. v. Marshall*, 71 N.C. App. 611, 614, 322 S.E.2d 655, 657 (1984) ("[T]he statutory procedure for challenging the validity of a zoning ordinance is to petition the Superior Court for certiorari to review the final decision of the Board of Adjustment. A zoning ordinance may not be collaterally attacked by a party that failed to avail herself of the judicial review that the ordinance and statutes authorize." (internal citation omitted)). Thus, the superior court properly concluded that petitioners were procedurally barred from challenging the 2016 Board Decision for the first time at the *certiorari* review hearing. Accordingly, we affirm the 2017 Order affirming the 2016 Board Decision based on these procedural grounds and thus do not reach the merits of petitioners' challenges to the 2016 Board Decision.

[2] As a secondary matter, petitioners contend the procedural posture underlying the superior court's *certiorari* merits-review of the 2015 Board Decision is identical to that of its *certiorari* review of the 2016 Board Decision and, thus, the superior court should have similarly reviewed the merits of that later decision. In both instances, petitioners argue, intervening-respondents filed the only *certiorari* petition in which they set forth no allegations of error in the Board's decisions and requested relief in the form of affirming those decisions for the purpose of preserving their right to refile their appeals from the 2012 and 2014 Orders. Although the 2016 Order is not on appeal, we reject petitioners' argument. The postures yielding both *certiorari* review hearings were procedurally different and, before the superior court's *certiorari* review of the 2015 Board Decision, petitioners unequivocally expressed their intent to appeal that decision and lodged specific, written objections to that decision.

The 2014 Order remanded the 2013 Board Decision, which yielded the 2015 Board Decision. On 19 October 2015, respondent Harnett County wrote a letter to Judge Gilchrist, who issued the 2014 Order, and enclosed a courtesy copy of the 2015 Board Decision. In its letter, Harnett County wrote: "It is the belief of counsel and the parties that procedurally, the appeal of the [2015 Board Decision] would lie in Harnett County Superior Court, but that Your Honor would be under no obligation to judicially review [that decision] unless appeal is affirmatively taken by any of the parties." On 26 October 2015, Jeffries responded by letter to Judge Gilchrist, writing that Hartnett County "is an adverse party in this case and does not speak for the petitioners" and that "[i]t is my position that an appeal is not necessary because this matter has already been appealed." Jeffries opined that this Court, in dismissing intervening-respondents' prior appeals, "labeled [the 2014 Order] as an 'interlocutory order' that 'did not decide all issues before the trial court' " and, thus, "[t]his case is now back in Your Honor's court . . . ." Jeffries then objected in writing to the Board's decision to "adopt[ ] wholesale the County's draft order" and not allow petitioners to discuss or explain their proposed order, and then set forth five separate grounds upon which he challenged the propriety of the 2015 Board Decision. Jeffries also requested that Judge Gilchrist "set dates for the submission of written arguments and for oral argument." Subsequently, on 13 November 2015, intervening-respondents filed their petition for *certiorari* review of the 2015 Board Decision.

As reflected, although the *certiorari* reviews of both the 2015 and 2016 Board Decisions were initiated solely by intervening-respondents' petition, unlike their failures to do so with the 2016 Board Decision, petitioners unambiguously expressed their intent to appeal the 2015 Board Decision and lodged specific, written objections to that decision before the hearing. Accordingly, we reject petitioners' argument.

IV. Intervening-Respondents' Appeals

A. 2014 Order

[3] On appeal from the 2014 Order, intervening-respondents assert the superior court erred by reversing the 2013 Board Decision with respect to its conclusions that Drake Landing's operation of commercial shooting activities involving "continental shooting towers, 3D archery courses and ranges, sporting clay, skeet and trap ranges, rifle ranges and pistol pits" constituted "agritourism" activities shielded by the statutory farm exemption from countywide zoning. Intervening-respondents argue that the superior court (1) misinterpreted our General Statutes by concluding as a matter of law that these shooting activities fall outside the farm exemption and were thus subject to zoning; and (2) erroneously concluded that, in the alternative, the 2013 Board Decision was not supported by substantial competent evidence in the whole record. Because we hold that the superior court properly concluded these shooting activities as a matter of law fall outside the statutory farm exemption, we affirm the 2014 Order on this basis. We thus need not address intervening-respondents' remaining challenge to the superior court's alternative rationale for reversing the 2013 Board Decision.

In its 2014 Order, the superior court concluded in relevant part:

> Issues of statutory interpretation are questions of law to be decided by application of a *de novo* standard of review. Applying the *de novo* standard, the court concludes that

> the General Assembly did not intend to include continental shooting towers, 3D archery courses and ranges, sporting clay, skeet and trap ranges, rifle ranges and pistol pits within the definition of "agriculture" in N.C. Gen. Stat. § 106-581.1 or of "bona fide farm purposes" under N.C. Gen. Stat. § 153A-340. These uses are instead non-farm purposes under N.C. Gen. Stat. § 153A-340(b) and are not exempt from county zoning laws, even when conducted on property which otherwise qualifies as a bona-fide farm or when conducted in connection with or 'in preparation for' hunting.

As reflected, the superior court properly identified *de novo* as the applicable review standard to address issues of statutory interpretation. Our review is whether it properly applied that standard by concluding these shooting activities do not as a matter of law constitute activities intended to be shielded from zoning under the statutory farm exemption.

1. Statutory Farm Exemption from Countywide Zoning

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Lanvale Properties, LLC v. Cty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809 (2012) (citation and quotation marks omitted). "[W]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. *Id.* at 154, 731 S.E.2d at 809–10 (citation and quotation marks omitted). Only where statutory language is unclear or ambiguous may courts resort to canons of judicial construction to interpret meaning.

Under the statutory farm exemption, "property used for bona fide farm purposes" is exempt from countywide zoning regulation but "the use of farm property for nonfarm purposes" is not. *See* N.C. Gen. Stat. § 153A-340(b)(1) (2013) (providing that countywide zoning "regulations may affect property used for bona fide farm purposes," with the exception of swine farms, but providing that "[t]his subsection does not limit regulation . . . with respect to the use of farm property for nonfarm purposes");[1] *see also Hampton v. Cumberland Cty.*, ___ N.C. App. ___, ___,

1. Effective 12 July 2017, our General Assembly eliminated county authority to regulate swine farms by amending N.C. Gen. Stat. § 153A-340(b)(1) to now provide that countywide zoning "regulations may not affect property used for bona fide farm purposes; provided, however, that this subsection does not limit regulation . . . with respect to the use of farm property for nonfarm purposes." *See* Act of July 12, 2017, ch. 108, sec. 9.(a), 2017 N.C. Sess. Laws ___, ___ (eliminating county authority to regulate swine farms).

808 S.E.2d 763, 775 (2017) (noting that "non-farm uses, even on bona fide farms, are not exempt from zoning regulation"). "[B]ona fide farm purposes include the production and *activities relating or incidental to the production of* crops, grains, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and *all other forms of agriculture*, as defined in G.S. 106-581.1." N.C. Gen. Stat. § 153A-340(b)(2) (2013) (emphasis added). "Agriculture" is defined in relevant part as follows:

> *When performed on the farm*, *'agriculture' . . . also include[s]* the marketing and selling of agricultural products, *agritourism*, the storage and use of materials for agricultural purposes, packing, treating, processing, sorting, storage, and other activities performed to add value to crops, livestock, and agricultural items produced on the farm, and similar activities incident to the operation of a farm.

Id. § 106-581.1(6) (2013) (emphasis added).

However, neither Chapter 153A, governing county authority, nor Chapter 106, governing agriculture, defined "agritourism." But Chapter 99E, governing special liability provisions, defined "[a]gritourism activity" in relevant part as

> [a]ny activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions.

Id. § 99E-30(1) (2013).

2. 2017 Act

While it was unclear when the Board and superior court decided the matter whether the legislature intended to shield from countywide zoning regulation the same "agritourism activities" it intended to shield from liability, after the case reached this Court, our General Assembly enacted "An Act to Amend Certain Laws Governing Agricultural Matters" ("2017 Act"). *See* Act of July 12, 2017, ch. 108, 2017 N.C. Sess. Laws ___, ___. Most pertinent here, the 2017 Act amended N.C. Gen. Stat. § 153A-340(b) by adding subdivision (2a), which in relevant parts incorporated N.C. Gen. Stat. § 99E-30(1)'s "agritourism activity" definition into section 153A-340 and described certain types of zoning-exempt agritourism buildings and structures. Ch. 108, sec. 8.(a), 2017 N.C. Sess. Laws at ___ (clarifying activities incident to the farm and agritourism). As a result, the applicable statutory farm exemption provisions now provide in pertinent part:

> For purposes of this section, "agritourism" means any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions. A building or structure used for agritourism includes any building or structure used for public or private events, including, but not limited to, weddings, receptions, meetings, demonstrations of farm activities, meals, and other events that are taking place on the farm because of its farm or rural setting.

N.C. Gen. Stat. § 153A-340(b)(2a) (2017). A threshold question is whether N.C. Gen. Stat. § 153A-340(b)(2a) applies in this case to guide our interpretation of whether these shooting activities were intended by the legislature to constitute agritourism activities shielded by the statutory farm exemption.

An amendment that substantially alters the meaning of a law applies only prospectively. *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 682 (2012) ("[T]he default rule provides statutes with a prospective effective date[.]" (citation omitted)). But an amendment that merely clarifies the meaning of a law, rather than alters its substance, "will apply to all claims pending or brought before our State's courts after the amendment's passage." *Id.* We must therefore determine whether the addition of subdivision (2a) clarifies or alters subsection (b). *Id.* at 9, 727 S.E.2d at 681¬82 ("It is this Court's job to determine whether an amendment is clarifying or altering." (citation omitted)).

> "To determine whether the amendment clarifies the prior law or alters it requires a careful comparison of the original and amended statutes." If the statute initially "fails expressly to address a particular point" but addresses it after the amendment, "the amendment is more likely to be clarifying than altering."

Id. at 10, 727 S.E.2d at 682 (quoting *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 659, 435 S.E.2d 309, 315 (1993)).

In *Ferrell*, our Supreme Court was presented with an issue requiring it to interpret a statute governing the reconveyance of land taken by eminent domain but no longer needed, which was amended while the appeal was pending, and addressed whether that amendment was merely clarifying and thus applicable, or was substantially altering and thus inapplicable. 334 N.C. 650, 435 S.E.2d 309 (1993). There, when the Department of Transportation (DOT) offered its initial sell-back price offer to the original property owner, the relevant statute did not specify at what price the DOT was to sell back the property. *Id.* at 657, 435 S.E.2d at 314. But by the time the case reached our Supreme Court, the legislature had amended that statute by adding language that provided clear guidance on the sell-back price calculation. *Id.* at 658–59, 435 S.E.2d at 315. Our Supreme Court concluded that the amendment was clarifying, not altering, and thus relied on its calculative guidance in determining the propriety of the DOT's sell-back price offer. The *Ferrell* Court reasoned:

> Since here the statute before amendment provided no express guidance as to selling price, the amendment which addresses the selling price is best interpreted as clarifying the statute as it existed before the amendment. It is, therefore, strong evidence of what the legislature intended when it enacted the original statute.

Id. at 659, 435 S.E.2d at 315–16 (footnote omitted).

Here, when the Board and superior court issued their decisions, N.C. Gen. Stat. § 153A-340(b) exempted from zoning regulation property used for "bona fide farm purposes," which included "all . . . forms of agriculture" under N.C. Gen. Stat. § 106-581.1, such as "agritourism." But neither statute defined "agritourism." However, after this case reached our Court, the legislature amended N.C. Gen. Stat. § 153A-340(b) by adding subdivision (2a), which incorporated verbatim N.C. Gen. Stat. § 99E-30(1)'s "agritourism activity" definition into the section 153A-340 and provided guidance on what buildings or structures might constitute agritourism buildings or structures, providing "strong evidence" that the General Assembly intended to shield from zoning regulation the same agritourism activities it intended to shield from liability, and that the amendment intended to clarify what sorts of activities it contemplated might constitute agritourism.

Thus, we conclude that the addition of N.C. Gen. Stat. § 153A-340(b)(2a) served merely to clarify, rather than alter, the substance of the statutory farm exemption by providing further guidance on what constitutes zoning-exempt agritourism activities. *See* ch. 108, sec. 8.(a), 2017 N.C. Sess. Laws at ___ (labeling the heading of section 8(a), which added N.C. Gen. Stat. § 153A-340(b)(2), as "Clarify activities incident to the farm and agritourism" (original in all caps)); *see also Taylor v. Crisp*, 286 N.C. 488, 497, 212 S.E.2d 381, 387 (1975) (" 'Whereas it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law, no such inference arises when the legislature amends an ambiguous provision.' In such case, the purpose of the variation may be 'to clarify that which was previously doubtful.' " (citation omitted)). We therefore rely on the clarifying language of subdivision (2a) to guide our interpretation of whether the legislature intended these shooting activities to constitute "agritourism" activities shielded from zoning regulation under the statutory farm exemption.

3. N.C. Gen. Stat. § 153A-340(b)(2a)

It is undisputed that Drake Landing operates its business on property it leases from Andrews Farms, a bona fide farm. At issue is whether using bona fide farm property to operate commercial shooting activities involving continental shooting towers, 3D archery courses and ranges, sporting clay, skeet and trap ranges, rifle ranges and pistol pits constitutes agritourism. As stated above, N.C. Gen. Stat. § 153A-340(b)(2a) defines "agritourism" in pertinent part as follows:

> "[A]gritourism" means any activity carried out on a farm or ranch that allows members of the general public, for recreational, entertainment, or educational purposes, to view or enjoy *rural activities*, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions.

Id. § 153A-340(b)(2a) (emphasis added).

Based on its plain language, it is unclear whether our legislature intended for these shooting activities, even when relating to or incidental to a rural activity such as hunting, to constitute zoning-exempt agritourism activities. Indeed, in the 2017 Act, the General Assembly requested a Legislative Research Commission study pertaining to what constitutes agritourism. *See* ch. 108, sec. 1.(a), 2017 N.C. Sess. Laws at ___ (ordering the Agriculture and Forestry Awareness Study Commission to study "[t]he type of activities that constitute agritourism when conducted on a bona fide farm and other relevant matters relating to agritourism activities"). Accordingly, we turn to the canons of judicial construction.

N.C. Gen. Stat. § 153A-340(b)(2a)'s use of "including" to introduce examples of acceptable "rural" agritourism activities indicates the list is meant to be illustrative and not exhaustive. The statute does not define "rural."

> "[U]ndefined words are accorded their plain meaning so long as it is reasonable to do so." In determining the plain meaning of undefined terms, "this Court has used 'standard, nonlegal dictionaries' as a guide."

Midrex Techs., Inc. v. N.C. Dep't of Revenue, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (alteration in original) (citations omitted); *see also id.* at 259, 794 S.E.2d at 792 (relying on the New Oxford American Dictionary to define "building," "construction," and "contractor"). The dictionary definition of "rural" is "in, relating to, or characteristic of the countryside rather than the town." *New Oxford American Dictionary* 1531 (Angus Stevenson & Christine A. Lindberg eds. 3d ed. 2010). As petitioners concede in their brief, "hunting is a traditional rural activity." Under certain circumstances, activities incidental or relating to hunting that occur in, relate to, and are characteristic of the countryside, which retain the spirit of the traditional hunting, may reasonably fit within an example of a "rural" agritourism activity. Thus, for instance, operating a controlled hunting preserve for domestically raised game birds which supports a bona fide farm operation and allows the public "for recreational [or] entertainment purposes[ ] to . . . enjoy [the] rural activit[y]" of traditional hunting may constitute agritourism. But the other shooting activities at issue here do not fit so squarely into this interpretation.

Because N.C. Gen. Stat. § 153A-340(b)(2a) lists examples of rural activities, we turn to associative canons of construction. The interpretative canon of *noscitur a sociis* instructs that "associated words explain and limit each other" and an ambiguous or vague term "may be made clear and specific by considering the company in which it is found, and the meaning of the terms which are associated with it." *City of Winston v. Beeson*, 135 N.C. 192, 198, 47 S.E. 457, 460 (1904) (citations omitted); *see also State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) ("*Noscitur a sociis* is a rule of construction applicable to all written instruments." (citation omitted)). The interpretive canon of *expressio unius est exclusio alterius* instructs that the expression of one thing implies the exclusion of another. *See, e.g.*, *Fort v. Cty. of Cumberland*, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355 (2012) (citations omitted).

Applying the principle of *noscitur a sociis* to subdivision (2a)'s rural activity examples of "farming, ranching, historic, cultural, harvest-your-own activities, or other natural activities and attractions" imply that other contemplated rural agritourism activities should fit, in a categorical sense, within this grouping. The listed examples associate in part because they allow members of the non-rural public to view or enjoy traditional rural activities or attractions relating to agriculture that typically occur in a rural setting. The activities listed also associate in part because they are "natural," in that their performance preserves the land and does not require its alteration other than by public consumption of natural items on the land. *Cf. Friends of Hatteras Island v. Coastal Res. Comm'n*, 117 N.C. App. 556, 575, 452 S.E.2d 337, 349 (1995) ("Hunting, fishing, navigation and recreation require only a temporary presence on the Reserve and do not necessitate alteration of the Reserve's undeveloped and natural state."). In applying the principle of *expressio unius est exclusio alterius*, however, that subdivision (2a) explicitly lists "farming" and "ranching" but not "hunting" implies that shooting activities, even when related to hunting, were not contemplated as "agritourism."

Moreover, N.C. Gen. Stat. § 153A-340(b)(2a) defines "[a] building or structure used for agritourism" in relevant part as

> any building or structure used for public or private events, including, but not limited to, weddings, receptions, meetings, demonstrations of farm activities, meals, and other events that are taking place on the farm because of its farm or rural setting.

Applying the principle of *noscitur a sociis*, the illustrative examples of agritourism buildings or structures include those used for "weddings, receptions, meetings, demonstrations of farm activities, [and] meals," events which share no commonality with hunting or shooting activities. Further, the inclusive phrase tying these examples together—"and other events that are taking place on the farm *because of its farm and rural setting*"—indicates the legislature did not contemplate buildings or structures used for shooting activities to be zoning-exempt agritourism buildings or structures. While shooting activities might require the land space that only a rural setting can provide, unlike the other event examples, they are not purposefully performed on a farm for the aesthetic value of the farm or its rural setting.

"Where legislative intent is not readily apparent from the act, it is appropriate to look at various related statutes *in pari materia* so as to determine and effectuate the legislative intent." *Craig v. Cty. of Chatham*, 356 N.C. 40, 46, 565 S.E.2d 172, 176–77 (2002) (citation omitted). Further, "words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent, while avoiding absurd or illogical interpretations[.]" *Fort*, 218 N.C. App. at 407, 721 S.E.2d at 355 (citations and quotations marks omitted).

That N.C. Gen. Stat. § 99E-30(1)'s "agritourism activity" definition was incorporated into N.C. Gen. Stat. § 153A-340(b)(2a) indicates the legislature intended to shield the same agritourism activities from countywide zoning that it intended to shield from liability. Thus, we turn to N.C. Gen. Stat. § 99E-30(3)'s explanation of inherent risks of agritourism activity for further guidance, which provides in part:

> (3) Inherent risks of agritourism activity. – Those dangers or conditions that are an *integral part of an agritourism activity* including certain hazards, including surface and subsurface conditions, natural conditions of land, vegetation, and waters, the behavior of wild or domestic animals, *and ordinary dangers of structures or equipment ordinarily used in farming and ranching operations.*

Id. § 99E-30(3) (2017) (emphasis added). That this provision lists as examples of inherent risks of agritourism activity "surface and subsurface conditions, natural conditions of land, vegetation, and waters, [and] the behavior of wild or domestic animals," relatively minor and rarer risks than those associated with shooting guns that would be integral to the shooting activities at issue here, supports our interpretation that such activities were not contemplated as "agritourism." Further, that the statute lists "ordinary dangers of . . . equipment ordinarily used in farming and ranching operations" but not equipment such as guns used in hunting operations, buttresses an interpretation that shooting activities, even when done "in preparation for the hunt," were not contemplated as "agritourism."

In summary, commercial shooting activities involving continental shooting towers, 3D archery courses and ranges, sporting clays, skeet and trap ranges, rifle ranges, and pistol pits neither fit as squarely within traditional notions of hunting, the definition of a "rural" activity, nor the category of a "natural" activity. Applying the principle of *noscitur a sociis* to N.C. Gen. Stat. § 153A-340(b)(2a), shooting activities that require the construction and use of artificial structures and the alteration of natural land, such as clearing farm property to operate gun ranges, share little resemblance to the listed rural agritourism activity examples or the same spirit of preservation or traditionalism. Applying that same principle to subdivision (2a)'s examples of agritourism events yields the same interpretation. Under the principle of *expressio unius est exclusio* *alterius* as applied to both N.C. Gen. Stat. § 153A-340(b)(2a) and N.C. Gen. Stat. § 99E-30(3), that these statutes list "farming" and "ranching" but not "hunting" implies that these shooting activities, even when done in preparation for a rural activity like traditional hunting, were not contemplated as "agritourism." Finally, N.C. Gen. Stat. § 99E-30(3)'s illustrative list of inherent risks of agritourism activities omits the typically greater risks of shooting guns that would be an integral danger to operating these commercial gun shooting activities.

Accordingly, after our *de novo* review of the statutory farm exemption provisions, we agree with the superior court that commercial shooting activities involving the operation of continental shooting towers, 3D archery courses and ranges, sporting clay, skeet and trap ranges, rifle ranges, and pistol pits, even when performed on a bona fide farm, and even when done in preparation for the hunt, were not contemplated by our legislature as types of "agritourism" activities intended to be shielded from countywide zoning under the statutory farm exemption. We thus hold that these shooting activities do not constitute "agritourism" as a matter of law and are subject to zoning. Accordingly, we affirm the 2014 Order on this basis. In light of our decision, we need not address intervening-respondents' remaining challenge to the 2014 Order. Intervening-respondents, of course, may freely apply for conditional-use permits to continue operating these activities, but we hold that they do not constitute "agritourism" as a matter of law under our General Statutes.

B. 2012 Order

[4] On appeal from the 2012 Order, intervening-respondents assert the superior court erred by remanding the 2011 Board Decision on the basis that (1) petitioners failed to meet their burden of presenting competent, substantial, and material evidence in support of their appeal to the Board of Adjustment; (2) the superior court erroneously concluded that petitioners had not been given an opportunity to be heard; and (3) the superior court misinterpreted the plain language of the Harnett County Unified Development Ordinance (UDO) and our General Statutes by concluding that there must be a nexus between agritourism activities offered on a bona fide farm and its farming operations in order to be shielded by the farm exemption.

The linchpin holding together each alleged error is the superior court's conclusion that petitioners burden to support their appeal from the 2011 Board Decision was to present evidence "to establish that there was no requisite nexus between the Respondents' farming activities[ ] and shooting activities." Intervening-respondents contend that, because the shooting activities constitute "agritourism," no such nexus is required under the plain language of the UDO and our General Statutes. According to intervening-respondents, the UDO provides that "zoning provisions . . . shall not apply to bona fide farms, as defined herein" and that the "use of any bona fide farm property for any non-farm use purposes shall be subject to the regulations of the Ordinance, *with the exception of those uses determined to be agritourism*, as defined by this Ordinance." (Emphasis added.) Thus, intervening-respondents continue, the superior court erred by finding that Drake Landing operates "on real property of Andrews Farms" and that "Andrews Farms is a bona fide farm pursuant to N.C. Gen. Stat. § 153A-340" but nonetheless remanding the matter to the Board with instructions to allow petitioners to present evidence that there was no connectivity between Drake Landing's shooting activities and Andrews Farms' farming operations when no such nexus is required for agritourism activities.

However, because intervening-respondents failed to include the UDO in the appellate record, the authority upon which they primarily rely to support their main challenge to the 2012 Order, these issues are not properly before us. *See Town of Scotland Neck v. W. Sur. Co.*, 301 N.C. 331, 338, 271 S.E.2d 501, 505 (1980) ("No Town ordinance . . . was introduced, and we cannot take judicial notice of one if it exists." (citation omitted)); *Beau Rivage Homeowners Ass'n v. Billy Earl, L.L.C.*, 163 N.C. App. 325, 327, 593 S.E.2d 120, 122 (2004) ("When no ordinance is presented to the appellate court through the record on appeal, the appellate court is not permitted to take judicial notice of the ordinance if it exists." (citation omitted)); *see also Cty. of Durham v. Roberts*, 145 N.C. App. 665, 671, 551 S.E.2d 494, 498 (2001) (refusing to consider appellant's zoning-ordinance-interpretation argument where, although the ordinance was attached in an appendix to the appellate brief, it was not included in the appellate record: "[E]xternal documents included in the appendix to defendant's brief are not considered here.").

Further, the practical effect of the 2012 Order was to remand the matter to the Board, which yielded the 2013 Board Decision and, ultimately, the 2014 Order on appeal. Because we have already determined that the superior court in its 2014 Order properly concluded that the challenged shooting activities do not constitute "agritourism" as a matter of law, and because we have already determined that the superior court in its 2017 Order properly affirmed the 2016 Board Decision that concluded the only remaining activity—Drake Landing's operation of its controlled hunting preserve for domestically raised game birds—is exempt from countywide zoning, and that petitioners are procedurally barred from objecting to that decision, no shooting activities remain to be challenged. Accordingly, we dismiss intervening-respondents' challenges to the 2012 Order on the grounds that they failed to include the UDO in the appellate record and on the grounds that, in light of our dispositions of the 2014 and 2017 Orders, their challenges to the 2012 Order are now moot.

V. Conclusion

Under N.C. Gen. Stat. §§ 160A-393(j) and (k)(1), the superior court was only required to address those issues raised by intervening-respondents' petition for *certiorari* review of the 2016 Board Decision and to ensure that intervening-respondents' rights were not prejudiced, as petitioners never raised any written objection to that decision, requested any alternative relief, or moved to intervene as a petitioner. The superior court also properly refused to consider petitioners' objections to the 2016 Board Decision for the first time at the *certiorari* hearing because petitioners were procedurally barred from challenging that decision by failing to comply with N.C. Gen. Stat. § 160A-393's requirements. Accordingly, based on intervening-respondents' petition for *certiorari* review, and on petitioners' failures to timely challenge that decision, the superior court did not err by affirming the 2016 Board Decision. We thus affirm the 2017 Order.

Additionally, based on our *de novo* interpretation of applicable provisions of the statutory farm exemption from countywide zoning, we hold that the particular outdoor shooting activities at issue here do not constitute "agritourism" as a matter of law and are thus subject to zoning. We therefore affirm the 2014 Order.

Finally, because intervening-respondents have failed to include in the appellate record the UDO upon which they primarily rely to support their appeal from the 2012 Order, and because our resolutions of petitioners' appeal from the 2017 Order and intervening-respondents' appeal from the 2014 Order renders moot the issues they raised with respect to the 2012 Order, we dismiss intervening-respondents challenges to the 2012 Order.

AFFIRMED IN PART; DISMISSED IN PART.

Chief Judge McGEE concurs.

Judge MURPHY concurs in result only.

ROBERT DAVID KAISER, Plaintiff
v.
JILL ANN GERBER KAISER, Defendant

No. COA17-553

Filed 15 May 2018

1. Child Custody and Support—support—parties' gross income

While it is well established that child support obligations are determined by a party's actual income at the time the order is made, evidence of past income can assist the trial court in determining current income where income is seasonal or highly variable. What matters is why the trial court examines past income; the findings must show that past income was used to accurately assess current income.

2. Child Custody and Support—support—capital gains—findings

A child support order did not contain sufficient findings to justify the use of a parent's past capital gains to calculate current, regular capital gains income. Capital gains are a highly variable type of income and income from past capital gains generally is a poor predictor of current, regular income from capital gains. If the trial court relies on past capital gains to calculate current, regular capital gains income, the court must establish that the party still owns capital assets of like kind to continue generating similar gains as in the past and that the party can reasonably be expected to continue realizing similar gains.

3. Child Custody and Support—support—parties' income—dividend income

A child support order was remanded where the trial court's findings about dividend income were not specific about sources, so that the Court of Appeals was not able to determine whether the trial court's calculation included dividends from assets that had been sold earlier and thus would not generate future dividend income.

4. Child Custody and Support—support—parent's income—annual business income

The trial court's general findings were sufficient to support its calculation of a parent's business income despite defendant's argument that the trial court's calculation did not include the final months of the year. There was testimony that the prediction of income for the fourth quarter was speculative.

5. Child Custody and Support—support—income of parent—loan from parents

The trial court did not err in a child support case by not treating as income payments the father received from his parents. The father testified that these payments were loans he was obligated to repay. The trial court's general findings concerning the father's income, which impliedly rejected defendant's argument, were sufficient.

6. Child Custody and Support—support—income of parent—fiance's payments

The trial court's findings in a child support case regarding amounts paid by the mother's fiance, a cohabitant, were not sufficient to categorize the fiance's payments as part of the mother's gross income. The trial court needed to resolve the conflicting evidence as to whether the payments were to help the mother in paying her own household expenses (maintenance), a sublease rental payment, or the fiance's share of the household expenses. Maintenance and rental income would be income to the mother, but the fiance's payment of his share of expenses would not be.

7. Child Custody and Support—support—parent's income—income from stock account

The trial court did not err in a child support action by treating the income from a stock market account as part of the mother's gross income even though she argued that the parties had agreed in the equitable distribution agreement that the account belonged to the mother's father. At the time of the child support order, the account was in her name, she paid the taxes on the dividends, and there was no evidence that she was unable to use the income from the account if she wished to.

8. Child Custody and Support—support—child therapy expenses

The trial court did not abuse its discretion in a child support case by denying defendant's request to recover past and future expenses for child therapy as part of the father's child support obligations. There was at least some competent evidence to support the trial court's finding that the mother created the need for the therapy.

9. Child Custody and Support—support—car payments—credits—finding not sufficient

The trial court abused its discretion in a child support action by awarding the father a credit for payments toward the mother's car. The trial court would have been within its discretion in awarding the credit had it made the required finding that an injustice would occur if the credit were not allowed, but it did not do so.

Appeal by defendant from order entered 14 November 2016 by Judge Jeffrey Evan Noecker in New Hanover County District Court. Heard in the Court of Appeals 14 November 2017.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for plaintiff-appellee.

Poyner Spruill LLP, by Steven B. Epstein and Andrew H. Erteschik, for defendant-appellant.

DIETZ, Judge.

Defendant Jill Ann Gerber Kaiser appeals from a child support order. She contends that the order lacks sufficient findings to support various determinations concerning the parties' gross income and applicable credits.

As explained below, we hold that the court's determination of Ms. Gerber's regular capital gains income, her dividend income, maintenance from Ms. Gerber's fiancé, and several other aspects of the order are unsupported by sufficient factual findings. We therefore vacate the order. On remand, the trial court, in its discretion, may enter a new child support order based on the existing record or may conduct any further proceedings that it deems necessary.

Facts and Procedural History

Defendant Jill Ann Gerber Kaiser and Plaintiff Robert David Kaiser are the parents of three minor children. Ms. Gerber and Mr. Kaiser married in June 2000, separated in June 2014, and divorced on 4 December 2015. Following the parties' separation, Ms. Gerber took custody of the three children, moved to Illinois, and later was awarded primary custody by consent order.

On 30 June 2014, Mr. Kaiser filed this action seeking a judicial determination of his child support obligation. While this action was pending, Mr. Kaiser paid $1,565 per month to Ms. Gerber, which he believed to be his child support obligation. These payments were a combination of cash payments and a $565 per month payment on Ms. Gerber's car debt. On 2 April 2015, Ms. Gerber filed a counterclaim for child support.

On 19 July 2016, Mr. Kaiser moved for an order to show cause for contempt and to modify child custody, alleging that Ms. Gerber was engaging in a "concerted effort to alienate the minor children" from him. Mr. Kaiser requested primary custody of the children. The trial court later entered an order transferring jurisdiction of any further child custody matters, including Mr. Kaiser's motion to modify, to Illinois where Ms. Gerber resides with the children.

At the hearing on the issue of child support, Ms. Gerber's testimony and the exhibits presented showed that she had significant capital gains each year from 2013 through 2015. In 2014 and 2015, Ms. Gerber sold mutual fund shares in a Wells Fargo account, realizing capital gains of $67,386 in 2014 and $73,143 in 2015. Ms. Gerber then sold the remaining assets in that account in early 2016, realizing $10,345 in capital gains from this final sale.

Ms. Gerber and her accountant both testified that Ms. Gerber received dividend income in 2014 and 2015 from three sources: $580 from the Wells Fargo account, $6,100 from a Vanguard account, and $1,541 from a Charles Schwab account. Ms. Gerber testified that, although the Charles Schwab account was in her name and she included the dividends on her tax returns, the account actually belonged to her father and she did not use the income generated from the account. The parties' post-nuptial agreement designated the account as "Wife's Father's Separate Property."

Ms. Gerber also testified that she and the children currently reside in a rental house that costs $3,500 per month. She testified that the lease is solely in her name, but that her fiancé lives with her and pays her $1,750 per month to cover his share of the rent and household expenses. Ms. Gerber explained the she and her fiancé "function financially like roommates."

Ms. Gerber also testified that, between the date of separation and trial, she incurred $15,048.88 in expenses for therapy for the children. The children were treated for PTSD and anxiety issues as "a result of the relationship with their father." Ms. Gerber testified that the intent of the therapy was "to try to repair the damage to the relationship between Mr. Kaiser and the children" because the children were afraid of their father, their fear got worse after they moved to Illinois, and the therapists were "trying to help them . . . be less afraid of him and—and relate to him better."

Mr. Kaiser testified that Ms. Gerber caused these issues for their children because she "creates this horrible situation for the girls where they feel like they've been abused and abandoned and then, uh, selects these counselors and tells them all these lies about things that have happened and tells the kids and creates all these issues."

Mr. Kaiser testified regarding the income he receives from his 50% interest in a business called SAJ Media. He provided documentation of the business's revenues from the first eight months of 2016 but did not provide a projection for likely profits for the remainder of the year. Ms. Gerber asserted that the business typically earned its largest profit in the final three months of the year. Mr. Kaiser testified that the net profit for the year "depends on what happens the rest of the year" and there is no way "with certainty to know what's going to happen in the next three months." He testified that "there's so much uncertainty you really don't know" because "our year is made or broken in the fourth quarter."

Mr. Kaiser also testified that, in addition to his income from SAJ, he had received a total of $50,000 in financial support from his parents after he separated from Ms. Gerber. Mr. Kaiser testified that the $50,000 he received was a loan rather than a gift. He explained that there is a written promissory note for repayment of $30,000 and an informal verbal agreement to repay the remaining $20,000.

On 14 November 2016, the trial court entered its child support order. The trial court found that it was necessary "to deviate from the presumptive child support guidelines" due to the length of time that the matter had been pending and the significant changes in income for both parties. The trial court stated that its determination of the parties' incomes was based on "the parties['] 2014-2015 Tax Returns, their current paystubs, 2015 and 2016 YTD Profit and Loss Statements of SAJ Media, and the testimony of [Ms. Gerber's] CPA." The trial court found that Ms. Gerber's income is $15,239 per month, including $685 per month in regular dividends, $6,095 per month in regular capital gains, and $1,750 per month from her fiancé for maintenance. The court found that Mr. Kaiser's income is $9,615 per month, including his salary of $5,833 per month from SAJ Media and his profits of $3,620 per month from his 50% ownership share of SAJ Media. The trial court relied on the 2016 year-to-date profits from SAJ Media to determine Mr. Kaiser's expected yearly income from the company, without assuming an increase from expected fourth quarter profits. Ultimately, the trial court found that Mr. Kaiser's income represents 38.7% of the parties' combined incomes and Ms. Gerber's income represents 61.3%.

Based on its findings regarding the parties' incomes and expenses, the trial court ordered Mr. Kaiser to pay $1,922 per month in child support to Ms. Gerber. The trial court determined that Mr. Kaiser had paid a total of $39,043 in child support from the date of separation through October 2016, resulting in a $1,304 overpayment. In making this determination, the court credited Mr. Kaiser for car payments of $565 per month on Ms. Gerber's car. The trial court denied Ms. Gerber's request for payment for the children's past and future therapy expenses, finding that the expenses for therapy were "unreasonable and unnecessary" and Mr. Kaiser was not obligated to pay Ms. Gerber for them because "the primary cause for any therapy was [Ms. Gerber's] active alienation of the minor children against their dad." Ms. Gerber timely appealed.

Analysis

Ms. Gerber challenges virtually every portion of the trial court's child support order in this case, but her arguments largely are tied together by a single thread: the lack of sufficient factual findings to support various legal determinations concerning the parties' respective child support obligations. As explained below, we agree that many of the decisions in the trial court's order lack sufficient factual findings. We therefore vacate the trial court's order and remand for further proceedings.

In North Carolina, the determination of parents' child support obligations is guided by the North Carolina Child Support Guidelines, which are designed to calculate the amount of financial support necessary to meet "the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c); *see also* 2015 N.C. Child Support Guidelines, AOC-A-162, Rev. 8/15, at 2.

Ordinarily, "[c]hild support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005).

Over time, this Court has decided hundreds of cases involving the calculation of gross income and the deductions and credits applicable to parties' child support obligations under the Guidelines. In many of these cases, this Court has identified specific fact findings that are necessary for this Court to review the judgment. The unfortunate result of this patchwork of precedent is that trial courts and parties preparing proposed orders must comb through decades of past cases to ensure that their orders contain the specific findings required by this Court. And, as this case demonstrates, despite the volume of past precedent, there are still some issues concerning the Guidelines that have yet to be addressed in an appellate decision.

Thus, we sympathize with the trial court in this case, which entered a detailed and well-reasoned order involving a number of complicated issues. Nevertheless, we hold that some of the court's determinations in the order lack specific findings required by our precedent or established in this opinion. We therefore vacate the order and remand for further proceedings.

I. Trial court's calculation of the parties' current gross income

[1] Ms. Gerber first challenges various aspects of the trial court's calculation of the parties' gross income. We address these challenges in turn below, but begin with the general principles that govern our review on this issue.

"It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997). Although this means the trial court must focus on the parties' current income, past income often is relevant in determining current income. Indeed, this Court has expressly held that "a trial court may permissibly utilize a parent's income from prior years to calculate the parent's gross monthly income for child support purposes." *Midgett v. Midgett*, 199 N.C. App. 202, 208, 680 S.E.2d 876, 880 (2009).

For example, in professions where income is seasonal or highly variable from month to month, evidence of income in past years can assist the trial court in determining current monthly gross income. *See, e.g.*, *Holland v. Holland*, 169 N.C. App. 564, 568, 610 S.E.2d 231, 235 (2005) (discussing use of prior years' income for a farmer whose "crops would have been harvested and sold in the late summer and fall"). Similarly, where the court finds that a party's most recent pay stubs or most recently filed tax return are unreliable, the court can use past years' income to fill in the gaps. *See, e.g.*, *Diehl v. Diehl*, 177 N.C. App. 642, 650, 630 S.E.2d 25, 30 (2006) (holding that a trial court may calculate current income by "averaging [the party's] income from his two prior tax returns" where the most recent tax return was unreliable).

What matters in these circumstances is the reason *why* the trial court examines past income; the court's findings must show that the court used this evidence to accurately assess current monthly gross income. *See Green v. Green*, __ N.C. App. __, __, 806 S.E.2d 45, 55 (2017).[1] With this precedent in mind, we turn to the trial court's findings in this case.

A. Regular capital gains income

[2] We begin by addressing the court's calculation of income from regular capital gains. The trial court found that Ms. Gerber had current, regular monthly income of $6,095 in capital gains at the time of the November 2016 order. The court appears to have calculated this monthly income by taking the total capital gains reported in Ms. Gerber's 2015 tax return and dividing that number by 12. The court also found that "while [Ms. Gerber] urged the Court to treat this income as irregular the Court finds that she regularly received capital gains in 2013, 2014, 2015 and will continue to receive capital gains in 2016." As explained below, we hold that these findings are insufficient and therefore remand for further proceedings.

Realized capital gains are treated as part of "gross income" under the North Carolina Child Support Guidelines. 2015 N.C. Child Support Guidelines, AOC-A-162, Rev. 8/15, at 3. But capital gains differ from more traditional sources of income and these differences mean more fact finding by the trial court often will be required. By their nature, capital gains are a highly variable type of income. To realize a capital gain, one must first own capital—whether stocks, bonds, real property, or any other form of capital—and then sell that capital for a profit. By doing so, one no longer owns that capital, and cannot expect to receive any further gains as that asset appreciates.

Likewise, particularly with respect to corporate stock, asset prices are volatile. Thus, even if one holds substantial assets in stock and regularly sells a fixed portion of those holdings each year, the capital gains could vary year to year (indeed, some years the sale could realize a capital loss). Thus, income from past capital gains generally is a poor predictor of current, regular income from capital gains.

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1. There are also circumstances in which the trial court can impute a higher current income based on earnings capacity where the court finds that "the party deliberately depressed its income." *Askew v. Askew*, 119 N.C. App. 242, 244–45, 458 S.E.2d 217, 219 (1995). This case does not involve any arguments concerning imputation based on earnings capacity.

This does not mean courts must ignore all past capital gains. But if the trial court relies on past capital gains to calculate current, regular capital gain income, the court must include sufficient findings to establish (1) that the party still owns additional capital assets of like kind sufficient to continue generating similar gains; and (2) that the party reasonably can be expected to continue realizing similar gains given past behavior and current market conditions.

Here, for example, the record indicates that Ms. Gerber's capital gains in 2014 and 2015—on which the trial court relied to determine Ms. Gerber's regular capital gains income in 2016—resulted from the sale of mutual fund holdings in a Wells Fargo account. In each of those years, Ms. Gerber realized approximately $70,000 in capital gains. But the record also shows that, by early 2016, Ms. Gerber sold the last remaining assets in that Wells Fargo account, realizing only $10,345 in capital gains.

Ms. Gerber also has capital assets in a Charles Schwab and a Vanguard account, but the trial court did not find that those accounts were similar to the Wells Fargo account, could be expected to generate similar capital gains, or were similarly suited for sale and realization of gains in current market conditions. Indeed, the record shows that the Vanguard account generates sizable dividend income, which may indicate that one would not reasonably expect Ms. Gerber to sell those assets but instead continue holding them to generate regular dividend income.

In sum, the trial court's order does not contain sufficient findings to justify the use of Ms. Gerber's past capital gains to calculate current, regular capital gains income. We therefore vacate and remand for further proceedings on this issue.[2]

B. Dividend income

[3] Ms. Gerber next challenges the trial court's findings concerning her regular dividend income. The trial court, based on evidence of Ms. Gerber's dividend income in 2014 and 2015, found that Ms. Gerber received $685 per month in regular dividend income. The court did not make specific findings about the sources of that dividend income. Mr. Kaiser concedes on appeal that the trial court's dividend calculation included income from three sources: the Wells Fargo account, the

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2. Ms. Gerber also argues that her capital gains should be treated as irregular, nonrecurring income and prorated over the period of time in which the asset was held. She can raise this argument on remand should the trial court determine that the facts do not support treating her capital gains as regular income.

Charles Schwab account, and the Vanguard account. But, as explained above, Ms. Gerber sold her remaining assets in the Wells Fargo account in early 2016. From the record on appeal, we are unable to determine if the trial court's calculation of regular dividend income as of November 2016 included dividend income from assets Ms. Gerber sold months earlier and thus cannot generate future dividend income. We therefore vacate and remand for further proceedings on this issue.

C. Business income

[4] Ms. Gerber next challenges the trial court's calculation of Mr. Kaiser's profit from his 50% ownership in SAJ Media. She argues that the trial court's findings are insufficient to support its calculation because the court relied on the business's net income during the first eight months of 2016 without making findings concerning the final three months of the year, which Ms. Gerber asserts are SAJ Media's "biggest quarter."

We reject this argument. The trial court heard testimony indicating that any prediction of increased profits for the business during the fourth quarter of 2016 was too speculative to credit. Thus, the trial court's calculation of SAJ Media's income, using only the existing eight months of 2016 income, is supported by competent evidence. To be sure, the trial court made no specific fact finding that rejected Ms. Gerber's evidence concerning the anticipated increase in 2016 profits during the fourth quarter. But our precedent does not require a specific, express fact finding on this issue. Accordingly, we hold that the trial court's general findings are sufficient to support its calculation of this business income.

D. Support from Mr. Kaiser's parents

[5] Ms. Gerber next challenges the trial court's decision not to treat as income approximately $50,000 in payments that Mr. Kaiser received from his parents. She argues that the trial court failed to make a specific, express finding that these payments were something other than ordinary maintenance that qualifies as gross income under the Guidelines.

We reject this argument. Mr. Kaiser testified that these payments were loans he was obligated to repay, not gifts or maintenance. And, as with the business income issue, our precedent does not require the trial court to include a separate, express fact finding concerning this determination. Thus, the court's general findings concerning Mr. Kaiser's income, which did not include these payments and thus impliedly rejected Ms. Gerber's argument, are supported by competent evidence and are sufficient.

E. Support from Ms. Gerber's fiancé

[6] Ms. Gerber next argues that the trial court improperly treated her fiancé's payments to her as income. She contends that her fiancé is a cohabitant and those payments are simply his share of the cost of housing and household expenses. She asserts that roommates' and other cohabitants' payments for their share of household expenses cannot be treated as maintenance under the Guidelines.

We agree that the trial court's findings are insufficient to categorize the fiancé's payments as part of Ms. Gerber's gross income. The Child Support Guidelines define income to include both "rental of property" and "maintenance received from persons other than the parties to the instant action." 2015 N.C. Child Support Guidelines, AOC-A-162, Rev. 8/15, at 3. "Maintenance" in this context means financial support that one provides to someone else for that other person's benefit. *Spicer*, 168 N.C. App. at 288, 607 S.E.2d at 682.

Thus, if Ms. Gerber were subleasing a portion of her home to her fiancé, his sublease payments would be income under the Guidelines. Similarly, if the fiancé's payments were intended to assist Ms. Gerber in paying her own household expenses, those payments properly could be treated as maintenance. Here, however, there was at least some competing evidence in the record indicating that the fiancé's payments were neither of these things, but instead were payments of the fiancé's share of household expenses that he incurred. In its findings, the trial court stated that these payments were used for "rent and utility bills which are all in Jill's sole name" but did not find that the payments were for Jill's benefit, rather than for her fiancé's share of rent and utilities incurred for his own benefit.

To treat these payments as part of Ms. Gerber's gross income, the trial court first must resolve the competing evidence by finding that the payments indeed were maintenance under the Guidelines. From the existing findings, we cannot be sure that the trial court properly applied the legal definition of maintenance because the findings could be interpreted to include payments for the fiancé's share of expenses. *See Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682 (holding that the trial court must "make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law"). We therefore vacate and remand for further proceedings.

F. Income from the Charles Schwab account

[7] Finally, Ms. Gerber argues that the doctrine of judicial estoppel barred Mr. Kaiser from asserting that the Charles Schwab account was Ms. Gerber's property. She contends that in the equitable distribution consent order, the parties agreed that this account was "Wife's Father's Separate Property." Thus, Ms. Gerber argues, Mr. Kaiser is judicially estopped from now claiming the account is Ms. Gerber's property.

We reject this argument because the record supports the trial court's finding that the income from the Charles Schwab account either belongs to Ms. Gerber or was given to her to use for her benefit. At the time of the child support order, the Charles Schwab account was in Ms. Gerber's name, she paid the taxes on the dividend income from that account, and there was no evidence that she was unable to use the income from that account to pay her expenses if she chose to do so.

The purpose of a child support order is to accurately determine the parties' respective gross incomes to assess their ability to meet the needs of their children. *Holt v. Holt*, 29 N.C. App. 124, 126, 223 S.E.2d 542, 544 (1976). The trial court's findings, supported by competent evidence in the record, show that the court properly treated the income from the Charles Schwab account as part of Ms. Gerber's gross income.

II. Denial of Ms. Gerber's request to recover child therapy expenses

[8] Ms. Gerber next challenges the trial court's denial of her request to recover past and future expenses for child therapy for her children as part of Mr. Kaiser's child support obligations. The trial court found that these expenses—which were incurred to repair Mr. Kaiser's relationship with his children—resulted from Ms. Gerber's "active alienation of the minor children against their dad." As a result, the trial court determined that Mr. Kaiser did not need to share payment for any past therapy expenses and "is not obligated to pay [Ms. Gerber] for such therapy in the future to the extent it relates to issues associated with the minor children's relationship with [Mr. Kaiser]."

Ms. Gerber contends that the trial court's finding concerning her efforts to alienate her children from Mr. Kaiser is "utterly at odds with the trial court's decision" to transfer the child custody dispute to an Illinois court that is a more convenient location for most of the witnesses who can address this issue in the custody context.

We reject this argument. On appeal from the child support order, our review of the trial court's findings is limited to whether those findings are supported by competent evidence in the record. *Hodges v. Hodges*, 147 N.C. App. 478, 482, 556 S.E.2d 7, 10 (2001). That a separate proceeding in another state may yield more detailed evidence on this issue is irrelevant.

In the child support proceeding below, there was at least some competent evidence to support the trial court's finding that Ms. Gerber's conduct created the need for this child therapy. Accordingly, the trial court did not abuse its discretion in determining that Mr. Kaiser need not pay any portion of these child therapy expenses. *Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682.

III. Credit for Mr. Kaiser's car payments

[9] Finally, Ms. Gerber challenges the trial court's decision to credit Mr. Kaiser for 17 payments he made toward Ms. Gerber's monthly car financing. She contends that the trial court failed to expressly find that an injustice would exist if the court did not apply this credit.

"[T]here are no 'hard and fast rules' when dealing with the issue of child support credits. Instead, the controlling principle is that credit is appropriate only when an injustice would exist if credit were not given." *Brinkley v. Brinkley*, 135 N.C. App. 608, 612, 522 S.E.2d 90, 93 (1999). When a "trial court properly awards a credit against a child support award, it should conclude in its written order that, as a matter of law, an injustice would exist if the credit were not allowed and should support that conclusion by findings of fact based on competent evidence." *Id.*

Our review of the record indicates that the trial court would have been well within its sound discretion to credit these payments toward Mr. Kaiser's child support obligation had it made sufficient findings. But the court did not make that finding and we therefore vacate and remand for further proceedings.

Conclusion

As explained above, various portions of the trial court's child support order are unsupported by sufficient findings of fact. We therefore vacate the trial court's order. On remand, the trial court, in its discretion, may enter a new order based on the existing record, or may conduct further proceedings including a new evidentiary hearing if necessary. *See Hendricks v. Sanks*, 143 N.C. App. 544, 549, 545 S.E.2d 779, 782 (2001).

VACATED AND REMANDED.

Judges BRYANT and DILLON concur.

ELIZABETH E. LeTENDRE, Plaintiff
v.
CURRITUCK COUNTY, NORTH CAROLINA, Defendant

No. COA17-1108

Filed 15 May 2018

1. **Appeal and Error—interlocutory appeals—preliminary injunction—enforcement of county unified development ordinance**

The Court of Appeals had jurisdiction to consider defendant county's interlocutory appeal from a preliminary injunction preventing the county from enforcing its unified development ordinance.

2. **Appeal and Error—mootness—enforcement of county's unified development ordinance—prior Court of Appeals opinion—completion of construction project**

A county's appeal of a preliminary injunction preventing it from enforcing its unified development ordinance (UDO) was not rendered moot by the plaintiff's completion of her construction project. The preliminary injunction continued to prevent the county from enforcing its UDO as required by the Court of Appeals' prior opinion in the matter.

3. **Zoning—unified development ordinance—definition of single family detached dwelling—validity**

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner's claim that the UDO violated the zoning enabling statute was an improper basis for the preliminary injunction. Plaintiff's argument regarding structural dependency misconstrued the UDO, and the UDO's definition of a single family detached dwelling did not impose an arbitrary restriction on her ability to use her property.

4. **Zoning—unified development ordinance—layout of interior rooms—validity**

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner's claim that the UDO violated N.C.G.S. 153A-340(l) was an improper basis for the preliminary injunction. Plaintiff's argument that the UDO impermissibly attempted to regulate the interior layout of rooms was a misconstruction of the UDO.

5. Zoning—unified development ordinance—due process—arbitrary and capricious

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her claim that the UDO was unconstitutionally arbitrary or capricious as applied to her. The zoning ordinance was within the scope of the county's police power, and it protected the natural environment of a remote portion of the Outer Banks and the people who lived there. The limited interference with plaintiff's use of her property was reasonable, and plaintiff's trouble was created by her decision to build on a certain area of her lot that required a Coastal Area Management Act permit (in addition to compliance with the UDO).

6. Zoning—unified development ordinance—due process—vagueness

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her claim that the UDO was unconstitutionally vague to the extent it required the wings of her home to be structurally dependent. Plaintiff's argument incorrectly assumed that the UDO required structural dependency, and the UDO plainly prohibited more than one principal structure per lot, while allowing accessory structures.

7. Zoning—unified development ordinance—equal protection—building permit

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her equal protection claim because there was no forecast of evidence that defendant county applied its zoning ordinance in a manner that treated plaintiff differently from other property owners in the same district.

8. Zoning—unified development ordinance—preemption by building code—location and use of buildings and structures

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff homeowner was not likely to prevail on her claim that the UDO impermissibly regulated construction practices and was preempted by the N.C. Building Code. The UDO dealt solely with the location and use of buildings and structures as expressly authorized by statute.

9. Injunctions—basis for—inverse condemnation—not claim to restrain

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals noted that plaintiff's complaint alleged that defendant county had taken her property by inverse condemnation but that the preliminary injunction was not and could not have been based upon this claim, because inverse condemnation is a claim for monetary compensation and not a claim to restrain defendant from taking some action.

10. Laches—enforcement of zoning ordinance—conduct of officials

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals noted that plaintiff homeowner's complaint alleged that defendant's enforcement of its UDO was barred by laches but that the preliminary injunction was not based upon this claim. Plaintiff would not have been entitled to a preliminary injunction on the basis of a likelihood of success on her laches claim because a municipality cannot be estopped from enforcing a zoning ordinance based on the conduct of its officials.

11. Zoning—common law vested right—construction during pendency of appeal—knowledge of risk

In an appeal from a trial court order granting a preliminary injunction preventing a county from enforcing its unified development ordinance (UDO), the Court of Appeals concluded that plaintiff was not likely to succeed on her common law vested right claim. Plaintiff could not accrue a vested right to construct or occupy the house where she began construction on the house while a legal challenge to the project was pending at the Court of Appeals—particularly where she was warned of the risks of proceeding with construction.

Appeal by Defendant from order entered 9 June 2017 by Judge Walter H. Godwin, Jr. in Superior Court, Currituck County. Heard in the Court of Appeals 21 March 2018.

Parker Poe Adams & Bernstein LLP, by Jonathan E. Hall, Michael J. Crook, and Jamie Schwedler, for plaintiff-appellee.

Currituck County Attorney Donald I. McRee, Jr., for Defendant-appellant.

STROUD, Judge.

I. Introduction

This case arises from this Court's prior opinion issued on 21 June 2016 in *Long v. Currituck County*, ___ N.C. App. ___, 787 S.E.2d 835 (2016), which held that under Currituck County's Unified Development Ordinance § 10.51, Plaintiff's proposed "project does not fit within the plain language of the definition of Single Family Dwelling, and thus is not appropriate in the SF District." *Id.* at ___, 787 S.E.2d at 841. While *Long* was pending before this Court, Plaintiff was warned of the possible consequences of proceeding with construction of the project if the trial court's order in that case was reversed on appeal, but she decided to build the project anyway. After Defendant took action to comply with this Court's ruling in *Long*, issued on 21 June 2016, Plaintiff sought and obtained a preliminary injunction issued on 9 June 2017 which required Defendant to "deem the home approved by the County building permit issued in March 2015 to be a single-family detached dwelling for purposes of the Currituck County Unified Development Ordinance" and to allow her to complete construction and occupancy of the project. Defendant appealed the preliminary injunction. Although Plaintiff's complaint includes many claims in her attempt to prevent Defendant from enforcing the Unified Development Ordinance in accordance with this Court's opinion in *Long*, ___ N.C. App. ___, 787 S.E.2d 835, Plaintiff has not demonstrated that she is likely to prevail on any of her claims, and therefore the preliminary injunction must be reversed.

II. Background

On 27 March 2017, Plaintiff filed this action seeking a declaratory judgment, preliminary injunction, permanent injunction, monetary damages, and attorney fees. On 9 June 2017, the trial court entered a preliminary injunction ordering Defendant to "deem the home approved by the County Building permit issued in March 2015 to be a single-family detached dwelling for purposes of the Currituck County Unified Development Ordinance;" to rescind the Stop Work Order issued in September 2016 and the Notice of Violation issued in February 2017; and to permit Plaintiff to complete construction of her project and then allow occupancy.

Plaintiff sought the preliminary injunction and other relief to prevent Defendant from complying with this Court's ruling issued on 21 June

2016 in *Long*, ___ N.C. App. ___, 787 S.E.2d 835. Plaintiff was a party to *Long* and that case dealt with the same project and the same provisions of the Currituck County Unified Development Ordinance ("UDO") as this case. *See generally id.* In *Long*, the petitioner-plaintiffs appealed

> a Superior Court (1) DECISION AND ORDER affirming the Currituck County Board of Adjustment's decision that a structure proposed for construction on property owned by Respondent Elizabeth Letendre is a single family detached dwelling under the Currituck County Unified Development Ordinance and a permitted use in the Single Family Residential Outer Banks Remote Zoning District and dismissing petitioners' petition for writ of certiorari and (2) ORDER denying petitioners' petition for review of the Currituck County Board of Adjustment's decision and again affirming the Currituck County Board of Adjustment's decision.

Id. at ___, 787 S.E.2d at 836 (quotation marks omitted). In other words, the preliminary injunction on appeal ordered Defendant to "deem" Plaintiff's project which was under construction during the pendency of the appeal of *Long* "to be a single-family detached dwelling" under the Currituck County UDO, although this Court held in *Long* that her house is *not* a single-family detached dwelling as defined by the Currituck County UDO. *See id.*, ___ N.C. App. ___, 787 S.E.2d 835.

Plaintiff described her plan to build the house which is the subject of this case, and was the subject of *Long*, in her complaint as follows:

> 4. LeTendre bought the Lot on the open market in April 2012 for a purchase price of $530,000.00.
>
> 5. From the time that LeTendre bought the Lot in April 2012, through the present time, the Lot has had a Single Family Residential Outer Banks Remote ("SFR") zoning classification assigned to it by Currituck County.
>
> 6. Under Currituck County's Unified Development Ordinance ("UDO"), developments that are permitted on properties with a SFR zoning classification include single-family detached dwellings.
>
> 7. Section 10.51 of the UDO defines a "single-family detached dwelling" as a "residential building containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal

structure. For regulatory purposes, this term does not include manufactured homes, recreational vehicles, or other forms of temporary or portable housing. Manufactured buildings constructed for use as single-family dwelling units (manufactured home dwellings) are treated similar [sic] to single-family detached dwellings."

8. Neither Section 10.51 of the Currituck County UDO, nor any other provision of the Currituck County UDO, limits the square footage that a single family detached dwelling may have.

9. Neither Section 10.51 of the Currituck County UDO, nor any other provision of the Currituck County UDO, limits the number of bedrooms that a single-family detached dwelling may have.

10. Neither Section 10.51 of the Currituck County UDO, nor any other provision of the Currituck County UDO, limits the number of rooms that a single family detached dwelling may have.

11. After buying the Lot in April 2012, LeTendre engaged an architect to develop plans for a home to be built on the Lot. LeTendre's architect first developed plans for a home ("Disconnected Home") with one central wing and two side wings. The two side wings would not be connected to the central wing, and instead unenclosed decking would run between the central wing and each side wing, such that a person would have to step outside of the Disconnected Home in order to travel from wing to wing. The three wings would not have connected rooflines. On the plans for the Disconnected Home, because the three wings were not connected, the architect labeled each of the three wings as a separate "building." Those plans were never utilized, and the Disconnected Home was never built.

12. LeTendre's representatives later sought guidance from the County regarding what type of development on the Lot would qualify as a single-family detached dwelling under the Currituck County UDO. LeTendre's representatives met with the County Planning Director and the County Attorney in 2013. At that meeting, the County Planning Director advised LeTendre's representatives

that, if the three wings had a connected roof and were connected by air-conditioned hallways that allowed for the free flow of heating and air conditioning, the resulting home would qualify as a single-family detached dwelling under the UDO. The County Planning Director did not claim that the three wings would need to have a common foundation in order for the home to qualify as a single-family detached dwelling.

13. Based on this guidance from the County Planning Director, LeTendre's architect developed a new set of plans for a different home for the Lot. This home ("Home") would also have a central wing and two side wings. But unlike in the Disconnected Home, the Home's side wings would be connected with the central wing by two enclosed, air-conditioned hallways. These hallways would allow for the free flow of heating and air conditioning, and they also would allow a person to walk throughout the Home, including all three wings, without ever stepping outside. The three wings in the Home would have a common, integrated roofline.

14. Although the plans for the Home showed that the three wings would be interconnected and would have a connected roofline, through inadvertence these plans continued the practice from the Disconnected Home's plans of labeling each wing as a separate "building."

15. In October 2013, LeTendre submitted the plans ("Plans") for this Home to Currituck County for the County to formally confirm that the Home would be a permissible single-family detached dwelling that would be permitted on the Lot under the County's UDO.

16. The Plans showed that each wing would be slightly less than 5,000 square feet in size, and they showed that the Home would also have a detached pavilion as an accessory structure.

17. The Plans showed that the foundation of each enclosed, air-conditioned hallway would be connected to the foundation of the side wing to which that hallway was attached.

> 18. The Plans showed that the foundations for the enclosed, air-conditioned hallways would not be connected to the foundation of the Home's central wing.
>
> 19. The Plans showed that each of the three wings would have its own separate foundation and that the foundations for the three wings would not connect together.
>
> 20. The Plans showed that the Home would not have a single common foundation.
>
> 21. The Plans that were submitted to Currituck County in October 2013 disclosed the square footage of each of the three wings of the Home as well as the total square footage of the Home.

In November of 2013, the Currituck County Planning Director, Mr. Ben E. Woody, issued a Letter of Determination "confirming that the Home as proposed in the Plans would be a single-family detached dwelling and would be permitted on the Lot pursuant to the Currituck County UDO."

Besides approval by the Currituck County BOA, Plaintiff's house required a permit from the N.C. Department of Environment and Natural Resources ("DENR") allowing "[m]ajor [d]evelopment in an [a]rea of [e]nvironmental [c]oncern pursuant to NCGS 113-118[.]" Plaintiff planned to build close to the water, in a location "set back a minimum of 60 feet from the first line of stable natural vegetation[.]" Plaintiff had hired George Wood, of Environmental Professionals, as a consultant to "assist her in obtaining state and federal approvals for construction of a home on the oceanfront property she bought in April 2012." Plaintiff's representatives, including Mr. Wood, her architect, and her contractor, worked with the North Carolina Division of Coastal Management to develop a plan for the house which would meet Coastal Area Management Act ("CAMA") requirements. The requirement which has created most of this controversy was that no building could be larger than 5,000 square feet; Plaintiff planned for the project to be approximately 15,000 square feet.

The trial court's order made several findings of fact regarding the CAMA regulations:

> 3. Construction on LeTendre's lot would also have to satisfy regulation under North Carolina's Coastal Area Management Act ("CAMA"). CAMA regulations impose setbacks that developments must satisfy that are based

on the size of the developments proposed. LeTendre wanted her home to use a CAMA setback known as the "60 foot" setback, which requires a development to be set back from the waterfront a minimum of 60 feet or 30 times the property's shoreline erosion rate. That setback is for developments less than 5,000 square feet in size. However, CAMA regulations allow a larger development to use the 60-foot setback if that development is composed of separate components that are each less than 5,000 square feet and that are structurally independent of each other. LeTendre therefore intended to design her home so that each of the three wings would be less than 5,000 square feet and would be structurally independent from each other. Designing homes that are larger than 5,000 square feet so that they have structurally independent components and can use the 60-foot CAMA setback is permitted by the Division of Coastal Management and is common along the North Carolina Coast and in Currituck County. LeTendre's representatives explained to the Division of Coastal Management and to Currituck County her desire for the wings of her home to be structurally independent so that the 60-foot setback could be used.

4. After consultation with the North Carolina Division of Coastal Management, which administers CAMA regulations, and with the Currituck County Planning Department, LeTendre's architect prepared a set of plans that proposed to connect the three wings of her home using uncovered, unenclosed decking. Although this would satisfy CAMA's requirement for structural independence, the Currituck County Planning Director would not accept those plans. The Planning Director determined that connecting the wings with unenclosed decking would not make the wings a single structure in order for the home to qualify as a single-family detached dwelling under the County UDO.

5. During subsequent discussions between LeTendre's design professionals and the County Planning Department, the County Planning Director proposed that the wings be connected with enclosed, air conditioned hallways. The Planning Director determined that connecting the wings in this way would allow the home to qualify as a single-family detached dwelling because

> the wings would be sufficiently integrated to constitute a single structure. There was no language in the UDO that expressly contradicted this determination by the Planning Director.[1]
>
> 6. LeTendre's architect therefore prepared a set of plans that proposed to connect the three wings using enclosed, air conditioned hallways. After reviewing these plans, the County Planning Director issued a November 2013 Letter of Determination providing that the home proposed on those plans would qualify as a single-family detached dwelling under the UDO. The Division of Coastal Management also concluded that those plans satisfied CAMA's setback regulations so that the 60-foot setback could be used for LeTendre's home.

After these consultations and plan revisions seeking to comply with both CAMA regulations and the UDO, the CAMA permit was "issued on March 17th, 2014, four days after the hearing before the Currituck County Board of Adjustment on March 13, 2014" where Mr. Wood testified as Plaintiff's CAMA expert.

In December of 2013, landowners adjacent to Plaintiff's lot, Mr. and Mrs. Long, appealed the November 2013 Letter of Determination to the Currituck County BOA, which upheld the Letter of Determination in May of 2014. The Longs then sought review of the BOA's determination by the Superior Court, which upheld the BOA's ruling in December of 2014; on 31 December 2014, the Longs appealed.

In March of 2015, *after* the Longs filed their notice of appeal and before the record on appeal had even been submitted to this Court, Plaintiff sought a Building Permit "permitting construction of the Home on the Lot." Our record shows that both the Currituck County Planning Director, Mr. Woody, and counsel for the Longs warned Plaintiff about beginning construction before this Court had issued its opinion in *Long*. On 2 April 2015, counsel for the Longs sent a letter to Plaintiff's counsel warning:

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1. Section 10.51 of the UDO does not permit the principal structure to be "physically attached" to any other principal structure, so the last sentence of this finding is not entirely accurate; this Court interpreted the UDO in *Long* and determined otherwise. *Long*, __ N.C. App. at ___, 787 S.E.2d at 838.

> I want to emphasize that this litigation is not over and you and your client are on notice that construction of the project while the litigation is ongoing is done with the risk that the appellate court will reverse the Superior Court, and that such reversal would result in the revocation of the building permit. While it may be true that your client can begin construction (provided there is no other prohibition from the Department of Insurance) your client will nonetheless be required to tear down, dismantle or otherwise remove such construction if the Court of Appeals reverses the Superior Court and revokes the zoning approval and attendant building permit. I understand that your client has elected to proceed with construction despite knowledge of the aforementioned risks.

Despite these warnings, Plaintiff proceeded with construction. Plaintiff described her decision to proceed in her affidavit filed in this case:

> 14. In March 2015, Currituck County issued a building permit for my home to me and to my general contractor. Although the Longs' appeal wasn't over, after carefully considering all options, I decided to proceed with construction of the home. I made this decision for several reasons.
>
> 15. First, over the course of a year, three different authorities had considered the 2013 plans for my home and had agreed that the home would be permitted under the County UDO. The Currituck County Planning Director had made that determination, the Currituck County Board of Adjustment had made that determination, and then a superior court judge had made that determination. All of them had considered the Longs' arguments for why my home shouldn't be allowed, and all of them had rejected the Longs' arguments.
>
> 16. Additionally, the plans for my home had been reviewed and approved by a number of other agencies . . . . These agencies all had reviewed the plans because a CAMA Major Development was required for my home.
>
> 17. Meanwhile, the Longs hadn't filed any appeal to the Board of Adjustment from the building permit issued

> to me in March 2015. No challenge to that permit existed when I decided to begin construction. In fact, to date, no one has appealed the issuance of my building permit, and the County Building Inspector has never withdrawn that permit. The Longs also had not appealed the Division of Coastal Management's issuance of a CAMA permit for my home.

On 21 June 2016, this Court issued its opinion in *Long*, reversing the superior court's order and holding that Plaintiff's project as proposed was not a single family detached dwelling as defined by the Currituck County UDO, Section 10.51. *See Long*, ___ N.C. App. ___, 787 S.E.2d 835. Plaintiff alleges in her complaint in this action that construction on the project was about 95% complete at that point. Plaintiff's representatives met with county officials and they discussed various ways of bringing Plaintiff's house into compliance with the UDO in a manner within the CAMA permit but could not reach an agreement. In September 2016, Defendant issued a Stop Work Order. In January 2017, Plaintiff proposed an amendment to the UDO which would allow her project to be permitted as a single family detached dwelling, but the Currituck County Board of Commissioners rejected it. On 1 February 2017, the Currituck County Planning Director issued a Notice of Violation based upon the house's failure to qualify as a single family detached dwelling under the UDO, in accordance with *Long*. Plaintiff made no changes to the house but filed this action seeking injunctions and a declaratory judgment preventing Defendant from complying with this Court's ruling in *Long* and compensation for Defendant's attempts to enforce *Long*.

III. Preliminary Matters

Before addressing the substance of Defendant's appeal, we first address a few preliminary matters.

A. Plaintiff's Claims

Plaintiff's complaint presents many claims which she alleges support issuance of a preliminary injunction, permanent injunction, and ultimately a declaratory judgment preventing Defendant from enforcing its UDO in accord with this Court's opinion in *Long*. To avoid confusion, we will address Plaintiff's claims mostly in the order as presented in her complaint, although we will group the claims of constitutional violations together since the analysis is similar for each. Plaintiff labeled her claims as follows:

FIRST CAUSE OF ACTION

(Section 10.51 of the Currituck County UDO Violates North Carolina's Zoning Enabling Statutes)

(Section 10.51's Requirement That the Home Have a Single Common Foundation Does Not Promote Health, Safety, Morals, or the General Welfare)

(Section 10.51's Requirement That a Single-Family Detached Dwelling Be Contained Within a Single Building Does Not Promote Health, Safety, Morals, or the General Welfare)

(Section 10.51 Otherwise Imposes Pointless Restrictions)

SECOND CAUSE OF ACTION

(Section 10.51 of the Currituck County UDO Violates the United States and North Carolina Constitutions Because It Is Arbitrary and Capricious)

THIRD CAUSE OF ACTION

(Section 10.51 of the Currituck County UDO Attempts To Regulate "Building Design Elements" In Violation of North Carolina Law)

FOURTH CAUSE OF ACTION

(Section 10.51 of the Currituck County UDO Is Preempted By the North Carolina Building Code)

FIFTH CAUSE OF ACTION

(Section 10.51 of the Currituck County UDO Is Unconstitutionally Vague)

SIXTH CAUSE OF ACTION

(Currituck County Has Taken LeTendre's Property)

SEVENTH CAUSE OF ACTION

(Currituck County Has Violated LeTendre's Right to Equal Protection Under the North Carolina Constitution and the United States Constitution)

EIGHTH CAUSE OF ACTION

(Currituck County's Attempts to Enforce Section 10.51 of the UDO Against the Home are Barred by Laches)

NINTH CAUSE OF ACTION

(LeTendre Has Vested Rights To Complete the Home and To Use the Home)[2]

In this appeal, we will consider *only* whether the trial court erred in issuing the preliminary injunction. We will consider only whether the trial court erred in issuing the preliminary injunction based upon the conclusion that Plaintiff is likely to prevail on the merits of any of the other claims and will suffer irreparable harm without issuance of the injunction.

B. Interlocutory Appeal

[1] Because the preliminary injunction is not a final order, this appeal is interlocutory. *See Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, 230 N.C. App. 317, 318, 749 S.E.2d 469, 471 (2013) ("It is well-established that a preliminary injunction is an interlocutory order.") "There is no immediate right of appeal from an interlocutory order unless the order affects a substantial right." *Id.* Defendant alleges that it has a substantial right that will be impaired if review is delayed because it has a right to exercise its police power to enforce its ordinances. Defendant is correct as clarified by Judge, now Justice, Ervin's dissent, which was adopted by the Supreme Court in *Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty.*: "[T]his Court has recognized that the entry of a preliminary injunction precluding a state or local agency from enforcing the law affects a substantial right and is immediately appealable." 236 N.C. App. 340, 360, 762 S.E.2d 666, 680 (2014) (Ervin, J. dissenting), *rev'd and remanded*, 368 N.C. 91, 773 S.E.2d 55 (2015). Adoption and enforcement of zoning ordinances is an exercise of the police power. *See Raleigh v. Fisher*, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950) ("In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State.") This Court therefore "has jurisdiction over Defendant's appeal from the issuance of the preliminary injunction" and we will "proceed to address the validity of Defendant's challenge to . . . the trial court's order on the merits." *Sandhill*, 236 N.C. App. at 361, 762 S.E.2d at 681.

C. Plaintiff's Motion to Dismiss as Moot

[2] Plaintiff has moved to dismiss this appeal as moot because the preliminary injunction on appeal allowed her to complete the construction

2. Plaintiff's complaint has 69 pages with 372 paragraphs of allegations. The record includes 651 pages of exhibits. In comparison, this opinion is relatively short.

of the project and begin using it. Plaintiff argues that the "[c]onstruction cannot be undone, the County's determination that the Home was constructed in accordance with the building code cannot be unmade, and the [Certificate of Occupancy] cannot rightfully be rescinded." Defendant responds that even though the project is complete, the preliminary injunction continues to have effect because it "prevents the County from requiring Letendre to cease use of the multiple buildings on her property until she complies with the UDO and this Court's *Long* decision and the County's use of civil and criminal remedies to enforce the county's ordinance."

"A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (citation and quotation marks omitted). Plaintiff's assertions that "construction cannot be undone" and "the [Certificate of Occupancy] cannot rightfully be rescinded" are not supported by law and are incorrect. Construction can be undone and structures can be moved. Plaintiff's assertion regarding "the County's determination that the Home was constructed in accordance with the building code" is irrelevant. There has never been any contention in this case that Plaintiff's project was in violation of the building code; the dispute arises from the UDO. Because the preliminary injunction continues to keep Defendant from enforcing the UDO as required by this Court's opinion in *Long*, this appeal is not moot, *see generally id.*, and Plaintiff's motion to dismiss is denied.

IV. Analysis

Defendant appealed the trial court's ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION which orders Defendant to "deem the home approved by the building permit issued in March 2015 to be a single-family detached dwelling for purposes of the Currituck County Unified Development Ordinance" and to allow Plaintiff to complete construction of the home and to grant a certificate of occupancy when complete. The trial court determined Plaintiff was likely to succeed on the merits of several claims in her complaint, and Plaintiff argues on appeal that even if a legal basis found by the trial court was in error, the order must be affirmed if there is any legal basis to support the result. Therefore, if just one of Plaintiff's claims is likely to succeed on the merits, the injunction must be affirmed. *See generally Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered.") Because we have determined that Plaintiff is not likely to succeed on any of her claims, we must address each of them.

A. Standard of Review

In review of a trial court's ruling on a motion for a preliminary injunction, we begin with the "presumption that the lower court's decision was correct, and the burden is on the appellant to show error." *A.E.P. Industries v. McClure*, 308 N.C. 393, 414, 302 S.E.2d 754, 767 (1983). But "on appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *Id.* at 402, 302 S.E.2d at 760. "The scope of appellate review in the granting or denying of a preliminary injunction is essentially *de novo*." *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984).

A preliminary injunction is an extraordinary measure normally intended only to preserve the status quo during litigation,

> [i]t will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

A.E.P., 308 N.C. at 401, 302 S.E.2d at 759–60 (citations omitted).

In this action, there is no challenge to the trial court's underlying findings of fact. Also, the preliminary injunction was not intended "to preserve the status quo[,]" *see id.*, but to change it, by requiring Defendant to disregard the UDO's plain language as interpreted by *Long* and remove Defendant's ability to enforce the law. *See generally Long*, ___ N.C. App. ___, 787 S.E.2d 835. But in any event, the first question in determining whether a preliminary injunction should have been granted is the likelihood of success on the merits. *See id.* If the Plaintiff is unable to show likelihood of success on the merits of her legal claims, the Court need not reach the second question of whether the Plaintiff "is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Id.*

We will next consider whether Defendant has met its burden of showing that Plaintiff does not have a likelihood of success on the merits for each claim. Defendant's brief addresses why Plaintiff's claims will likely not succeed, and Plaintiff's brief addresses why they will.

Thus, while Defendant is the appellant, the focus of our analysis is on Plaintiff's claims and their "likelihood of success on the merits[.]" *Id.* We consider "essentially *de novo*[,]" *Robin*, 70 N.C. App. at 540, 320 S.E.2d at 696, whether the trial court erred in taking this "extraordinary measure" and determining "plaintiff is able to show likelihood of success on the merits[.]" *A.E.P.*, 308 N.C. at 401, 302 S.E.2d at 759. Because many of Plaintiff's claims are similar and her arguments tend to overlap, and because Plaintiff's brief does not address the issues in the same order as Defendant's brief, we will address the claims in the order as set forth in the complaint.

We also note that while Plaintiff has presented nine claims, including constitutional claims, Plaintiff is actually challenging a *definition* of a single family detached dwelling. Six out of Plaintiff's nine claim headings specifically reference Section 10.51 and the other three implicitly rely upon it. As noted by *Long*, Section 10.51 simply defines a single family detached dwelling as "[a] residential building containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal structure. UDO § 10.51." *Long*, __ N.C. App. at ___, 787 S.E.2d at 838. While it is easy to lose the forest for the trees amidst Plaintiff's many claims, Plaintiff is simply challenging the definition of a single family detached dwelling as interpreted by *Long* and as applied to her project. *See Id.* ___ N.C. App. ___, 787 S.E.2d 835.

B. Claim I: UDO Section 10.51 Violates North Carolina's Zoning Enabling Statutes

Plaintiff raises two claims under the Zoning Enabling Statutes.

1. North Carolina General Statute § 153A-340(a)

[3] Plaintiff alleges that Section 10.51 of the UDO violates North Carolina General Statute § 153A-340(a), which is the grant of power to counties to enact zoning ordinances:

> For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances. These ordinances may be adopted as part of a unified development ordinance or as a separate ordinance. A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and

> use of buildings, structures, and land for trade, industry, residence, or other purposes.

N.C. Gen. Stat. § 153A-340(a) (2017).

The trial court made this conclusion of law on the zoning enabling statute:

> 4. LeTendre is likely to prevail on her claim that the provisions of the UDO that are barring her home from being a single-family detached dwelling are unenforceable because *those provisions violate the zoning enabling statutes*. They constitute an arbitrary restriction on her ability to use her property in that they do not promote health, safety, morals, or the general welfare.

(Emphasis added.) Plaintiff contends that Section 10.51 of Currituck County's UDO violates North Carolina General Statute § 153A-340(a) because it does not promote "health, safety, morals, or the general welfare[.]" *Id.* Plaintiff argues that Section 10.51's "requirements" of "a Single Common Foundation" and "that a Single-Family Detached Dwelling Be Contained Within a Single Building" do not "Promote Health, Safety, Morals, or the General Welfare[.]"

"The presumption is that the zoning ordinance as a whole is a proper exercise of the police power[.] The burden to show otherwise rests upon a property owner who asserts its invalidity." *Durham County v. Addison*, 262 N.C. 280, 282, 136 S.E.2d 600, 602 (1964) (citations, quotation marks, and ellipses omitted). In asserting Section 10.51's "invalidity[,]" *see id.*, Plaintiff focuses on her alleged "requirements" of UDO Section 10.51 and the lack of a substantial relation between the regulation and the promotion of general welfare. Plaintiff argues,

> Our courts have confirmed that zoning regulations are valid only if they substantially promote one of the four stated goals. 'Zoning ordinances are upheld when, but only when, they bear a ***substantial relation*** to the public health, safety, morals, or general welfare.' *Schloss v. Jamison*, 262 N.C. 108, 114, 136 S.E.2d 691, 695 (1964) (emphasis added); *see also Covington v. Town of Apex*, 108 N.C. App. 231, 234-35, 423 S.E.2d 537, 539 (1992) (striking down a town's rezoning ordinance in part because the rezoning would create only aesthetic improvements, which were a minimal public benefit); *Wenco Mgmt. Co. Town of Carrboro*, 53 N.C. App. 480, 281 S.E.2d 74 (1981)

> (finding zoning ordinances that barred drive-thru restaurants but allowed other types of businesses to have drive-thru windows as not being reasonably related to any legitimate governmental objective).

(Emphasis in original.) Plaintiff claims, and the trial court found, that Section 10.51 of the UDO is an "arbitrary restriction on her ability to use her property" because it does "not promote health, safety, morals, or the general welfare" so it is in violation of the zoning enabling statutes. Plaintiff argues that "the UDO's requirement of structural dependence does not bear substantial relation to the zoning enabling statute because this statute does not authorize a County to regulate the design or function of structural elements."

The most basic problem with Plaintiff's argument is that UDO Section 10.51 does *not* require "a Single Common Foundation" or that "a Single-Family Detached Dwelling Be Contained Within a Single Building[,]" nor does it "regulate the design or function of structural elements." As explained in *Long*,

> The UDO defines "DWELLING, SINGLE-FAMILY DETACHED" as follows: "A residential building containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal structure." UDO § 10.51. Thus, the definition of a Single Family Dwelling has five elements: (1) A building, (2) for residential use, (3) containing not more than one dwelling unit, (4) to be occupied by one family, and (5) not physically attached to any other "principal structure." The definition of a Single Family Dwelling includes portions that address the physical structure of the proposed dwelling: "a building," "containing not more than one dwelling unit," and "not physically attached to any other principal structure." . . .
>
> . . . .
>
> Yet the definition of Single Family Dwelling clearly allows more than one "building" or "structure" to be constructed on the same lot, so the presence of three "buildings" alone does not disqualify the project.

___ N.C. App. at ___, 787 S.E.2d at 838-40 (citation and footnotes omitted).

Plaintiff argues because the UDO would allow a 15,000 square foot house on Plaintiff's lot there is no practical difference between her project and a 15,000 square foot house of a more traditional configuration. Plaintiff's argument, and some of the trial court's findings, also focus on a "structural dependence" requirement allegedly imposed by Defendant. But the UDO does not address structural dependency nor does it require any particular type or design of foundation. The type or design of foundation was also not a factor in this Court's decision in *Long*. *See Long*, ___ N.C. App. ___, 787 S.E.2d 835. Section 10.51 addresses the types of structures allowed but says nothing about their construction or design. *See generally id.* at ___, 787 S.E.2d at 838. Section 10.51 is directly within the types of restrictions listed by North Carolina General Statute § 153A-340(a); Defendant

> may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

N.C. Gen. Stat. § 153A-340(a).

Plaintiff's focus on a requirement of "structural dependence" is simply misplaced.

The only specific requirements as to the design or size of the house or type of foundation are imposed by the CAMA permit which will not allow any single building to be over 5,000 square feet. As the trial court found, "CAMA regulations allow a larger development to use the 60-foot setback if that development is composed of *separate components that are each less than 5,000 square feet* and that are *structurally independent of each other*." (Emphasis added). And the need for a CAMA permit was created by Plaintiff's decision to build the house so close to the shore. Plaintiff's lot is approximately 3.5 acres, and the project could have been constructed in another location where a CAMA permit would not be needed. The unique characteristics of Plaintiff's lot and her desired project location do not mean that Defendant acted beyond the authority granted by North Carolina General Statute § 153A-340(a) to enact ordinances which in their legislative judgment "promote health, safety, morals, or the general welfare[.]" N.C. Gen. Stat. § 153A-340(a).

> In addition, *Long* also noted the substantial relation between Section 10.51 and the general welfare:

The UDO provides that the SF District

> is established to accommodate very low density residential development on the portion of the outer banks north of Currituck Milepost 13. The district is intended to accommodate limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events. The district accommodates single-family detached homes. Public safety and utility uses are allowed, while commercial, office, and industrial uses are prohibited.

Long, ___ N.C. App. at ___, 787 S.E.2d at 838 (citation, ellipses, and brackets omitted). "The UDO defines DWELLING, SINGLE–FAMILY DETACHED as follows: A residential building containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal structure. UDO § 10.51." *Id.* at ___, 787 S.E.2d at 838 (quotation marks omitted). Thus, allowing only residential buildings that do not contain "more than one dwelling unit to be occupied by one family" and are "not physically attached to any other principal structure" ensures there is "limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events[;]" *id.*, the UDO's goals would promote "the public health, safety, morals, or general welfare." N.C. Gen. Stat. § 153A-340(a). And while we find Plaintiff's argument to be without merit, even assuming *arguendo* there was weight to her contention that UDO Section 10.51 does not promote "public health, safety, morals, or general welfare[,]" Plaintiff's own cited case law states that

> [w]hen the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary

> duty and responsibility of determining whether its action is in the interest of the public health, safety, morals or general welfare.

Schloss v. Jamison, 262 N.C. 108, 115, 136 S.E.2d 691, 696 (1964) (citations and quotation marks omitted).

Plaintiff is asking this Court to conclude she is likely to prevail on a claim that a UDO *definition* of a single family detached dwelling is beyond the legislative authority granted by North Carolina General Statute § 153A-340(a). If we were to determine that Plaintiff is likely to prevail on such a claim, our ruling would cast serious doubt on nearly every common provision of all municipal ordinances in the State of North Carolina, including definitions of single family detached dwellings and other common uses. Plaintiff has presented no authority that Defendant's definition of a single family detached dwelling is beyond the County's statutory power. Plaintiff is unlikely to prevail on her claim that UDO Section 10.51 is not authorized by North Carolina General Statute § 153A-340(a), and thus that is not a proper basis for a preliminary injunction.

2. North Carolina General Statute § 153A-340(l)

[4] North Carolina General Statute § 153A-340(l) provides, in part,

> Any zoning and development regulation ordinance relating to building design elements adopted under this Part, under Part 2 of this Article, or under any recommendation made under G.S. 160A-452(6)c. may not be applied to any structures subject to regulation under the North Carolina Residential Code for One- and Two-Family Dwellings . . . .
>
> . . . .
>
> . . . For the purposes of this subsection, the phrase "building design elements" means exterior building color; type or style of exterior cladding material; style or materials of roof structures or porches; exterior nonstructural architectural ornamentation; location or architectural styling of windows and doors, including garage doors; the number and types of rooms; and the interior layout of rooms. The phrase "building design elements" does not include any of the following: (i) the height, bulk, orientation, or location of a structure on a zoning lot; (ii) the use of buffering or screening to minimize visual impacts, to mitigate the impacts of light and noise, or to protect the privacy of

> neighbors; or (iii) regulations adopted pursuant to this Article governing the permitted uses of land or structures subject to the North Carolina Residential Code for One- and Two-Family Dwellings.

N.C. Gen. Stat. § 153A-340(l) (2017).

Plaintiff also argues that "Section 10.51 of the Currituck County UDO [a]ttempts [t]o [r]egulate "[b]uilding [d]esign [e]lements" [i]n [v]iolation of North Carolina [l]aw[,]" specifically North Carolina General Statute § 153A-340(l). Plaintiff essentially alleges in her complaint that because multiple principal structures are not allowed on her lot, the UDO impermissibly attempts "to regulate the interior layout of rooms[.]" The trial court did not make a specific conclusion as to North Carolina General Statute § 153A-340(l) and its conclusion regarding the zoning enabling statute focuses on the "public welfare" portion of subsection (a). Plaintiff also does not make any arguments specifically regarding North Carolina General Statute § 153A-340(l) in her brief.

But just as we discussed above, Plaintiff's argument seeks to impose imaginary "requirements" upon Section 10.51. Section 10.51 does not address the "interior layout of rooms" any more than it addresses foundations or "structural dependence[.]" Plaintiff is unlikely to prevail on a claim that Defendant wrongfully regulated the interior layout of her rooms, and thus that could not be a proper basis for a preliminary injunction.

C. Constitutional Claims

Plaintiff's second, fifth, and seventh claims all raise constitutional issues. Each of the constitutional issues again focuses on Section 10.51. It is not entirely clear if Plaintiff's claims are facial or as-applied challenges to Section 10.51.

> [T]here is a difference between a challenge to the facial validity of an ordinance as opposed to a challenge to the ordinance as applied to a specific party. The basic distinction is that an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context. In an as-applied case, the plaintiff is contending that the defendant municipal agency violated his or her constitutional rights in the manner in which an ordinance was applied to his or her property. Only in as-applied

> challenges are facts surrounding the plaintiff's particular circumstances relevant.
>
> . . . And in the context of a zoning action involving property, it must be clear that the state's action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. Further, in making this determination we may consider, among other factors, whether: (1) the zoning decision is tainted with fundamental procedural irregularity; (2) the action is targeted at a single party; and (3) the action deviates from or is inconsistent with regular practice.

Town of Beech Mountain v. Genesis Wildlife, ___ N.C. App. ___, ___, 786 S.E.2d 335, 347 (2016) (citations, quotation marks, and brackets omitted), *aff'd per curiam*, 369 N.C. 722, 799 S.E.2d 611 (2017). The complaint uses the phrase "on its face" several times, but Plaintiff cites no authority and makes no real argument that the UDO is unconstitutional on its face. Because "a facial challenge represents a Plaintiff's contention that a statute is incapable of constitutional application *in any context*[,]" if we determine the ordinance is constitutional as-applied to Plaintiff, we have necessarily also determined it is facially constitutional as her case is the "context" where it is capable "of constitutional application[.]" *Id.* (emphasis added). Plaintiff's real argument is that UDO Section 10.5 is unconstitutional as applied to her project, so we will address her contentions accordingly.

Again, it is also important to remember the history of this case. Defendant initially approved Plaintiff's plans and the Longs challenged that approval in *Long*. *See generally Long*, ___ N.C. App. ___, 787 S.E.2d 835. Defendant did not *apply* UDO Section 10.51 to Plaintiff in the manner she claims to be unconstitutional in this case until after *Long* was issued and Defendant sought to comply with the ruling in *Long*. So Plaintiff's as-applied constitutional challenges are based upon Defendant's efforts to enforce the UDO as interpreted by *Long*.

While our standard of review remains "essentially *de novo*[,]" *Robin*, 70 N.C. App. at 540, 320 S.E.2d at 696, for purposes of whether the trial court should have issued a preliminary injunction, we also consider constitutional issues *de novo*:

> The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering

> the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act. In passing upon the constitutionality of a statute there is a presumption that it is constitutional, and it must be so held by the courts, unless it is in conflict with some constitutional provision.

State v. Fryou, 244 N.C. App. 112, 125, 780 S.E.2d 152, 161 (2015), *disc. review dismissed*, 368 N.C. 689, 781 S.E.2d 479, *disc. review denied*, 368 N.C. 689, 781 S.E.2d 483 (2016).

1. Arbitrary and Capricious

[5] Plaintiff argues that application of Section 10.51 violates the state and federal constitutions because it arbitrarily and capriciously distinguishes between building characteristics and her constitutional due process rights have been violated. To a large extent, Plaintiff's argument repeats her contentions from her arguments regarding North Carolina General Statute § 153A-340(a). The trial court's only conclusion which appears to address this claim is: "They constitute an arbitrary restriction on her ability to use her property in that they do not promote health, safety, morals, or the general welfare."[3]

Plaintiff contends

> Section 10.51 violates the federal and state constitutions because it is arbitrary and capricious in three respects: (1) its distinction of permissible buildings based on common, versus separate, foundations; (2) its requirement that a 'dwelling' be a single building; and (3) the County's interpretation that labeling within plans as opposed to actual building characteristics, is determinative.

Plaintiff only cites one case in this section of her brief: " 'Governmental action in the zoning or land use context violates due process principles if it is arbitrary or capricious, lacks a rational basis, or is undertaken with improper motives.' *Browning-Ferris Industs. Of South Atlantic, Inc. v. Wake Cty.*, 905 F. Supp. 312, 319 (E.D.N.C. 1995)."[4] Plaintiff uses *Browning-Ferris* only to support this general proposition, which is

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3. It appears this conclusion was actually addressing the zoning enabling statutes since that is the only legal basis the trial court mentions along with the "health, safety, morals, or the general welfare" language, but it is the only conclusion which uses the word "arbitrary[.]"

4. As a federal district court case, *Browning-Ferris* is from a federal trial court, and is not binding upon this Court.

correct, but Plaintiff cites no cases to show how her enumerated three contentions would likely violate her rights to due process.

In *Responsible Citizens*, our Supreme Court set out the analysis to be used in "due process challenges to governmental regulations of private property claimed to be an invalid exercise of the police power." *See generally Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261, 302 S.E.2d 204, 208 (1983).

> Several principles must be borne in mind when considering a due process challenge to governmental regulation of private property on grounds that it is an invalid exercise of the police power. First, is the object of the legislation within the scope of the police power? Second, considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable?
>
> In short, then, the court is to engage in an ends-means analysis in deciding whether a particular exercise of the police power is legitimate. The court first determines whether the ends sought, *i.e.*, the object of the legislation, is within the scope of the power. The court then determines whether the means chosen to regulate are reasonable. Justice Brock stated that this second inquiry is really a two-pronged test. That is, in determining if the means chosen are reasonable the court must answer the following: (1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?

Id. at 255, 261–62, 302 S.E.2d at 208 (1983) (citations and quotation marks omitted).

As directed by our Supreme Court in *Responsible Citizens*, *see id.*, we must first consider whether "the object of the ordinance is within the scope of the police power[.]" *Id.* at 261, 302 S.E.2d at 208. It is well-established that zoning ordinances such as Section 10.51 are within Defendant's police power:

> In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. The police power is that

> inherent and plenary power in the state which enables it to govern, and to prohibit things hurtful to the health, morals, safety, and welfare of society.

Raleigh v. Fisher, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950). In addition, Section 10.51 is specifically within the authority granted by North Carolina General Statute § 153A-340(a). *See* N.C. Gen. Stat. § 153A-340(a).

Next, we must address whether "considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable?" *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208. This question includes a "two-pronged test": "(1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?" *Id.* at 261–62, 302 S.E.2d at 208.

The first question is whether Section 10.51 of the UDO is "in its application reasonably necessary to promote the accomplishment of a public good[.]" *Id.* Defendant has chosen to adopt a zoning ordinance which limits development in the Single Family Residential Outer Banks Remote District. *See generally Long*, ___ N.C. App. at ___, 787 S.E.2d at 838. The "public good" which the ordinance seeks to accomplish is provided by the ordinance itself:

> The UDO provides that the [Single Family Residential Outer Banks Remote] District
>
> > is established to accommodate very low density residential development on the portion of the outer banks north of Currituck Milepost 13. The district is intended to accommodate limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events. The district accommodates single-family detached homes. Public safety and utility uses are allowed, while commercial, office, and industrial uses are prohibited.

Id.

Part of the "surrounding circumstances[,]" *Responsible Citizens*, 308 N.C. at 261, 302 S.E.2d at 208, is the natural environment of the

Single Family Residential Outer Banks Remote District. The location of Plaintiff's project is so environmentally sensitive that her house also required a CAMA permit and approval by other agencies. Plaintiff's project is in exactly the type of location which justifies limitations on development. The limitations are intended both to protect the natural environment *and* to protect the people who live in or visit the area. As the UDO notes, there is a "lack of infrastructure," making access by emergency personnel more difficult. *See generally Long*, ___ N.C. App. at ___, 787 S.E.2d at 838. In addition, the area is subject to "flooding and catastrophic weather events" so there is a greater risk of a need for emergency evacuation. *Id.*

The risk from flooding and erosion is also one of the stated reasons for the structural limitations of the CAMA permit: "Any structure authorized by this permit shall be relocated or dismantled when it becomes imminently threatened by changes in shoreline configuration." Plaintiff's environmental expert, Mr. Woody, described the reasons for the 5,000 square foot limitation in his affidavit:

> The goal in determining structure setbacks under CAMA is articulated in a January 17, 1992 memorandum to the Implementation & Standards Committee (CRAC) from Charles Jones of the DCM staff. That memorandum states that the "*objective [of determining the size of a structure] is to limit the total size of a structure so that it can be readily relocated if threatened by erosion." If a home is larger than 5,000 square feet but consists of structurally independent components that are each less than 5,000 square feet, that would facilitate relocation of the structure if it is threatened by erosion.*

(Emphasis added.)

Defendant's ordinances are "reasonably necessary to promote the accomplishment of a public good" and Defendant is applying them reasonably and consistently with that purpose. "[I]t is this Court's duty to apply the ordinance irrespective of any opinion we may have as to its wisdom, for it is our duty to declare what the law is not what the law ought to be." *Town of Pine Knoll Shores v. Evans*, 104 N.C. App. 79, 83, 407 S.E.2d 895, 897 (1991) (citation, quotation marks, and brackets omitted), *aff'd as modified*, 331 N.C. 361, 416 S.E.2d 4 (1992). Although there may be other ways to accomplish the UDO's purposes and it could be worded differently, we cannot substitute our judgment for that of the

Currituck County Board of Commissioners.[5] *See id.* The specific application of Section 10.51 of the UDO to Plaintiff's project which Plaintiff challenges is based upon Defendant's Notice of Violation and Stop Work order issued after, and based directly upon, this Court's opinion in *Long*. Plaintiff cannot show that Defendant has acted unreasonably or arbitrarily by seeking to comply with this Court's mandate. *See Battle v. City of Rocky Mount*, 156 N.C. 329, 337, 72 S.E. 354, 357 (1911) ("The law will not countenance or condone any attempt to defy its mandate. The private citizen must obey the law, and the public officer is not exempt from this duty by any special privilege appertaining to his office. He is not wiser than the law, nor is he above it.")

The second prong of the test "is [whether] the interference with the owner's right to use his property as he deems appropriate [is] reasonable in degree?" *Responsible Citizens*, 308 N.C. at 255, 262, 302 S.E.2d at 208. In *Wenco Management Co. v. Town of Carrboro*, this Court addressed whether a zoning ordinance was a reasonable interference with the landowner's right to use its property. 53 N.C. App. 480, 281 S.E.2d 74 (1981). Carrboro had adopted an amendment to its zoning ordinances which barred drive-through windows for restaurants in all of the business zoning districts in town except one, the B-4 district. *See id.* at 482, 281 S.E.2d at 75. But Carrboro designated no area in the town as B-4, so there was nowhere in town where Wenco could operate a restaurant with drive-through service. *See id.* In addition, Carrboro had adopted the amendment to its zoning ordinance "in direct response to plaintiffs' proposed construction of a restaurant with drive-in service after plaintiffs had obtained a valid conditional use permit." *Id.* at 483, 281 S.E.2d at 76. This Court determined the amendment was not reasonably related to any legitimate governmental interest because of the timing of the ordinance in response to plaintiff's permit and the fact that no area was designated as a B-4 district, holding that "[t]he B-4 district amendment was unlawful as an arbitrary and unduly discriminatory interference with plaintiffs' property rights which lacked any rational relation to valid police power objectives." *Id.* at 484, 281 S.E.2d at 76.

Here, there is no indication that Defendant has adopted or applied any zoning ordinance in a discriminatory, arbitrary, or retaliatory manner. Nor does the ordinance prevent Plaintiff from using her lot for its intended purpose, a single family detached dwelling. The UDO does not limit plaintiff's right to build a house on her property; it does not limit

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5. Again, Plaintiff proposed an amendment to the UDO which would allow her project to be permitted as a single family detached dwelling, but the Currituck County Board of Commissioners rejected it.

the square footage of the house, or as relevant for this case, where on the lot she may build. Once again, plaintiff's issue is created by a combination of her decision to build in a certain location on her property, the CAMA permit based upon that location, and the requirements of the UDO. Any "interference with [Plaintiff's] right to use her property as [she] deems appropriate" imposed by the UDO is secondary to the other factors and is "reasonable in degree[.]" *Responsible Citizens*, 308 N.C. at 262, 302 S.E.2d at 208.

Plaintiff also argues that the UDO is arbitrary and capricious as applied to her because of (1) a distinction of permissible buildings based on common versus separate foundations; (2) a requirement that a dwelling be a single building; and (3) Defendant's interpretation that labeling within the plans, as opposed to actual building characteristics, is determinative.

Plaintiff's argument regarding the foundation of the project is based primarily upon the Letter of Determination from the Planning Director, of 27 March 2017. In that letter, Mr. Woody stated:

> In response to the Notice of Violation dated February 1, 2017, you have submitted for review construction plans dated January 20, 2017. The construction plans dated January 20, 2017 depict the same three structurally separate and independent buildings illustrated on construction plans dated November 22, 2013 that were the subject of the Letter of Determination reversed by the Court of Appeals. Other than modification of language on the construction plan sheets, there appears to be no material difference between the plans used to construct the three structurally separate and independent buildings and the construction plans dated January 20, 2017. It is also noteworthy that to acquire a permit from the North Carolina Division of Coastal Management it is represented to that agency that the buildings located on your property are structurally separate and independent buildings. In a January 27, 2017 North Carolina Division of Coastal Management memorandum from Doug Hugget, Major Permits Coordinator, to Ron Reinaldi, Field Representative, Mr. Hugget writes, "The original major permit authorized the construction of three single-family dwellings connected via a structurally detached roofed two story deck . . . ." Mr. Hugget's memorandum further shows that the only changes on construction plan sheets

> are (1) "[c]hanges nomenclature on the Title Sheet to refer to the dwelling as a 'Single-Family Dwelling' " and "depicts a smaller constructed size of the permitted gazebo building" and (2) "that a girder system that would connect the separate buildings is no longer being considered and is not incorporated into the submitted construction plans."
>
> The February 1, 2017 Notice of Violation requires compliance by structurally modifying separate and independent buildings on your property into one structurally dependent building. The construction plans dated January 20, 2017 do not show one structurally dependent building. It is therefore my determination that plans dated January 20, 2017 do not show a building that complies with the UDO definition for single-family detached dwelling and a modified zoning compliance permit is denied.

This letter was part of Defendant's efforts to comply with this Court's decision in *Long*. After *Long*, plaintiff and Defendant sought to find an acceptable revision to the project to make it fit within the UDO requirements as set forth by *Long*. Several possible changes were discussed, such as moving the three buildings out of the CAMA setback area so they could be connected as one principal structure or reconfiguring the side buildings to be smaller accessory buildings, with the middle building as the principal structure. Plaintiff declined to make any changes, and ultimately Mr. Woody issued the 27 March 2017 letter. But Defendant was not requiring any particular revision to Plaintiff's project. Defendant has no duty to tell Plaintiff what she must do to comply with the UDO, although Defendant has worked extensively with Plaintiff and her representatives to consider alternatives. It is not the job of Defendant's Planning Department to direct the details of how to bring the project into compliance with the UDO; their job is to determine if Plaintiff's proposed plans comply with the UDO. Section 10.51 does not regulate plaintiff's "foundation[.]" The fact that Defendant may have suggested changes to plaintiff's foundation as one way to comply with both the UDO and CAMA, does not mean the UDO regulates foundations.

Nor does the UDO require that a single family detached dwelling be "a single building[.]" As explained by *Long*, the dwelling may include "accessory structures" which are

> "subordinate in use and square footage" to a principal structure. UDO § 10.34. Even assuming that the two side "buildings" or "structures" are subordinate in use to the center "building," it is uncontested that all of the buildings are approximately 5,000 square feet. No building is

> subordinate in square footage to another so none can meet the definition of an "accessory structure."

Id. at ___, 787 S.E.2d at 840 (citations and footnote omitted).

And if labeling on plans, instead of actual building characteristics, were controlling, there would be no dispute here. Plaintiff could simply re-label the structures on the plans as whatever she likes that would comply with the UDO. According to Mr. Woody's letter, that is what she attempted to do.[6] Although in *Long*, ___ N.C. App. ___, 787 S.E.2d 835, the parties were dealing with plans on paper, when Plaintiff filed her complaint, the buildings were nearly complete so Defendant is dealing with actual structures. Giving a structure a new name on paper changes nothing; it is what it is. *See, e.g.*, *Pine Knoll Shores*, 104 N.C. App. 79 at 80-81, 407 S.E.2d at 895-96. (The defendant landowners called their structure a "ground cover," not a "deck," where zoning ordinance forbade construction of "other separate structures" on single-family residential lot; Court determined name of structure was not controlling and landowner had violated the ordinance by construction of a structure of "precisely sized wooden boards connected to one another so as to form a level, continuous surface covering a substantial area of the lot between the canal and house."). Plaintiff has failed to show she is likely to prevail on her claim that Section 10.51 of the UDO is unconstitutionally arbitrary or capricious as applied to her, and thus that is not a proper basis for the issuance of a preliminary injunction.

2. Vagueness

[6] Plaintiff argues that "[t]he UDO is unconstitutionally vague to the extent it requires the wings of the home to be structurally dependent."

> [A] statute is unconstitutionally vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply the law. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Fryou, 244 N.C. App. at 125, 780 S.E.2d at 161 (citation omitted).

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6. Mr. Woody's letter provides, "Other than modification of language on the construction plan sheets, there appears to be no material difference between the plans used to construct the three structurally separate and independent buildings and the construction plans dated January 20, 2017."

The trial court determined that Plaintiff is likely to prevail on her claim that Section 10.51 is unconstitutionally vague:

> LeTendre is likely to prevail on her claim that those provisions in the UDO that are barring her home from being a single-family detached dwelling are unconstitutionally vague. The UDO as written does not provide reasonable notice that a home like LeTendre's, in which the wings connected by enclosed, air conditioned hallways and have connected rooflines, would not meet the definition of a single-family detached dwelling. Those UDO provisions therefore fail to reasonably apprise property owners concerning what conduct they prohibit.

Again, Plaintiff's argument is based upon an assumption that the UDO requires "structural dependency[,]" although it does not. In fact, even Plaintiff notes that "Section 10.51 of the UDO does not expressly include a requirement that the wings of a building be structurally dependent on one another in order for the building to be considered a dwelling." As explained in *Long*,

> The UDO defines "DWELLING, SINGLE-FAMILY DETACHED" as follows: "A residential building containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal structure." UDO § 10.51. Thus, the definition of a Single Family Dwelling has five elements: (1) A building, (2) for residential use, (3) containing not more than one dwelling unit, (4) to be occupied by one family, and (5) not physically attached to any other "principal structure." The definition of a Single Family Dwelling includes portions that address the physical structure of the proposed dwelling: "a building," "containing not more than one dwelling unit," and "not physically attached to any other principal structure." . . .
>
> . . . .
>
> Yet the definition of Single Family Dwelling clearly allows more than one "building" or "structure" to be constructed on the same lot, so the presence of three "buildings" alone does not disqualify the project. However, the remainder of the definition does disqualify the project. The last element in the definition of a Single Family Dwelling is "not physically attached to any other principal

> structure." UDO § 10.51. In other words, the Single Family Dwelling is "detached," which is part of the title. The UDO provides that "words used in the singular number include the plural number and the plural number includes the singular number, unless the context of the particular usage clearly indicates otherwise." UDO § 10.1.11. In the definition of Single Family Dwelling, the context does clearly indicate otherwise. We cannot substitute the word "buildings" for "a building" without rendering the last phrase of the definition, "not physically attached to any other principal structure" either useless or illogical. The Planning Director determined that the multiple buildings together function as a principal structure, but even if they are functionally used as one dwelling unit, each individual building is itself a "structure." *See* §§ 10.43, .83. Thus, each building is necessarily either an "accessory structure" or a principal structure. And respondents do not argue that the side buildings are "accessory structures;" they argue only that the entire project functions as one "principal structure." Although the ordinance does not define principal structure, it does define "accessory structures" as "subordinate in use and square footage" to a principal structure. UDO § 10.34. Even assuming that the two side "buildings" or "structures" are subordinate in use to the center "building," it is uncontested that all of the buildings are approximately 5,000 square feet. No building is subordinate in square footage to another so none can meet the definition of an "accessory structure." This would mean that each building is a principal structure, however a Single Family Dwelling only allows for one. In addition, the ordinary meaning of "principal" is in accord. *See* Webster's Seventh New Collegiate Dictionary 676 (1969). "Principal" is defined as "most important." *Id.* There can be only one "principal structure" on a lot in the SF District and that principal structure can be attached only to "accessory structures."

Long, ___ N.C. App. at ___, 787 S.E.2d at 838-40 (citations, brackets, and footnotes omitted).

The UDO defines a single family detached dwelling as "[a] residential building containing not more than one dwelling unit to be occupied by one family, *not physically attached* to any other principal structure.

UDO § 10.51." *Id.* at ___, 787 S.E.2d at 838 (emphasis added). Plaintiff is again arguing, as she did in *Long*, *see id.* at ___ 787 S.E.2d at 840, that if the structures are *connected*, they function as and should be deemed as one "building" under the UDO.[7] But "connection" does not make three building into one, despite the function. As explained in *Long*,

> Perhaps a more "absurd" result would be if we were to read the ordinances to focus only upon the "use" portion of Single Family Dwelling definition, as respondents argue, while ignoring the structural portion, since it would not matter how many "buildings" are connected by "conditioned hallways" if they are functioning as one dwelling for one family. Were we to adopt respondent Currituck County's interpretation, a project including ten 5,000 square foot buildings, all attached by conditioned hallways, which will be used as a residential dwelling for one family with a kitchen facility in only one of the buildings would qualify as a Single Family Dwelling. Respondents' interpretation would also be contrary to the stated purpose of the zoning, which calls for "very low density residential development" and "is intended to accommodate limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events."

Id. at ___, 787 S.E.2d at 840-41 (citation omitted).

The words "physically attached" are not vague or difficult to understand; they mean the same thing as "connected." *Id.* at ___, 787 S.E.2d at 838. However the structures are "physically attached" – whether by the foundation or by "air conditioned hallways" – Plaintiff's project includes three separate buildings which are *physically attached* to one another. The importance of the foundation of the structures comes only from the CAMA requirements, not the UDO. The CAMA permit will allow no building larger than 5,000 square feet and will not allow the three buildings to be structurally dependent upon one another. Plaintiff's

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7. For example, the affidavit from Plaintiff's architect states that "[o]n the October 10, 2013 plans, because the wings were connected with air conditioned hallways and their roof lines were connected, the wings were integrated and connected such that the entire home would be considered a single building and a single dwelling in the design and construction industry."

project included three separate buildings from the beginning; it was intentionally designed this way to comply with CAMA requirements.

The *Long* case answered the question of vagueness. *Id.* at ___, 787 S.E.2d at 840-41. Although the UDO provisions can be difficult to read, as many ordinances and statutes are, they are not unconstitutionally vague. Section 10.51 "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "provide[s] explicit standards for those who apply the law[,]" *Fryou*, 244 N.C. App. at 125, 780 S.E.2d at 161, by plainly prohibiting more than one principal structure per lot, although allowing accessory structures. *See Long*, ___ N.C. App. at ___, 787 S.E.2d at 838-40. Plaintiff understood this also; the negotiations and plan revisions have been caused by Plaintiff's insistence on fitting a square peg into a round hole. The problem was created by the CAMA regulations and Plaintiff's decision to build within the CAMA setback area; these factors do not make the ordinance vague. Plaintiff is unlikely to prevail on her claim of unconstitutional vagueness, and thus that is not a proper basis for the issuance of a preliminary injunction.

3. Equal Protection

[7] Plaintiff's final constitutional claim was regarding equal protection. The trial court's order did not address whether plaintiff was likely to prevail on her equal protection claim. Neither Plaintiff nor Defendant have addressed equal protection in their briefs on appeal.[8]

An equal protection violation would require Plaintiff to show that Defendant treated her differently from other similarly situated property owners in its application of the UDO because in order

> [t]o establish an equal protection violation, [plaintiff] must identify a class of similarly situated persons who are treated dissimilarly. . . . Thus, in order to properly assert an equal protection violation, Petitioner was required to allege and demonstrate that she was treated differently than other similarly situated individuals in some relevant way.

Yan-Min Wang v. UNC-CH Sch. Of Med., 216 N.C. App. 185, 204–05, 716 S.E.2d 646, 658–59 (2011) (citation and quotation marks omitted). There has been no forecast of evidence that Defendant has applied its

8. Because a trial court's order must be affirmed if there is any legal basis for the order, even one other than stated in the order, *see generally Shore*, 324 N.C. at 428, 378 S.E.2d at 779, we are briefly addressing equal protection. In addition, plaintiff was unwilling to concede at oral argument that any one of the nine claims may not support the preliminary injunction.

zoning ordinance in a manner that treats Plaintiff differently from other property owners in the SF District. Plaintiff is not likely to prevail on a claim for violation of her equal protection rights so it may not serve as the reason a preliminary injunction may issue.

D. Preemption by North Carolina Building Code

[8] Plaintiff's fourth cause of action is that "Section 10.51 of the Currituck County UDO [i]s [p]reempted [b]y the North Carolina Building Code[.]" The trial court's order agreed with Plaintiff and found:

> The provisions in the UDO that prevent LeTendre's home from qualifying as a single-family detached dwelling also attempt to regulate matters already regulated by the North Carolina Building Code. Ms. LeTendre's home is governed [by] the Building Code, and the Building Code contains detailed provisions governing such matters as how the foundations of her home should be constructed and whether the wings of her home should be structurally dependent. Nothing in the Building Code requires the foundations of LeTendre's home to be structurally integrated, and nothing in the Building Code requires the wings of her home to be structurally dependent. The UDO provisions that bar her home from being a single family detached dwelling therefore require her home to be constructed in a way that the Building Code does not require.

The trial court concluded:

> LeTendre is likely to prevail on her claim that the provisions of the UDO that are barring her home from being a single-family detached dwelling are preempted by the North Carolina Building Code because those provisions attempt to regulate matters of construction that are already comprehensively and exclusively regulated by the Building Code.

We first note that neither Plaintiff's brief nor the trial court's order identifies which provisions of the North Carolina Building Code preempt Defendant's zoning ordinance, but Plaintiff's complaint identified the statutory basis for her claim as North Carolina General Statute § 143-138(e), which provides:

> Effect upon Local Codes. -- Except as otherwise provided in this section, the North Carolina State Building Code shall apply throughout the State, from the time of

its adoption. Approved rules shall become effective in accordance with G.S. 150B-21.3. However, any political subdivision of the State may adopt a fire prevention code and floodplain management regulations within its jurisdiction. The territorial jurisdiction of any municipality or county for this purpose, unless otherwise specified by the General Assembly, shall be as follows: Municipal jurisdiction shall include all areas within the corporate limits of the municipality and extraterritorial jurisdiction areas established as provided in G.S. 160A-360 or a local act; county jurisdiction shall include all other areas of the county. No such code or regulations, other than floodplain management regulations and those permitted by G.S. 160A-436, shall be effective until they have been officially approved by the Building Code Council as providing adequate minimum standards to preserve and protect health and safety, in accordance with the provisions of subsection (c) above. Local floodplain regulations may regulate all types and uses of buildings or structures located in flood hazard areas identified by local, State, and federal agencies, and include provisions governing substantial improvements, substantial damage, cumulative substantial improvements, lowest floor elevation, protection of mechanical and electrical systems, foundation construction, anchorage, acceptable flood resistant materials, and other measures the political subdivision deems necessary considering the characteristics of its flood hazards and vulnerability. In the absence of approval by the Building Code Council, or in the event that approval is withdrawn, local fire prevention codes and regulations shall have no force and effect. Provided any local regulations approved by the local governing body which are found by the Council to be more stringent than the adopted statewide fire prevention code and which are found to regulate only activities and conditions in buildings, structures, and premises that pose dangers of fire, explosion or related hazards, and are not matters in conflict with the State Building Code, shall be approved. Local governments may enforce the fire prevention code of the State Building Code using civil remedies authorized under G.S. 143-139, 153A-123, and 160A-175. If the Commissioner of Insurance or other State official with responsibility for enforcement of the Code institutes

> a civil action pursuant to G.S. 143-139, a local government may not institute a civil action under G.S. 143-139, 153A-123, or 160A-175 based upon the same violation. Appeals from the assessment or imposition of such civil remedies shall be as provided in G.S. 160A-434.
>
> A local government may not adopt any ordinance in conflict with the exemption provided by subsection (c1) of this section. No local ordinance or regulation shall be construed to limit the exemption provided by subsection (c1) of this section.[9]

N.C. Gen. Stat. § 143-138(e) (2017). North Carolina General Statute § 143-138(e) merely sets forth the authority of the State to adopt building codes which apply throughout the state. Plaintiff's house is governed by the North Carolina Residential Code.

Plaintiff again focuses her argument on her contention that the UDO requires "structurally dependent foundations[.]" Plaintiff submitted the affidavit of her contractor, Mr. Mancuso, who averred:

> 80. The Building Code contains a chapter on foundations. I have reviewed and relied upon that chapter of the Building Code many times over the years and am personally familiar with it. An accurate copy of that chapter is attached as <u>Exhibit 13</u>. The Building Code's chapter on foundations applies to and governs the foundations in Ms. LeTendre's home. That chapter of the Building Code states that it "shall control the design and the construction of the foundation and foundation spaces for all buildings." That chapter comprehensively regulates the foundations of one and two family dwellings, and it has provisions governing matters like what materials must be used in a home's foundation, how the different components in a home's foundation must connect together and connect to other parts of the home, and what standards the components of a home's foundation must meet.
>
> 81. Neither the Building Code's chapter on foundations, nor any other provision in the Building Code, requires the foundations of the three wings in Ms. LeTendre's home

9. Subsection (c1) deals with elevators in private clubs and religious organizations, so it is not relevant to this case. *See* N.C. Gen. Stat. § 143-138(c1) (2017).

> to be connected or requires Ms. LeTendre's home to have a single common foundation.
>
> 82. Simply put, Ms. LeTendre's home is one building and one dwelling. It is one building for purposes of the Building Code, and it is considered one building as [that] term is understood and used in the local design and construction industry.

Plaintiff also relies upon a determination by the North Carolina Building Code Council issued in August 2015. Plaintiff's project came under consideration by the Building Code Council based upon Plaintiff's appeal from the North Carolina Department of Insurance ("NCDOI"). A staff member of NCDOI determined, after

> his review of the building plans, coupled with his review of the Coastal Area Management Agency ("CAMA") permit application for the project, led him to conclude that the proposed occupancy more closely resembles a "hotel" and should be constructed in compliance with R-l type occupancy as mandated in the North Carolina Building Code ("NCBC").

After discussion among Plaintiff's contractor, members of Defendant's staff, and NCDOI staff,

> an agreement was reached wherein Mr. Newns issued a residential building permit for the project with various modifications to construction standards and methods normally called for only in projects meeting R-3 occupancy standards found in the [North Carolina Building Code], but not in the [North Carolina Residential Code.] The additional requirements included sprinkler systems, handicap access, increased fire protection, emergency exits and the like.

Plaintiff's contractor agreed to these requirements with the "express understanding that . . . [Plaintiff] would solicit a formal interpretation from NCDOI regarding the occupancy classification and petition the County to remove all additional requirements not expressly mandated by the NCRC" if the NCDOI's determination that the building closely resembled a hotel" was reversed. On 28 May, 2015, a deputy commissioner of the NCDOI approved the determination that "if the property is 'used as a house,' it can be built according to NCRC standards, but if it were rented out as a ''vacation rental,' as shown in the CAMA application, it most closely resembles a Group R-l Occupancy and must be constructed in accordance with the NCBC." Plaintiff appealed this determination to the North Carolina Building Code Council, and the Council reversed the NCDOI ruling and concluded that "[t]his project meets the definition of a one family dwelling not more than three stories above grade plane in height with a separate means of egress, as required in NCRC section R101.2. Accordingly, the NCRC applies to this project."

Plaintiff argues that

> Currituck County's application of the UDO attempts to regulate a home's foundations in a manner different from that prescribed by the Building Code. (*See* Doc. Ex. 116 ¶¶80–81) The construction of a home's foundation(s) is regulated by the Building Code, and nowhere in the Code is there a requirement that various wings of a home must be structurally dependent or share a common foundation.

Plaintiff then footnotes that

> [t]hese conclusions are supported by the August 2015 ruling of the Building Code Council, which determined that the home depicted in the October 2013 plans is a "single-family dwelling." (Doc. Ex. 94-95, Ex. 11) Two building inspectors, including the County's Chief Building Inspector, have confirmed that the home is a single building for purposes of the Building Code. (Doc. Ex. 115 ¶78)

The first problem with plaintiff's preemption argument is that the Currituck County UDO does not regulate the construction of foundations. Plaintiff is arguing only that the *definition* of a single family detached dwelling in the UDO somehow addresses the construction of foundations. The Planning Director's letter of 17 March 2017 also did not address any of the technical requirements of foundations. In addition, the determination by the North Carolina Building Code Council does not in any way control Defendant's application of its UDO.

In *Duggins v. Town of Walnut Cove*, this Court rejected a similar argument that the town ordinance's definitions of "mobile home," "modular home," and "site-built home" were an "impermissible attempt to regulate construction practices." 63 N.C. App. 684, 687, 306 S.E.2d 186, 188 (1983). The plaintiffs contended that they should be allowed to install a mobile home in an area which allowed only modular and site-built homes. *See id.* Prior to purchasing the mobile home, "the plaintiffs described to Defendant's town clerk/zoning administrator the type of manufactured home they intended to erect on their property and were assured this home complied with local ordinances. Defendant issued a building permit to plaintiffs and accepted their payment of $200 as a water tap fee." *Id.* at 685, 306 S.E.2d at 187. But when the plaintiffs tried to install the mobile home on their lot, they were informed that it was not allowed in that zoning district. *Id.* One of the plaintiffs' arguments on appeal was that

> [d]efendant's attempt to "zone out" mobile homes as defined in the ordinance exceeds Defendant town's statutory authority both because the zoning enabling act does not authorize Defendant to regulate the types of structures used for single-family residential purposes and because Defendant's ordinance constitutes a back door attempt to intrude into a field preempted by state and federal law.

63 N.C. App. at 686, 306 S.E.2d at 188. Regarding building codes, the plaintiffs argued that because mobile homes and modular or site-built homes are governed by different building codes, "the zoning ordinance . . . [has] the effect of distinguishing between structures used for the same purpose--single-family residences--based solely on the construction methods and materials used." *Id.* at 687, 306 S.E.2d at 188. But this Court determined,

> We do not agree with plaintiffs' interpretation of the ordinance. It is obvious from the definitions in the ordinance that the different applicable building codes is not the only factor differentiating mobile homes from modular homes. Therefore, the ordinance does not have the effect suggested by plaintiffs. Defendant is clearly authorized by G.S. 160A-381 to regulate and restrict the location and use of any buildings or structures for residential and other purposes, and that is exactly what defendant has done in restricting the location of mobile homes.
>
> Similarly, plaintiffs attack the ordinance on the grounds it is an impermissible attempt to regulate construction practices. *Defendant's ordinance was not intended to and does not have the effect of regulating construction practices in any way. Rather, the ordinance deals solely with the location and use of buildings and structures as the statute expressly authorizes. Plaintiffs' attempt to read more into defendant's enactment of the ordinance is not warranted.* Accordingly, we hold both aspects of plaintiffs' first argument are meritless.

Id. at 687, 306 S.E.2d at 188–89 (emphasis added).

Defendant's UDO also "deals solely with the location and use of buildings and structures as the statute expressly authorizes. Plaintiff[']s[] attempt to read more into defendant's enactment of the ordinance is not warranted." *Id.* The trial court erred in concluding that Plaintiff is likely to prevail on her claim that UDO Section 10.51 impermissibly regulates construction practices and is preempted by the North Carolina Building Code. Plaintiff is unlikely to prevail on this claim so it is not a proper basis for a preliminary injunction.

E. Inverse Condemnation

[9] Plaintiff's sixth cause of action is that "Currituck County [h]as [t]aken LeTendre's [p]roperty[.]" The trial court did not conclude and Plaintiff does not argue that the preliminary injuction could be based upon her alternative claim for inverse condemnation. Plaintiff's complaint alleges that "Section 10.51 of the Currituck County UDO, by itself and in combination with those County actions, assurances, and representations . . . induced [her] to build" the project which now is deprived "of all economic value, market value, and utility." But since inverse condemnation is a claim for monetary compensation and not a claim to restrain the Defendant from taking some action, a preliminary injunction could not logically be based on inverse condemnation. We also note that under North Carolina General Statute § 40A-51, a Memorandum of Action must be filed for an inverse condemnation claim, and plaintiff has failed to do so. *See* N.C. Gen. Stat. § 40A-51(b) (2017); *see also Cape Fear Pub. Util. Auth. v. Costa*, 205 N.C. App. 589, 596, 697 S.E.2d 338, 342 (2010) ("Defendant's counterclaim for inverse condemnation was thus subject to dismissal for its failure to comply with N.C. Gen. Stat. § 40A–51.") Since the preliminary injunction could not be based upon this claim, we will not speculate on it further, but we note Plaintiff would not be entitled to a preliminary injunction on this basis.

F. Laches

[10] Plaintiff's eighth cause of action is that "Currituck County's [a]ttempts to [e]nforce Section 10.51 of the UDO [a]gainst the Home are [b]arred by [l]aches[.]" This claim is based upon her allegation that Currituck County had notice "that the Home as described in the Plans might not comply with the UDO" in December of 2013 when the Longs appealed the BOA's determination. In other words, Defendant has taken too long to oppose Plaintiff's plans; Defendant should have known better than to approve her plans in November 2013 and should have changed its position right away to join in the Longs' challenge.[10] The trial court did not rely upon laches in its issuance of the preliminary injunction, and Plaintiff has not addressed laches on appeal. But we do note that "a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past." *Fisher*, 232 N.C. at 635, 61 S.E.2d at 902. Therefore, plaintiff is not entitled to a preliminary injunction on the basis of a likelihood of success of her claim of laches.

G. Common Law Vested Right

[11] Plaintiff's last claim is that even if she is not likely to prevail on any of her other claims, she still has a common law vested right to use the project. The trial court concluded that Plaintiff was likely to prevail on her vested right claim:

> LeTendre is likely to prevail on her claim that she has a vested right to complete and use her home as approved by the County in November 2013. At the time that LeTendre constructed her home, starting in the spring of 2015, she had valid approvals from Currituck County for that home's construction. This Court had ruled in December 2014 that the County's approval of her home was valid, and there was no stay in place to prevent this Court's order from taking effect. As a result, when LeTendre spent substantial sums in reliance on her approvals from the County to construct her home, she was relying on valid governmental approvals. Her reliance on those approvals was also reasonable and in good faith.

Plaintiff argues that

> [t]o establish a common law vested right, an owner must obtain an approval for the development and make substantial expenditures in good faith reliance on that approval. *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 112, 388 S.E.2d 538, 544–45 (1990). LeTendre received approval of her home's construction in the County's November 2013 Letter of Determination and March 2015 building permit. She then spent over $4 million building her home in

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10. In *Long*, Plaintiff and Defendant were in agreement. *See Long*, ___ N.C. App. ___, 787 S.E.2d 835. Defendant is now carrying out this Court's mandate in *Long*, in opposition to Plaintiff.

> reliance on those approvals. (*See* Doc. Ex. 10 ¶32) Thus, she made substantial expenditures in good faith reliance on governmental approvals.

This Court described how a landowner may acquire a vested right to use her land in a certain way in *Browning-Ferris Industries v. Guilford County Bd. of Adj.*:

> The common law vested rights doctrine is rooted in the due process of law and the law of the land clauses of the federal and state constitutions and has evolved as a constitutional limitation on the state's exercise of its police powers. A party's common law right to develop and/or construct vests when: (1) the party has made, prior to the amendment of a zoning ordinance, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building; (2) the obligations and/or expenditures are incurred in good faith; (3) the obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required, authorizing the use requested by the party; and (4) the amended ordinance is a detriment to the party. The burden is on the landowner to prove each of the above four elements.

126 N.C. App. 168, 171–72, 484 S.E.2d 411, 414 (1997) (citations, quotation marks, and brackets omitted).

As described in *Browning-Ferris*, the first element of a vested rights claim is that "the party has made, *prior to the amendment of a zoning ordinance*, expenditures or incurred contractual obligations substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building[.]" *Id.* at 171, 484 S.E.2d at 414 (emphasis added). Here, the zoning ordinance has not been amended; the only question from the beginning has been whether Plaintiff's house is a "single-family detached dwelling" as defined by Section 10.51 of the UDO. *Long*, ___ N.C. App. at ___, 787 S.E.2d at 836 ("On appeal, there is no real factual issue presented but only an issue of the interpretation of the UDO. The parties have made many different arguments, with petitioners focusing upon the applicable definitions and provisions of the UDO, and respondents focusing upon the intended use and function of the project. This case ultimately turns upon the definition of a single family detached dwelling." (citations, quotation marks, and brackets omitted)). Plaintiff is correct in noting that her project was initially approved by Defendant:

> The 22 November 2013, LETTER OF DETERMINATION from the Planning Director describes the project as follows: "The plans indicate a three-story main building that includes cooking, sleeping, and sanitary facilities; as well as two-story side buildings that include sleeping and sanitary facilities. The building plans also show two conditioned hallways connecting rooms within the proposed single family detached dwelling." This is an accurate and undisputed description of the project. The BOA affirmed the Planning Director's description, and the Superior Court affirmed the BOA's decision.

Id. at ___, 787 S.E.2d at 839.

But the Longs appealed and that case proceeded on appeal to this Court, where it was resolved by issuance of *Long* in favor of the petitioner-plaintiffs who argued against plaintiff LeTendre. *See id.*, ___ N.C. App. ___, 787 S.E.2d 835. Thus, as to Plaintiff's argument that she relied upon "the County's November 2013 Letter of Determination and March 2015 building permit[,]" Plaintiff knew the Letter of Determination as affirmed by the BOA and then the Superior Court was on appeal and was specifically warned that this Court may not find in her favor Plaintiff did not get her building permit and begin construction until *after* the appeal. *See generally id.* But Plaintiff argues that unless someone took *additional* legal action to stop her, she was still entitled to proceed to build: "With a valid building permit in hand, and without any injunction in place, proceeding with her home was a reasonable decision made in good faith." Thus, Plaintiff's vested rights theory is that she could acquire a common law vested right to build and occupy her house simply by proceeding with construction quickly, even while aware that her right to do so was on appeal and could be reversed.

Plaintiff's interpretation of vested rights is simply not supported by the law. *See generally Fisher*, 232 N.C. 629, 61 S.E.2d 897. First, Plaintiff's interpretation would deprive Defendant of its right and duty to exercise the police power if a landowner building a structure in violation of its zoning ordinance simply acts fast enough to complete the work before a legal challenge to the landowner's project can be completed. Although *Fisher* did not specifically address vested rights, the situation presented is very similar to this case. *See generally id.* In *Fisher*, the City of Raleigh sued to enjoin the Defendant "landowners from carrying on business in a residential zoning district in violation of a zoning ordinance." *Id.* at 630, 61 S.E.2d at 898. The Defendants had been "operating a bakery and sandwich company" at an address within a residential zoning district. *Id.* at 631, 61 S.E.2d at 899 (quotation marks omitted). The property had been zoned as residential since 1923, and in 1936 the Defendants acquired the land and constructed the house in which the business operated. *See id.* at 632, 61 S.E.2d at 900. Defendants operated the business from this location "with the full approval and consent of the officials of the City of Raleigh" "for at least ten years." *Id.* The Defendants also "increased their facilities from the operation of the business" during this time, investing "at least $75,000.00, which [would] be lost in case they are precluded from continuing their commercial operations[.][11] *Id.* (quotation marks omitted). But in 1948, the City of Raleigh notified Defendants they must "discontinue their business operations within said residential district[;]" the Defendants refused to comply, leading to the lawsuit to enjoin them from continuing operation of the business. *Id.* at 631, 61 S.E.2d. at 899-900 (quotation marks omitted),

The Supreme Court determined that the City of Raleigh could not be estopped from enforcing "its zoning ordinance against the defendants" despite "the fact that its officials have encouraged or permitted them to violate it for at least ten years." *Id.* at 634, 61 S.E.2d at 900. While the Court recognized Defendants' good faith reliance upon the City's acquiescence, and even encouragement, of the operation of the business for many years *and* their substantial expenditures based upon that reliance, it determined that because enforcement of the zoning ordinances is within the police power of the City, the City could change its position and require the business to cease operation in that location:

> In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. The police power is that inherent and plenary power in the state which enables it to govern, and to prohibit things hurtful to the health, morals, safety, and welfare of society. In the very nature of things, the police power of the State cannot be bartered away by contract, or lost by any other mode.

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11. To put the investment of $75,000.00 in context, according to the United States Department of Labor, Bureau of Labor Statistics' Consumer Price Index calculator, this expenditure in 1940 would be equivalent to over $1,300,000.00 today. *See* United States Department of Labor, Bureau of Labor Statistics, Databases, Tables & Calculators by Subject, CPI Inflation Calculator - https://www.bls.gov/data/inflation_calculator.htm.

> This being true, a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past.
>
> Undoubtedly this conclusion entails much hardship to the defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.

Id. at 635, 61 S.E.2d at 902 (citations omitted). The November 2013 Letter of Determination could not create a vested right for Plaintiff to build the project as planned, particularly since that letter was *immediately* challenged, and she did not even begin construction until much later. *See generally id.* We have no doubt that Defendant's Planning Director was acting in good faith in approving Plaintiff's plans, but Plaintiff could not in good faith rely upon the November 2013 letter to build the house, where a legal challenge to the project was pending.

Our Supreme Court has also recognized that a landowner cannot in good faith acquire a vested right if the landowner knows of a pending amendment to a zoning ordinance which would change the use of the land:

> The "good faith" which is requisite under the rule of *Warner v. W & O, Inc.*, *supra*, is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him.

Town of Hillsborough v. Smith, 276 N.C. 48, 56, 170 S.E.2d 904, 910 (1969).

In *Finch v. City of Durham*, the plaintiffs planned to build a hotel on a tract of land zoned as Office-Institutional, which would allow hotels. *See Finch*, 325 N.C. 352, 355-56, 384 S.E.2d 8, 10 (1989). The plaintiffs worked on planning the motel for several years and leased the property with an option to purchase it at the end of the lease. *See id.* at 356-60, 384 S.E.2d at 10-12. In 1984, the plaintiffs entered into an agreement with

Red Roof Inns providing for Red Roof Inns to construct the motel and lease the property from plaintiffs. *See id.* The plaintiffs had to exercise their option to purchase by giving notice by 1 May 1985; if they did not, the lease would end in June 1985. *See id.* The plaintiffs exercised the option, but a rezoning request for the property was under consideration during April 1985, and on 6 May 1985, the Durham City County adopted an amendment to the zoning, changing it back to R-10, residential. *See id.* at 355-60, 384 S.E.2d at 10-12. Therefore, when the plaintiffs exercised the option to purchase, they knew that a proposed change to the zoning was pending, although it had not yet been approved. *See generally id.* at 356-57, 384 S.E.2d at 10-11.

The plaintiffs brought a declaratory judgment and damages lawsuit against Durham with claims quite similar to this case which included

> six claims: (1) that the zoning ordinance be invalidated as arbitrary, capricious, discriminatory and unreasonable; (2) that the zoning ordinance be invalidated as a “taking” under the state and federal Constitutions; (3) that the City of Durham be found liable for inverse condemnation under N.C.G.S. § 40A-51, and pay damages of $700,000; (4) that the City of Durham be estopped from enforcing the zoning ordinance and the subsequent general ordinance requiring a use permit; (5) that should the zoning ordinance be invalidated, the City of Durham be found liable for a “temporary taking” and plaintiffs be compensated under N.C.G.S. § 40A-51 in the amount of $100,000; and (6) that the City of Durham be found liable under 42 U.S.C. § 1983 for a taking and compensate plaintiffs in the amount of $700,000 and costs and attorney’s fees.

Id. at 358, 384 S.E.2d at 11.

Some of the plaintiffs’ claims were dismissed by summary judgment but some proceeded to a jury trial. *See id.* at 358, 384 S.E.2d at 11-12. But on appeal of various issues and rulings, the Supreme Court ruled in favor of the City of Durham on all claims. *See id.*, 325 N.C. 352, 384 S.E.2d 8. Regarding the plaintiffs’ decision to exercise their option to purchase despite knowledge of a pending proposal to change the zoning, the Court stated:

> [W]here an investor knows of a pending ordinance change proposed by a city planning board to the city council, the investor has no valid claim that he relied upon the prior ordinance in guiding his investment decision. An investor

> may speculate on regulatory changes, but the purchase price is irrelevant to the reasonableness of the current restriction. To hold otherwise would constitute a windfall to the investor at taxpayer expense.
>
> In analyzing the distinct investment-backed expectations of plaintiffs, we note the City Council enacted the zoning change on 6 May 1985, seven days after plaintiffs were under an equitable obligation to perform the purchase contract. However, the undisputed evidence shows that plaintiffs chose to exercise their option to purchase the property on 29 April 1985. *This was some twenty-seven days after plaintiffs knew of the recommendation by the Durham Planning and Zoning Commission to rezone the property to R-10. Plaintiffs' expectations of investment return were in fact based on a speculative risk that the Durham City Council would not rezone the property to prohibit the proposed Red Roof Inn project.*
>
> Plaintiffs argue that exercise of the option was necessary to protect prior financial investment in the property. It is axiomatic, however, that the purpose of an option contract is to minimize investment exposure to adverse changes in the business environment by postponing for an extended period the decision to accept or reject an offer. *When such changes threatened, plaintiffs chose to ignore the warning clouds. They cannot now say that they reasonably expected an investment return untroubled by zoning changes.*

Finch v. City of Durham, 325 N.C. 352, 366–67, 384 S.E.2d 8, 16–17 (1989) (emphasis added) (citations omitted).

As noted above, vested rights cases are normally based upon an actual or pending *amendment* to a zoning ordinance after a landowner has made substantial expenditures or entered into contractual obligations as part of developing the land. Here, there was no change in zoning and Defendant's action which Plaintiff seeks to permanently enjoin is its enforcement of this Court's mandate from litigation challenging Plaintiff's project which was pending before a building permit was issued or any construction occurred. Although we are not aware of a North Carolina case which has directly held that a landowner may not acquire a vested right to develop land in a certain way where there is pending litigation directly challenging the proposed development, we conclude that *actual* litigation challenging the plan is a far stronger factor in eliminating the landowner's reasonable expectations than the landowner's knowledge of a pending rezoning proposal, as in *Finch*. *See generally id.*, 325 N.C. 352, 384 S.E.2d 8. In addition, although in dicta, our Supreme Court has cited with approval several cases from other states which do address whether vested rights may accrue when the landowner knows of a pending lawsuit which may affect use of the land:

> In *Omaha Fish & Wildlife Club, Inc. v. Community Refuse Disposal, Inc.*, 213 Neb. 234, 329 N.W.2d 335 (1983), the Nebraska Supreme Court refused to apply the doctrine of "vested rights" for the benefit of defendant landowner. That court found that expenditures made by defendant with knowledge that a lawsuit had been filed challenging his proposed use were not made in good faith.
>
> In an analogous situation, the Supreme Court of Hawaii held that a resort developer proceeded at his own risk where he made expenditures despite notice that a petition had been certified for a public referendum which would (and, when passed, did) prohibit the proposed use. The court refused to apply the "vested rights" or "equitable estoppel" doctrines to allow property rights to vest. *County of Kauai v. Pacific Std. Life Ins.*, 65 Haw. 318, 653 P.2d 766 (1982), *appeal dismissed*, 460 U.S. 1077, 103 S.Ct. 1762, 76 L.Ed.2d 338 (1983).
>
> In *Bosse v. City of Portsmouth*, 107 N.H. 523, 226 A.2d 99 (1967), the Pace Industrial Corporation had successfully persuaded the local administrative body to rezone its particular tract from residential to light industrial. Adjoining landowners had sought two injunctions to prevent the proposed use, and during the hearings, the trial court had twice warned Pace that it proceeded with construction at its own peril. The New Hampshire Supreme Court held that the designation change procured by Pace constituted unlawful "spot zoning" and stated that Pace had taken a "calculated risk" in proceeding with construction after plaintiffs had twice instituted legal proceedings seeking to enjoin the construction. Quoting from the Master's order below, the court went on to note:
>
>> " 'Under the circumstances, and considering the fact that the Pace Industrial Corporation was aware that this was a Residential Zone at the time the purchase was made, and was aware shortly

> after the passage of the ordinance that the validity of this particular zone would be attacked, the Master finds that no vested interest accrued to Pace Industrial Corporation.' "

Id. at 532, 226 A.2d at 107.

Finally, in an often-cited Florida Supreme Court case, *Sakolsky v. City of Coral Gables*, 151 So.2d 433 (Fla. 1963), that court held that knowledge by a developer that a political contest in which the success of certain candidates might alter the voting pattern of the municipal body did not prevent good faith reliance on an act of the current governing body. However, the court was careful to point out that

> "[t]he effect of pending litigation directly attacking the validity of a permit or zoning ordinance, or the effect of an eventual determination that such permit was invalid, may present a very different problem. The decision in the instant case was not rested on any showing that petitioner, at the time he acted in reliance on the permit granted him, was a party defendant in legal action directly attacking its validity, that he had any notice that his permit might have been invalid in its inception, or that its revocation was in fact required in the public interest."

Id. at 436 (footnote omitted). *See generally* Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urban L. Ann. 63, 80.

A trial court could conclude that application of the "vested rights" doctrine is inappropriate on the facts of this case and hold that when the landowner here incurred expenses with the knowledge that a lawsuit had been filed challenging the validity of the zoning ordinance amendment under which the landowner had obtained his building permit, he proceeded at his peril and thereby acquired no vested rights in the use of the property which is prohibited as a result of a judicial declaration that the ordinance amendment was invalid. In such a situation, it could not be said that the landowner had expended funds

> in good faith and in reasonable reliance upon a building permit issued pursuant to the challenged amendment.

Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 64 n.2, 344 S.E.2d 272, 280 n.2 (1986).

Here, Plaintiff also took a calculated risk to proceed with construction while litigation challenging her project's approval was pending. Plaintiff could not accrue a vested right to construct or occupy the project where she knew of the potential effect of pending litigation – particularly since the Plaintiff herself was a party to that litigation. The litigation in *Long* challenged Defendant's approval of Plaintiff's plans, but Plaintiff decided, upon consideration of many factors as described in her affidavit, she would proceed with construction. *See generally Long* ___ N.C. App. ___, 787 S.E.2d 835. Plaintiff believed she would prevail on the *Long* appeal because her plans had been approved by the BOA and by the Superior Court, so she demanded a building permit and sought to complete construction before the *Long* appeal was concluded. After issuance of the *Long* opinion, Plaintiff sought the preliminary injunction at issue here so she could continue to build and use the project. Plaintiff even moved to dismiss this appeal as moot because she had completed the project in spite of the issuance of the opinion in *Long*.

Plaintiff also argues that since no one stopped her, she could continue to build. Defendant issued the building permit, which it had a duty to do based upon the Superior Court's approval of the BOA's ruling. Plaintiff argues that either Defendant or the Longs should have sought injunctive relief against her to stop her construction. But in *Godfrey*, our Supreme Court rejected a similar argument:

> We disagree with the suggestion of the panel below that plaintiffs and others similarly situated must resort to obtaining or attempting to obtain injunctive relief in order to protect their property interests against unlawful actions of a zoning board. Plaintiffs were well within their rights in electing to challenge the 1980 amendment through a declaratory judgment action rather than attempting, possibly in vain, to raise sufficient bond in order to procure an injunction.
>
>> A suit to determine the validity of a city zoning ordinance is a proper case for a declaratory judgment. The plaintiffs, owners of property in the adjoining area affected by the ordinance, are parties in interest entitled to maintain the action.

> *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E.2d 78; *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325.
>
> The adjoining property owners should not be called upon to suffer to protect the financial investment of one who acts at his own peril with forewarning of the possible consequences. If the law were otherwise, there would be no protection from a zoning board which, unlike the situation before us, might act from purely corrupt motives. If one, in a situation such as the one at bar, could be assured that a major investment would be protected regardless of the outcome of his gamble, a comprehensive zoning ordinance would offer little or no protection to those who have relied upon that ordinance.

Godrey, 317 N.C. at 67, 344 S.E.2d at 281 (citations omitted).

Just as in *Godfrey*, neither Defendant nor adjacent property owners were required to take *additional* legal action "to protect the financial investment of one who acts at his own peril with forewarning of the possible consequences." *Id.* Plaintiff knew of the potential consequences of her decision to construct the home as it is designed and in the location she chose. She did not even *begin* construction until after the Superior Court order in *Long* was on appeal, so if she did not know before then, she knew about the potential for reversal when that appeal was taken. Both the Long's counsel and Defendant specifically warned Plaintiff of the risks of proceeding with construction. Plaintiff knowingly chose to gamble that the order in *Long* would not be reversed, and she lost that gamble. The consequences of delaying construction may have also been harsh, and Plaintiff had to make a difficult choice, but the choice was hers to make:

> The ultimate result in cases such as this may indeed be harsh. As this Court said in *City of Raleigh v. Fisher*, 232 N.C. 629, 61 S.E.2d 879 (1950):
>
>> Undoubtedly this conclusion entails much hardship to the Defendants. Nevertheless, the law must be so written; for a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it.

Id. at 67, 344 S.E.2d at 281–82. Plaintiff is not likely to prevail on her vested rights claim, and thus it is not a proper basis for a preliminary injunction.

V. Conclusion

We have examined each of Plaintiff's causes of action and determined that none have a likelihood of success for the purposes of entering a preliminary injunction. Because the order below must be reversed, we need not address Defendant's other contentions of why Plaintiff's preliminary injunction should be reversed, including arguments that Plaintiff failed to properly appeal the March 2017 determination letter from Mr. Woody; that Plaintiff's claims are barred by the statute of limitations; that Plaintiff has unclean hands; and that Plaintiff has an adequate remedy at law.

On *de novo* review, Defendant has borne its burden of showing that the trial court's preliminary injunction was erroneous. Even if Plaintiff has demonstrated the potential for harm and substantial financial loss, she has not demonstrated a likelihood of success on any of her causes of action. The preliminary injunction is hereby reversed. "[T]he mandate of an appellate court is binding on the trial court, which must strictly adhere to its holdings." *Campbell v. Church*, 51 N.C. App. 393, 394, 276 S.E.2d 712, 713 (1981). This matter is remanded to the trial court for further proceedings consistent with this Court's opinion in *Long* and this opinion.

REVERSED and REMANDED.

Judges DAVIS and ARROWOOD concur.

CRISTAL A. MARSH (now Kurfees), Plaintiff
v.
TIMOTHY B. MARSH, Defendant

No. COA17-457

Filed 15 May 2018

Child Custody and Support—custody—modification—visitation—temporary order—substantial change of circumstances not needed

The trial court did not err by entering an order modifying visitation in a child custody case without making sufficient findings showing a substantial change in circumstances where the initial order was a temporary custody order. The trial court stated in the original order that its findings would not be binding on the parties in future hearings; the conclusions were consistent with a temporary order; the order stated at one point that it was temporary; and it was clear from the plain language of the parties that it was entered without loss or other prejudice to the rights of the parties.

Appeal by plaintiff from order entered 15 December 2016 by Judge Mark L. Killian in Iredell County District Court. Heard in the Court of Appeals 19 October 2017.

Homesley, Gaines & Dudley, LLP, by Christina Clodfelter, for plaintiff-appellant.

Bowling Law Firm, PLLC, by Kirk L. Bowling, for defendant-appellee.

BERGER, Judge.

Cristal A. Marsh ("Plaintiff") appeals from a child custody order entered on December 15, 2016 granting Timothy B. Marsh's ("Defendant") motion to modify child custody and denying Defendant's motion for attorney's fees. Plaintiff argues the trial court erred by entering the order without making sufficient findings of fact showing a substantial change in circumstances regarding the child's welfare since the entry of a child custody order on September 16, 2014. We disagree.

Factual and Procedural Background

Plaintiff and Defendant were married on August 5, 2000, and one minor child was born of the marriage. The parties separated on June 27, 2007, and executed a Separation and Property Settlement Agreement ("the Agreement") on March 3, 2009. On May 11, 2009, the trial court entered a divorce decree which incorporated the Agreement. The trial court's order set a visitation schedule between the parties that entitled Defendant to a "substantial and loving relationship with the child," with visitation to be mutually agreed upon by the parties. Defendant's initial visitation arrangement was every other weekend from Friday to Sunday.

On July 25, 2014, Defendant filed a motion to modify child custody, for psychological assessments, and attorney's fees alleging a substantial change in circumstances concerning the visitation schedule and lack of consistent application of the Agreement in the May 2009 Order. Defendant's motion specifically alleged that Plaintiff had deprived Defendant of visitation with the minor child for extended periods of time in 2010 through mid-2011, and cut short pre-planned visits based on Plaintiff's schedule. In 2012, Defendant was only able to see the minor child on average once a month, and eventually not at all due to Plaintiff's refusal to respond to Defendant's emails, letters, and phone calls. In March 2014, Defendant attempted to visit the minor child, but Plaintiff refused to communicate with Defendant or honor the May 2009 Order and Agreement. In April 2014, Defendant contacted the minor child's doctor's office to review her medical records, and Plaintiff delayed giving medical information to Defendant. Defendant attempted to specifically contact the minor child on her birthday and holidays, including Christmas 2012 and 2013, but was never able to reach her. Defendant further requested psychological assistance with the minor child to help her develop a loving relationship with him after such a prolonged separation from her father.

On August 19, 2014, the trial court denied Defendant's motion for a psychological assessment of both Plaintiff and the minor child for lack of evidence of a mental health disorder requiring an assessment. In the same order, the trial court mandated that both Plaintiff and Defendant attend mediation and a parenting class.

On September 16, 2014, the trial court entered a "Temporary Child Custody Order" that granted primary custody to Plaintiff and visitation to Defendant. The September 2014 Order found that Defendant had been deprived of seeing the minor child for extended periods of time, and that the minor child was excited about seeing Defendant again regularly. Further, the trial court found that both parents were fit and proper to exercise temporary custody of the minor child. The September 2014 Order further set out a temporary visitation schedule for Defendant to exercise until further notice, and found that it was in the best interests of the minor child to have a relationship with both parents. The parties performed under the schedules outlined in the September 2014 Order until 2016.

Defendant filed a second notice of hearing on his motion for modification of child custody and attorney's fees on August 31, 2015. The trial court conducted a hearing on Defendant's motions for modification of child custody and attorney's fees in September 2016. A permanent child custody order was entered on December 15, 2016 granting Defendant primary custody of the minor child and visitation to Plaintiff. Plaintiff timely appeals from the December 2016 Order.

Standard of Review

"[W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582, *disc. review denied*, 363 N.C. 375, 678 S.E.2d 670 (2009) (citation omitted); see also *File v. File*, 195 N.C. App. 562, 567, 673 S.E.2d 405, 409 (2009).

Analysis

Plaintiff argues that, although the September 2014 Order was labeled a temporary order, it was a permanent order because more than a "reasonably brief" amount of time had passed since the temporary order was entered, the order failed to set forth a specific reconvening date, and the order determined all issues relating to custody of the minor child. Plaintiff further contends the trial court erred by modifying the September 2014 Order without finding a substantial change in circumstances. We disagree.

"An order is temporary if either (1) it is entered without prejudice to either party; (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Peters v. Pennington*, 210 N.C. App. 1, 13-14, 707 S.E.2d 724, 734 (2011) (citations, quotation marks, and brackets omitted). "In its elementary sense the word 'or' . . . is a disjunctive particle indicating that the various members of the sentence are to be taken separately." *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (citation and internal quotation marks omitted). For the reasons discussed below, the September 2014 Order was entered without prejudice to either party, and was a temporary custody order. Accordingly, we do not need to address the remaining disjunctive elements of the permanency test.

An order is "without prejudice" if it is entered "[w]ithout loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party." *Without Prejudice*, Black's Law Dictionary (8th ed. 2004); *see also Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (holding the custody order was entered "without prejudice" because it contained express language stating as such); *File*, 195 N.C. App. at 568, 673 S.E.2d at 410. A temporary custody order is not determinative of all material issues, and leaves open the possibility of a hearing on the merits for permanency. *See Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677; *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000); *Lamond v. Mahoney*, 159 N.C. App. 400, 404, 583 S.E.2d 656, 659 (2003). "If a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change of circumstances." *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002).

Here, the trial court stated at the outset of the September 2014 Order, "[s]ince the [c]ourt placed time limits on the parties, the <u>Findings of Fact</u> *will not be binding on the parties in future hearings*." (Emphasis added). In addition, Finding of Fact #9 indicates the court and the parties contemplated the September 2014 Order to be temporary:

> After the hearing last week, the parties were able to agree on some visitation. It was not as much as the Defendant would have desired. It was consistent with the Plaintiff's desire to have a gradual process. It began with 4 hours one Saturday, 24 hours the next weekend.

The trial court made conclusions of law consistent with a temporary order:

> 1. The mother is a fit and proper person to have temporary primary custody of the minor child . . . *pending further orders of the Court.*
>
> 2. The father is a fit and proper person to have *temporary* reasonable visitation with the minor child.
>
> 3. It is in the best interest of the minor child that *temporary* primary custody remains with the mother[,] with the father having joint custody in the form of reasonable visitation.

(Emphasis added).

The September 2014 Order also recognized that "Defendant is still driving more, but in case the Plaintiff has trouble getting off work, the exchange is closer to her house and *this is a temporary order*." (Emphasis added). Litigation continued between the parties after the entry of the temporary order regarding child custody, indicating the intent of the parties and trial court regarding the status of the case as ongoing. *See Miller v. Miller*, 201 N.C. App. 577, 580, 686 S.E.2d 909, 912 (2009). Even though the trial court did not include express language in the order stating it was entered "without prejudice," it is clear from the plain language of the order that it was entered without the loss of rights, or otherwise prejudicial to the legal rights of either party. Consequently, we hold the September 2014 Order was a temporary custody order.

The trial court was not required to find a substantial change in circumstances between the temporary September 2014 Order and the permanent December 2016 Order. *See LaValley*, 151 N.C. App. at 292, 564 S.E.2d at 915. The plain language of the September 2014 Order shows that it was both entered without prejudice to either party and did not fully adjudicate the facts concerning the best interests of the child. The custody arrangements were tailored to be an intermediate solution, not a permanent determination of custody and visitation, until the facts of the case could be fully adjudicated. Accordingly, the trial court did not err when entering the December 2016 Order and made the necessary findings of fact and conclusions of law considering the child's best interests.

Conclusion

The September 2014 Order was a temporary custody order as it was entered without prejudice to the parties in a way that does not harm or cancel their legal rights or privileges. Accordingly, the trial court did not err when entering the December 2016 Order.

AFFIRMED.

Judges DAVIS and ZACHARY concur.

JAMIE LUNSFORD MASTNY, Plaintiff
v.
CHAD JOSEPH MASTNY, Defendant

No. COA17-1171

Filed 15 May 2018

Child Custody and Support—change of circumstances—nexus between change and child's welfare—findings

The trial court in a child custody case failed to follow the mandate of the Court of Appeals to reconsider whether a significant change of circumstances affecting the child's welfare had occurred and, if so, whether modification of the custody provisions of the prior consent order would be in the child's best interest—and to demonstrate these through sufficient additional findings of fact. The trial court merely rearranged and reworded its previous order.

Appeal by defendant from order entered 17 May 2017 by Judge Christine M. Walczyk in Wake County District Court. Heard in the Court of Appeals 18 April 2018.

Laura C. Brennan for plaintiff-appellee.

Tharrington Smith, LLP, by Steve Mansbery and Jeffrey R. Russell, for defendant-appellant.

TYSON, Judge.

Defendant appeals from an order modifying custody of his minor child. We reverse the order and remand.

I. Background

This appeal is before this Court a second time. *Mastny v. Mastny*, __ N.C. App. __, 796 S.E.2d 402, 2017 N.C. App. LEXIS 101 (2017) (unpublished) (hereinafter "*Mastny I*"). Jamie Lunsford Mastny ("Plaintiff") and Chad Joseph Mastny ("Defendant") originally settled the custody arrangements for their minor child, Tyler, by entering into a consent order in 2012.

This order entitled Defendant to "alternating weekend visitation from Thursday at the recess of school until Monday morning" when Tyler would return to school. On the weeks Defendant did not have weekend visitation, he was entitled to overnight visitation on Thursdays.

Additionally, Defendant was granted two "floating days" per month for visitation. Each party was guaranteed one week of vacation with Tyler in the summer.

Between 2013 and 2015, both Defendant and Plaintiff sought to modify the custody arrangement. The use and scheduling of the "floating days" was at issue in each motion for modification. The trial court first mandated make-up visitation days for Defendant in 2013, since Plaintiff had allegedly denied his exercise of these floating visitation days seven times without reason.

In the 2015 order modifying custody, the trial court eliminated these "floating days" from the custody schedule. During the school year, Defendant was entitled to an alternating weekend visitation spanning from the end of the school day on Friday to the beginning of school on Monday. Summer visitation was to follow an alternating week schedule.

Defendant appealed the 2015 order to this Court. In *Mastny I*, this Court reversed the portions of the 2015 order that had modified the custody schedule from the prior consent order, and remanded to the trial court. *Mastny*, 2017 N.C. App. LEXIS 101 at *26. Upon remand, the trial court was ordered to

> revisit the question of whether there has been a significant change of circumstances affecting Tyler's welfare and, if so, whether modification of the custody provisions of the prior consent order would be in Tyler's best interest. *If* the trial court decides that modification of the custody provisions of the prior consent order are warranted, it *shall* demonstrate through sufficient additional relevant findings of fact that there is a nexus between any change in circumstances and Tyler's welfare, and that any particular modifications of the custody portions of the prior consent order are in Tyler's best interest.

Id. (emphasis supplied).

Upon remand, the trial court did not receive or hear any additional evidence. On 17 May 2017, the trial court entered an order modifying child custody that contained additional findings of fact and conclusions of law, but retained the identical custody schedule from 2015. Defendant timely appealed.

II. Jurisdiction

An appeal of right lies to this Court from a child custody order entered in a district court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2017).

III. Issues

Defendant argues the trial court erred by failing to follow the mandates of *Mastny I* by: (1) making certain findings of fact; (2) failing to make sufficient findings of fact to support conclusion of law #4; (3) failing to show modification was in the best interests of Tyler and in response to the substantial changes; (4) reducing Defendant's physical custody time; and, (5) failing to promote the policy of the State articulated in N.C. Gen. Stat. § 50-13.01.

IV. Analysis

A. Standard of Review

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted). "[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011). Conclusions of law must be supported by the findings of fact. *Id.* "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006) (citation omitted).

B. Findings of Fact

Defendant argues insufficient evidence supports Findings of Fact 24(j), 24(g), 15A(a), 15A(b), 15A(c), 15A(e), 16A, 17A, and 27. Plaintiff only addresses Finding of Fact 24(j) in her brief.

Finding of Fact 24 states, in relevant part:

> 24. Since the entry of this Order, there has been a substantial change of circumstances justifying this court to assume jurisdiction to modify the August 13, 2012 Order as it relates to the custodial schedule in that:
>
> . . . .
>
> (g) Plaintiff sometimes requires Tyler to facetime with his father outside;
>
> . . . .
>
> (j) Defendant has inappropriate boundaries concerning Plaintiff. Following the first day of trial and

> after learning Plaintiff's salary at Trinity Academy, Defendant called Plaintiff's boss to ask him to give her a raise. Defendant had previously asked Plaintiff's employer for information on the tuition discount Plaintiff was entitled to as a result of her employment at Trinity. This behavior undoubtedly put the Plaintiff's employment at Tyler's school, and the family's financial security, at risk[.]

Finding of Fact 24(j) was partially included in the 2015 modification order, with the final sentence being added upon remand. We previously found "Defendant's having 'inappropriate' boundaries concerning Plaintiff could theoretically affect Tyler's welfare, but there are no findings of fact supporting any conclusion that this has happened." *Mastny I*, 2017 N.C. App. LEXIS 101 at *23.

Plaintiff argues the effects of Defendant's actions are "self-evident" requiring no "evidence directly linking the change to the effect on the child." *In re A.C.*, __ N.C. App. __, __, 786 S.E.2d 728, 743 (2016) (citation and internal quotation marks omitted). Whether or not Defendant's actions contacting Tyler's school were inappropriate, it cannot be presumed, and is hardly "self-evident," that Defendant's contacting Plaintiff's employer "undoubtedly" jeopardized Plaintiff's position at the school or placed the "family's financial security [] at risk." No new evidence was offered at the hearing upon remand. This finding is unsupported by any substantial evidence. *See Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

Finding of Fact 24(g) is also not supported by competent evidence. Finding 24(g) was slightly modified from the 2015 order, where it was labeled 15(g) and read: "Plaintiff does not allow [Tyler] to facetime with Defendant in her residence; rather, she makes the minor child go outside to facetime with Defendant." This Court previous found "substantial record evidence" to support the 2015 finding. *Mastny*, 2017 N.C. App. LEXIS 101 at *12. As no new evidence was taken or received upon remand, no evidence supports the change of Plaintiff "making" Tyler go outside to facetime with his father to "sometimes requir[ing]" Tyler to go outside. It is unclear why the trial court altered this Finding of Fact.

A similar change in the Findings of Fact from the 2015 order can be seen in Finding 17A, which reads:

> 17[A]. As stated previously, there have been disagreements about the floating days which have prevented the Defendant from having the children for specific events such as the family wedding and NC State football games.

> Plaintiff has sometimes been inflexible on these matters. She has also made the child talk with his father outside the house on occasion. Despite these things, Plaintiff is less likely, based on the evidence presented, to involve the children directly in the parties' conflict.

This finding not only reiterates the new, occasional nature of Plaintiff requiring Tyler to speak to his father outside, but also modified the related finding from the 2015 order, which read:

> 16. Plaintiff has unreasonably denied Defendant extra custodial time with the children for specific events and refused to modify the schedule that would have provided the children with experiences with Defendant such as the family wedding and NC State football games.

Upon remand, and without additional evidence to support the change, the trial court now finds Defendant was "prevented . . . from having the children for specific events" because the Plaintiff "has sometimes been inflexible," whereas previously the trial court had found Plaintiff's denial of these requests unreasonable. There is no substantial evidence to support the changes in Finding of Fact 17A. We will consider in greater detail below the trial court's conclusion that the Plaintiff is less likely to involve the children in the parties' conflict.

Finding of Fact 15A reads in relevant part:

> 15[A]. These changes have affected Tyler negatively in the following ways:
>
> > (a) Because the parties communicate ineffectively and cannot agree on floating days, Tyler has missed certain sporting, cultural and family events such as NC State Football games and an out-of-state wedding[.]
> >
> > (b) There are no consistent rules or expectations between homes concerning the use of phones, online gaming, and television and movie viewing. This makes it difficult for Tyler, an eight year old boy [now ten years old], who is going back and forth between homes regularly[.]
> >
> > (c) Tyler is aware of his parent's conflict.
>
> . . . .

> (e) Because the parties do not communicate effectively and there are multiple exchanges during the school week, Tyler has not had things for school such as uniforms and supplies for classroom projects and/or activities.

Substantial record evidence supports Findings 15A(a), (c), and (e). There is evidence to support the lack of consistent rules as indicated in Finding 15A(b). We return to these Findings as they relate to the nexus between the substantial change and Tyler's welfare and best interests, below.

No substantial evidence supports Finding of Fact 16A:

> 16[A]. The changes have affected Tyler positively in the following ways:
>
> > (a) Due to Plaintiff's new work schedule at the child's school, Plaintiff is able to be involved with the children's educational pursuits on a daily basis. This has proved beneficial to Tyler to have a parent employed at his school as evidenced by his good grades.

No evidence or prior findings tends to show Tyler was doing poorly in school prior to Plaintiff's employment therewith, nor is there evidence that his good grades are related to his mother's employment at the school.

Finding of Fact 27 is most appropriately considered as a conclusion of law, and is discussed below.

<u>C. Nexus Between Changed Circumstances; Effect on Welfare and Best Interests</u>

Defendant argues the trial court failed to find facts showing the required nexus between the changed circumstances and Tyler's welfare, and erred by concluding:

> 4. Modification of the child custody provisions set forth in the Consent Order is in Tyler's best interest, promotes his best interest, and directly addresses needs indicated by the substantial changes in circumstances affecting Tyler's best interest.

"The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. The trial court can only modify an existing order after it determines the change affected the child's welfare and modification is in the child's best interests. *Id.*

"[Be]fore a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection." *Id.* at 478, 586 S.E.2d at 255 (citation omitted). Upon remand, the trial court attempted to meet this requirement through modifying the wording of the findings it had previously made in 2015, but failed to follow the mandate we prescribed in *Mastny I*.

The modification in Finding 17A, "Plaintiff is less likely, based on the evidence presented, to involve the children directly in the parties' conflict," is unsupported by the evidence. The trial court attempted to soften its findings concerning Plaintiff's behavior in order to "shoehorn" this finding and tie the changed circumstances to Tyler's welfare. The 2015 and 2017 modifications removed the conflict over the "floating days," but it appears Plaintiff would be less likely to involve the children in the conflict only because she would not be provided an opportunity to unreasonably deny Defendant access to the children, as she had in the past.

We previously discussed how Finding of Fact 15A, related to the 2015 modification:

> Finding[] 15A(a) . . . involve[s] Plaintiff's unwillingness to allow Defendant access to Tyler for specific events. To the extent Plaintiff's unwillingness in this regard constituted a substantial change that affected Tyler's welfare, it was a change of Plaintiff's making, and the 21 December 2015 modification order does not address this situation. The concerns implicit in findings 15A(c) and (d) are likewise not addressed by the 21 December 2015 order. Rearranging the custody schedule will not serve to make rules between the two homes more consistent, nor remove Tyler from the "middle" of any conflicts between Plaintiff and Defendant, with the possible exception that removal of the "floating" days dispenses with one source of prior conflict.
>
> . . . .
>
> In finding 15A(e) the trial court found that "[t]he children have not had things for school such as uniforms and supplies for classroom projects and/or activities." By reducing the number of times Tyler changes custody during

> the school year to once every two weeks instead of once every week, the trial court has reduced the chances that Tyler might not have access to certain items he needs for school because they have been left at the other parent's home. However, we do not find that this benefit is enough to support a conclusion that modifying the consent order in the manner done in the 21 December 2015 order was in Tyler's best interest. While it may well be correct . . . that "[a] specific and detailed custody order will reduce the conflict between the parties[,]" we hold there are insufficient findings of fact concerning how the trial court's modifications will reduce conflict between Plaintiff and Defendant to such an extent that the modifications made were in Tyler's best interest.

Mastny, 2017 N.C. App. LEXIS 101 at *22-24. This reasoning from *Mastny I* equally applies to the current appeal.

Finding of Fact 27 appears to have been drafted by the trial court as a way to remedy the errors in the 2015 order. Finding 27 states:

> 27. It is in the best interest of the minor child that the number of back and forth exchanges during the school year be reduced and that Tyler has a more consistent "home base" during the school year. This will enable Tyler to have more consistent rules and expectations at home during the school year, and reduce the number of times he is missing equipment or school supplies. It is [i]n Tyler's best interest that the "home base" be Plaintiff's home for the following reasons:
>
> > a. Plaintiff is employed at the children's school and has more time to spend with the [sic] Tyler during the work/school week;
> >
> > b. Plaintiff is able to transport Tyler to and from school daily;
> >
> > c. Tyler's time in the care of Defendant's employees and at Defendant's office will be reduced;
> >
> > d. Tyler will have regular and consistent time with Reagan; and
> >
> > e. Plaintiff is less likely to involve the children in the conflict between the parties.

Again, no finding shows how changing custody would make the rules between the homes more consistent, nor does the reduction of the number of times he may be missing something for school justify a change in custody. *See id.*

Plaintiff's employment at the children's school does not have any bearing on Tyler's custody, nor does it support a conclusion that Plaintiff's home is a more appropriate "home base." No evidence suggests Defendant has had any issue with taking the children to or from school. The fact that Defendant employs a caretaker for the children while he finishes his workday does not support a conclusion that his home is not appropriate for weekday visitation. In fact, the record shows the children attend after-school care or activities while Plaintiff also finishes her workday at the school.

"There are no findings, and there is no evidence, that Tyler will be afforded more opportunities to spend time with Reagan as a result of the modification[.]" *Id.* at *23. As stated above, the evidence does not support the conclusion that Plaintiff is less likely to involve the children in the parties' conflict. "In short, these findings of fact do not support a conclusion that the modification of the existing custody consent order, in the manner ordered by the trial court, served to promote Tyler's best interests." *Id.*

The trial court failed to follow and apply the mandate set forth in *Mastny I*. As before,

> the trial court's findings of fact are not sufficient to demonstrate the nexus between the change of circumstances and any effect on Tyler's welfare. Further, the 21 December 2015 order [and the 2017 order on remand] fails to demonstrate that the particular remedy chosen – a significant reduction in Defendant's custodial time for nine months with an increase in Defendant's custodial time for three months – addresses the concerns raised in light of any change in circumstances.

Id. at *25.

We reverse the 2017 order and remand. In light of our holding, we do not address Defendant's argument concerning the policy of N.C. Gen. Stat. § 50-13.01 (2017).

V. Conclusion

The holding in *Mastny I* was clear: the trial court had failed to find a nexus between the changed circumstances and Tyler's welfare, and failed to support its conclusion that the specified modification addressed the changes and was in Tyler's best interest. *See Mastny*, 2017 N.C. App. LEXIS 101 at *25-26. This Court also provided detailed guidance based upon *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. Instead of making findings upon remand to demonstrate the nexus between the substantial changes and Tyler's welfare, the trial court merely rearranged and reworded its previous order, bringing the same failures to this Court for a second time.

It appears the trial court did not reconsider its conclusion there had been a substantial change. It may still do so upon this remand. If the court still concludes a substantial change has occurred, the trial court must make the required findings of fact to demonstrate how the substantial change affects Tyler's welfare. If a substantial change did not occur, or if it did occur, but it did not affect the child's welfare, "the court's examination ends, and no modification can be ordered." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

If the trial court finds a substantial change occurred that affected Tyler's welfare, the trial court must then determine if the proposed modification is in Tyler's best interest <u>and</u> is in response to the identified substantial changes. All of these findings must be supported by substantial evidence in the record. As several years have passed since a full evidentiary hearing was conducted in this matter, new and additional evidence may be presented upon remand.

This Court previously reversed portions of the 2015 order and remanded. The trial court subsequently entered the 2017 order, presently before us, which is indistinguishable in substance from the 2015 order. We reverse the 2017 order, effectively putting the parties back under the initial 2012 consent order.

We again remand to the trial court for additional findings and conclusions consistent with this opinion and the prior mandate set forth in *Mastny I*. Any visitation due to Defendant under the 2012 consent order, but missed due to Plaintiff's actions and the trial court's 2015 and 2017 orders, must be credited and provided to Defendant upon remand. *It is so ordered.*

REVERSED AND REMANDED.

Judges ELMORE and ZACHARY concur.

MAGGIE B. McDONALD, Plaintiff
v.
THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION fka The Bank of New York Mellon Trust Company N.A., as successor to JPMorgan Chase Bank, N.A., as successor in interest to Bank One, National Association, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates Series 2001-RS3, SPECIALIZED LOAN SERVICING, LLC, and SUBSTITUTE TRUSTEE SERVICES, INC., in its capacity as Substitute Trustee, Defendants

No. COA17-1310

Filed 15 May 2018

1. Mortgages and Deeds of Trust—permanent loan modification agreement—preconditions—time-is-of-the-essence payment

In an action to enjoin a foreclosure sale, plaintiff mortgagor failed to allege sufficient facts to show that a permanent loan modification agreement was binding upon defendant mortgagee parties, so the trial court properly dismissed her contractual claims pursuant to Rule of Civil Procedure 12(b)(6). Plaintiff's complaint showed that she failed to make a time-is-of-the-essence payment that was required to make the permanent loan modification agreement become effective.

2. Mortgages and Deeds of Trust—permanent loan modification agreement—preconditions—foreclosure—unfair or deceptive trade practices

Where plaintiff mortgagor failed to remit a time-is-of-the-essence payment to make a permanent loan modification agreement become effective, defendant mortgagee parties had no obligation to accept her subsequent payments under the terms of that agreement and were within their rights to initiate foreclosure proceedings against her. Plaintiff thus failed to state a claim for unfair or deceptive trade practices against defendants.

Appeal by plaintiff from order entered 1 September 2017 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 18 April 2018.

Legal Aid of North Carolina, Inc., by Celia Pistolis, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough, L.L.P., by Donald R. Pocock, for defendant-appellees.

TYSON, Judge.

Maggie B. McDonald ("Plaintiff") appeals the trial court's 1 September 2017 order granting The Bank of New York Mellon Trust Company, National Association's f/k/a The Bank of New York Mellon Trust Company, N.A. as successor to JPMorgan Chase Bank, N.A., as successor-in-interest to Bank One, National Association, as Trustee For Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates Series 2001-RS3 ("Bank of New York Mellon") and Specialized Loan Servicing, LLC's ("SLS") (collectively, "Defendants") motion to dismiss. We affirm.

I. Background

Plaintiff and her husband, Turnal D. McDonald, have lived at the same house situated in Fayetteville, North Carolina for over sixteen years. On 12 June 2001, Plaintiff obtained a fifteen-year mortgage loan from Decision One Mortgage Company, LLC, which is secured by a deed of trust on her home. The principal amount of the mortgage was $185,491.25 and carried a 9.60% annual interest rate, with monthly payments of $1,573.27. Plaintiff agreed to pay off the mortgage loan in full by 18 June 2016. The deed of trust securing the loan was properly recorded in the Cumberland County Registry at deed book 5499, page 278.

At an unspecified time after the mortgage loan was made, Decision One Mortgage Company, LLC transferred the ownership and servicing of the loan to GMAC Mortgage, LLC ("GMAC"). Plaintiff made the required monthly loan payments until January 2010, when she defaulted on those payments to GMAC. On 1 February 2011, Plaintiff petitioned for Chapter 13 bankruptcy. Plaintiff's bankruptcy petition was dismissed without discharge on 2 March 2012.

After the bankruptcy dismissal, Plaintiff allegedly submitted a loan modification application to GMAC. In June 2012, GMAC approved Plaintiff for a trial loan modification under the Home Affordable Modification Program. GMAC temporarily reduced Plaintiff's required monthly payments from $1,573.27 to $1,117.82 and required three timely consecutive payments of that amount.

After Plaintiff allegedly made the three monthly payments under the trial loan modification, GMAC allegedly offered her a permanent loan modification agreement in September 2012. Plaintiff agreed to the permanent loan modification agreement on 26 September 2012. The monthly payments under the permanent loan modification agreement were to be paid by the first of each month, with the first payment due on 1 October 2012.

At some unspecified time after Plaintiff had entered the permanent loan modification agreement, GMAC transferred the ownership and servicing rights of Plaintiff's mortgage loan to Defendants, SLS and Bank of New York Mellon. On 15 October 2012, Plaintiff allegedly tendered a $1,441.92 mortgage payment to SLS under the permanent loan modification agreement. Sometime in November 2012, Plaintiff's niece, Sobriena Medley, telephoned SLS on Plaintiff's behalf to make a second mortgage payment. SLS allegedly refused to accept Plaintiff's modified loan payment upon the grounds that Plaintiff's loan had not been modified.

In December 2012, Ms. Medley again allegedly called SLS on Plaintiff's behalf to make the third mortgage payment under the permanent loan modification agreement. SLS also allegedly refused to accept that payment because the loan had not been modified.

Over three years later on 6 February 2016, Substitute Trustee Services, Inc. ("the Substitute Trustee"), initiated a power of sale foreclosure proceeding with the Cumberland County Clerk of Superior Court against Plaintiff on behalf of Bank of New York Mellon. On 23 May 2016, the clerk of superior court issued an order pursuant to N.C. Gen. Stat. § 45-21.16(d), which included all of the statutorily required findings to permit a foreclosure sale. The clerk's order included, in part, the finding that "said note is now in default . . . ." The clerk's order authorized the Substitute Trustee to proceed with a foreclosure by power of sale on Plaintiff's home. Plaintiff did not appeal from the clerk's order.

Plaintiff subsequently filed another Chapter 13 bankruptcy to attempt to stay the foreclosure sale on 10 June 2016. As part of the bankruptcy proceeding, SLS filed a proof of claim on 30 September 2016, asserting Plaintiff owed approximately $276,470.58 to Bank of New York Mellon, and that the debt was secured by the deed of trust on Plaintiff's home. SLS attached a copy of the permanent loan modification agreement signed by Plaintiff to its proof of claim. SLS alleged that Plaintiff was past due on the November 2012 payment required under the agreement, which Plaintiff alleges her niece attempted to pay on her behalf.

On 25 October 2016, Plaintiff objected to SLS's proof of claim. Plaintiff later withdrew the objection and the debt identified in the proof of claim was included in Plaintiff's bankruptcy plan. On 12 May 2017, the United States Bankruptcy Court for the Eastern District of North Carolina dismissed Plaintiff's bankruptcy case as a result of her inability to make payments in accordance with her bankruptcy plan.

On 23 May 2017, the Substitute Trustee filed an *ex parte* motion to reactivate foreclosure. The clerk of superior entered an order allowing the foreclosure sale of Plaintiff's home to proceed. A foreclosure sale was conducted on 17 July 2017. Plaintiff's home was sold to Bank of New York Mellon as the highest bidder.

On 27 July 2017, Plaintiff filed a motion for preliminary injunction and verified complaint pursuant to N.C. Gen. Stat. § 45-21.34 to enjoin the foreclosure sale. In her motion and complaint, Plaintiff asserts several legal and equitable claims, including: a claim for specific performance requesting the trial court to order Defendants to comply with the terms of the permanent loan modification agreement, a breach of contract claim, a breach of the duty of good faith and fair dealing claim, and an unfair or deceptive trade practices claim pursuant to N.C. Gen. Stat. § 75-1.1.

On 16 August 2017, Defendants filed a motion to dismiss pursuant to Rule of Civil Procedure 12(b)(6), asserting Plaintiff's verified complaint failed to state a claim for relief and that the doctrines of *res judicata* and collateral estoppel barred Plaintiff from asserting claims premised upon Plaintiff not being in default. Plaintiff was expressly found to be in default on payments due on the note in the clerk of superior court's 23 May 2016 order. Defendant's motion to dismiss also asserted Plaintiff should be estopped from asserting a breach of the permanent loan modification agreement, because Plaintiff had previously alleged the agreement was forged before the bankruptcy court.

On 1 September 2017, the trial court granted Defendant's motion to dismiss and dismissed Plaintiff's verified complaint with prejudice. Plaintiff filed timely notice of appeal of the trial court's order.

II. Jurisdiction

Appeal lies of right in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 1-277 (2017).

III. Issue

Plaintiff argues the trial court erred in granting Defendants' motion to dismiss and asserts she adequately stated claims for which relief can be granted. She asserts the clerk of court's determination of her being in default did not collaterally estop her from asserting contract and unfair or deceptive trade practice claims against Defendants.

IV. Standard of Review

In reviewing an order granting a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), this Court is to analyze:

> whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true.

Bissette v. Harrod, 226 N.C. App. 1, 7, 738 S.E.2d 792, 797 (2013) (citations omitted), *disc. review denied*, 367 N.C. 219, 747 S.E.2d 251 (2013). A motion to dismiss should be granted when: "(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." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

"[W]hen ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers[.]" *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001). We review the trial court's dismissal of an action *de novo*. *Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013).

V. Analysis

Plaintiff contends the trial court improperly dismissed her verified complaint because: (1) her legal and equitable claims are supported by sufficient allegations; and (2) any determinations made in a non-judicial foreclosure proceeding before a clerk of court do not implicate *res judicat*a or collateral estoppel in a subsequent judicial action.

A. Contractual Claims

[1] In her verified complaint, Plaintiff asserts claims for: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; and (3) specific performance to enforce the permanent loan modification agreement.

"The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of [the] contract." *McLamb v. T.P. Inc.*, 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005) (citation omitted), *disc. review denied*, 360 N.C. 290, 627 S.E.2d 621 (2006). "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.' " C*onleys Creek Ltd. P'ship v. Smoky Mountain Country Club Prop. Owners Ass'n, Inc.*, __ N.C. App. __, __, 805 S.E.2d 147, 158 (2017) (alterations in original) (quoting *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228-29, 333 S.E.2d 299, 305 (1985)), *disc. review denied*, __ N.C. __, 811 S.E.2d 596 (2018). A defendant cannot breach a covenant of good faith and fair dealing when a claimant fails to establish the defendant breached the underlying contract. *See Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 (2012).

"The party claiming the right to specific performance must show *the existence of a valid contract*, its terms, and either *full performance on his part* or that he is ready, willing and able to perform." *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981) (emphasis supplied and citation omitted).

The permanent loan modification agreement, attached as an exhibit to Plaintiff's verified complaint, states payments were due on the first day of each month. Plaintiff does not allege she made all required payments by the first of each month as provided by the permanent loan modification agreement.

Attached as an exhibit to Plaintiff's complaint is a transactional history showing her payment due 1 October 2012 was made on 15 October 2012. The permanent loan modification agreement specifically states, "This Agreement will not take effect unless the preconditions set forth in Section 2 have been satisfied." The first subsection under Section 2 states that "TIME IS OF THE ESSENCE[.]" The permanent loan modification agreement specifically states and expressly requires "the first modified payment will be due on October 01, 2012." The agreement does not contain a grace or forbearance period for this requirement.

Plaintiff asserts no equitable defense to foreclosure in her complaint, asserting Defendants had waived the right to prompt payment by purportedly accepting a late payment on 15 October 2012. *See In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 859 (1993) ("Equitable defenses to foreclosure, such as waiver of the right to prompt payment through acceptance of late payments, may not be raised in a hearing pursuant to N.C.G.S. § 45-21.16 or on appeal therefrom but must be asserted in an action to enjoin the foreclosure sale under N.C.G.S. § 45-21.34.").

Viewing the allegations in Plaintiff's complaint as true, and in light of the exhibits attached to it and referenced therein, the permanent loan modification agreement did not become effective, due to her failure to make a timely first payment by 1 October 2012. *See Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 642, 599 S.E.2d 410, 412 (2004) ("Since the exhibits to the complaint were expressly incorporated by reference in the complaint, they were properly considered in connection with the motion to dismiss as part of the pleadings."), *aff'd per curiam*, 360 N.C. 167, 622 S.E.2d 495 (2005).

Plaintiff premises all her claims upon the validity of the permanent loan modification. Plaintiff asserts no equitable defense to foreclosure in her complaint, asserting Defendants waived or should be estopped from requiring prompt payment, by purportedly accepting a late payment on 15 October 2012. *See Goforth*, 334 N.C. at 374, 432 S.E.2d at 859.

Presuming Plaintiff's complaint to be true, the permanent loan modification agreement Plaintiff alleges Defendants breached had not commenced and was not in effect, when Defendants allegedly refused to accept the payments tendered on her behalf in November and December 2012. *Schlieper v. Johnson*, 195 N.C. App. 257, 265, 672 S.E.2d 548, 553 (2009) ("The trial court may reject allegations that are contradicted by documents attached to the complaint [on a Rule 12(b)(6) motion.]" (citation omitted)).

Plaintiff cannot meet her burden of proof on her claims for breach of contract, specific performance, and breach of the covenant of good faith and fair dealing. She has failed to allege sufficient facts to show the permanent home modification agreement was binding upon Defendants, or that she had timely performed according to the terms of the permanent home modification agreement.

Upon review of the face and exhibits of Plaintiff's complaint, the trial court correctly held Plaintiff cannot prevail on her contractual claims. Her complaint shows the permanent loan modification agreement she alleges Defendants breached did not commence and was in effect, because she failed to make a time-is-of-the-essence payment as due by 1 October 2012. Plaintiff's arguments are overruled.

B. Unfair or Deceptive Trade Practices

[2] Plaintiff's unfair or deceptive trade practices claim alleges Defendants (1) refused to honor the terms of the permanent loan modification agreement by rejecting payments from Plaintiff; (2) initiated foreclosure proceedings against Plaintiff's property; and (3) forced Plaintiff to file Chapter 13 bankruptcy and incur additional expenses, costs and attorney's fees in an effort to stay the foreclosure proceedings.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013) (citation omitted). "[A]ctions for unfair or deceptive trade practices are distinct from actions for breach of contract, and a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Suntrust Bank*, 222 N.C. App. at 826, 732 S.E.2d at 599.

Plaintiff alleges Defendants committed unfair or deceptive trade practices by allegedly refusing to accept her November and December 2012 mortgage payments without reason, which proximately caused injury to her due to her default on the permanent loan modification agreement. Because the permanent loan modification agreement did not commence and go into effect due to Plaintiff's failure to make a timely payment by 1 October 2012, Defendants could not have committed unfair or deceptive trade practices by refusing to honor an agreement that was not in effect. Plaintiff has failed to state an unfair or deceptive trade practices claim for which relief can be granted. Plaintiff's arguments are overruled.

C. Collateral Estoppel and Res Judicata

Based on our determination that Plaintiff has failed to state any claim for which relief can be granted, it is not necessary to address the parties' remaining arguments regarding the doctrines of *res judicata* and collateral estoppel.

VI. Conclusion

Plaintiff has failed to plead claims for which relief can be granted. Construing Plaintiff's complaint as true and in conjunction with the permanent loan modification agreement attached thereto, Plaintiff did not make a timely payment on 1 October 2012 to validate and initiate the permanent loan modification agreement. Defendants could not be in breach of the defaulted permanent loan modification agreement for refusing to accept payments in November and December 2012. Because of Plaintiff's late payment, Defendants cannot breach an agreement not in effect. Plaintiff cannot succeed on her claims for breach of contract, specific performance, and breach of the covenant of good faith and fair dealing as a matter of law.

Plaintiff has also failed to assert a viable claim for unfair or deceptive trade practices. Defendants were under no obligation to accept payments in November and December 2012, after Plaintiff failed to submit a timely payment on 1 October 2012. The order of the trial court dismissing Plaintiff's complaint with prejudice is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and ZACHARY concur.

CAROL D. MOORE, Plaintiff
v.
WILLIAM W. JORDAN and HILL EVANS JORDAN & BEATTY,
A Professional Limited Liability Company, Defendants

No. COA17-577

Filed 15 May 2018

Attorneys—legal malpractice—proximate cause—equitable distribution—evidentiary decisions

Summary judgment was properly granted to defendant attorneys in a legal malpractice action where plaintiff client failed to forecast sufficient evidence that her attorney's decision not to present certain evidence regarding alleged hidden marital assets, which the attorney determined was speculative and unfounded, proximately caused damage to her in the prior equitable distribution action.

Appeal by plaintiff from order entered 7 February 2017 by Judge James K. Roberson in Orange County Superior Court. Heard in the Court of Appeals 29 November 2017.

Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellant.

Sharpless & Stavola, P.A., by Frederick K. Sharpless, for defendant-appellees.

CALABRIA, Judge.

Carol D. Moore ("plaintiff") appeals from the trial court's order granting defendants' motion for summary judgment on plaintiff's claim for legal malpractice. After careful review, we conclude that plaintiff failed to forecast any evidence to prove that, but for defendants' alleged negligence, plaintiff would have received a more favorable judgment in her prior equitable distribution action. Accordingly, we affirm the trial court's order.

I. Background

Plaintiff and James B. Moore, III ("Dr. Moore") were married on 22 September 1984 and separated on 29 March 2009. On 23 July 2009, plaintiff filed *Moore v. Moore*, 09 CVD 1183, in Orange County District Court seeking, *inter alia*, spousal support and an equitable distribution of marital property. On 21 June 2010, plaintiff retained William W. Jordan ("Jordan") and Hill Evans Jordan & Beatty, PLLC, (collectively, "defendants") to represent her in the pending action. Plaintiff hired defendants due to their experience tracing marital assets in complex equitable distribution proceedings. Defendants were aware that plaintiff believed that Dr. Moore had hidden assets in anticipation of the parties' divorce. In addition to defendants, plaintiff also retained certified public accountant Heather Linton and certified fraud examiner Carl Allen ("Allen") to help locate the alleged missing assets.

During discovery, defendants conducted depositions; subpoenaed financial institutions; and reviewed tax returns and other documents for evidence of undisclosed earnings or accounts, including potential offshore transactions. However, neither defendants nor plaintiff's experts ever located any undisclosed assets. Jordan ultimately concluded that the Moores' once-substantial marital estate had been depleted as a result of market factors and the parties' extravagant lifestyle choices. Although Allen had "theories" that Dr. Moore might have mismanaged marital funds, Jordan determined that the evidence was speculative, unsubstantiated, and likely inadmissible. Therefore, when the trial commenced on 3 January 2011, Jordan notified Allen that he would not call him to testify. At trial, defendants did not present any expert witness evidence to support plaintiff's theory that Dr. Moore hid marital assets prior to the parties' divorce.

On 20 June 2012, the trial court entered an Equitable Distribution Judgment and Alimony Order awarding plaintiff alimony and an unequal distribution of the parties' net, non-retirement marital and divisible estate. The trial court found, in relevant part, that:

> 26. Plaintiff believed that [Dr. Moore] was moving and hiding the parties' money. The Court finds Plaintiff's belief to be unfounded.

> . . .
>
> 40. The parties lived well above their means during their marriage. The parties frequently incurred charges on their credit cards of $12,000 - $15,000 per month. They hired private tennis coaches for the children. Their children attended private and/or out-of-state schools. The parties used savings and investment accounts during the latter part of their marriage to meet their lifestyle expenses; in so doing and with the help of negative market forces, the parties dwindled their non-retirement cash and investment accounts from approximately $3,000,000 to under $200,000 by the time the parties separated.
>
> . . .
>
> 83. Plaintiff's claim for attorney's fees should be denied. . . . The parties' respective estates, after the entry of this Judgment, shall be substantially similar. Many fees were incurred by the parties due to Plaintiff's unfounded suspicion that [Dr. Moore] was hiding money, and the Court cannot find any statutory basis and justification to support an award of attorney's fees from [Dr. Moore] to Plaintiff.

Plaintiff did not appeal the Equitable Distribution Judgment and Alimony Order. However, on 18 June 2015, plaintiff filed a complaint against defendants in Orange County Superior Court, alleging legal malpractice in their representation of plaintiff's equitable distribution action. Following some discovery, on 14 October 2016, defendants filed a motion for summary judgment. On 7 February 2017, the trial court entered an order granting defendants' motion for summary judgment. Plaintiff appeals.

II. Analysis

On appeal, plaintiff argues that defendants' failure to present certain evidence to the district court proximately caused her to receive a less-favorable judgment at equitable distribution. We disagree.

As an initial matter, since this is a legal malpractice action, "the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, . . . and that this negligence (2) proximately caused (3) damage to the plaintiff." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985) (internal citation omitted). "In a negligence action, summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury." *Id.* (citation and quotation marks omitted). We review the trial court's summary judgment order *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

A legal malpractice action is considered "a case within a case." *Young v. Gum*, 185 N.C. App. 642, 647, 649 S.E.2d 469, 473 (2007), *disc. review denied*, 362 N.C. 374, 662 S.E.2d 552 (2008). In order to hold an attorney liable for harm arising from the attorney's negligence in another action, the plaintiff must establish causation by proving that "(1) the original claim was valid; (2) the claim would have resulted in a judgment in the plaintiff's favor; and (3) the judgment would have been collectible." *Id.* at 646, 649 S.E.2d at 473 (citation and quotation marks omitted). We look to the substantive law defining the plaintiff's underlying claim in order to determine which facts the plaintiff must forecast to support the legal malpractice claim. *Id.* at 647, 649 S.E.2d at 473-74.

In an equitable distribution action,

> the burden of proof is upon the party claiming that property is marital property to show by a preponderance of the evidence that the property: (1) was acquired by either spouse or both spouses; (2) during the marriage; (3) before the date of the separation of the parties; and (4) is presently owned.

Id. at 647, 649 S.E.2d at 474 (citation and quotation marks omitted). "The party claiming that property is marital property must also provide evidence by which that property is to be valued by the trial court." *Id.* at 647-48, 649 S.E.2d at 474. Accordingly, in order to succeed on her legal malpractice claim against defendants, "plaintiff was required to forecast evidence that would be sufficient to demonstrate not only that defendants were negligent in advising her, but also evidence which would support plaintiff's underlying equitable distribution claim and her allegation that an equitable distribution judgment in her favor would have exceeded" the amount she actually received. *Id.* at 648-49, 649 S.E.2d at 474.

On appeal, plaintiff asserts that there are several assets that *would have been* classified as marital property, but for defendants' failure to present expert financial evidence at equitable distribution. For example, plaintiff contends that a projected income spreadsheet prepared by the Moores' financial planner, Kyle Elliott, along with Elliott's deposition testimony, establishes that on 1 December 2008, "the Moores owned a 20% interest in a Texas business valued at 1.8 million dollars."

Assuming, *arguendo*, that this bare assertion and evidence would suffice at equitable distribution, plaintiff's belief that the Moores' business interest would be classified as marital property might be correct, because the spreadsheet was drafted 118 days prior to the parties' separation. *See generally* N.C. Gen. Stat. § 50-20 (2017) ("Distribution by court of marital and divisible property."). However, N.C. Gen. Stat. § 50-21(b) provides, in pertinent part:

> For purposes of equitable distribution, *marital property shall be valued as of the date of the separation of the parties*, and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties.

N.C. Gen. Stat. § 50-21(b) (emphasis added). Accordingly, at best, Elliott's spreadsheet and testimony would have been competent as corroborative evidence of the value of the Moores' business interest.

In any event, this alleged asset was never presented to the district court because there was *not* sufficient supporting evidence for equitable distribution purposes. Jordan questioned Elliott about the spreadsheet and business interest during his deposition prior to equitable distribution:

> [JORDAN:] All right. Now over to the right I see that you've got some accounts listed and you have Carol IRA, Carol taxable, Jim IRA, Jim taxable, 20 percent of business and rental house equity.
>
> [ELLIOTT:] Yes, sir.
>
> Q. Okay. Can you explain what those accounts are and numbers represent?
>
> A. The IRA and taxable are the accounts that are managed by my firm. Twenty percent of business references what I was – I guess what I was told was his interest in his new business. And that is the estimate of the value of that stock.
>
> Q. And is that based on what he told you?
>
> A. Yes, sir.
>
> Q. And what was that new business?
>
> A. I've gone blank on the name. It's where he's currently employed.

> . . .
>
> Q. . . . [E]arlier you were talking about a business that [Dr. Moore] had 20 percent interest in.
>
> A. Okay; right.
>
> Q. And you couldn't remember the name of it. And I'm – I want to know if it was Highline FI. Or was it Mentis Analytics or some other business?
>
> A. I believe Highline was his old company.
>
> Q. Uh-huh.
>
> A. And . . . The 20 percent was in the new business that I believe is located in Texas.
>
> Q. Okay. But you don't remember the name of it?
>
> A. I've gone totally blank; and that doesn't sound familiar.

Elliott's spreadsheet includes the specific disclosure that "Wilbanks, Smith and Thomas Asset Management LLC *does not guarantee the accuracy of the data* or future performance returns." (emphasis added). And although plaintiff argues that this "asset should have been disclosed, valued, and distributed as marital property" during the equitable distribution trial, she presents no evidence of its existence beyond Elliott's spreadsheet and testimony. Indeed, plaintiff fails to provide even *the name* of any business in which she and Dr. Moore claimed a 20% ownership interest. In short, "plaintiff has not forecast any evidence which would permit the court to identify, value or classify" any alleged asset not considered by the equitable distribution court, "and in the absence of this evidence, the court could not value or classify the property." *Young*, 185 N.C. App. at 649, 649 S.E.2d at 474.

Plaintiff also contends that defendants breached the community's standard of care by failing to present expert financial testimony to support her theory that Dr. Moore hid marital assets. Plaintiff supports this contention by relying upon the report and deposition testimony of Buddy Herring, her own expert witness in the instant case.

An attorney must "represent his client with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. The standard is that of members of the profession in the same or similar locality under similar circumstances." *Rorrer*, 313 N.C. at 356, 329 S.E.2d at 366. However, "[t]he mere fact that one attorney-witness testifies that he would have acted contrarily to or differently from the action taken by defendant is not sufficient to establish a prima facie case of defendant's negligence. . . . Differences in opinion are consistent with the exercise of due care." *Id.* at 357, 329 S.E.2d at 367.

During his deposition in the instant case, Jordan explained why he decided not to present plaintiff's expert evidence to the equitable distribution court:

> [Allen] had lots of questions. He had theories. But there were no – there was nothing that could be substantiated to his various theories about the money. And, therefore, I deemed it speculative.
>
> It was unsupported. . . . I did express concern about the quality of the work of Carl Allen on multiple occasions. And I don't believe that Heather Linton did work that would be usable.
>
> . . . I discussed with Ms. Moore on many occasions leading up to the trial the – the concern that I had with regard to what evidence we had of the so-called missing money.
>
> It was non-existent. And as a lawyer, you have an obligation to not offer evidence that you know is not going to be allowed in and doesn't – doesn't represent probative evidence.
>
> . . .
>
> I've also found that in my 40-some years of trial practice that you weaken a case when you're trying a case to the bench by offering evidence that's basically fluff or speculative and subject to multiple attacks by the opposition.
>
> So if you don't have something that is really probative, you're better off leaving it alone, instead of setting up a dummy for the other side to knock down and make you look bad with.

"The law is not an exact science but is, rather, a profession which involves the exercise of individual judgment." *Id.* Contrary to plaintiff's arguments, Jordan's failure to present evidence that he, in his professional judgment, deemed "speculative" and "unsupported" is consistent both with the exercise of due care in representing plaintiff's action, and with his duty of candor to the court.

III. Conclusion

Plaintiff failed to forecast sufficient evidence for the trial court to consider regarding any alleged marital asset. Without such evidence, the trial court could not determine whether plaintiff might have obtained a judgment in excess of the one that she actually received at equitable distribution. Furthermore, contrary to plaintiff's arguments, there is no evidence that defendants failed to exercise due care and diligence in representing plaintiff's action. Since plaintiff failed to establish that any alleged negligence on the part of defendants proximately caused damage to her, we affirm the trial court's order granting defendants' motion for summary judgment.

AFFIRMED.

Judges DAVIS and TYSON concur.

N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY,
DIVISION OF WASTE MANAGEMENT, Petitioner
v.
TRK DEVELOPMENT, LLC, Respondent

No. COA17-882

Filed 15 May 2018

1. Estoppel—equitable—against government agency

An administrative law judge and superior court judge erred by holding that the Department of Environmental Quality (DEQ) was estopped from enforcing the Solid Waste Management Act against a developer based on a prior permit. A State agency's power to enforce its government powers cannot be impaired by estoppel and enforcing the Solid Waste Management Act and its regulations falls within DEQ's core governmental powers.

2. Estoppel—equitable—elements—erosion control permit

Equitable estoppel did not apply on the facts where the Department of Environmental Quality (DEQ) had issued an erosion and sediment control permit to a developer, the developer discovered trash below the surface of the ground, and the developer began disposing of the trash on an adjacent parcel instead of in a landfill. The developer had no basis for believing that anything other than its erosion and sedimentation control plan had been approved, and DEQ was not estopped for its failure to foresee a future violation.

Appeal by petitioner from order entered 26 January 2017 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 21 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General T. Hill Davis, III, for petitioner.

Hartsell & Williams, PA, by Andrew T. Cornelius and Austin "Dutch" Entwistle III, for respondent.

DAVIS, Judge.

This case requires us to determine whether the North Carolina Department of Environmental Quality ("DEQ") was properly estopped from enforcing the Solid Waste Management Act against a developer based on the developer's prior receipt of an erosion and sedimentation control permit from DEQ. Because we conclude that both the administrative law judge and the trial court erred in their application of the equitable estoppel doctrine in favor of the developer on these facts, we reverse.

Factual and Procedural Background

At all times relevant to this appeal, TRK Development, LLC ("TRK") owned three adjoining parcels of land in Concord, North Carolina. In April 2014, TRK sought to make a structural addition to a warehouse located on the first parcel. The planned addition required that a substantial amount of soil be excavated from the second parcel. Prior to beginning construction, TRK hired surveyors, an architect, and a civil engineer to prepare an erosion and sedimentation control plan to be submitted to DEQ for approval.[1]

On 18 June 2014, Dale Fink, the civil engineer hired by TRK, submitted the completed erosion and sedimentation control plan to Tamara Eplin, an assistant regional engineer in the Land Quality Section of

1. At the time the erosion and sedimentation control plan was submitted, DEQ was known by its former name, the Department of Environment and Natural Resources.

DEQ.[2] Included in the plans were topographic maps containing the results of soil boring testing conducted by TRK at the proposed construction site. The borings indicated the presence of trash in multiple locations beneath the surface of the soil TRK intended to excavate.

The Land Quality Section approved TRK's erosion and sedimentation control plan by issuing a Letter of Approval and Certificate of Plan Approval on 26 June 2014. The Letter of Approval contained the following language:

> If, following the commencement of this project, the erosion and sedimentation control plan is inadequate to meet the requirements of the Sedimentation Pollution Control Act of 1973 . . . this office may require revisions to the plan and implementation of the revisions to insure compliance with the Act.
>
> Acceptance and approval of this plan is conditioned upon your compliance with Federal and State water quality laws, regulations, and rules. In addition, local city or county ordinances or rules may also apply to this land-disturbing activity. *This approval does not supersede any other permit or approval.*

(Emphasis added.)

On 18 August 2014, Fink submitted an amended erosion and sedimentation control plan to Eplin that was specifically for the "spoils area" where excavated soil would be placed. DEQ approved TRK's second erosion and sedimentation control plan on 26 August 2014 by issuing another Letter of Approval and Certificate of Plan Approval. The 26 August Letter of Approval contained the same above-quoted language as the 26 June Letter of Approval.

After receiving these approvals, TRK began construction on the warehouse addition in September 2014. On 18 September 2014, an inspector with the Land Quality Section conducted an inspection of the construction site and determined that it was in compliance with the Sedimentation Pollution Control Act of 1973.[3]

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2. DEQ is comprised of eleven divisions, which are in turn subdivided into sections. The departments within DEQ relevant to this appeal are: (1) the Division of Energy, Land, and Mining Resources, which contains the Land Quality Section; and (2) the Division of Waste Management, which encompasses the Solid Waste Section.

3. N.C. Gen. Stat. § 113A-50, *et seq.* (2017).

On 23 November 2014, DEQ received an anonymous letter stating, in pertinent part, as follows:

> In the area of Ramdin Court and Cascade Drive in Concord, NC there seems to be some activity taking place that basically is leaving the area looking like a landfill. . . . There is some sort of grading taking place that is uncovering what appears to be a massive area of buried trash and garbage. There is all kind of trash and also rank odors. It has been spread across a large area near a creek and near power lines. . . . We would appreciate it if you can help look into this matter. If this is not a matter you are responsible for, please forward it [to] the appropriate department. You are the only place I could think of that handles this sort of thing.

In response to the letter, Teresa Bradford, an environmental senior specialist working in the Solid Waste Section of DEQ's Division of Waste Management, conducted a site inspection of the construction area on 3 December 2014. During the inspection, she observed "waste being moved from one area to the next[.]" Bradford spoke with TRK's main contractor, Brandon Cornelius, who told her that TRK possessed the necessary permits for its construction project. Cornelius showed Bradford one of the Certificates of Plan Approval that TRK had received from the Land Quality Section of DEQ. Bradford explained that this approval had been given "for erosion and sediment control measures only" and not "to dispose [of] solid waste on the [third] parcel." While at the site, Bradford also spoke by phone with Rishi Kapadia, a member manager of TRK. She advised Kapadia that TRK's permit "was approval for erosion control measures only" and that she "wasn't aware of any solid waste permit that would allow for the disposal."

On the following day, Bradford informed Kapadia that TRK had not been issued a permit allowing it to dispose of solid waste on its property. She further told Kapadia that — for this reason — the waste that had already been excavated would have to be taken to a permitted landfill and that, similarly, "any waste continuing to be removed from the original location would have to be disposed of at [a permitted] landfill." Kapadia responded that doing so would cost "millions of dollars."

Bradford conducted a second site inspection on 16 December 2014 and saw that waste was continuing to be disposed of on the third parcel. She further observed that the waste area had increased in size since her first inspection from one acre to approximately 1.7 acres and from ten feet in height to between twenty and thirty feet.

On 29 December 2014, DEQ issued a Notice of Violation to TRK, which stated that TRK was "operating a non-conforming solid waste disposal site/open dump" in violation of four separate North Carolina Administrative Code regulations related to the disposal of solid waste.[4] The Notice of Violation also provided that TRK had sixty days in which to come into compliance with these regulations by taking certain specified actions, including that it refrain from disposing of any additional waste on TRK's third parcel and that it remove "all solid waste from the site including any that may be buried and properly dispose of it in a facility permitted by the Division of Waste Management."

DEQ received no response from TRK, and Bradford conducted another site inspection on 29 January 2015. During this inspection, she "observed that the [waste] area had increased in height and also that there was an additional area to the east of the disposal area that had been excavated and waste was being placed into the excavated area."

Following this inspection, a meeting was scheduled at the DEQ Mooresville Regional Office between Kapadia, Bradford, and Charles Gerstell, another environmental senior specialist in the Solid Waste Section. At the meeting, Kapadia reiterated his view that TRK had already obtained the necessary permits for its construction project. Bradford informed Kapadia that "the only solution was removal of the waste, but [that] the section would work with him on technical assistance for removal and disposal options and . . . a time line for a cleanup for the site."

On 27 February 2015, TRK sent a letter to DEQ responding to the Notice of Violation. The letter stated, in pertinent part, as follows:

> In response to your notice sent December 29, 2014, TRK Development respectfully disagrees with [DEQ's]

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4. The specific regulations listed in the Notice of Violation as having been violated by TRK were 15A N.C.A.C. 13B .0106(a) and (b), and 15A N.C.A.C. 13B .0201(a) and (b). Rule 13B .0106(a) provides that "[a] solid waste generator shall be responsible for the satisfactory storage, collection and disposal of solid waste." 15A N.C.A.C. 13B .0106(a) (2017). Rule 13B .0106(b) states that "[t]he solid waste generator shall ensure that his waste is disposed of at a site or facility which is permitted to receive the waste." 15A N.C.A.C. 13B .0106(b). Rule 13B .0201(a) provides that "[n]o person shall treat, process, store, or dispose of solid waste . . . except at a solid waste management facility permitted by the Division for such activity[.]" 15A N.C.A.C. 13B .0201(a) (2017). Rule 13B .0201(b) states that "[n]o person shall cause, suffer, allow, or permit the treatment, storage, or processing of solid waste upon any real or personal property owned, operated, leased, or in any way controlled by that person without first obtaining a permit for a solid waste management facility from the Division authorizing such activity[.]" 15A N.C.A.C. 13B .0201(b). Each of these regulations was promulgated pursuant to North Carolina's Solid Waste Management Act.

> assessment that site work . . . involves the excavation, transportation and/or disposal of solid waste. We believe that that material being transported consists of mostly soil/dirt and is in line with the definition of spoils as stated in the approved plans and Certificate of Plan Approval issued by [DEQ]. . . .
>
> We propose that we will leave the spoils in place as is, seed and mulch the area and add additional security measures such as a gate to secure the site.

DEQ issued a Notice of Continuing Violation to TRK on 17 March 2015 along with an accompanying letter informing TRK that it had thirty days in which to come into compliance with the applicable regulations. After the thirty-day deadline passed, Bradford returned to the site on 12 May 2015 with four other DEQ employees to conduct soil sampling. The laboratory results of this sampling indicated the presence of both semi-volatile organic compounds and metals (including arsenic and aluminum) in the soil at levels hazardous to human health.

On 23 July 2015, DEQ issued a Compliance Order With Administrative Penalty to TRK "because of certain violations of the North Carolina Solid Waste Management Act (N.C. General Statute 130A, Article 9) and of the North Carolina Solid Waste Management Rules (15A N.C. Administrative Code 13B) which implements [sic] the Act." The compliance order alleged violations of the same four regulations that had been listed in the Notice of Violation and Notice of Continuing Violation previously issued to TRK by DEQ. It also assessed an administrative penalty of $14,287.13.

TRK filed a petition for a contested case hearing with the Office of Administrative Hearings on 8 September 2015. Following a hearing, Administrative Law Judge ("ALJ") David F. Sutton issued a final decision on 11 July 2016 that "overruled and reversed" the 23 July 2015 compliance order issued by DEQ. In his decision, the ALJ determined, *inter alia*, that TRK was, in fact, a solid waste generator and did not come within the exception set out in the Solid Waste Management Act for "the management of solid waste that is generated by an individual . . . on the individual's property and is disposed of on the individual's property." However, the ALJ further concluded that DEQ was estopped from issuing a compliance order against TRK based on its prior issuance of approvals for the erosion and sedimentation control plans submitted by TRK.

On 8 August 2016, DEQ filed a petition for judicial review of the ALJ's final decision in Cabarrus County Superior Court. The Honorable Julia Lynn Gullett entered an order on 26 January 2017 affirming the

ALJ's final decision. DEQ filed a notice of appeal to this Court on 23 February 2017.

Analysis

Judicial review of an administrative decision is governed by Chapter 150B of the North Carolina General Statutes, which provides, in pertinent part, as follows:

> (b) The Court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2017).

It is well settled that "in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (citation, quotation marks, and brackets omitted). "The whole record test requires the reviewing court to examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." *Fehrenbacher v. City of Durham*, 239 N.C. App. 141, 146, 768 S.E.2d 186, 191 (2015) (citation and quotation marks omitted).

Our Supreme Court has stated that "where only one inference can reasonably be drawn from undisputed facts, the question of estoppel is one of law for the court to determine." *Hawkins v. M & J Fin. Corp.*, 238 N.C. 174, 185, 77 S.E.2d 669, 677 (1953) (citation omitted). However, where "the evidence bearing on the issue of estoppel [is] conflicting and susceptible of diverse inferences[,]" the issue is a mixed question of fact and law. *Bowling v. Combs*, 60 N.C. App. 234, 241, 298 S.E.2d 754, 758 (citation omitted), *disc. review denied*, 307 N.C. 696, 301 S.E.2d 389 (1983).

On appeal, DEQ contends that the trial court erred in affirming the final decision of the ALJ for two reasons: (1) the doctrine of equitable estoppel cannot operate so as to impair the State's exercise of its governmental powers; and (2) the elements of equitable estoppel were not met in this case. We agree with both of DEQ's arguments.

I. Equitable Estoppel as a Limit on the Exercise of Governmental Powers

[1] DEQ first contends that the trial court erred in affirming the final decision of the ALJ because a State agency's ability to exercise its governmental powers cannot be impaired by the operation of estoppel. DEQ asserts that its duty to enforce the Solid Waste Management Act constitutes a police power as to which ordinary principles of estoppel do not apply.

It is well established that an administrative agency of the State "is not subject to an estoppel to the same extent as a private individual or a private corporation." *Meachan v. Montgomery Cty. Bd. of Educ.*, 47 N.C. App. 271, 279, 267 S.E.2d 349, 354 (1980) (citation omitted). Our appellate courts have made clear that estoppel "may not arise against a governmental entity if such estoppel will impair the exercise of the governmental powers of the entity." *Wallace v. Bd. of Tr.*, 145 N.C. App. 264, 277, 550 S.E.2d, 552, 560 (citation omitted), *disc. review denied*, 354 N.C. 580, 559 S.E.2d 553 (2001).

The Solid Waste Management Act states, in pertinent part, as follows:

> (a) For the purpose of promoting and preserving an environment that is conducive to public health and welfare, and preventing the creation of nuisances and the depletion of our natural resources, the Department shall maintain a Division of Waste Management to promote sanitary processing, treatment, disposal, and statewide management of solid waste and the greatest possible recycling and recovery of resources, and the Department shall employ and retain qualified personnel as may be necessary to effect such purposes. . . .
>
> (b) In furtherance of this purpose and intent, it is hereby determined and declared that it is necessary for the health and welfare of the inhabitants of the State that

> solid waste management facilities permitted hereunder and serving a specified geographic area shall be used by public or private owners or occupants of all lands, buildings, and premises within the geographic area. Actions taken pursuant to this Article shall be deemed to be acts of the sovereign power of the State of North Carolina[.]

N.C. Gen. Stat. § 130A-291 (2017). It is clear that DEQ's responsibility for enforcing the Act — along with the provisions of the North Carolina Administrative Code promulgated thereunder — directly invokes its core governmental powers.

Our Supreme Court recognized the inability of a city to be estopped from exercising its governmental authority in *City of Raleigh v. Fisher*, 232 N.C. 629, 61 S.E.2d 897 (1950). In that case, the defendants were allowed to operate a bakery within an area zoned for residential use with the knowledge of city officials for over ten years. *Id.* at 632, 61 S.E.2d at 900. During that time period, the defendants both increased their business operations and invested substantial amounts of money into the bakery. When the city later sought to enforce its zoning regulations against them, the defendants argued that the city was estopped from doing so "because its officials ha[d] encouraged and permitted such conduct for at least ten years." *Id.* In rejecting the defendants' argument, the Supreme Court stated the following:

> In enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State. The police power is that inherent and plenary power in the State which enables it to govern, and to prohibit things hurtful to the health, morals, safety, and welfare of society. In the very nature of things, the police power of the State cannot be bartered away by contract, or lost by any other mode.

Id. at 635, 61 S.E.2d at 902 (internal citations omitted). As a result, the Court held that the city could not be estopped from enforcing its zoning ordinances against the defendants despite the longstanding acquiescence of city officials to the defendants' zoning violations prior to beginning enforcement efforts. *Id.*[5]

5. TRK argues that *Fisher* was later distinguished by this Court's decision in *City of Winston-Salem v. Hoots Concrete Company, Inc.*, 37 N.C. App. 186, 245 S.E.2d 536, *disc. review denied*, 295 N.C. 645, 248 S.E.2d 249 (1978). However, *Hoots* dealt with the question of whether or not a zoning officer had issued a building permit in accordance with applicable zoning regulations. *Id.* at 189, 245 S.E.2d at 538. In our opinion, we expressly stated

This principle was also applied in *Mecklenburg County v. Westbery*, 32 N.C. App. 630, 233 S.E.2d 658 (1977), which involved a mistakenly issued zoning permit that was later revoked by the county after the defendants had "incurred a substantial expense in good faith reliance upon [the] permit before it was revoked[.]" *Id.* at 635, 233 S.E.2d at 661. Citing *Fisher*, this Court held that the county could not be estopped from revoking the permit because "the planned usage was illegal from its inception" and "a contrary decision would require an acceptance of the paradoxical proposition that a citizen can acquire immunity to the law of his country by habitually violating such law with the consent of unfaithful public officials charged with the duty of enforcing it." *Id.* (citation and quotation marks omitted). *See also Kings Mountain Bd. of Educ. v. N.C. State Bd. of Educ.*, 159 N.C. App. 568, 578, 583 S.E.2d 629, 636 (2003) (holding that State Board of Education could not be estopped from approving school merger where "application of the estoppel doctrine would impede the State Board from exercising its legislative power to approve or deny school mergers").

In arguing that the application of estoppel in the present case would not impair the exercise of DEQ's governmental powers, TRK attempts to rely upon *County of Wake v. North Carolina Department of Environment & Natural Resources*, 155 N.C. App. 225, 573 S.E.2d 572 (2002), *disc. review denied*, 357 N.C. 62, 579 S.E.2d 387 (2003), and *Fike v. Board of Trustees*, 53 N.C. App. 78, 279 S.E.2d 910, *disc. review denied*, 304 N.C. 194, 285 S.E.2d 98 (1981). Both cases, however, are inapposite.

County of Wake concerned a dispute between the Town of Holly Springs and Wake County over the siting of a landfill. Holly Springs initially approved the proposed landfill site and accepted compensation from Wake County before revoking its approval years later. *Cty. of Wake*, 155 N.C. App. at 230, 573 S.E.2d at 577. We held that Holly Springs was estopped from reneging on its agreement with Wake County because "[t]o allow the Town to withdraw its approval . . . would be inequitable under the circumstances." *Id.* at 241, 573 S.E.2d at 584. The dispute in that case, however, was purely contractual as no evidence was presented showing that any statute or regulation was violated by the siting of the landfill.

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that our decision was not in conflict with "the principle of law set out in . . . *Fisher*" and that if the zoning permit had, in fact, been issued in error "the city cannot be estopped to enforce its zoning ordinance under an appropriate interpretation of the ordinance." *Id.* at 190, 245 S.E.2d at 538.

In *Fike*, a state employee sought to compel the State Employees' Retirement System to provide him with disability retirement benefits. *Fike*, 53 N.C. App. at 79, 279 S.E.2d at 912. This Court ruled that the Retirement System was estopped from denying benefits to the employee where the Retirement System made representations that the employee's personnel officer would assist him with the proper execution of the correct forms for obtaining benefits, but the personnel officer failed to do so. *Id.* at 81, 279 S.E.2d at 913. Like *County of Wake*, the dispute in *Fike* did not concern the exercise of a police power by a governmental entity. Indeed, we expressly noted that "application of principles of estoppel in the present case would not impair the exercise of [the Retirement System's] governmental powers." *Id.* at 82, 279 S.E.2d at 913.

Here, the ALJ's findings established that TRK was in violation of the Solid Waste Management Act. It is beyond dispute that the Act serves important interests in terms of regulating "in the most economically feasible, cost-effective, and environmentally safe manner the storage . . . and disposal of solid waste in order to protect the public health, safety, and welfare; enhanc[ing] the environment for the people of this State; and recover[ing] resources which have the potential for further usefulness." N.C. Gen. Stat. § 130A-309.03(b)(1) (2017). Moreover, as noted earlier, the Act specifically provides that "[a]ctions taken pursuant to this Article shall be deemed to be acts of the sovereign power of the State of North Carolina[.]" N.C. Gen. Stat. § 130A-291.

Thus, DEQ's duty to enforce the Solid Waste Management Act and its accompanying regulations epitomizes the type of core police power possessed by a government agency that cannot be impaired by estoppel. Accordingly, on this ground alone, the trial court erred in affirming the final decision of the ALJ.

II. Elements of Equitable Estoppel

[2] The ALJ and the trial court also erred in their application of the elements of equitable estoppel to these facts. Therefore, we deem it appropriate to address this issue as well.

It is helpful at the outset to review basic principles regarding equitable estoppel.

> [T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than,

> and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Hawkins, 238 N.C. at 177-78, 77 S.E.2d at 672 (citation omitted).

This Court has held that "mere silence will not operate to create an estoppel. In order to work an estoppel the silence must be under such circumstances that there are both a specific opportunity, and a real or apparent duty, to speak." *Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 164, 356 S.E.2d 912, 916 (internal citations, quotation marks, and brackets omitted), *disc. review denied*, 320 N.C. 794, 361 S.E.2d 80 (1987). Furthermore, "[w]hen a party is misled through his own lack of diligence and reasonable care, he may not then avail himself of the doctrine of equitable estoppel." *N.C. Fed. Sav. & Loan Ass'n v. Ray*, 95 N.C. App. 317, 323, 382 S.E.2d 851, 855 (1989) (citation omitted). Finally, it is a well-established principle that "everyone is equally capable of determining the law, is presumed to know the law and . . . cannot be deceived by representations concerning the law or [be] permitted to say he or she has been misled." *Dalton v. Dalton*, 164 N.C. App. 584, 586, 596 S.E.2d 331, 333 (2004) (citation omitted).

In the present case, TRK submitted plans on 18 June 2014 to the Land Quality Section for the sole purpose of seeking approval for an erosion and sedimentation control plan. Based upon these submissions, the Land Quality Section issued documentation containing the limited and specific approval TRK had sought.[6] The Letter of Approval explicitly stated that "[t]his approval does not supersede any other permit or approval."

Despite the fact that the approval documents did not in any way mention the issue of solid waste disposal, TRK nevertheless contends that DEQ's approval of the erosion and sedimentation control plan should be deemed to be a representation by DEQ that TRK's project was

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6. We note that TRK does not allege that DEQ has ever attempted to revoke its prior approval of the erosion and sedimentation control plan submitted by TRK.

— and would continue to be — in full compliance with the Solid Waste Management Act. This argument lacks merit.

The Letters of Approval and Certificates of Plan Approval issued by the Land Quality Section were, by their express terms, limited to the erosion and sedimentation control plan submitted by TRK and merely signified the compliance of the plan with the Sedimentation Pollution Control Act. None of the language appearing in these documents can be read as amounting to a declaration by DEQ that its approval of the erosion and sedimentation control plan also constituted approval of *other* aspects of TRK's construction project.

TRK also argues that the soil boring markers on the plans it submitted to the Land Quality Section indicated the presence of trash beneath the surface of the proposed excavation site and therefore (1) provided DEQ with knowledge of the necessity for TRK to obtain a solid waste permit; and (2) triggered an obligation on the part of the Land Quality Section to refer the application to the Division of Waste Management. This argument fails for several reasons.

First, to the extent that the soil boring markers provided DEQ with any indication of the eventual necessity for TRK to obtain a solid waste permit, such knowledge could be equally imputed to TRK, which was the entity ultimately responsible for ensuring that its project complied in all respects with North Carolina law. Second, while coordination among different sections of a state agency in appropriate circumstances is desirable, TRK has cited no legal authority suggesting that the Land Quality Section was somehow *required* as a matter of law to refer TRK's erosion and sedimentation control plan to the Solid Waste Section.

Finally, it is clear that TRK was not actually in violation of the Solid Waste Management Act at the time DEQ gave its approval for TRK's erosion and sedimentation control plan. Instead, TRK only began violating the Solid Waste Management Act once it actually started excavating and disposing of solid waste on its property. Thus, in essence, TRK is making the novel argument that DEQ should be estopped based on its failure to foresee a *future* violation of the statute by TRK. TRK has failed to explain why DEQ was legally required to assume that as the project moved forward TRK would proceed to dispose of this trash in a manner that was unlawful under the Solid Waste Management Act.

In sum, at no point was there any valid basis for TRK to believe that the documentation it had previously received from the Land Quality Section meant anything more than that its erosion and sedimentation control plan had been approved. Consequently, TRK's claimed reliance upon this limited approval as a basis for believing it could lawfully proceed to excavate and dispose of 1.7 acres of solid waste without a solid waste permit in violation of the Solid Waste Management Act was manifestly unreasonable. In actuality, TRK was misled only by its "own want of reasonable care and circumspection." *Peek v. Wachovia Bank & Tr. Co.*, 242 N.C. 1, 12, 86 S.E.2d 745, 753 (1955) (citation omitted).

Conclusion

For the reasons stated above, we reverse the trial court's 26 January 2017 order and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges STROUD and ARROWOOD concur.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Plaintiff
v.
LAXMI HOTELS OF SPRING LAKE, INC.; CIENA CAPITAL FUNDING, LLC; and AMERICAN BUSINESS LENDING, INC., Defendants

No. COA17-951

Filed 15 May 2018

1. Appeal and Error—interlocutory order—appellate jurisdiction—collateral estoppel not applicable—consent judgment—petition for certiorari

The Court of Appeals had jurisdiction where the Department of Transportation (DOT) appealed from a Rule 60(b) order in a condemnation case arising from a consent judgment in a highway improvement project. The order was interlocutory because it clearly contemplated further proceedings at trial on just compensation and collateral estoppel did not apply because this was not relitigation of the same issue. However, DOT's petition for certiorari was granted.

2. Civil Procedure—Rule 60—consent judgment—timeliness of motion

The trial court did not abuse its discretion by setting aside a consent judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6) in a condemnation case arising from a highway improvement project.

Although the Department of Transportation (DOT) contended that the motion to set aside was not timely filed because the consent judgment could only be set aside based on fraud, mutual mistake, duress, or undue influence pursuant to Rule 60(b)(3), which has a one-year time limitation, facts illustrative of fraud and misrepresentation do not mean that the trial court is limited to apply only those facts as grounds for relief. Relief may be appropriate pursuant to Rule 60(b) if those facts are accompanied by circumstances that justify relief from the judgment. The motion must then be brought within a reasonable time, which was done here.

3. Judgments—consent—condemnation of land—motion to set aside—just compensation

The trial court did not abuse its discretion by setting aside a consent judgment under N.C.G.S. § 1A-1, Rule 60(b)(6) in an action arising from a condemnation for a highway improvement project. Extraordinary circumstances existed to support, and justice demanded, the setting aside of the judgment; the record was replete with evidence to support the trial court's conclusion that the Department of Transportation did not adequately inform the landowner of the extent of the taking. These were not two entities negotiating at arm's length and just compensation was constitutionally required.

Appeal by plaintiff from order entered 18 April 2017 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 22 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Alvin W. Keller, Jr. and Assistant Attorney General James Aldean Webster, III, for plaintiff-appellant.

McCoy Wiggins Cleveland & McLean PLLC, by Richard M. Wiggins, for defendants-appellees.

ZACHARY, Judge.

The North Carolina Department of Transportation ("DOT") appeals from the trial court's order granting defendant Laxmi Hotels of Spring Lake's ("Laxmi") 60(b) motion to set aside the parties' Consent Judgment. After careful review, we affirm.

I. Background

Laxmi owns real property abutting South Main Street in Spring Lake, upon which it operates a Super 8 Motel franchise ("the Hotel"). DOT intended to acquire a portion of the Hotel's property in order to widen and improve South Main Street. On 8 February 2012, DOT right of way agent Greg Kolat met with Laxmi's president Dev Rajababoo and informed him that DOT would be exercising its power of eminent domain to take a portion of the Hotel's property in order to execute DOT's South Main Street project. Kolat informed Rajababoo that DOT was going to acquire a small portion of the property fronting South Main Street in addition to taking a permanent utility easement along the frontage of the property. According to Kolat's testimony and the DOT Negotiating Diary admitted into evidence, Kolat explained the DOT "acquisition procedure and why it is fair" to Rajababoo.

DOT maintains that Kolat informed Rajababoo that DOT would also build a retaining wall to run adjacent to South Main Street along the Hotel property; Rajababoo testified that no one from DOT told him about the retaining wall. The appraisal that DOT provided to Rajababoo showed a retaining wall along the property's frontage, but did not indicate the height of the prospective wall. Rajababoo also testified that DOT assured him that the Hotel would not lose any parking spaces as a result of the taking, and the appraisal did not indicate a loss of parking spaces.

Based on these plans, DOT's initial appraisal reflected a $25,700 "offer of just compensation" for the taking. On 6 June 2012, Laxmi made a counteroffer of $35,000. DOT accepted Laxmi's counteroffer; however, Laxmi was unable to obtain the consent of one of its lenders, so the parties did not complete the settlement at that time.

At some point after accepting Laxmi's counteroffer, DOT made various changes to its South Main Street project plans. These changes were reflected in a modified appraisal summary. The modified appraisal indicated that the right of way would be enlarged, and added a temporary construction easement and a slope easement. DOT provided Laxmi with a copy of the revised offer and appraisal summary, but Laxmi maintains that it was never orally informed by DOT of the change in construction plans. The revised appraisal reflected a settlement offer to Laxmi of $35,000 as just compensation for the taking, which Laxmi accepted. According to Laxmi, it believed that the increase of DOT's offer to $35,000 was in response to Laxmi's counteroffer rather than in response to an increase in the scope of the taking. On 23 July 2014, the parties entered into a Consent Judgment in which the parties agreed to settle for $35,000 as just compensation for the taking. DOT prepared the Consent Judgment.

Laxmi contends that it did not realize that DOT had changed its project plans until after construction began. The DOT project eliminated several of Laxmi's parking spaces, which caused the Hotel's parking lot to be in violation of local codes. In addition, when the Department completed construction of the retaining wall, the wall was roughly fifteen feet tall, completely blocking the Hotel's visibility from the street. The Hotel, which prior to the taking was fully visible from the main thoroughfares in the area, was, according to Rajababoo, now in a "dungeon." The pictures taken after the construction show the Hotel to be invisible from the main roadways because of the retaining wall.

DOT maintains that it informed Laxmi of the plan changes by providing Laxmi with copies of the modified appraisal and increased settlement offer. In support of this contention, DOT points to the Consent Judgment, which incorporated by reference the revised project plans. However, the Consent Judgment "states there is a slope easement under a heading entitled 'TEMPORARY CONSTRUCTION EASEMENT,' but does not mention the height of the retaining wall or the loss of parking spaces."

In contrast, Rajababoo testified that he was never informed of the changes to the plans regarding the loss of parking spaces or the increased height of the retaining wall. At trial, no one from DOT testified that he or she told Laxmi or Rajababoo that DOT's plans had changed. While the documents that DOT provided to Laxmi mentioned a "retaining wall," no document, including the modified appraisal summary, referenced a loss of parking spaces. Moreover, while the retaining wall was mentioned, none of the documents indicated how tall that wall would be.

Rajababoo testified that he first discovered that the Hotel was going to lose parking spaces "[w]hen they were already gone. . . . They just started the work. And one fine day I come to work and all the land is bulldozed, and there's—they are putting in dirt to make a ramp to come in. . . . Nobody had ever approached me for that." Laxmi maintains that "the construction of the wall in front of [the] hotel has severely impacted the value of the hotel . . . and that the taking of the additional parking space from the available usable parking spaces has also severely impacted the value of the hotel." When asked whether Laxmi would have entered into the Consent Judgment if it had been told about the wall or the loss of parking spaces, Rajababoo responded, "Absolutely no way."

On 15 February 2017, Laxmi filed a motion to set aside the Consent Judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. Laxmi's motion alleged that in persuading Laxmi to enter into the Consent Judgment, DOT misrepresented (1) the nature and extent of Laxmi's property that DOT intended to take, and (2) the effect that the taking would ultimately have on "the ability of [Laxmi] to operate or work on the site after the taking."

A hearing on Laxmi's motion was conducted before the Honorable Mary Ann Tally in Cumberland County Superior Court. Judge Tally determined that Laxmi "reasonably relied upon the representations made by [DOT]" and that Laxmi "was never informed of the loss of parking spaces or the change in the height of the retaining wall placed in front of the Hotel." Based on these facts, Judge Tally concluded that DOT "did not adequately inform [Laxmi] of the extent of the taking of the Hotel property, and did not provide just compensation to the Hotel." Judge Tally concluded that these facts warranted the setting aside of the Consent Judgment pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. Accordingly, Judge Tally granted Laxmi's motion and ordered that the case proceed to trial in order to determine the appropriate amount of compensation for the taking. DOT timely appealed.

On appeal, DOT argues that the trial court erred in setting aside the Consent Judgment (1) because Laxmi's motion was not timely, and (2) because there was no substantive basis to justify overturning the judgment.

II. Grounds for Appellate Review

[1] We initially consider whether this Court has jurisdiction to review the trial court's order granting Laxmi's Rule 60(b) motion.

DOT maintains that this Court has jurisdiction over the trial court's order setting aside the Consent Judgment because the trial court's order "affects a final judgment" pursuant to N.C. Gen. Stat. § 7A-27(b)(1). However, even if we deem DOT's appeal to be interlocutory, DOT asserts that the trial court's order is immediately appealable because it affects a substantial right. Finally, in the event that this Court determines that the trial court's order does not affect a substantial right, DOT has filed a petition for writ of certiorari asking this Court to assert jurisdiction and address the merits of its arguments.

A. Interlocutory Appeals

This Court customarily entertains appeals only from final judgments. *See* N.C. Gen. Stat. § 7A-27(b) (2017). A judgment is final if it "leaves nothing further to be done in the trial court." *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014) (citing *Steele v. Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963)). In contrast, "[a]n order is interlocutory 'if it does not determine the issues but directs some further proceeding preliminary to final decree.' " *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (quoting *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961)). Because an interlocutory order is not yet final, with few exceptions, "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]" *Consumers Power v. Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

DOT first argues that even though the order setting aside the parties' Consent Judgment was interlocutory, this Court nevertheless "has jurisdiction to review the trial court's order because it set aside a final judgment." This argument is not persuasive. Judge Tally's order set aside the Consent Judgment in order for the parties "to put on evidence at trial . . . to determine the amount of damages to which [Laxmi] is entitled pursuant to the General Statutes of North Carolina." Clearly, as it contemplates further proceedings at the trial level on the issue of just compensation—the crux of the Consent Judgment—Judge Tally's order is interlocutory. *See Campbell*, 237 N.C. App. at 3, 764 S.E.2d at 632.

However, notwithstanding its lack of finality, an interlocutory order may be immediately appealed if "the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the appeal," *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation omitted), or if the "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*, 285 N.C. at 437, 206 S.E.2d at 181 (citation omitted); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2017). "A substantial right is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right.' " *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976)). "We consider whether a right is substantial on a case-by-case basis." *Id.*

In the instant case, the trial court did not certify the order setting aside the Consent Judgment for immediate appellate review. Nevertheless, DOT argues that "the trial court's setting aside the consent judgment deprived the Department of a substantial right, *i.e.*, the benefit of its bargain in the court-sanctioned settlement of the case."

In support of its argument, DOT turns our attention to *Turner v. Hammocks Beach Corp.* We do not find *Turner* persuasive in the case at bar.

In *Turner*, the defendant had previously "filed a declaratory judgment action seeking to quiet title" to a tract of property which was the subject of a charitable trust. *Turner*, 363 N.C. at 557, 681 S.E.2d at 773. The plaintiffs contested the quiet title action and the case was set for trial. *Id.* However, "[p]rior to trial . . . , the parties reached a settlement and signed a consent judgment, which was entered by the trial court[.]" *Id.* Nearly twenty years later, the plaintiffs brought an action seeking termination of the trust "alleging that fulfillment of the trust terms has become impossible or impracticable[.]" *Id.* The defendant filed a motion to dismiss the plaintiffs' action on the grounds that the "plaintiffs' rights to the property now in question . . . had already been determined by [a prior] consent judgment and that relitigation is barred by collateral estoppel." *Id.* The trial court denied the defendant's motion to dismiss, which the defendant argued was immediately appealable because "the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel." *Id.* at 558, 681 S.E.2d at 773. Our Supreme Court agreed with the defendant, and explained that "[u]nder the collateral estoppel doctrine, 'parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.' " *Id.* (quoting *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973)) (internal citations omitted) (alteration omitted). Thus, because the doctrine of collateral estoppel "is designed to prevent repetitious lawsuits," our Supreme Court concluded that the defendant had "a substantial right to avoid litigating issues that have already been determined by a final judgment." *Id.* at 558, 681 S.E.2d at 773.

Here, DOT cites the language from *Turner* and maintains that the trial court's order is immediately appealable because "parties have a substantial right to avoid litigating issues that have already been determined by a final judgment[,]" that is, the parties' Consent Judgment. *Id.* However, DOT overlooks "*why* our appellate courts hold that . . . collateral estoppel" triggers a substantial right: it "ensures that parties . . . are not forced to re-litigate issues that were *fully litigated* and *actually determined* in previous legal actions." *Campbell*, 237 N.C. App. at 5, 764 S.E.2d at 633 (citing *Turner*, 363 N.C. at 558, 681 S.E.2d at 773) (emphasis added). In this instance, the trial court's order setting aside the parties' Consent Judgment "will not force [DOT] to re-litigate [just compensation] issues that already were determined by a court in an earlier proceeding[,]" *Campbell*, 237 N.C. App. at 5, 764 S.E.2d at 633, nor would the denial of an immediate appeal require DOT to endure "repetitious lawsuits." *Turner*, 363 N.C. at 558, 681 S.E.2d at 773. In fact, the issue of just compensation was never "fully litigated"; rather, the Consent Judgment prevented the need for litigation, as it was designed to do. *Id.* "Indeed, in the only similar proceeding between the parties," Laxmi agreed to accept a settlement of $35,000 as just compensation for DOT's taking, thereby "preventing the trial court from determining that issue on the merits." *Id.* In effect, DOT

> argues not that [it] is compelled to re-litigate an issue previously determined by a court, but instead that [it] must fully litigate—for the first time—an issue that [it] thought was precluded by the [consent] judgment [it] obtained. But that argument can be made in virtually every Rule 60(b) case and our appellate courts have long rejected it as a basis for immediate appeal.

Campbell, 237 N.C. App. at 5, 764 S.E.2d at 633 (citing *Waters*, 294 N.C. at 208, 240 S.E.2d at 344 (1978) and *Robinson v. Gardner*, 167 N.C. App. 763, 768, 606 S.E.2d 449, 452 (2005)). Collateral estoppel is thus no bar in the instant case. *See Turner*, 363 N.C. at 558-59, 681 S.E.2d at 773-74 ("To successfully assert collateral estoppel . . . , defendant would need to show that [an] earlier suit resulted in a final judgment on the merits [and] that the issue in question was identical to an issue *actually litigated* and necessary to the judgment[.]") (citation and quotation marks omitted) (emphasis added).

In that "no court has yet adjudicated" the just compensation issue in the instant case, DOT "cannot rely on our collateral estoppel precedent to immediately appeal the trial court's Rule 60(b) order." *Id.* Moreover, while DOT points out that the ultimate jury verdict in the instant case "may not be as favorable as the" Consent Judgment and that DOT would be liable for court costs and "interest on a jury verdict[,]" it has not offered an explanation as to why a verdict that demonstrates that the Consent Judgment failed to provide Laxmi with just compensation would deprive *DOT* of a substantial right. *See e.g.*, *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right[.]"). Accordingly, we conclude that the trial court's order setting aside the parties' Consent Judgment does not affect a substantial right and is therefore not immediately appealable.

B. Petition for Writ of Certiorari

DOT has filed a petition for writ of certiorari asking this Court to invoke its powers under Rule 21 of the North Carolina Rules of Appellate Procedure in order to address the merits of the instant appeal, notwithstanding its interlocutory nature.

"The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists[.]" N.C. R. App. P. Art. V, Rule 21(a) (2017). Such "appropriate circumstances" exist when " 'review will serve the expeditious administration of justice or some other exigent purpose.' " *Amey v. Amey*, 71 N.C. App. 76, 79, 321 S.E.2d 458, 460 (1984) (quoting *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975)).

In its petition for writ of certiorari, DOT explains that its "power to acquire rights of way and other interests by . . . condemnation" is crucial to its mission as a state department. According to DOT, it "has more than 1750 condemnation cases pending . . . across the State," approximately ninety-five percent of which are settled by consent judgment. We choose to exercise our discretion to grant certiorari so that this Court can address the merits of this matter.

III. Rule 60(b)

Because we choose to grant DOT's petition for writ of certiorari, we must determine whether the trial court erred when it granted Laxmi's Rule 60(b) motion to set aside the Consent Judgment.

Where a final judgment or order has been entered in a particular case, Rule 60(b) will nevertheless allow for a party to obtain relief from that judgment or order "[o]n motion and upon such terms as are just[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017). "Rule 60(b) has been described as 'a grand reservoir of equitable power to do justice in a particular case.' " *Sloan v. Sloan*, 151 N.C. App. 399, 404, 566 S.E.2d 97, 101 (2002) (quoting *Branch Banking & Trust Co. v. Tucker*, 131 N.C. App. 132, 137, 505 S.E.2d 179, 182 (1998)). Pursuant to Rule 60(b), a trial court may relieve a party from operation of a final judgment for the following reasons:

> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017).

This Court reviews a trial court's order granting a Rule 60(b) motion for abuse of discretion. *State ex rel. Davis v. Adams*, 153 N.C. App. 512, 515, 571 S.E.2d 238, 240 (2002) (citations omitted). "Our Supreme Court has stated that this Court should not disturb a discretionary ruling of a trial court unless it 'probably amounted to a substantial miscarriage of justice[.]' " *Sloan v. Sloan*, 151 N.C. App. at 404, 566 S.E.2d at 101 (quoting *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982)). Otherwise, "[a] judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted).

A. Timeliness of Laxmi's Rule 60(b) Motion

[2] DOT first argues that the trial court erred in granting Laxmi's Rule 60(b) motion because Laxmi's motion was not timely filed.

"One of the conditions precedent that must be proven before a court will consider a Rule 60(b) motion is timeliness." *Bruton v. Sea Captain Properties, Inc.*, 96 N.C. App. 485, 488, 386 S.E.2d 58, 59 (1989). A Rule 60(b) motion for relief made pursuant to subsections (b)(1), (2), or (3), *supra*, must be made "not more than one year after the judgment, order, or proceeding was entered or taken." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017). Conversely, a motion made pursuant to Rule 60 (b)(6) (on the grounds of any other reason justifying relief), must only be brought forward "within a reasonable time[.]" *Id.* "What constitutes a reasonable time depends on the circumstances of the individual case." *McGinnis v. Robinson*, 43 N.C. App. 1, 8, 258 S.E.2d 84, 88 (1979) (citation omitted).

In the instant case, the trial court set aside the parties' Consent Judgment pursuant to Rule 60(b)(6). In order for the trial court to have properly granted Laxmi's Rule 60(b) motion pursuant to Rule 60(b)(6), Laxmi must have made its motion "within a reasonable time." DOT, however, maintains that the Consent Judgment could have been set aside *only* "on the limited grounds of fraud, mutual mistake, duress, or undue influence" pursuant to Rule 60(b)(3), rather than Rule 60(b)(6). DOT argues that Laxmi cannot circumvent the one year time limitation imposed under Rule 60(b)(3) "simply by failing to identify its arguments as falling within [that] section[]." Therefore, DOT contends that the trial court erred in granting Laxmi's Rule 60(b) motion because the motion was not brought within the requisite one year period under Rule 60(b)(3).

DOT correctly notes that "Rule 60(b)(6) cannot be the basis for a motion to set aside judgment if the facts supporting it are facts which more appropriately would support one of the five preceding clauses." *Bruton*, 96 N.C. App. at 488, 386 S.E.2d at 59-60. "We have repeatedly held that a movant may not be allowed to circumvent the requirements for clauses (b)(1) through (b)([3]) by 'designating [the] motion as one made under Rule 60(b)(6)[.]' " *Id.* at 488, 386 S.E.2d at 60 (quoting *Akzona, Inc. v. American Credit Indem. Co.*, 71 N.C. App. 498, 505, 322 S.E.2d 623, 629 (1984)).

That facts illustrative of fraud and misrepresentation exist, however, does not mean that the trial court is limited to applying those facts as grounds for relief under Rule 60(b)(3). A trial court will err in couching a Rule 60(b) order in terms of Rule 60(b)(6) only to the extent that "the facts supporting [the motion] are facts which *more appropriately* would support" judgment under Rule 60(b)(3) rather than under Rule 60(b)(6). *Bruton*, 96 N.C. App. at 488, 386 S.E.2d at 59-60 (emphasis added). Even where a case involves various indicia of fraud or misrepresentation, relief may be appropriate pursuant to Rule 60(b)(6) if those facts are accompanied by circumstances that "justify[] relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2017).

We conclude that the trial court did not abuse its discretion in concluding that the facts of the instant case more appropriately supported relief pursuant to Rule 60(b)(6), as explained in subsection *B* below. Accordingly, in order for Laxmi to be entitled to relief from the judgment pursuant to Rule 60(b)(6), Laxmi must have made its Rule 60(b) motion "within a reasonable time." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017).

In the instant case, we find no abuse of discretion on the part of the trial court in concluding that, under the particular circumstances of the case, Laxmi brought its Rule 60(b) motion within a reasonable period of time. While the Consent Judgment was filed on 23 July 2014, construction on the retaining wall did not begin until almost one year later, on 19 May 2015. The retaining wall was not completed until 22 October 2015. As the trial court noted, Laxmi "could not have sought relief from the judgment less than one (1) year after entry of the consent judgment because construction on the wall and the slope easement resulting in the loss of parking spaces was not completed until more than one (1) year after the entry of the consent judgment." Laxmi then filed its motion to set aside the Consent Judgment less than a year and a half after construction of the wall had completed. This, according to DOT, was an unreasonable delay. We do not find a year and a half delay to be so inherently unreasonable as to constitute an abuse of discretion. Rather, given the complexities of this case, we conclude that the trial court did not abuse its discretion when it determined that Laxmi's "motion to set aside the judgment was brought within a reasonable time pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure."

B. Substantive Grounds for Laxmi's Rule 60(b) Motion

[3] Lastly, the Department argues that the trial court erred in setting aside the Consent Judgment because there was no substantive basis to justify the trial court's order. We disagree.

As explained *supra*, Rule 60(b)(6) "authorizes relief from final judgments for 'any other reason justifying relief from the operation of the judgment.' " *Lumsden v. Lawing*, 117 N.C. App. 514, 517, 451 SE.2d 659, 661 (1995). "Relief is appropriate under Rule 60(b)(6) if 'extraordinary circumstances exist' and 'justice demands relief.' " *Id.* at 518, 451 S.E.2d at 662 (quoting *Thacker v. Thacker*, 107 N.C. App. 479, 481, 420 S.E.2d 479, 480 (1992)). While not technically a "catch-all" provision, Rule 60(b)(6) provides trial courts with a "vast reservoir of equitable power." *Lumsden*, 117 N.C. App. at 517, 451 S.E.2d at 661 (citation and quotation marks omitted). "The broad language of clause (6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice." *Brady v. Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971) (citation and quotation marks omitted). Exercise of this equitable power is within the full discretion of the trial judge. *Thacker*, 107 N.C. App. at 482, 420 S.E.2d at 480 (citation omitted).

Initially, we note that DOT has not argued before this Court that the trial court abused its discretion when it concluded that the facts of the present case were sufficient to support the trial court's grant of relief to Laxmi pursuant to Rule 60(b)(6). Rather, DOT directs our attention to the conflicting evidence presented at the hearing to support its argument that there was not a sufficient showing of *fraud* to justify relief pursuant to Rule 60(b)(3). As explained *supra*, a trial court is not prevented from granting relief pursuant to Rule 60(b)(6) merely because the "extraordinary circumstances" involved contain aspects of fraud or misrepresentation.

In the instant case, we agree with Laxmi that extraordinary circumstances existed to support, and that justice so demanded, the trial court's setting aside of the Consent Judgment pursuant to Rule 60(b)(6).

The record is replete with evidence to support the trial court's conclusion that DOT "did not adequately inform [Laxmi] of the extent of the taking of the Hotel property." For instance, DOT maintains that its second offer of $35,000 provided notice to Laxmi that DOT had changed its project plans since the initial offer of $25,700. However, DOT's modified offer of $35,000—which DOT contends reflected the amended calculation of just compensation in light of the plan revisions—was the exact amount of Laxmi's counteroffer to DOT's initial offer of $25,700. Rajababoo testified that DOT "didn't tell me [the updated $35,000 offer] was for the change. That's what we had asked for. There was no change mentioned to me. It was the amount we had countered with[.]" DOT, on the other hand, maintains that its "right of way agent explained the plan changes to Laxmi[.]" As the sole judge of credibility, the trial judge acted well within her discretion when she accepted Laxmi's version of events. *See e.g.*, *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) ("We note that it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial."). The same principle applies to the remaining conflicting testimony that DOT urges us to consider on appeal.

Additionally, in attacking the substantive grounds on which the Consent Judgment was set aside, DOT maintains that "Laxmi, through reasonable diligence, could have requested additional information regarding the retaining wall and slope easement effects." Thus, according to DOT, it "had no duty to disclose additional information absent a request for it and violated no such duty." This contention is surprising, however, considering the representations made by the DOT Right of Way agent and the fact that Laxmi had no option but to enter into a transaction with DOT.

The present case does not involve two entities that were conducting arm's-length negotiations, in which it was clear that neither party had any incentive to act against its best interest. In fact, Kolat represented to Rajababoo that this was not a regular arm's-length transaction. Kolat's testimony was unambiguous: he explained to Rajababoo that "the State's . . . looking out for . . . [the landowner's] best interest . . . ."

> Q. . . . Line Item No. 2, it says, "Did you explain acquisition procedure and why it is fair," and a box mark is checked, what does that indicate? Can you just describe for us what

you mean by explaining the acquisition procedure and why it's fair?

A. The process --

Q. Yeah.

A. -- of the appraisal and explaining to them what's going to take place on their property, explain the process of fair market value, just compensation to the property owner, and I guess that's the way, you know, that *the State's, you know, looking out for, you know, their best interest, too.*

Q. So the State is looking out for the landowner's best interest?

A. Yes.

Q. Did you tell them that –

THE COURT: Wait a minute. What did you just say?

THE WITNESS: I said the State would be--you know, they're concerned about the–you know, the property owner --

THE COURT: Uh-huh. Uh-huh.

THE WITNESS:

--and how it affects what they're doing.

***

Q. (By Mr. Dantinne) And what do you mean by why it is fair?

A. I can't answer that. I don't know.

Q. Did you check the box saying that you explained why it was fair?

A. Well, yes, I explained it. *It's fair. It's the process. It's the DOT's policies and procedures.*

Q. Did you explain to him--

A. I followed the rules.

Q. *Did you explain to him that the appraisal conducted on the property is fair?*

A. *Yes, it would be fair.* And he has the opportunity to get one himself, also.

> Q. Did you give him the appraisal that you told him was fair?
>
> A. Yes.

In contrast to DOT's assertion that it "had no duty to disclose additional information," DOT was obligated to deal in a fair manner with Laxmi. The transaction was a *condemnation* proceeding—that is, a forced sale of Laxmi's private property for public use. As such, DOT was *required* to provide Laxmi with just compensation. *Eller v. Bd. of Educ.*, 242 N.C. 584, 586, 89 S.E.2d 144, 146 (1955) ("When private property is taken for public use, just compensation must be paid."); *Dep't of Transp. v. Rowe*, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001) ("Just compensation is clearly a fundamental right under both the United States and North Carolina Constitution.").

Such constitutional protections do not exist in ordinary arm's-length transactions, which is precisely why the facts at hand are not compatible with, and would not "more appropriately" support, the traditional elements of fraud and misrepresentation. *Bruton*, 96 N.C. App. at 488, 386 S.E.2d at 59-60. However, we find no abuse of discretion on the part of the trial court in concluding that the various *indicia* of fraud and misrepresentation, at the very least, established that DOT "did not adequately inform [Laxmi] of the extent of the taking of the Hotel property." Moreover, in light of the constitutional protections at hand, we are satisfied that the fact that DOT inadequately informed Laxmi of the extent of its taking was sufficient to establish "(1) that extraordinary circumstances exist, and (2) that justice demands relief." *Sloan*, 151 N.C. App. at 405, 566 S.E.2d at 101 (citing *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987)). Accordingly, we are not convinced that the trial court abused its discretion when it concluded that relief was appropriate pursuant to Rule 60(b)(6) in light of such inadequate information.

In addition to its determination that DOT did not adequately inform Laxmi of the extent of the taking of the Hotel property, the trial court also determined that DOT did not provide just compensation to Laxmi. This finding is fully supported by the evidence.

Just compensation is measured by "the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking[.]" N.C. Gen. Stat. § 136-112(1) (2017); *Dep't of Transp. v. Mahaffey*, 137 N.C. App. 511, 517, 528 S.E.2d 381, 385 (2000) ("The measure of compensation provided by section 136-112 . . . provides 'just compensation' within the scope of both the federal and state constitutions.").

It is undisputed that the amount reflected in DOT's second appraisal did not account for the loss in parking spaces. The DOT right of way agent who modified the appraisal testified that normally, "the taking of parking spaces would be considered" in an appraisal. The appraisal also did not account for the height of the retaining wall or the loss of visibility suffered by the Hotel. Moreover, DOT agreed to pay Laxmi the sum of $35,000 as just compensation for the taking, which was the same amount that the parties had agreed upon as just compensation two weeks *prior to* the revision of DOT's plans. If the sum of $35,000 was just compensation in May 2012 for a lesser taking, then it could not be just compensation in July 2014 after DOT substantially increased the scope of the taking. This evidence supports the trial court's finding that the Consent Judgment did not provide just compensation to Laxmi, and the trial court did not abuse its discretion in concluding that, in light of such constitutional deficiency, justice demanded relief pursuant to Rule 60(b)(6).

Accordingly, we conclude that the evidence supports the trial court's determination that Laxmi was not adequately informed of the extent of DOT's taking of the Hotel property, and that the Consent Judgment did not provide just compensation for DOT's taking. In light of the constitutional protections involved, the trial court did not abuse its discretion when it concluded that these facts warranted the setting aside of the Consent Judgment pursuant to Rule 60(b)(6).

IV. Conclusion

For the reasons expressed herein, the trial court's order setting aside the parties' Consent Judgment is

AFFIRMED.

Judges HUNTER, JR. and DIETZ concur.

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA, Plaintiff
v.
LE BEI, ADMINISTRATOR OF THE ESTATE OF TEI PAW, THLA AYE, ADMINISTRATOR OF THE ESTATE OF KHAI HNE, KHAI TLO, NU CING AND TIN AUNG, Defendants

No. COA17-1086

Filed 15 May 2018

Insurance—motor vehicle accident—UIM coverage—stacking—multiple claimant exception

Where estates of decedent car accident victims, who were passengers in the tortfeasor driver's vehicle and also had their own UIM policies, sought a declaratory judgment that they were entitled to underinsured motorist (UIM) coverage under the tortfeasor driver's policy, the trial court properly permitted them to recover UIM coverage under their own policies *and* the tortfeasor driver's policy. The purpose of the Financial Responsibility Act was to provide the innocent victim with the fullest possible protection, and the multiple claimant exception in the Act did not preclude the stacking of the UIM policies.

Judge DIETZ concurring in a separate opinion.

Appeal by Plaintiff from order entered 17 July 2017 by Judge A. Graham Shirley, II in Wake County Superior Court. Heard in the Court of Appeals 8 March 2018.

Simpson Law Firm PLLC, by George L. Simpson, IV, for plaintiff-appellant.

Arnold & Smith, PLLC, by Paul A. Tharp, for defendant-appellees.

HUNTER, JR., Robert N., Judge.

Nationwide Affinity Insurance Company of America ("Plaintiff") appeals from an order granting Le Bei, Administrator of the Estate of Tei Paw, and Thla Aye's, Administrator of the Estate of Khai Hne, (collectively "Defendants") motion for summary judgment and denying Plaintiff's motion for summary judgment. On appeal, Plaintiff argues the trial court improperly allowed Defendants to recover underinsured motorist coverage ("UIM"). We affirm.

I. Factual and Procedural Background

On 3 May 2016, Plaintiff filed a complaint for declaratory judgment, seeking a declaration regarding automobile insurance issued by Plaintiff to Sa Hietha. The complaint alleged the following narrative.

On 26 September 2014, around 11:00 p.m., Hietha drove his Honda Pilot on I-77, near Fort Mill, South Carolina. Hietha traveled northbound, in the far, right lane. Tei Paw, Khia Hne, Khia Tlo, Tin Aung, and Nu Cing rode as passengers in Hietha's vehicle. David Hope drove an American Red Cross bus ahead of Hietha, in the same lane. Mabel Gutierrez drove a Honda Accord in the neighboring lane, also northbound.

Hietha traveled too quickly for the conditions.[1] Consequently, he collided with the rear of the American Red Cross bus. Hietha's vehicle then "spun into the adjacent lane in front of" and collided with Gutierrez's Honda Accord. Tin Aung and Nu Cing suffered personal injuries from the accident. Tei Paw, Khai Hne, and Khai Tlo died as a result from injuries sustained from the accident.

From 28 May 2014 to 28 November 2014, Plaintiff insured Hietha's vehicle through a personal automobile insurance policy ("Hietha policy"). The Hietha policy provided liability insurance coverage with limits of $50,000 per person and $100,000 per accident. The policy also provided UIM coverage with limits of $50,000 per person and $100,000 per accident.

Plaintiff distributed the following amounts under the maximum per accident limit of liability coverage: $26,000 to Tei Paw; $26,000 to Khai Hne; $26,000 to Khai Tlo; $13,000 to Tin Aung; $5,000 to Mabel Gutierrez; $2,500 to David Hope; and $1,500 to Nu Cing. The parties disagreed on whether the passengers were entitled to recover under Hietha's UIM coverage for the difference between the amounts received under the liability coverage and the per person limits of UIM coverage. Thus, Plaintiff requested the trial court declare UIM under Hietha's policy "[wa]s not triggered for any of the Defendants under the Policy."

On 25 July 2016, Defendants filed their answer. Defendants asserted they were entitled to UIM coverage under the Hietha policy. At the time

1. The complaint provides no other details for Hietha's driving beyond that he "traveled too fast for the conditions[.]" Pursuant to Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure, the record includes a narrative form of matters presented at the summary judgment hearing. N.C. R. App. P. 9(c)(1) (2017). The narrative includes the following, additional details. Hope, driving the American Red Cross bus, slowed down in the right lane, to exit I-77. Hietha "travell[ed] too fast for conditions (inattention) [and] ran into the rear of" the bus.

of the accident, Hne had a separate insurance policy with Plaintiff. This separate policy provided UIM coverage with limits of $50,000 per person and $100,000 per accident. Paw also had a separate insurance policy with Plaintiff. Paw's policy provided coverage with UIM limits of $100,000 per person and $300,000 per accident. Defendants contended the UIM coverage under their separate policies should be "stacked" with the UIM coverage under the Hietha policy.

On 30 January 2017, the trial court held a hearing for approval of proposed settlements. In orders entered 31 January 2017, the trial court approved of settlements of $30,800 of liability-policy funds to Defendant Aye and $1,000 of liability-policy funds to Defendant Bei. In both orders, the trial court specifically stated the settlements "shall not affect any rights of [Defendants] to pursue any underinsured motorist claims against any party, including . . . Sa Hietha[.]"

On 13 February 2017, Defendants filed a joint motion for summary judgment. Defendants requested the trial court "declare that they are entitled to UIM coverage under Sa Hietha's policy, in amounts sufficient to exhaust said UIM coverage[.]" On 1 May 2017, Plaintiff filed its own motion for summary judgment. Plaintiff contended the multiple claimant exception in the Financial Responsibility Act precluded Defendants from recovering UIM coverage under the Hietha policy.

On 24 May 2017, the trial court held a hearing on the parties' motions. In an order entered 17 July 2017, the trial court granted Defendants' motion for summary judgment and denied Plaintiff's motion for summary judgment. The trial court ordered "the movant-Defendants are entitled to payment under at-fault Sa Hietha's per-person underinsured motorist coverage provided by Plaintiff, subject to any applicable credits." On 15 August 2017, Plaintiff filed timely notice of appeal.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal quotation marks and citation omitted).

III. Analysis

On appeal, Plaintiff contends the trial court erred by granting summary judgment in favor of Defendants. Specifically, Plaintiff argues the multiple claimant exception in N.C. Gen. Stat. § 20-279.21(b)(4) (2017) applies to the matters at hand. Accordingly, Plaintiff contends the trial court erred in allowing Defendants to recover UIM coverage under Hietha's policy. We disagree.

"Statutory interpretation begins with 'the cardinal principle of statutory construction . . . that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish.' " *Benton v. Hanford*, 195 N.C. App. 88, 92, 671 S.E.2d 31, 34 (2009) (brackets omitted) (ellipses in original) (quoting *State ex rel. Util. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443-44 (1983)). Moreover, "[l]egislative intent can be ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other." *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (citations omitted), *superseded by statute on other grounds*, *N.C. Farm Bureau Mut. Ins. Co. v. Stamper*, 112 N.C. App. 254, 257-58, 468 S.E.2d 584, 585-86 (1996). "The Court will not adopt an interpretation which results in injustice when the statute may reasonably be otherwise consistently construed with the intent of the act." *Nationwide Mut. Ins. Co. v. Chanto*s, 293 N.C. 431, 440, 238 S.E.2d 597, 603 (1977) (citation omitted).

At the outset, our analysis is guided by the "avowed purpose" of the Financial Responsibility Act, which is:

> to compensate the innocent victims of financially irresponsible motorists. The Act is remedial in nature and is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. The purpose of the Act, we have said, is best served when every provision of the Act is interpreted to provide the innocent victim with the fullest possible protection.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573-74, 573 S.E.2d 118, 120 (2002) (citations, quotation marks, ellipses, and brackets omitted).

The Financial Responsibility Act permits interpolicy stacking of UIM coverage to calculate the "applicable limits of underinsured motorist coverage for the vehicle involved in the accident." *N.C. Farm Bureau*

Mut. Ins. Co. v. Bost, 126 N.C. App. 42, 50-51, 483 S.E.2d 452, 458 (1997). After stacking, the parties use the stacked amount to determine if the tortfeasor's vehicle is an underinsured highway vehicle, under N.C. Gen. Stat. § 20-279.21(b)(4). *Id.* at 51, 483 S.E.2d at 458.

Our case law and a statutory amendment in 2004 shaped the relevant definition of an underinsured highway vehicle under N.C. Gen. Stat. § 20-279.21(b)(4). First, our Court decided *Ray v. Atlantic Casualty Insurance Co.*, 112 N.C. App. 259, 435 S.E.2d 80 (1993). In *Ray*, another vehicle crossed the centerline and struck one plaintiff's vehicle. *Id.* at 260, 435 S.E.2d at 80. One plaintiff, and the two passengers in her vehicle, all suffered injuries. *See id.* at 260, 435 S.E.2d at 80. Aetna Insurance Company insured the tortfeasor under a vehicle insurance policy. *Id.* at 260, 435 S.E.2d at 80. The policy provided for coverage with a liability limit of $100,000 per person and $300,000 per accident. *Id.* at 260, 435 S.E.2d at 80. The defendant insurer insured the plaintiff. *Id.* at 260, 435 S.E.2d at 80. Defendant's policy provided for coverage with a UIM limit of $100,000 per person and $300,000 per accident. *Id.* at 260-61, 435 S.E.2d at 80.

Aetna paid an occupant in the tortfeasor's car $98,000, pursuant to the liability coverage under the policy. *Id.* at 261, 435 S.E.2d at 80-81. Thus, $202,000 remained in liability coverage, to be split amongst the three plaintiffs—the driver and her two passengers. *Id.* at 260-61, 435 S.E.2d at 81. Plaintiffs sought a judgment declaring defendant insurer's policy provided for UIM coverage. *Id.* at 261, 435 S.E.2d at 81. Defendant insurer filed a motion for summary judgment, which the trial court granted. *Id.* at 261, 435 S.E.2d at 81. Plaintiffs appealed. *Id.* at 260, 435 S.E.2d at 80.

This Court analyzed whether an underinsured vehicle, as defined in N.C. Gen. Stat. § 20-279.21(b)(4), included "a tortfeasor's vehicle whose available liability insurance is less than the relevant UIM coverage." *Id.* at 261, 435 S.E.2d at 81. At the time our Court decided *Ray*, N.C. Gen. Stat. § 20-279.21(b)(4) provided UIM coverage applies when "all liability bonds or insurance policies providing coverage for bodily injured caused by . . . the underinsured highway vehicle have been exhausted." *Id.* at 261, 435 S.E.2d at 81 (emphasis omitted) (ellipses in original). Thus, the language of the statute "required this Court to base this determination on a comparison of the tortfeasor's overall liability *coverage* (not the actual liability *payment*) to the victim's UIM coverage." *Integon Nat'l Ins. Co. v. Maurizzio*, 240 N.C. App. 38, 42, 769 S.E.2d 415, 419 (2015) (analyzing *Ray*'s holding and the subsequent amendment of N.C. Gen. Stat. § 20-279.21(b)(4)).

Accordingly, this Court held plaintiffs were not entitled to UIM coverage under defendant insurer's policy, because the liability coverage and the UIM coverage provided were the same. *Ray*, 112 N.C. App. at 262, 435 S.E.2d at 81. Thus, the tortfeasor's vehicle did not meet the definition of an underinsured highway vehicle. *Id.* at 262, 435 S.E.2d at 81.

In 2004, in response to *Ray*, the General Assembly amended N.C. Gen. Stat. § 20-279.21(b)(4). The General Assembly added two sentences, and the statute now reads, *inter alia*:

> An "uninsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. *For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle unless the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are greater than that policy's bodily injury liability limits.*

N.C. Gen. Stat. § 20-279.21 (b)(4) (emphasis added).

Following the amendment, our Court twice examined the added two sentences and their effect on claimants' right to recover UIM. First, in *Benton*, plaintiff suffered injuries as a result of a single car accident.[2]

2. In *Benton*, there were actually two plaintiffs, the other plaintiff being the driver of the vehicle.

195 N.C. App. at 89, 671 S.E.2d at 32. Nationwide insured plaintiff under a vehicle insurance policy. *Id.* at 89-90, 671 S.E.2d at 32. The policy provided for coverage with a liability limit of $50,000 per person and a UIM limit of $50,000 per person. *Id.* at 90, 671 S.E.2d at 32. Defendant insurer, Progressive Southeastern Insurance Company, also insured plaintiff, under a household resident policy. *Id.* at 90, 671 S.E.2d at 32. This policy provided UIM coverage of $100,000 per person. *Id.* at 90, 671 S.E.2d at 32.

Nationwide paid plaintiff $50,000, pursuant to the liability limit. *Id.* at 90, 671 S.E.2d at 32. Defendant insurer contended the vehicle did not meet the definition of an "underinsured highway vehicle" because the Nationwide policy provided UIM coverage with limits equal to that of the policy's liability limits. *Id.* at 91, 671 S.E.2d at 33.

Our Court disagreed with defendant insurer. The Court, while specifically highlighting it "must interpret the provisions of the Act liberally in order to provide the innocent victim with the fullest possible protection," held the second sentence of the amendment did not apply. *Id.* at 93-94, 671 S.E.2d at 34-35 (brackets omitted). The Court titled the second sentence of the amendment the "multiple claimant exception" and concluded the sentence only applies to accidents with multiple claimants. *Id.* at 94, 671 S.E.2d at 34-35. Since the accident involved only one claimant, the Court used the general definition of an underinsured highway vehicle and concluded the vehicle met said definition. *Id.* at 94, 671 S.E.2d at 35.

Next, in *Maurizzio*, three family members, Destany, Daijah, and Desiree', were involved in a single car accident. 240 N.C. App. at 39, 769 S.E.2d at 417. Destany drove the vehicle owned by Suzanne Maurizzio, and Daijah and Desiree' rode as passengers. *Id.* at 39, 769 S.E.2d at 417. Desiree' and Daijah suffered injuries. *Id.* at 39, 769 S.E.2d at 417.

At the time of the accident, Suzanne insured the vehicle through a policy with plaintiff insurer. *Id.* at 39, 769 S.E.2d at 417. The policy provided both liability and UIM coverage with limits of $50,000 per person and $100,000 per accident. *Id.* at 39, 769 S.E.2d at 417. The parties settled Desiree's claim within the liability coverage limits of the policy. *Id.* at 39, 769 S.E.2d at 417.

Daijah's injuries resulted in an excess of $200,000 of expenses. *Id.* at 39, 769 S.E.2d at 417. Plaintiff insurer tendered the $50,000 per person liability limit. *Id.* at 39, 769 S.E.2d at 417. Daijah's parents also had an insurance policy with plaintiff insurer. *Id.* at 39, 769 S.E.2d at 417. This policy provided UIM coverage with limits of $50,000 per person and $100,000 per accident. *Id.* at 39, 769 S.E.2d at 417-18.

Plaintiff insurer sought a declaratory judgment, declaring Daijah's parents' policy did not provide UIM coverage for Daijah's injuries from the accident. *Id.* at 39, 769 S.E.2d at 418. Defendants moved for summary judgment and contended the UIM coverage under the parents' policy could be stacked with the UIM coverage under Suzanne's policy. *Id.* at 39, 769 S.E.2d at 418. Plaintiff insurer filed its own motion for summary judgment, asserting the multiple claimant exception applied, and, thus, the claimants could not stack the UIM coverage from Suzanne's policy with any other UIM coverage. *Id.* at 40, 769 S.E.2d at 418. The trial court denied plaintiff's motion for summary judgment and granted defendants' motion for summary judgment. *Id.* at 40, 769 S.E.2d at 418. The trial court declared plaintiff insurer's policies, to Suzanne and Daijah's parents, provided $100,000 in UIM coverage. *Id.* at 40, 769 S.E.2d at 418.

Plaintiff insurer appealed. *Id.* at 40, 769 S.E.2d at 418. Plaintiff insurer argued the multiple claimant exception applied because two people were injured in the accident. *Id.* at 40, 769 S.E.2d at 418. Our Court summarized the effect of amendment as providing "an additional definition of 'underinsured highway vehicle' for situations where multiple claimants seek liability funds." *Id.* at 42, 769 S.E.2d at 419. The Court explained:

> [t]he multiple claimant exception prevents an increase in liability or UIM exposure of the carrier providing coverage for the tortfeasor's vehicle. The exception states a vehicle is not an "underinsured motor vehicle" if the owner's policy provides UIM coverage with limits, which are less than or equal to that policy's bodily injury liability limits.

Id. at 43, 769 S.E.2d at 420 (citing N.C. Gen. Stat. § 20-279.21(b)(4)).

The Court held the multiple claimant exception was not triggered "simply because there were two injuries in an accident." *Id.* at 44, 769 S.E.2d at 420. The Court limited the exception's applicability to "when the amount paid to an individual claimant is less than the claimant's limits of UIM coverage after liability payments to multiple claimants." *Id.* at 44, 769 S.E.2d at 420-21 (citation omitted).

Plaintiff insurer and Desiree' settled her claim in the per person liability coverage. *Id.* at 44, 769 S.E.2d at 421. Thus, the liability payment did not reduce the liability coverage available for Daijah's claim. *Id.* at 44, 769 S.E.2d at 421. Accordingly, the multiple claimant exception did not apply. *Id.* at 44-45, 769 S.E.2d at 421.

Turning to the case at bar, the parties disagree on the issue before our Court. Plaintiff contends the case is an issue of first impression and is not question of stacking insurance policies. Additionally, Plaintiff asserts the General Assembly sought "to broaden UIM coverage only for occupants of an innocent operator's vehicle . . . and expressly excludes occupants of a tortfeasor's vehicle from the expanded UIM coverage[.]"

Defendants disagree and argue the issue is not one of first impression. Instead, Defendants assert the issue only requires this Court to apply settled law permitting stacking of insurance policies. Defendants further contend Plaintiff's interpretation would "pervert the statute by adding a restrictive distinction that would punish innocent victims of a tortfeasor's negligence by exempting the latter's underinsured motorist coverage from his own passenger's claims."

We agree with Defendants' framing of the issue and conclude the multiple claimant exception does not apply to the case *sub judice*. The General Assembly added the multiple claimant exception post-*Ray* in an effort to further protect innocent victims of financially irresponsible motorists. To construe the multiple claimant exception to limit UIM recovery to innocent occupants of a tortfeasor's vehicle, while allowing recovery by innocent occupants of an innocent operator's vehicle, would be "an interpretation which results in injustice[.]" *Chantos*, 293 N.C. at 440, 238 S.E.2d at 603 (citation omitted).

Keeping in mind we are required to liberally construe the Act, we decline to apply the multiple claimant exception in a way which would reduce compensation to innocent victims and conflict with the avowed purpose of the Act. *Pennington*, 356 N.C. at 573, 573 S.E.2d at 120 (citation omitted). Moreover, this holding comports with the intent of the legislature, and we considered the "nature and purpose of the act and the consequences which would follow its construction one way or the other" and "the language of the statute, the spirit of the statute, and what it seeks to accomplish." *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763 (citations omitted); *Benton*, 195 N.C. App. at 92, 671 S.E.2d at 34 (quotation marks and citation omitted).

Because we hold the multiple claimant exception does not apply, the trial court properly permitted Defendants to recover UIM coverage under their own policies and the UIM coverage under Hietha's policy with Plaintiff. Accordingly, the trial court properly granted Defendants' motion for summary judgment and properly denied Plaintiff's motion for summary judgment.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judge ZACHARY concurs.

Judge DIETZ concurs in a separate opinion.

DIETZ, Judge, concurring.

I concur in the majority opinion but write separately to emphasize that “[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. *Wilkie v. City of Boiling Spring Lakes*, __ N.C. __, __, 809 S.E.2d 853, 858 (2018). In other words, “[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.” *Id.* We address the General Assembly’s intent and the potential for injustice in this case only because N.C. Gen. Stat. § 20-279.21(b)(4), read in its entirety, is open to more than one reasonable interpretation and is therefore ambiguous.

STATE OF NORTH CAROLINA
v.
JAMES HAROLD COURTNEY, III

No. COA17-1095

Filed 15 May 2018

1. **Appeal and Error—preservation of issues—double jeopardy—motion to dismiss**

   Where defendant argued on appeal that the State’s voluntary dismissal of a murder charge after a mistrial terminated the jeopardy that attached at his first murder trial, he preserved the issue for appeal by raising his double jeopardy defense in a written motion to dismiss before the second trial.

2. **Constitutional Law—double jeopardy—after mistrial for hung jury—voluntary dismissal by State—reprosecution**

   Where defendant’s murder trial was declared a mistrial due to jury deadlock and the State subsequently filed a section 15A-931 voluntary dismissal of the murder charge, the State’s reprosecution of defendant for the same offense four years later violated the constitutional prohibition against double jeopardy. While the hung-jury mistrial did not terminate the initial jeopardy, the State's voluntary dismissal did terminate the jeopardy and was functionally tantamount to an acquittal.

Appeal by defendant from judgment entered 9 November 2016 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 18 April 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jess D. Mekeel, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for defendant.

ELMORE, Judge.

In 2009, the State charged James Harold Courtney, III (defendant) with first-degree murder for the shooting death of James Deberry. At trial the jury hung, and the trial court declared a mistrial on the ground of jury deadlock. Four months later, the prosecutor filed a N.C. Gen. Stat. § 15A-931 voluntary dismissal of the murder charge with the trial court, acknowledging on the form that its dismissal was being entered after defendant had already faced jeopardy for the charge and explaining the following reason for its dismissal: "Hung jury, State has elected not to re-try case."

In 2015, however, after acquiring new evidence it believed strengthened its case, the State recharged defendant with first-degree murder for Deberry's homicide. Before his second trial, defendant moved to dismiss the new murder indictment, claiming a double jeopardy bar, which the trial court summarily denied. The second jury found defendant guilty of second-degree murder, and the trial court entered a judgment sentencing him to approximately eighteen to twenty-two years in prison.

On appeal, defendant concedes that the State was permitted to retry him on the mistried murder charge without violating his double jeopardy rights because the hung-jury mistrial did not terminate the initial jeopardy that attached when the first jury was empaneled and sworn. He argues, however, that the prosecutor's post-mistrial voluntary dismissal of the mistried charge terminated that initial continuing jeopardy and, therefore, the State was barred from reprosecuting him four years later for the same offense. After careful consideration, we agree.

The Double Jeopardy Clause bars successive prosecutions for the same offense after acquittal. This protection "serves a constitutional policy of finality for the defendant's benefit[,]" *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977) (citation and quotation marks omitted), and "guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Blueford v. Arkansas*, 566 U.S. 599, 605, 132 S. Ct. 2044, 2050, 182 L. Ed. 2d 937 (2012) (citation and quotation marks omitted).

In North Carolina, a prosecutor may take "a simple and final dismissal which terminates the criminal proceedings under that indictment" at any time. *State v. Lamb*, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988) (citing N.C. Gen. Stat. § 15A-931). While "[s]ection 15A-931 does not bar the bringing of the same charges upon a new indictment," *id.* (citing N.C. Gen. Stat. § 15A-931 official cmt.), in this case defendant's constitutional right to be free from double jeopardy did, *see* N.C. Gen. Stat. § 15A-931 official cmt. (opining that reprosecution would be barred "if jeopardy had attached when the . . . charge[ ] w[as] dismissed").

We hold that when a prosecutor takes a section 15A-931 voluntary dismissal of a criminal charge after jeopardy had attached to it, such a post-jeopardy dismissal is accorded the same constitutional finality and conclusiveness as an acquittal for double jeopardy purposes. Further, while the State has the undisputed right to retry a hung charge, we hold that a prosecutor's election instead to dismiss that charge is binding on the State and tantamount to an acquittal.

We thus hold that here, by virtue of the prosecutor's post-jeopardy dismissal of the murder charge, regardless of whether it was entered after a valid hung-jury mistrial but before a permissible second trial, the State was barred under double jeopardy principles from retrying defendant four years later for the same charge. Accordingly, we vacate the judgment entered against defendant in 15 CRS 213392.

I. Background

On Halloween 2009, James Deberry was fatally shot outside his apartment in Raleigh. The State's evidence tended to show that when responding officers arrived, Deberry was still conscious and told a detective that "a friend upstairs" had shot him. Monica Bustamante, Deberry's fiancé, was with him and explained to the detective that "what he meant was Jar, a friend that lived upstairs, or one of Jar's friends."

Police determined that "Jar" was David Moses. The State's evidence also indicated that Moses and defendant had grown up together in New York; that defendant met Deberry at Moses' apartment; that Deberry sold a few pounds of low-grade marijuana to defendant, and likely others, for lower-level distribution; and that Deberry's homicide may have been drug-related.

The State charged defendant and Moses with first-degree murder. But in return for agreeing to testify at defendant's trial, the State dropped the charge against Moses and granted him immunity. After the jury hung at defendant's first trial, the trial court declared a mistrial, and defendant was released on bail.

On 16 December 2010 and 10 February 2011, the trial court issued "homicide status hearing" (original in all caps) orders containing handwritten notes from the judge indicating that the matter was set to be reviewed at a later status hearing to determine whether the State was going to retry the case. On 14 April 2011, the prosecutor filed a "Dismissal/ Notice of Reinstatement" with the trial court, indicating that it was voluntarily dismissing the murder charge. The form, Form AOC-CR-307, is separated into three sections: (1) "Dismissal," (2) "Dismissal with leave," and (3) "Reinstatement." The prosecutor filled in the "Dismissal" section, checking the following boxes: (1) "The undersigned prosecutor enters a dismissal to the above charge(s) and assigns the following reasons:" and (2) "4. Other: (*specify*)." Next to box 4, the prosecutor wrote: "hung jury, State has elected not to re-try case." Under box 4 the form contains a typewritten sentence concerning whether a jury had been impaneled and whether evidence had been presented, with instructions to edit the sentence to reflect whether the voluntary dismissal was being entered before or after jeopardy had attached to the charge. With the handwritten edits, that sentence reads as follows (omissions are stricken; additions are underlined): "A jury has ~~not~~ been impaneled ~~nor~~ <u>and</u> has [sic] evidence been introduced."

In 2013 and 2014, the State acquired new evidence putting Ivan McFarland, a friend of both defendant and Moses from New York, at the scene of Deberry's shooting, and obtained cellphone records indicating that five calls were made between defendant's and McFarland's cellphones during the day of the shooting. In 2015, the State charged McFarland and recharged defendant with Deberry's murder.[1] On 6 July 2015, a grand jury reindicted defendant for first-degree murder.

1. A pretrial hearing transcript reveals that another judge had previously denied the State's motion to join McFarland's and defendant's murder trials, and that the State

Before his second trial, defendant moved to dismiss the 2015 murder indictment on double jeopardy grounds. Defendant conceded that the State was permitted to retry him for Deberry's homicide following the December 2010 hung-jury mistrial. But he argued that since the prosecutor four months later in April 2011 instead elected under N.C. Gen. Stat. § 15A-931 to voluntarily dismiss the 2009 murder indictment, after he had already faced jeopardy for that charge at the first trial, the Double Jeopardy Clause barred the State from retrying him for the same offense. The trial court summarily denied the motion.

Additionally, the following events occurred which we briefly address only to provide context for defendant's other non-dispositive alleged errors. Before his second trial, defendant also moved to dismiss the 2015 murder indictment on speedy trial grounds, which the trial court denied; and he objected to not having been formally arraigned at least a week before he was tried and requested a continuance, which the trial court denied, immediately arraigned him, and began trial the same day. At trial, the trial court admitted cellphone record evidence under Rule 802(6)'s business-records exception to the rule against hearsay, over defendant's objection that the records were not properly authenticated under Rule 902.

After the State rested its case, defendant presented no evidence. The jury convicted defendant of second-degree murder, and the trial court entered a judgment sentencing him to 220 to 273 months in prison. Defendant appeals.

II. Alleged Errors

On appeal, defendant asserts the trial court erred by denying his motions to dismiss the second murder charge on both double jeopardy and speedy trial grounds. First, he argues his double jeopardy dismissal motion was improperly denied because the prosecutor's post-mistrial section 15A-931 voluntary dismissal of the murder charge terminated its jeopardy that attached at the first trial and continued after the hung-jury mistrial and, thus, the State was barred under the Double Jeopardy Clause from retrying him for Deberry's murder. Second, and alternatively, defendant argues that if the voluntary dismissal did not terminate the continuing original jeopardy that attached at the first trial, his speedy trial rights were violated by the State's seven-year delay from his first arrest to the second trial; or, defendant argues, the case

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intended to try McFarland after it tried defendant. The record is silent as to the outcome of the murder charge against McFarland.

should be remanded for a new speedy trial hearing, because the trial court failed to account for the four years between the dismissal entry and his reindictment when the court balanced *Barker*'s length-of-delay factor in its speedy trial analysis.

Third, defendant argues the trial court erred by admitting the phone records into evidence under Rules 803(6)'s public-records hearsay exception over his Rule 902(a)(2) authentication objection. And fourth, he asserts the trial court violated his statutory right under N.C. Gen. Stat. § 15A-943(b) not to be tried within seven days of his arraignment because he was formally arraigned and tried the same day.

Because we conclude that defendant's first argument is dispositive and warrants vacating the judgment entered against him, we analyze only the double jeopardy issue presented and decline to address his remaining arguments.

III. Double Jeopardy

Defendant asserts his double jeopardy rights were violated when he was reprosecuted for first-degree murder. He argues the prosecutor's voluntary dismissal of the 2009 murder charge terminated the jeopardy that attached at the first trial and continued following the hung-jury mistrial. Thus, defendant contends, the trial court improperly denied his pretrial motion to dismiss the 2015 murder charge before his second trial, and he unconstitutionally faced jeopardy twice for the same offense.

A. Issue Preservation

[1] As a threshold matter, the State asserts that defendant failed to preserve his double jeopardy claim because he failed to object to the hung-jury mistrial. The State's preservation argument is meritless.

The State cites to *State v. Lachat*, 317 N.C. 73, 343 S.E.2d 872 (1986), for support. In *Lachat*, our Supreme Court interpreted its decision in *State v. Odom*, 316 N.C. 306, 341 S.E.2d 332 (1986), as holding that, in "a noncapital case, . . . a defendant is not entitled by reason of former jeopardy to dismissal of the charge against him, where he failed to object to the trial court's termination of his first trial by a declaration of mistrial." *Id.* at 85, 343 S.E.2d at 878 (citing *Odom*, 316 N.C. at 309, 341 S.E.2d at 334)). The *Lachat* Court, however, after declining to extend *Odom*'s objection requirement to capital cases, clarified that its decision in *Odom* was limited to situations where a defendant is given notice and opportunity to object before a mistrial is declared but fails to do so. Thus, the *Lachat* Court explained, it was declining to apply *Odom*'s objection requirement in part because "both declarations of mistrial by the trial court were entered on the trial court's own motion and without prior notice or warning to the defendant." *Id.* at 86, 343 S.E.2d at 879. The *Lachat* Court determined that "requir[ing] [the defendant] to go through the formality of objecting after a mistrial had already been declared or lose her protection against double jeopardy would be a triumph of form over substance[,]" *id.* at 86, 343 S.E.2d at 879, "particularly [where] the defendant properly raised the issue of former jeopardy before the commencement of the second trial by filing her written motion to dismiss the charge against her," *id.* at 87, 343 S.E.2d at 879. Indeed, the *Lachat* Court reasoned, "it was the trial court's denial of that motion which preserved this issue for appeal." *Id.* at 87, 343 S.E.2d at 879. This authority, however, is simply inapplicable here.

The former jeopardy defenses raised by both defendants in *Odom* and *Lachat* before their second trials were grounded in their assertion that the prior mistrial was improperly declared, implicating their double jeopardy right to have their guilt or innocence determined by the first jury. Here, defendant neither disputed the validity of the hung-jury mistrial nor used it to support his former jeopardy defense; rather, his double jeopardy claim was grounded in his assertion that the State's voluntary dismissal of the murder charge terminated the jeopardy that attached at the first trial. Additionally, the constitutional protection at issue here is not defendant's right to have his guilt or innocence decided by a particular tribunal, but his right to avoid successive prosecutions for the same offense. Further, defendant here, like the defendant in *Lachat*, properly raised his former jeopardy defense before the second trial by filing a written motion to dismiss the murder charge on double jeopardy grounds, and it was the trial court's denial of that motion that preserved this issue for appeal. Accordingly, despite defendant's failure to object to the hung-jury mistrial, his former jeopardy argument is preserved.

B. Discussion

[2] As we review alleged double jeopardy violations *de novo*, *see*, *e.g.*, *State v. Schalow*, ___ N.C. App. ___, ___, 795 S.E.2d 567, 571 (2016) (citation omitted), *disc. rev. allowed*, 369 N.C. 521, 796 S.E.2d 791 (2017), *and disc. rev. improvidently allowed*, ___ N.C. ___, 809 S.E.2d 579 (2018), it follows that we review *de novo* a trial court's denial of a motion to dismiss an indictment on double jeopardy grounds.

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. The Clause " 'guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' " *Blueford v. Arkansas*, 566 U.S. 599, 605, 132 S. Ct. 2044, 2050, 182 L. Ed. 2d 937 (2012) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S. Ct. 1349, 1353, 51 L. Ed. 2d 642 (1977)).

Under the Double Jeopardy Clause, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may [not] be tried . . . a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S. Ct. 732, 736–37, 154 L. Ed. 2d 588 (2003) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)). "Where successive prosecutions are at stake, the guarantee serves 'a constitutional policy of finality for the defendant's benefit.' " *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977) (quoting *United States v. Jorn*, 400 U.S. 470, 479, 91 S. Ct. 547, 554, 27 L. Ed. 2d 543 (1971) (plurality opinion)). "The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' " *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 829, 54 L. Ed. 2d 717 (1978) (quoting *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S. Ct. 671, 672, 7 L. Ed. 2d 629 (1962)). The federal protection against successive prosecutions for the same offense is also guaranteed by the Law of the Land Clause of the North Carolina Constitution. *See State v. Brunson*, 327 N.C. 244, 247, 393 S.E.2d 860, 863 (1990) (citing N.C. Const. art. I, § 19; other citations omitted); *see also State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977) ("It is a fundamental principle of the common law, guaranteed by our Federal and State Constitutions, that no person may be twice put in jeopardy of life or limb for the same offense." (citations omitted)).

Defendant concedes that the hung-jury mistrial was a "nonevent" that did not terminate the initial jeopardy attached to the murder charge when the first jury was empaneled and sworn, and thus the State was permitted to retry him on that mistried charge without unlawfully twice subjecting him to jeopardy. He argues the State's post-mistrial section 15A-931 voluntary dismissal of that mistried charge was a jeopardy-terminating event functionally equivalent to an acquittal of that charge, thereby barring the second trial.

In its brief, the State does not address the jeopardy-terminating effect on the murder charge of the prosecutor's voluntary dismissal;

rather, it argues that where, as here, a proper hung-jury mistrial was declared, " 'in legal contemplation there has been no trial.' " *Lachat*, 317 N.C. at 82, 343 S.E.2d at 877 (quoting *State v. Tyson*, 138 N.C. 627, 629, 50 S.E. 456 (1905)). According to the State, because the "hung jury mistrial rendered the original trial 'a nullity' such that there was 'no trial' at all," the "clock was effectively rewound to before the impaneling of a jury and corresponding attachment of jeopardy." Thus, the State continues, "jeopardy cannot be terminated when it never attached in the first place."

"There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.' " *Martinez v. Illinois*, 134 S. Ct. 2070, 2074, 188 L. Ed. 2d 1112 (2014) (citations omitted); *see also Crist v. Bretz*, 437 U.S. 28, 35 n.10, 98 S. Ct. 2156, 2160 n.10, 57 L. Ed. 2d 24 (1978) ("[J]eopardy does attach even in a trial that does not culminate in a jury verdict[.] . . ." (citation omitted)). Here, jeopardy attached when the first jury was empaneled and sworn, and despite the State's theoretical argument, there can be no doubt that defendant faced the direct peril of being convicted and punished for first-degree murder at that trial. Jeopardy does not "unattach" when the jury hangs. *See Yeager v. United States*, 557 U.S. 110, 118, 129 S. Ct. 2360, 2366, 174 L. Ed. 2d 78 (2009) ("*[A] jury's inability to reach a decision* is the kind of 'manifest necessity' that *permits* the declaration of a mistrial and *the continuation of the initial jeopardy that commenced when the jury was first impaneled.*" (emphasis added) (citations omitted)).

" '[T]he conclusion that jeopardy has attached,' however, 'begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial.' " *Martinez*, 134 S. Ct. at 2075 (quoting *Serfass v. United States*, 420 U.S. 377, 390, 95 S. Ct. 1055, 1064, 43 L. Ed. 2d 265 (1975)). "The remaining question is whether the jeopardy ended in such a manner that the defendant may not be retried." *Id.* (citation omitted).

The Double Jeopardy Clause does not bar retrial of a hung charge because a hung-jury mistrial is "not an event that terminates the original jeopardy . . . ." *Richardson v. United States*, 468 U.S. 317, 326, 104 S. Ct. 3081, 3086, 82 L. Ed. 2d 242 (1984). But the Clause bars retrial after a jeopardy-terminating event, such as (1) a jury acquittal, *see, e.g.*, *Evans v. Michigan*, 568 U.S. 313, 328, 133 S. Ct. 1069, 1080, 185 L. Ed. 2d 124 (2013) ("There is no question that a jury verdict of acquittal precludes retrial . . . ." (citation omitted)); (2) a judicial acquittal, *see id.* at 319, 133 S. Ct. at 1075 (explaining that a judicial " 'acquittal' includes 'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding that necessarily establishes the criminal defendant's lack of criminal culpability,' and any other 'ruling which relate[s] to the ultimate question of guilt or innocence' " (citation and brackets omitted)); or (3) certain non-defense-requested terminations of criminal proceedings, such as non-procedural dismissals or improperly declared mistrials, that for double jeopardy purposes are functionally equivalent to acquittals. *See, e.g.*, *Lee v. United States*, 432 U.S. 23, 30, 97 S. Ct. 2141, 2145, 53 L. Ed. 2d 80 (1977) ("A mistrial ruling invariably rests on grounds consistent with reprosecution, while a dismissal may or may not do so." (internal citation omitted)); *see also United States v. Scott*, 437 U.S. 82, 99–100, 98 S. Ct. 2187, 2198, 57 L. Ed. 2d 65 (1978) (holding that there is no jeopardy bar to a second trial where the trial court grants a defendant-requested motion to dismiss a charge on a basis unrelated to factual guilt or innocence on the ground that the Double Jeopardy Clause "does not relieve a defendant from the consequences of his voluntary choice").

In determining whether a judicial ruling, whether labeled a dismissal or mistrial, amounts to an acquittal barring retrial, "[t]he critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged." *Lee*, 432 U.S. at 30, 97 S. Ct. at 2145; *see also Evans*, 568 U.S. at 319, 133 S. Ct. at 1075 (explaining that "substantive rulings" of true judicial acquittals "stand apart from procedural rulings that may also terminate a case midtrial," such as "rulings on questions that 'are unrelated to factual guilt or innocence,' " including, for instance, "some problem like an error with the indictment" (citation omitted)). At issue here is whether the non-defense-requested section 15A-931 voluntary dismissal of the murder charge was a jeopardy-terminating event tantamount to an acquittal. We conclude that it was.

1. Post-jeopardy Section 15A-931 Voluntary Dismissal Amounts to an Acquittal

Under N.C. Gen. Stat. § 15A-931, entitled "Voluntary dismissal of criminal charges by the State":

> (a) . . . *[T]he prosecutor may dismiss any charges stated in a criminal pleading including those deferred for prosecution* by entering an oral dismissal in open court before or during the trial, or *by filing a written dismissal with the clerk at any time. The clerk must* record the dismissal entered by the prosecutor and *note in the case file whether a jury has been impaneled or evidence has been introduced.*

Id. § 15A-931(a) (2017) (emphasis added). In the context of addressing a speedy trial claim, our Supreme Court has interpreted a section 15A-931 dismissal as "a simple and final dismissal which terminates the criminal proceedings under that indictment[,]" *State v. Lamb*, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988) (interpreting N.C. Gen. Stat. § 15A-931), and explained that "[s]ection 15A-931 does not bar the bringing of the same charges upon a new indictment." *Id.* (citing N.C. Gen. Stat. § 15A-931 official cmt.). But the plain language of section 15A-931 explicitly requires that voluntary dismissals acknowledge whether a defendant has faced jeopardy for the charge, indicating that the legislature contemplated jeopardy attachment to a dismissed charge to be significant, and that the double jeopardy consequences of pre- and post-jeopardy dismissals would differ. *See State v. Williams*, 286 N.C. 422, 431, 212 S.E.2d 113, 119 (1975) ("[A] statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage." (citations omitted)).

Thus, in the jeopardy context, we have held that a defendant is not twice unlawfully subjected to jeopardy if the State recharges him or her with the same charge a prosecutor had previously dismissed under section 15A-931 before a jury was empaneled and sworn, because a defendant must face jeopardy before he can suffer double jeopardy. *See, e.g.*, *State v. Jacobs*, 128 N.C. App. 559, 569, 495 S.E.2d 757, 764 (1998) (rejecting a double jeopardy claim because "[t]he former prosecution was voluntarily dismissed by the State *before a jury had been empaneled and before jeopardy had attached*" (emphasis added) (citation omitted)); *State v. Strickland*, 98 N.C. App. 693, 694–95, 391 S.E.2d 829, 830–31 (1990) (same); *State v. Hice*, 34 N.C. App. 468, 471–72, 238 S.E.2d 619, 621–22 (1977) (same); *see also State v. Muncy*, 79 N.C. App. 356, 360, 339 S.E.2d 466, 469 (1986) ("A voluntary dismissal taken by the State, pursuant to G.S. 15A-931, does not preclude the State from instituting a subsequent prosecution for the same offense *if jeopardy has not attached*." (emphasis added) (citation omitted)).

But where, as here, the State voluntarily dismisses a criminal charge after a jury had been empaneled and sworn, we interpret section 15A-931 as according that dismissal the same constitutional finality and conclusiveness as an acquittal for double jeopardy purposes. We hold that if a prosecutor enters a post-jeopardy section 15A-931 dismissal of a charge, a defendant cannot again face jeopardy for that same charge. Accordingly, we conclude that defendant here was unlawfully placed twice in jeopardy when the prosecutor voluntarily dismissed the murder charge after jeopardy had attached to it, and the State years later retried him for that same offense. *Cf. Midgett v. McClelland*, 547 F.2d 1194, 1196 (4th Cir. 1977) ("Putting [the defendant] to trial on the assault charge after he had been put to trial on that charge once, the prosecution dropping the charge only after the testimony was in, was clearly a violation of [his] right not to be put in jeopardy twice.").

Our conclusion—that a prosecutor's post-jeopardy dismissal of a criminal charge is functionally equivalent to an acquittal barring the State under double jeopardy principles from later reprosecuting that same charge—is buttressed by the official commentary to section 15A-931. "Although the official commentary was not drafted by the General Assembly," and it is thus not binding but merely persuasive, "its inclusion in The Criminal Procedure Act is some indication that the legislature expected and intended for the courts to turn to it for guidance when construing the Act." *State v. Williams*, 315 N.C. 310, 327, 338 S.E.2d 75, 85 (1986) (finding "the logic of the official commentary [to N.C. Gen. Stat. § 15A-1235] to be persuasive" and adopting the opinion of the Criminal Code Commission in reaching its holding). Section 15A-931's official commentary provides:

> [T]he Commission here provide for *a simple and final dismissal by the solicitor. No approval by the court is required*, on the basis that it is the responsibility of the solicitor, as an elected official, to determine how to proceed with regard to pending charges. *This section does not itself bar the bringing of new charges. That would be prevented* if there were a statute of limitations which had run, or *if jeopardy had attached when the first charges were dismissed.*

N.C. Gen. Stat. § 15A-931 official cmt. (emphasis added). The Criminal Code Commission clearly contemplated that the State would be barred from reprosecuting a section 15A-931 voluntarily dismissed charge "if jeopardy had attached when the . . . charge[ ] w[as] dismissed," and we find that logic persuasive.

Based on our understanding that the Double Jeopardy Clause's protection against reprosecution of an acquitted charge "serves a constitutional policy of finality for the defendant's benefit[,]" *Brown*, 432 U.S. at 165, 97 S. Ct. at 2225 (citation and quotation marks omitted), and "guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty[,]" *Blueford*, 566 U.S. at 605, 132 S. Ct. at 2050 (citation and quotation marks omitted), and based on our interpretation of the contemplated finality of a post-jeopardy section 15A-931 dismissal, we explicitly hold what we have concluded in *Muncy*, *Strickland*, *Hice*, and *Jacobs*: if a prosecutor voluntarily dismisses a criminal charge after jeopardy has attached, it is functionally equivalent to an acquittal for double jeopardy purposes, and a defendant cannot be reprosecuted for that same offense.

2. Section 15A-931 Dismissal of a Hung Charge

In this case, however, it is the timing of the prosecutor's voluntary dismissal—after a hung-jury mistrial that afforded the State the right to a second trial without violating defendant's double jeopardy rights—which both parties concede presents an issue of first impression in our state. To this end, aside from relying on the basic double jeopardy principles above to compel our further holding that the timing of a post-jeopardy voluntary dismissal should not undermine its constitutional finality, we find further guidance from our Supreme Court's explanation and application of the "State's election" rule. The rule instructs that a prosecutor's pre-jeopardy silence of an intent to prosecute a potential charge in an indictment constitutes a "binding election . . . tantamount to an acquittal" of that potential charge, barring the State from later attempting to prosecute that potential charge for the first time after jeopardy had already attached to the indictment. *State v. Jones*, 317 N.C. 487, 494, 346 S.E.2d 657, 661 (1986).

In *Jones*, the indictment charging the defendant with rape arguably supported counts of both first- and second-degree rape, but the State only announced its intent to pursue a conviction for second-degree rape before the jury was empaneled and sworn. *Id.* After jeopardy had attached to the indictment, however, the State successfully prosecuted for first-degree rape. *Id.* at 491–92, 346 S.E.2d at 659–60.

On appeal, our Supreme Court vacated the judgment entered on the first-degree rape conviction and remanded for entry of a judgment on second-degree rape. *Id.* at 501, 346 S.E.2d at 665. The *Jones* Court reasoned that

> by unequivocally arraigning the defendant on second-degree rape and by failing thereafter to give *any notice whatsoever*, prior to the jury being impaneled and jeopardy attaching, of an intent instead to pursue a conviction for first-degree rape arguably supported by the short-form indictment, the State made a binding election not to pursue the greater degree of the offense, and such election was tantamount to an acquittal of first-degree rape.

Id. at 494, 346 S.E.2d at 661; *see also State v. Hickey*, 317 N.C. 457, 466, 346 S.E.2d 646, 652–53 (1986) ("[A]n announced election by the district attorney [to seek conviction for only some charges in an indictment] *becomes binding on the State and tantamount to acquittal of charges* contained in the indictment but not prosecuted at trial *only* when *jeopardy has attached* as the result of a jury being impaneled and sworn to try the defendant." (first emphasis added) (citations omitted)).

While *Jones* and *Hickey* applied the "State's election" rule in the context of its election not to seek conviction for some charges supported by an indictment until after jeopardy attached, we find the principle announced—that the event of jeopardy attachment renders such a decision binding and tantamount to an acquittal—applicable to the State's action here. In this case, jeopardy attached to the murder charge when the first jury was empaneled and sworn. The State had the right to retry defendant for that charge following the hung-jury mistrial. But after what the record indicates was at least one homicide status hearing with the trial court to determine whether the State was going to exercise its right to retry the hung charge, the prosecutor instead elected to file a section 15A-931 voluntary dismissal of that charge, explicitly acknowledging in its dismissal entry that a jury had been empaneled and evidence had been introduced, and reasoning in part that "State has elected not to re-try case." The record in this case leaves little doubt that both the trial court and the prosecutor contemplated his election to dismiss the hung charge, rather than announce the State's intent to retry it, amounted to a decision conclusively ending the prosecution, as would any reasonable defendant.

A logical extension of the State's election rule applied in *Jones* and *Hickey* buttresses our conclusion here: Because the prosecutor, after acknowledging that jeopardy had attached to the murder charge, elected to dismiss the hung charge in part because the "State has elected not to re-try case," rather than announce the State's intent to exercise its right to retry it, that decision was "binding on the State and tantamount to acquittal" of the murder charge. *Hickey*, 317 N.C. at 446, 346 S.E.2d at 652. *Cf. State v. Phillips*, 127 N.C. App. 391, 392–94, 489 S.E.2d 890, 891–92 (1997) (arresting judgment on a speeding conviction at superior court "because the State took a voluntary dismissal at the district court on the speeding charge" and, "[t]hus, the superior court did not have jurisdiction over the speeding offense" (citation omitted)); *State v. Reeves*, 218 N.C. App. 570, 574, 721 S.E.2d 317, 321 (2012) (vacating judgment on a convicted charge at superior court where the State previously voluntarily dismissed that charge in district court).

We have already rejected the State's main argument in its appellate brief: In essence, that the hung-jury mistrial "unattached" the jeopardy from the first trial. But at oral argument the State asserted that since its dismissal was entered after the hung-jury mistrial but before the second trial, the case was back in "pretrial" status, and thus its dismissal was equivalent to a pre-jeopardy dismissal. We disagree.

The State cited to *United States v. Sanford*, 429 U.S. 14, 97 S. Ct. 20, 50 L. Ed. 2d 17 (1976) (per curiam), for support. In *Sanford*, the defendant's first trial ended in a hung-jury mistrial and, four months later, the trial court granted the defendant's motion to dismiss the indictment before the second trial began. *Id.* at 14, 97 S. Ct. at 20. The *Sanford* Court concluded that, based on the timing of the dismissal—"several months after the first trial had ended in a mistrial, but before retrial . . . had begun[,]"—the case was "governed by *Serfass v. United States*, [420 U.S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975)], in which we held that a pretrial order of the District Court dismissing an indictment . . . was appealable[.] . . ." *Id.* at 16, 97 S. Ct. at 21. The Court reasoned: "The dismissal in this case, like that in *Serfass*, was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend." *Id.* at 16, 97 S. Ct. at 21–22. Thus, the *Sanford* Court held, the Double Jeopardy Clause did not bar the Government's appeal from that dismissal.

We recognize that the sequence of events are similar—a charge was dismissed following a hung-jury mistrial but before retrial began—but the similarity ends there. The *Sanford* dismissal was requested by the defendant, and the hung charge was dismissed at a time when the Government intended to retry it. Here, contrarily, the State entered a non-defense-requested dismissal, and the charge was dismissed at a time when the dismissal entry itself announced the State did not intend to retry the case, effectively terminating any right the State had to reprosecute the hung charge. Accordingly, the *Sanford* Court's conclusion that the parties there were back in "pretrial" status for double jeopardy purposes is simply inapplicable here.

III. Conclusion

Defendant faced the direct peril of being convicted and punished for murder at his first trial. "He was forced to run the gauntlet once on that charge and the jury refused to convict him." *Green v. United States*, 355 U.S. 184, 190, 78 S. Ct. 221, 225, 2 L. Ed. 2d 199 (1957). The initial jeopardy that attached to the murder charge during the first trial remained intact following the hung-jury mistrial, but it terminated when the prosecutor voluntarily dismissed that charge four months later.

We hold that a post-jeopardy section 15A-931 voluntary dismissal is to be accorded the same constitutional finality and conclusiveness as an acquittal of that charge. Further, while the State had the right to retry the hung charge without violating defendant's double jeopardy rights, in applying the State's election rule to the prosecutorial action in this case, we hold that the prosecutor's election instead to voluntarily dismiss the charge, rather than announce the State's intent to retry it, was binding on the State and tantamount to an acquittal. After defendant faced jeopardy for the murder charge at his first trial, and the prosecutor later dismissed that hung charge, the Double Jeopardy Clause's protection against successive prosecutions for the same offense barred the State from reprosecuting defendant for Deberry's murder four years later. The trial court thus erred by denying defendant's motion to dismiss the 2015 murder indictment on double jeopardy grounds. Accordingly, we vacate the judgment entered against defendant in 15 CRS 213392. In light of our disposition, we decline to address defendant's remaining arguments.

VACATED.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
LESLIE JUNIOR COX

No. COA17-862

Filed 15 May 2018

Search and Seizure—traffic stop—extended—reasonable suspicion

In a case arising from a traffic stop and drug charges, the trial court's findings supported its conclusion that the officer observed a sufficient number of "red flags" *before* issuing a warning citation to support a reasonable suspicion of criminal activity and therefore justify extending the stop.

Appeal by Defendant from order entered 29 July 2016 by Judge William H. Coward and from judgments entered 4 November 2016 by Judge Robert G. Horne in Superior Court, Macon County. Heard in the Court of Appeals 2 April 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State.

Guy J. Loranger for Defendant.

McGEE, Chief Judge.

Leslie Junior Cox ("Defendant") appeals from an order denying his motion to suppress evidence recovered during a traffic stop from a vehicle in which Defendant was a passenger. For the reasons discussed below, we affirm.

I. Factual and Procedural Background

First Sergeant Clay Bryson ("Sergeant Bryson") and Deputy Sheriff Josh Stewart ("Deputy Stewart") of the Macon County Sheriff's Department ("MCSD") were patrolling U.S. Route 441 in separate patrol cars in Macon County, North Carolina, on 10 December 2015. Sergeant Bryson had been employed by the MCSD for over sixteen years, had extensive training in the area of drug interdiction, and had investigated more than one hundred drug cases for the MCSD. According to the trial court's unchallenged findings, U.S. Route 441 is a major thoroughfare for traffic from Atlanta, and Atlanta is "a major source of controlled substances for western North Carolina." Sergeant Bryson testified there was "a lot of drug activity on [U.S. Route] 441." While on patrol on 10 December 2015, Sergeant Bryson had with him a police dog trained to detect controlled substances.

Sergeant Bryson was parked in his patrol car on the east side of U.S. Route 441, perpendicular to the road, when he noticed a gold Pontiac ("the vehicle") traveling northbound around 3:00 p.m. Sergeant Bryson testified that, as the vehicle approached, he "noticed the female driver . . . was slumped back and over toward the center console [and] the male passenger . . . [who was wearing] . . . a cowboy type of hat[,] . . . tilted his head slightly, almost to block his face." Sergeant Bryson testified this behavior by the driver, later identified as Melanie Pursley ("Pursley"), and the passenger, later identified as Defendant, suggested "nervousness" and "aroused [Sergeant Bryson's] suspicion somewhat [based on] some of the [drug interdiction] training [he had] been through." Sergeant Bryson pulled his patrol car onto the road and into the far left lane, behind the vehicle. When Pursley did not voluntarily switch lanes, Sergeant Bryson moved over into the right-hand lane and pulled up alongside the vehicle. Sergeant Bryson testified that, as he pulled up beside the vehicle, Pursley "swerved over into [Sergeant Bryson's] lane with the two right[-]side tires of [Pursley's] vehicle crossing the dotted white line in the center of the roadway into [Sergeant Bryson's] lane." This caused Sergeant Bryson to pull his patrol car to the right "over the fog line in order to keep from having a [] collision with the vehicle and [to] abruptly hit[] [his] brakes." After hitting his brakes, Sergeant Bryson pulled back into the passing lane, behind the vehicle. Using a radar device, Sergeant Bryson clocked the vehicle's speed at sixty-two miles per hour in a fifty-five mile per hour speed limit zone. Sergeant Bryson initiated a traffic stop for Pursley's unsafe movement and the speeding violation, and Pursley pulled off the road into a vacant parking lot.

Sergeant Bryson approached the driver's side of the vehicle and asked Pursley for her driver's license and vehicle registration. Pursley produced a registration card and began "fumbling all through the vehicle . . . searching for a driver's license." Sergeant Bryson testified that, as Pursley was searching for her license, he "was watching her behavior" and "note[d] a lot of [] nervousness[.]" Pursley's "hands were shaking" when she handed Sergeant Bryson her registration card, and he could "see her heartbeat[.]" Pursley eventually stopped searching for her driver's license and told Sergeant Bryson she believed she had left it at a gas station in Georgia.

Because Pursley had no driver's license or other form of personal identification, Sergeant Bryson asked her to exit the vehicle. While standing behind the vehicle, Sergeant Bryson "engaged [Pursley] in general conversation[,] . . . ask[ing] . . . where [she was] coming from, [and] where [she was] going[.]" Pursley gave Defendant's name and indicated Defendant was her boyfriend. She stated they were traveling from Georgia, "headed to Kentucky . . . [for Pursley] to meet [Defendant's] parents for the first time." Pursley indicated that was "the reason for her nervousness[.]" Sergeant Bryson wrote Pursley's name and date of birth on the back of her registration card.

Sergeant Bryson asked Pursley "if [Defendant] had an ID on him because [Pursley did] not . . . and asked if [he] could . . . speak to [Defendant]." According to Sergeant Bryson, Pursley responded, "of course." Sergeant Bryson approached the passenger side of the vehicle and tapped on the window "to get [Defendant] to roll it down." Sergeant Bryson testified:

> I asked [Defendant] just a couple of general questions after asking for his ID. He [told] me [he and Pursley were] headed to his camper on Big Cove in Cherokee[.] [I] asked

> him if he was going to do any gambling over there, just ask[ed] him some general questions. He said they were going over there to work on his camper for the week. . . . As I first walked up to the vehicle – I've been working dope for an extended period of time now. When I walked up to the vehicle I noticed [] [Defendant] had a sore, [an] open sore on the side of his face . . . [that] looked to me [like] that of a meth[amphetamine] sore.

Sergeant Bryson indicated one of his purposes in speaking with Defendant was to see if Defendant could "vouch" for Pursley. According to Sergeant Bryson, when asked to verify Pursley's name, Defendant replied: "I guess that's her name." Sergeant Bryson testified that when, at the end of their initial conversation, he again asked Defendant for Pursley's name, Defendant stated "he [did not] remember." Sergeant Bryson testified he "didn't see a great deal of nervousness with [Defendant]."

Sergeant Bryson returned to his patrol car to enter Pursley's name and date of birth into his mobile data terminal. Sergeant Bryson testified it took longer to run a data search using a name and date of birth rather than a driver's license number. Sergeant Bryson also testified he had to search "in the correct [S]tate that [Pursley] was out of, Georgia[,]" and that "[a] lot of times Georgia is slow to respond and . . . I have no control over that." The search revealed Pursley's driver's license expired the previous day. Sergeant Bryson prepared a written warning citation. He testified that an out-of-state citation takes longer to prepare because the information must be entered manually rather than by automatically accessing a database of the North Carolina DMV.

While preparing Pursley's warning citation, Sergeant Bryson asked Deputy Stewart to run Defendant's driver's license "to see if [Defendant's license] was valid [such that Defendant would] be able to drive [Pursley's vehicle] off from that location." Sergeant Bryson issued the printed citation to Pursley and returned Defendant's license. Sergeant Bryson testified that, "[i]n the process of getting the [license] back [to Defendant][,] I asked him if there was anything illegal in the vehicle, anything I needed to know of[.]" Defendant responded: "Not that I'm aware of." Sergeant Bryson testified this was a "red flag[,]" based on his drug interdiction training, because it was "a yes or no question." Pursley continued to engage Sergeant Bryson in unsolicited conversation about her expired license. As they continued speaking, Sergeant Bryson asked Pursley whether she was "responsible for everything in the vehicle." Pursley "hesitated and [said], my stuff." Pursley stated Defendant "ha[d] his own stuff." Sergeant Bryson testified this response from Pursley was another "red flag," because "[a] typical response in a situation like that[] [would be][,] I know what's in my vehicle. . . . [M]ost people will give you a straight up yes or no answer." Sergeant Bryson asked Pursley "if [the drug-sniffing] dog was going to . . . alert on her vehicle, and [Pursley] said, 'I don't reckon.' " This equivocal response from Pursley was "another red flag."

Sergeant Bryson told Pursley he would ask Defendant to exit the vehicle and he would then conduct a dog sniff around the exterior perimeter of the vehicle. Sergeant Bryson testified Pursley's "level of nervousness was elevated" and Pursley continued "engaging [him] in conversation at that point." Pursley indicated Defendant might be in possession of some "personal use" marijuana and that there might be a hunting knife in the vehicle. Sergeant Bryson's dog "[s]howed [] indicators that he smelled illegal controlled substances there inside [Pursley's] vehicle." Sergeant Bryson returned the dog to his patrol vehicle and called for assistance to begin searching the vehicle. Inside the vehicle, officers found "[a] large amount of illegal contraband including methamphetamine, some marijuana, [and] some paraphernalia, including baggies, scales, . . . [and] pipes."

Defendant was arrested and subsequently indicted on charges of trafficking in methamphetamine by possession, possession of marijuana, possession of drug paraphernalia, trafficking in methamphetamine by transportation, and possession of methamphetamine with intent to manufacture, sell, or deliver. Defendant filed a motion on 23 March 2016 seeking "to suppress the use as evidence of any and all items seized from the vehicle of the co-defendant [] Pursley." Defendant contended Sergeant Bryson unlawfully extended the 10 December 2015 traffic stop without reasonable suspicion of criminal activity by either Pursley or Defendant. The trial court held a hearing on Defendant's motion to suppress on 26 July 2016 and denied the motion by order entered 29 July 2016. A jury convicted Defendant on all charges on 4 November 2016. The trial court consolidated Defendant's convictions for sentencing and sentenced Defendant to two separate terms of 225 to 282 months' imprisonment. Defendant appeals.

II. Motion to Suppress

Defendant contends the trial court erred by denying his motion to suppress because Sergeant Bryson unlawfully extended an otherwise-completed traffic stop without reasonable suspicion of criminal activity. Following our Supreme Court's recent holding in *State v. Bullock*, ___ N.C. ___, 805 S.E.2d 671 (2017), we disagree.

A. *Standard of Review*

"This Court's review of an appeal from the denial of a defendant's motion to suppress is limited to determining 'whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the [trial court's] conclusions of law.' " *State v. Granger*, 235 N.C. App. 157, 161, 761 S.E.2d 923, 926 (2014) (quoting *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011)). "[W]e examine the evidence . . . in the light most favorable to the State[.]" *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010).

On appeal, "[t]he trial court's findings of fact regarding a motion to suppress are conclusive . . . if supported by competent evidence." *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007). "[U]nchallenged findings of fact are presumed to be supported by competent evidence and [are] binding on appeal." *Cape Fear River Watch v. N.C. Envtl. Mgmt. Comm'n*, 368 N.C. 92, 99, 772 S.E.2d 445, 450 (2015) (citation and quotation marks omitted) (first alteration added). "Our review of a trial court's conclusions of law on a motion to suppress is *de novo*." *Edwards*, 185 N.C. App. at 702, 649 S.E.2d at 648 (citation omitted). "Under *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *State v. Ward*, 226 N.C. App. 386, 388, 742 S.E.2d 550, 552 (2013) (citation and internal quotation marks omitted) (alteration in original).

B. *Analysis*

According to Defendant, the 10 December 2015 traffic stop concluded when Sergeant Bryson issued the warning citation to Pursley and, at that time, Sergeant Bryson lacked necessary reasonable suspicion to justify extending the stop to conduct the dog sniff that ultimately led to the discovery of contraband inside Pursley's vehicle.

The Fourth Amendment to the United States Constitution secures the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV. "A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008) (citation and internal quotation marks omitted). During a traffic stop, both the driver *and* any passengers are "seized" within the meaning of the Fourth Amendment, and a passenger "may challenge the constitutionality of the stop[,] . . . including any improper prolongation of that investigatory detention." *State v. Hernandez*, 208 N.C. App. 591, 597, 704 S.E.2d 55, 59 (2010) (citations and internal quotation marks omitted). While "it is not unreasonable under the Fourth Amendment . . . to detain a passenger when a vehicle has been stopped due to a traffic violation committed by the driver of the car[,]" this Court has held that "a passenger may not be detained indefinitely. Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." *State v. Brewington*, 170 N.C. App. 264, 272, 612 S.E.2d 648, 653 (2005) (citations and internal quotation marks omitted).

The "tolerable duration" of a routine traffic stop "is determined by the seizure's 'mission,' which is to address the traffic violation that warranted the stop, and attend to related safety concerns." *Rodriguez v. U.S.*, 575 U.S. ___, ___, 191 L. Ed. 2d 492, ___ (2015) (internal citation omitted). In *Rodriguez*, the United States Supreme Court held that a seizure for a traffic violation "ends when tasks tied to the traffic infraction are – or reasonably should have been – completed[,]" and an otherwise-completed traffic stop may not be prolonged "absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at ___, 191 L. Ed. 2d at ___; *see also State v. Downey*, ___ N.C. App. ___, ___, 796 S.E.2d 517, 519 (2017) ("When a law enforcement official initiates a valid traffic stop, . . . the officer may not extend the duration of that stop beyond the time necessary to issue the traffic citation unless the officer has reasonable, articulable suspicion of some other crime." (citation omitted)).

"Traffic stops have been historically reviewed under the investigatory detention framework first articulated [by the United States Supreme Court] in *Terry v. Ohio*, 392 U.S. 1, [] 20 L. Ed. 2d 889 (1968). Therefore, reasonable suspicion is the necessary standard for traffic stops." *State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012) (citation and quotation marks omitted). "If [an] investigatory seizure is invalid [due to a lack of reasonable suspicion], evidence resulting from the warrantless stop is inadmissible under the exclusionary rule in both our federal and state constitutions." *State v. Fields*, 195 N.C. App. 740, 743, 673 S.E.2d 765, 767 (2009) (citation omitted). "Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required." *State v. Salinas*, 214 N.C. App. 408, 409, 715 S.E.2d 262, 264 (2011) (citation and quotation marks omitted). Our Supreme Court

> has determined that the reasonable suspicion standard requires that the stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious

> officer, guided by his experience and training. Moreover, [a] court must consider "the totality of the circumstances – the whole picture" in determining whether a reasonable suspicion exists.

Id. at 409-10, 715 S.E.2d at 264 (citation and quotation marks omitted) (alterations in original); *see also State v. Johnson*, ___ N.C. ___, ___, 803 S.E.2d 137, 139 (2017) ("To determine whether reasonable suspicion exists, courts must look at 'the totality of the circumstances,' as viewed from the standpoint of an *objectively* reasonable police officer[.]" (citations and internal quotation marks omitted) (emphasis added)).

In the present case, Defendant contends that (1) the traffic stop concluded when Sergeant Bryson gave the warning citation to Pursley,[1] and (2) "[a]t that point in the stop, [Sergeant] Bryson could not have formed reasonable suspicion [of criminal activity] from his interactions with Pursley and [Defendant][.]" Defendant has not challenged any of the trial court's findings of fact, and we therefore "accept the findings of fact as true." *State v. Gerard*, ___ N.C. App. ___, ___, 790 S.E.2d 592, 595 (2016). Defendant also does not appear to argue that Sergeant Bryson unlawfully prolonged the traffic stop up to the point of issuing the warning citation to Pursley. Indeed, Defendant states in his brief that the printing of the warning citation was "the end of what had been a '*necessary and unavoidable*' *process*." (emphasis added). Thus, the only question for our consideration is whether, as Defendant argues, the trial court erroneously concluded Sergeant Bryson observed a sufficient number of "red flags" prior to issuing the warning citation to support a reasonable suspicion of criminal activity and justify further detaining Defendant and Pursley. Applying *Bullock*, as further discussed below, we do not find the trial court's conclusion erroneous.

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1. The trial court similarly determined that "[t]he 'traffic stop' mission was concluded when [Sergeant] Bryson handed the warning citation to Pursley." We note this Court has held that "an initial traffic stop concludes . . . *only after an officer returns the detainee's driver's license and registration*." *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009) (emphasis added); *see also State v. Velasquez-Perez*, 233 N.C. App. 585, 595, 756 S.E.2d 869, 876 (2014) (discussing *Jackson*, and holding traffic stop did not conclude when officer handed defendant written warning citation, because officer "had not completed his checks related to the licenses, registration, insurance, travel logs, and invoices of [the defendant's] commercial vehicle."). Thus, contrary to Defendant's argument, the mere issuance of the printed citation to Pursley did not itself conclude the traffic stop. However, the distinction is inapposite in this case, because the trial court's findings indicate Sergeant Bryson returned Pursley's registration at the same time he handed her the printed citation, thus concluding the initial traffic stop.

The trial court stated the following in Conclusion of Law Number Three:

> The [c]ourt's findings of fact show that up to the point of the delivery of the citation [to Pursley], the "red flags" that [Sergeant] Bryson [observed] were as follows:
>
> a. [Pursley's and Defendant's] evasiveness [by] hiding their faces as they passed [Sergeant] Bryson;
>
> b. [The fact that Pursley and Defendant were] travelling on a road known to [Sergeant] Bryson as a major route for drug traffic into western North Carolina;
>
> c. The swerving of [Pursley's] car upon the sudden appearance of [Sergeant Bryson's patrol vehicle];
>
> d. Pursley's extreme and continued nervousness;
>
> e. The clear inconsistencies in [Pursley's and Defendant's] descriptions of their travel plans and their relationship;
>
> f. The open sore on [Defendant's] face, which [Sergeant] Bryson believed to be related to [the] use of methamphetamine; [and]
>
> g. Pursley's equivocal answer to [Sergeant Bryson's] question, "Is there anything in the vehicle that I need to know about?"

The court later concluded in Conclusion of Law Number Thirteen that "[g]iven the 'red flags' observed by [Sergeant] Bryson <u>before</u> he delivered the warning citation to Pursley, . . . based on the totality of [the] circumstances, reasonable suspicion existed to support [Sergeant] Bryson . . . in his determination that criminal activity may have been afoot." (emphasis in original). Defendant does not dispute that Sergeant Bryson in fact observed the "red flags" enumerated in Conclusion of Law Number Three. Defendant instead argues that the first six "red flags" relied upon by the trial court involved noncriminal behavior "consistent with innocent travel." *See Fields*, 195 N.C. App. at 745, 673 S.E.2d at 768. Defendant further asserts that the final "red flag" identified in Conclusion of Law Number Three – Pursley's equivocal response to Sergeant Bryson's question about the contents of the vehicle – actually occurred *after* Sergeant Bryson issued the citation and returned Pursley's registration.

Defendant cites *State v. Reed*, ___ N.C. App. ___, 791 S.E.2d 486 (2016), in which this Court held a law enforcement officer lacked reasonable suspicion of criminal activity to extend a traffic stop after issuing a speeding ticket. In *Reed*, a state trooper pulled the defendant over for speeding and, in the course of the stop, asked the defendant to sit in the trooper's patrol vehicle while he ran checks on the defendant's license and criminal background; asked the defendant questions about his travel plans and criminal history; and separately questioned the defendant's passenger. The trooper "told [the] [d]efendant that his driver's license was okay[,] . . . issued a warning ticket [for speeding][,] and asked [the] [d]efendant if he had any questions." *Id.* at ___, 791 S.E.2d at 489. The trooper then told the defendant "he was completely done with the traffic stop, but [that he] wanted to ask [the] [d]efendant additional questions." *Id.* (internal quotation marks omitted). The trooper's subsequent questioning of the defendant and the passenger led to the discovery of cocaine inside the defendant's vehicle.

This Court held the *Reed* trial court's findings of fact "[did] not support its conclusion that [the trooper] had reasonable suspicion of criminal activity to extend the traffic stop and conduct a search after the traffic stop concluded." *Id.* at ___, 791 S.E.2d at 493. The factors relied upon by the trial court in that case included that the defendant appeared "overly nervous;" initially refused to sit in the trooper's patrol vehicle with the door closed; and provided a rental car agreement for a different car than the vehicle he was operating. *Id.* at ___, 791 S.E.2d at 492-93. The trial court further found that the defendant was driving outside the geographic area approved in his rental car agreement; the trooper observed numerous air fresheners in the defendant's vehicle and other signs of "hard travel;" there was a female dog in the defendant's vehicle and "dog food scattered throughout the car[;]" and the defendant and his passenger "provided inconsistent travel plans." *Id.* at ___, 791 S.E.2d at 493. This Court concluded that the *Reed* defendant's nervousness, although "an appropriate factor to consider," was insufficient to support reasonable suspicion when considered together with other factors that were "consistent with innocent travel[,]" including the presence of a dog in the vehicle and the defendant's possession of energy drinks, trash, dog food, and air fresheners. *See id.*; *but see State v. Castillo*, ___ N.C. App. ___, ___, 787 S.E.2d 48, 54 (2016) (recognizing that "[f]actors consistent with innocent travel, *when taken together*, can give rise to reasonable suspicion, even though some travelers exhibiting those factors will be innocent." (citation and quotation marks omitted) (emphasis added)).

Our Supreme Court vacated and remanded this Court's decision in *Reed* for reconsideration in light of its holding in *Bullock*.[2] *Reed* is therefore unavailing to Defendant, and *Bullock* controls Defendant's appeal. In *Bullock*, our Supreme Court reversed a decision of this Court in which we held a law enforcement officer lacked reasonable articulable suspicion of criminal activity before extending the duration of a traffic stop. The *Bullock* defendant was pulled over for speeding and unsafe movement. In the course of the traffic stop, officers ultimately discovered a large amount of heroin inside the vehicle the defendant was driving. This Court held the police "unlawfully prolonged [the stop] by causing [the] defendant to be subjected to a frisk, sit in the officer's patrol car, and answer questions while the officer searched law enforcement databases for reasons unrelated to the mission of the stop and for reasons exceeding the routine checks authorized by *Rodriguez*." *State v. Bullock*, ___ N.C. App. ___, ___, 785 S.E.2d 746, 752 (2016).

Our Supreme Court reversed this Court's decision and held the traffic stop at issue in *Bullock* was not unlawfully prolonged under the framework set forth in *Rodriguez*. The Court began its analysis by noting that, under *Rodriguez*, "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, unless reasonable suspicion of another crime arose *before that mission was completed*[.]" *Bullock*, ___ N.C. at ___, 805 S.E.2d at 673 (citations omitted) (emphasis added). It further noted that "[t]he reasonable duration of a traffic stop . . . includes more than just the time needed to write a ticket[,]" *e.g.*, time spent conducting " 'ordinary inquiries incident to [the traffic] stop' " and taking certain precautionary safety measures. *Id.* (citation omitted).

The facts in *Bullock* showed that the officer who initiated the traffic stop was an experienced police officer specially trained in drug

2. On remand, this Court found *Bullock* factually distinguishable and again held that the officer in *Reed* "did not have reasonable suspicion of criminal activity to justify prolonging the traffic stop." *State v. Reed*, ___ N.C. App. ___, ___, 810 S.E.2d 245, 249 (2018) ("*Reed II*"). This Court concluded that, under *Bullock*, the *Reed* officer's "actions of requiring [the] [d]efendant to exit his car, frisking him, and making him sit in the patrol car while he ran records checks and questioned [the] [d]efendant, did not unlawfully extend the traffic stop." *Id.* We further concluded, however, that "after [the officer] returned [the] [d]efendant's paperwork and issued the warning ticket, [the] [d]efendant remained unlawfully seized in the patrol car[,]" and the stop was improperly prolonged based on "legal activity consistent with lawful travel." *Id.* at ___, 810 S.E.2d at 249-50. The State filed a motion seeking a temporary stay of this Court's decision in *Reed II*, which our Supreme Court allowed by order entered 2 February 2018. *See State v. Reed*, ___ N.C. ___, 809 S.E.2d 130 (2018). We do not find the present case materially distinguishable from *Bullock*, and this Court's holding in *Reed II* does not alter our analysis.

interdiction. It was undisputed that the officer had reasonable suspicion to stop the defendant based on multiple traffic violations. After initiating the traffic stop, the officer asked to see the defendant's driver's license and registration. The defendant provided a driver's license, but indicated the vehicle was a rental car. The rental car agreement showed the car had been rented in another person's name, and the defendant "was not listed as an authorized driver on the rental agreement." *Id.* at ___, 805 S.E.2d at 674. During this initial interaction, the officer observed multiple cell phones inside the vehicle which, in the officer's experience, was common among "people who transport illegal drugs[.]" *Id.* The defendant told the officer he had recently moved to North Carolina. He also indicated he was going to a specific location, but the officer "knew that [the] defendant was well past his exit if [he] was going [where he said]." *Id.* The officer asked the defendant to exit the vehicle, told the defendant he would receive a warning for the traffic violations, and frisked the defendant. During the frisk, the officer found a large sum of cash in the defendant's pocket. After the frisk, the defendant sat in the officer's patrol car while the officer "[ran the] defendant's information through various law enforcement databases[.]" *Id.* at ___, 805 S.E.2d at 675.

While sitting in the patrol car, the *Bullock* defendant made certain self-contradictory statements and made inconsistent eye contact with the officer. The database checks revealed the defendant was issued a North Carolina driver's license more than a decade prior and had a criminal history in North Carolina, calling into question the defendant's earlier statement that he had only recently moved to North Carolina. The officer asked for the defendant's permission to search his vehicle. The defendant assented to a search of the vehicle but not certain personal possessions inside it. The officer removed a bag from the trunk of the defendant's vehicle and performed a dog sniff. The dog alerted to the bag, which was found to contain heroin. *Id.*

Our Supreme Court held the officer did not unlawfully prolong the stop by frisking the defendant, asking the defendant to sit in the patrol car while running several database checks, or talking to the defendant "up until the moment that all three database checks had been completed." *Id.* at ___, 805 S.E.2d at 677. The Court then concluded:

> The conversation that [the officer] had with [the] defendant while the database checks were running enabled [the officer] to constitutionally extend the traffic stop's duration. The trial court's findings of fact show[ed] that, by the time these database checks were complete, this conversation, *in conjunction with [the officer's]*

> *observations from earlier in the traffic stop*, permitted [the officer] to prolong the stop until he could have a dog sniff performed.

Id. (emphasis added). The Court noted that the officer "came into the stop with extensive experience investigating drug running, and he knew that [the route the defendant was traveling was] a major drug trafficking corridor." *Id.* "[E]ven before [the] defendant began talking[,]" the officer made several observations that "suggested possible drug-running," including the defendant's nervousness, the presence of multiple cell phones inside the defendant's vehicle, and the fact that the defendant was driving a rental vehicle that had been rented in another person's name. *Id.* "[The] [d]efendant's conversation with [the officer], and other aspects of their interaction, quickly provided more evidence of drug activity[,]" including the defendant's "illogical" statement about his intended destination and the cash found in the defendant's pocket. While speaking to the officer inside the patrol car, the defendant made self-contradictory statements and did not maintain consistent eye contact. The database checks also suggested the defendant had been untruthful about recently moving to North Carolina. Under these circumstances, "the officer legally extended the duration of the traffic stop to allow for the dog sniff." *Id.* at ___, 805 S.E.2d at 678.

In the present case, we likewise conclude the trial court's findings of fact supported its conclusion that Sergeant Bryson observed a sufficient number of "red flags" *before* issuing the warning citation to Pursley to support a reasonable suspicion of criminal activity and therefore justify extending the stop. Sergeant Bryson had extensive training in drug interdiction, including "the detection of behaviors by individuals that tend to indicate activity related to the use, transportation[,] and other activity [associated] with controlled substances." He had investigated more than one hundred drug cases for the MCSD and knew that U.S. Route 441 was a major thoroughfare for drug trafficking from Atlanta into western North Carolina. When Sergeant Bryson first saw Pursley's vehicle, he observed body language by both Pursley and Defendant that he considered evasive. Pursley exhibited "extreme and continued nervousness" throughout the ensuing traffic stop and was unable to produce any form of personal identification. Defendant and Pursley gave conflicting accounts of their travel plans and their relationship to each other. During Sergeant Bryson's initial conversation with Defendant – which Defendant has not challenged as improper – Sergeant Bryson observed an open sore on Defendant's face that appeared, based on Sergeant Bryson's professional training and experience, "related to [the] use of methamphetamine[.]" Background checks further revealed that Pursley was driving with an expired license. Under *Bullock*, considering the totality of the circumstances, we conclude Sergeant Bryson formed reasonable suspicion of criminal activity, before issuing the written warning citation and returning Pursley's vehicle registration, sufficient to justify extending the traffic stop for further investigation.[3] *See Downey*, ___ N.C. App. at ___, 796 S.E.2d at 521-22.

III. Conclusion

Because the trial court's findings of fact supported its conclusion that Sergeant Bryson formed reasonable suspicion of criminal activity before the mission of the 10 December 2015 traffic stop was complete, we affirm the trial court's order denying Defendant's motion to suppress.

AFFIRMED.

Judges STROUD and BERGER concur.

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3. We find it unnecessary to address Defendant's argument that one of the seven "red flags" relied upon by the trial court actually occurred after the issuance of Pursley's warning citation. The "red flags" that Defendant concedes did occur before the completion of the traffic stop were sufficient to support a conclusion that reasonable suspicion existed to justify extending the stop. *See State v. Rayfield*, 231 N.C. App. 632, 648, 752 S.E.2d 745, 757 (2014) (holding that "to the extent the trial court's other findings contain[ed] errors, they [were] not so severe as to undercut the court's conclusion of law that probable cause was present to justify [a] search[] . . . [i]n light of the other evidence cited by the trial court in support of its conclusion[.]").

STATE OF NORTH CAROLINA
v.
TORREY GRADY

No. COA17-12

Filed 15 May 2018

1. Appeal and Error—preservation of issues—failure to raise argument in trial court

The State waived an argument that satellite-based monitoring constitutes a special needs search by failing to raise the issue in the trial court.

2. Satellite-Based Monitoring—mandatory lifetime SBM—Fourth Amendment search—reasonableness

The trial court erred by determining the State met its burden of showing the imposition of lifetime satellite-based monitoring (SBM) was reasonable under the Fourth Amendment as to this defendant where the State failed to present any evidence of its need to monitor defendant or the procedures actually used to conduct SBM in unsupervised cases such as defendant's. While parolees and probationers have significantly diminished expectations of privacy as a result of their legal status, unsupervised offenders such as defendant, although statutorily determined to be recidivist sex offenders, have a greater expectation of privacy than supervised offenders.

Judge BRYANT dissenting.

Appeal by defendant from order entered 26 August 2016 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 8 August 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, and Everett & Everett, Attorneys at Law, by Lewis ("Luke") Everett, for defendant-appellant.

CALABRIA, Judge.

Torrey Grady ("defendant") appeals from the trial court's order determining that satellite-based monitoring ("SBM") of defendant is a reasonable search under the Fourth Amendment. After careful review, we conclude that the State failed to prove the reasonableness of imposing SBM for defendant's lifetime. Accordingly, we reverse.

I. Factual and Procedural Background

In 1997, defendant pleaded no contest to a second-degree sex offense, and in 2006, he pleaded guilty to taking indecent liberties with a child. The trial court never made an SBM determination at either of defendant's sentencing hearings for these offenses. However, on 14 May 2013, the trial court held an SBM "bring-back" hearing pursuant to N.C. Gen. Stat. § 14-208.40B (2017). The court found that defendant's convictions were both "sexually violent offenses" pursuant to N.C. Gen. Stat. § 14-208.6(5), and therefore, defendant met the criteria of a "recidivist" under N.C. Gen. Stat. § 14-208.6(2b). Accordingly, the trial court ordered defendant to enroll in SBM for the remainder of his natural life, as required by N.C. Gen. Stat. § 14-208.40B(c).

Defendant appealed that order to this Court, arguing that SBM violated his right to freedom from unreasonable searches and seizures, as provided by the Fourth Amendment to the United States Constitution. In an unpublished decision filed 6 May 2014, we affirmed the trial court's order, concluding that we were bound by our Court's rejection of a nearly identical argument in *State v. Jones*, 231 N.C. App. 123, 750 S.E.2d 883 (2013). *State v. Grady*, 233 N.C. App. 788, 759 S.E.2d 712 (2014) (unpublished). After our Supreme Court dismissed defendant's appeal and denied discretionary review, *State v. Grady*, 367 N.C. 523, 762 S.E.2d 460 (2014), the United States Supreme Court granted defendant's petition for writ of certiorari.

The United States Supreme Court held that despite its civil nature, North Carolina's SBM program "effects a Fourth Amendment search." *Grady v. North Carolina*, 575 U.S. __, __, 191 L. Ed. 2d 459, 462 (2015) (per curiam). However, since "[t]he Fourth Amendment prohibits only *unreasonable* searches[,]" the Supreme Court remanded the case for North Carolina courts to "examine whether the State's monitoring program is reasonable—when properly viewed as a search . . . ." *Id.* at __, 191 L. Ed. 2d at 463.

On 16 June 2016, the trial court held a remand hearing on the reasonableness of defendant's lifetime enrollment in SBM. Officer Scott Pace, a probation supervisor for the Department of Public Safety, Division of Adult Correction, testified as the State's sole witness at the hearing. In addition to Officer Pace's testimony, the State presented photographs of the SBM equipment currently used to monitor offenders; certified copies of the two sex offense judgments; and defendant's criminal record. At the close of the State's evidence, defendant moved for a directed verdict and dismissal, arguing that the State had failed to prove that SBM is a reasonable search under the Fourth Amendment. *See State v. Blue*, __ N.C. App. __, __, 783 S.E.2d 524, 527 (2016) (concluding that "the State shall bear the burden of proving that the SBM program is reasonable"). In response, the State offered arguments about the dangers of recidivism and the State's interest in protecting the public from sex offenders. After considering both parties' arguments, the trial court denied defendant's motion for a directed verdict. Defendant then presented evidence, but did not testify, and subsequently renewed his motion for judgment as a matter of law. The trial court determined that it would rule on defendant's motion out of term, subject to the parties' submission of briefs.

On 26 August 2016, the trial court entered an order concluding that (1) based on the totality of the circumstances, SBM of defendant is a reasonable search; and (2) the SBM statute is facially constitutional. Defendant appeals.

II. Standard of Review

"An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citation omitted). "The trial court's findings of fact are binding on appeal if they are supported by competent evidence, and they must ultimately support the trial court's conclusions of law." *Id.* (citation and quotation marks omitted).

III. Constitutionality

The Fourth Amendment, applied to the States through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV. It is clear that SBM "effects a Fourth Amendment search." *Grady*, 575 U.S. at __, 191 L. Ed. 2d at 462. Accordingly, the only remaining issue for the trial court to determine was whether SBM is reasonable under the Fourth Amendment.

On appeal, defendant first contends that the State failed to prove that lifetime SBM is a reasonable search of defendant. We agree.

"The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* (citations omitted). "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . .

reasonableness generally requires the obtaining of a judicial warrant" issued upon a showing of probable cause. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653, 132 L. Ed. 2d 564, 574 (1995). "But a warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either." *Id.* "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. __, __, 189 L. Ed. 2d 430, 439 (2014).

Grady directs us to consider two approaches for our analysis of the warrantless search in this case: (1) a "general Fourth Amendment approach" based on diminished expectations of privacy, and (2) "special needs" searches. *See* 575 U.S. at __, 191 L. Ed. 2d at 462-63 (citing *Samson v. California*, 547 U.S. 843, 165 L. Ed. 2d 250 (2006) (suspicionless search of parolee was reasonable); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995) (random drug testing of student athletes was reasonable)). Under either approach, we use the same context-specific balancing test to determine the reasonableness of the search. *Compare Samson*, 547 U.S. at 848, 165 L. Ed. 2d at 256 ("Whether a search is reasonable is determined by assessing on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." (citation and quotation marks omitted)), *with Vernonia Sch. Dist.*, 515 U.S. at 652-53, 132 L. Ed. 2d at 574 ("[W]hether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." (citation and quotation marks omitted)).

However, because the special needs doctrine is typically used to uphold sweeping programmatic searches, it is a "closely guarded" exception to the warrant requirement, which only applies to a limited "class of permissible suspicionless searches." *Ferguson v. City of Charleston*, 532 U.S. 67, 80 n.17, 149 L. Ed. 2d 205, 218 n.17 (2001). In order for the exception to apply, the "special need" advanced to justify dispensing with a warrant or individualized suspicion must be "divorced from the State's general interest in law enforcement." *Id.* at 79, 149 L. Ed. 2d at 217.[1]

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1. The Supreme Court has upheld warrantless searches based on a variety of "special needs." *See, e.g.*, *United States v. Flores-Montano*, 541 U.S. 149, 158 L. Ed. 2d 311 (2004) (suspicionless searches of vehicles at the international border); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995) (suspicionless drug testing of public high school athletes); *Griffin v. Wisconsin*, 483 U.S. 868, 97 L. Ed. 2d 709 (1987) (search of a probationer's home).

A. Special Needs

[1] On appeal, the State contends that SBM is a reasonable special needs search. However, according to the record, it does not appear that the trial court considered this argument, as neither the hearing transcript nor the State's Memorandum In Support of the Reasonableness of Satellite Based Monitoring mentions the special needs doctrine. The State was aware that defendant challenged the constitutionality of the SBM program; indeed, that was the entire purpose of the hearing. *See Grady*, 575 U.S. at __, 191 L. Ed. 2d at 463 (remanding for North Carolina courts to "examine whether the State's monitoring program is reasonable—when properly viewed as a search"). The State had ample opportunity to argue the special needs doctrine—both at the hearing and in its subsequent brief to the trial court—but nevertheless failed to do so. *Cf. State v. Romano*, 369 N.C. 678, 693-94, 800 S.E.2d 644, 654 (2017) ("[T]he trial court specifically asked the parties for additional research regarding the constitutionality of the statute in regard to the unconscious defendant. . . . The State had the opportunity at the suppression hearing to argue that the good faith exception to the exclusionary rule should apply if the court determined that the officer's actions were unconstitutional, but the State failed to raise the argument." (internal quotation marks omitted)). Since the State failed to advance this constitutional argument below, it is waived. *Id.* at 693, 800 S.E.2d at 654; N.C.R. App. P. 10.

Furthermore, our Court has interpreted the Supreme Court's mandate in *Grady* to require case-by-case determinations of reasonableness, now commonly referred to as "*Grady* hearings." *See, e.g.*, *State v. Spinks*, __ N.C. App. __, __, 808 S.E.2d 350, 361 (2017) (Stroud, J., concurring) ("The reasonableness of the search and the totality of the circumstances under which the SBM will operate will depend necessarily upon *the defendant's circumstances and the operation of SBM at the time the monitoring will be done of the defendant*." (emphasis added)), *disc. review denied*, No. 432P17, __ N.C. __, __ S.E.2d __ (filed Apr. 5, 2018). Following some initial uncertainty in our trial courts, the parties' burdens at *Grady* hearings are now well established. It is "clear that a case for satellite-based monitoring is the State's to make." *State v. Greene*, __ N.C. App. __, __, 806 S.E.2d 343, 345 (2017). And, as with other constitutional arguments, a defendant's Fourth Amendment SBM challenge must be properly asserted at the hearing in order to preserve the issue for appeal. *See State v. Bishop*, __ N.C. App. __, __, 805 S.E.2d 367, 370 (2017) (declining to issue a writ of certiorari or invoke Rule 2 to review the defendant's unpreserved *Grady* argument and dismissing his untimely appeal for lack of jurisdiction), *disc. review denied*, No. 369P17, __ N.C. __, __ S.E.2d __ (filed Apr. 5, 2018).[2]

Accordingly, a "general Fourth Amendment approach" based on diminished expectations of privacy is consistent with our Court's prior decisions, as well as the State's arguments below. *See United States v. Knights*, 534 U.S. 112, 121-22, 151 L. Ed. 2d 497, 507 (2001) (explaining that "general or individual circumstances, including 'diminished expectations of privacy,' may justify an exception to the warrant requirement" (quoting *Illinois v. McArthur*, 531 U.S. 326, 330, 148 L. Ed. 2d 838, 847 (2001))).

B. Diminished Expectations of Privacy

[2] "The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.' " *Vernonia Sch. Dist.*, 515 U.S. at 654, 132 L. Ed. 2d at 575. "What expectations are legitimate varies . . . with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." *Id.* (citation omitted). "In addition, the legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State." *Id.*

The Supreme Court has held that parolees and probationers have significantly diminished expectations of privacy as a result of their legal status. *Samson*, 547 U.S. at 852, 165 L. Ed. 2d at 259; *Knights*, 534 U.S. at 119, 151 L. Ed. 2d at 505. These individuals "are on the 'continuum' of state-imposed punishments[,]" *Samson*, 547 U.S. at 850, 165 L. Ed. 2d at 258 (citation omitted), and may be required, as reasonable conditions of parole or probation, to submit to warrantless searches at any time. *Id.* at 852, 165 L. Ed. 2d at 259; *Knights*, 534 U.S. at 119, 151 L. Ed. 2d at 505. Moreover, "a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Samson*, 547 U.S. at 853, 165 L. Ed. 2d at 260.

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2. *But see State v. Bursell*, No. COA16-1253, __ N.C. App. __, __, __ S.E.2d __, __, 2018 WL 1953403, at *4 (filed March 20, 2018) ("In view of the gravity of subjecting someone for life to a potentially unreasonable search of his person in violation of his Fourth Amendment rights, especially when considering defendant's young age, the particular factual bases underlying his pleas, and the nature of those offenses, combined with the State's and the trial court's failures to follow well-established precedent in applying for and imposing SBM, and the State's concession of reversible *Grady* error, even if this argument was unpreserved, in our discretion we would invoke Rule 2 to relax Rule 10(a)(1)'s issue-preservation requirement in order to prevent manifest injustice to defendant.").

The Supreme Court has never addressed whether a convicted sex offender has a diminished expectation of privacy solely due to the individual's prior conviction. However, the Court has recognized a state's strong interest in protecting its citizens, particularly minors, from sex offenders. *E.g.*, *Smith v. Doe*, 538 U.S. 84, 103, 155 L. Ed. 2d 164, 183-84 (2003). The North Carolina General Assembly also recognizes "that protection of the public from sex offenders is of paramount governmental interest" and accordingly enacted mandatory "Sex Offender and Public Protection Registration Programs," including SBM. N.C. Gen. Stat. § 14-208.5.

At the hearing, Officer Pace testified that North Carolina's SBM program includes supervised and unsupervised offenders. Supervised offenders include probationers and individuals under post-release supervision following active sentences in the custody of the Division of Adult Correction. These individuals "are on the 'continuum' of state-imposed punishments[,]" *Samson*, 547 U.S. at 850, 165 L. Ed. 2d at 258, and their expectations of privacy are accordingly diminished. Unsupervised offenders, however, are statutorily required to submit to SBM, but are not otherwise subject to any direct supervision by State officers.

Defendant is an unsupervised offender. He is not on probation or supervised release, but rather was enrolled in lifetime SBM more than three years after "all rights of citizenship which were forfeited on conviction including the right to vote, [we]re by law automatically restored" to him.[3] Solely by virtue of his legal status, then, it would seem that defendant has a greater expectation of privacy than a supervised offender. Yet, as a recidivist sex offender, defendant must maintain lifetime registration on DPS's statewide sex offender registry. N.C. Gen. Stat. § 14-208.23. The sex offender registry provides public access to "necessary and relevant information" about defendant, including his name, home address, offense history, driver's license number, fingerprints, and current photograph. *Id.* at §§ 14-208.5, -208.7, -208.22. Defendant's expectation of privacy is therefore appreciably diminished as compared to law-abiding citizens.

However, it is unclear whether the trial court considered the legitimacy of defendant's privacy expectation. The trial court found, from the evidence presented at the hearing, that SBM affects defendant's Fourth Amendment interests in the following ways:

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3. *But see* N.C. Gen. Stat. § 14-415.1 (making it "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction").

> Officer Pace testified about how the ankle monitor operates and how it affects the person wearing it. Included in his testimony, Officer Pace testified that the device weighs 8.7 oz., it can be worn underneath socks and/or long pants, it can be worn while bathing, showering, and swimming in pools and the ocean. The ankle monitor does not prohibit any defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes. It does not prohibit or restrict air travel. Officer Pace has monitored defendants wearing the ankle monitor who have worked both physical labor jobs and office jobs, travelled by airplane and engaged in sporting activities including surfing. The ankle monitor does not monitor or reveal the activities of the offender—it merely monitors his location. The device does not confine the person to their residence or any other specific location. The ankle monitor and related equipment requires a quarterly (three months) review/inspection by the State to ensure that the device is in proper working order.

These findings address "the nature and purpose" of SBM, but not "the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 575 U.S. at __, 191 L. Ed. 2d at 462. This is a significant omission, because the Supreme Court has consistently emphasized the importance of viewing the "character of the intrusion" in context. *See*, *e.g.*, *Knights*, 534 U.S. at 119, 151 L. Ed. 2d at 505 ("Knights' status as a probationer subject to a search condition informs both sides of th[e reasonableness] balance."); *Vernonia Sch. Dist.*, 515 U.S. at 665, 132 L. Ed. 2d at 582 ("We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: *that the Policy was undertaken in furtherance of the government's responsibilities*, *under a public school system*, *as guardian and tutor of children entrusted to its care*." (emphasis added)).

Viewed in context, SBM intrudes to varying degrees upon defendant's privacy through (1) the compelled attachment of the ankle monitor, and (2) the continuous GPS tracking it effects. We consider each in turn.

<u>1. Ankle Monitor</u>

Officer Pace testified that the SBM program currently uses an electronic monitoring device called the ExacuTrack One ("ET-1"), which is "installed" on an offender's ankle with tamper-proof fiber-optic straps.

The ET-1 is physically unobtrusive: it weighs a mere 8.7 ounces and is small enough to be covered by a pant leg or sock. Unlike prior SBM devices, the ET-1 is waterproof up to 15 feet and may be worn in the ocean. The ET-1 does not physically limit an offender's movements; employment opportunities; or ability to travel, even on airplanes.[4]

On appeal, defendant complains about the audible voice warning messages that the ET-1 occasionally utters, and the need to remain near an electrical outlet for two hours each day while its lithium battery charges. However, we consider those aspects of SBM to be more inconvenient than intrusive, in light of defendant's diminished expectation of privacy as a convicted sex offender. *Cf. Belleau v. Wall*, 811 F.3d 929, 935 (7th Cir. 2016) (observing that "the plaintiff's privacy has already been severely curtailed" due to Wisconsin's mandatory sex offender registration law, and reasoning that any additional privacy loss he experiences when "his trouser leg hitches up and reveals an anklet monitor that may cause someone who spots it to guess that this is a person who has committed a sex crime must be slight"); *see also Bowditch*, 364 N.C. at 347, 700 S.E.2d at 9 (rejecting that SBM enrollment is akin to house arrest, because "[i]n this day and age, finding a source of available electricity, whether at a home, hotel, place of employment, or even in a moving vehicle, should be little or no challenge").

<u>2. Continuous GPS Monitoring</u>

In addition to physically intruding on defendant's body, "a constitutionally protected area," *United States v. Jones*, 565 U.S. 400, 406 n.3, 181 L. Ed. 2d 911, 919 n.3 (2012), the ET-1 also effects a continuous, warrantless search of defendant's location through the use of GPS technology. Notwithstanding defendant's diminished expectation of privacy, this aspect of SBM is "uniquely intrusive" as compared to other searches upheld by the United States Supreme Court. *Belleau*, 811 F.3d at 940 (Flaum, J., concurring).

As a recidivist sex offender, defendant is required by law to notify the State—and by extension, the public—whenever he moves to a new address, enrolls as a student, or obtains employment at an institution of higher education. N.C. Gen. Stat. § 14-208.9(a),(c),(d). Nevertheless, this type of static information is materially different from the continuous,

4. Compare the water resistance and travel flexibility afforded by the current SBM device with the one used in 2010. *See Bowditch*, 364 N.C. at 339-40, 700 S.E.2d at 4-5 ("Submerging the ankle bracelet in three feet or more of water generates a 'bracelet gone' alert[,] . . . and commercial airplane flight is likely limited due to security regulations.").

dynamic location data SBM yields. "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Jones*, 565 U.S. at 415, 181 L. Ed. 2d at 924 (Sotomayor, J., concurring). At the hearing, Officer Pace acknowledged that through analysis of SBM location data, the State could ascertain whether an offender was regularly visiting a doctor's office, an ABC store, or a place of worship.

However, the only portion of the trial court's order which addresses GPS monitoring is the finding that the "ankle monitor does not monitor or reveal the activities of the offender—it merely monitors his location." On appeal, the State contends that this aspect of SBM is similar to the compulsory drug testing of Oregon public high school student-athletes upheld in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995). *See id.* at 658, 132 L. Ed. 2d at 578 (observing that one "privacy-invasive aspect of urinalysis is . . . the information it discloses concerning the state of the subject's body, and the materials he has ingested"). We agree that the type of information disclosed through the search is certainly an important consideration. However, the State's *use* of the information is also relevant. *See id.* (deeming it "significant" that, *inter alia*, the tests "look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic[,]" and that the results were "not turned over to law enforcement authorities or used for any internal disciplinary function").

Here, it is significant that law enforcement is not required to obtain a warrant in order to access defendant's SBM location data. The ability to track a suspect's whereabouts is an undeniably powerful tool in a criminal investigation. However, the State presented no evidence of defendant's current threat of reoffending, and the record evidence regarding the circumstances of his convictions does not support the conclusion that lifetime SBM is objectively reasonable.[5] Although the State has no

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5. The only evidence within the appellate record of the circumstances underlying defendant's sex offense convictions is in the Memorandum In Support of Defendant's Motion for Judgment As a Matter of Law, which states:

"[T]he evidence that the State did present shows that although [defendant] was convicted of second degree sexual offense in 1996 when he was 17 years old, and that he pled 'no contest' to that charge. *See* State's Exhibit 5. The State also relied on the prior court record in this case to show that [defendant] was convicted in 2006 of indecent liberties. The indictment, also a part of that court record, indicates that this conviction was based on [defendant]'s having had [a] non-forcible sexual relationship with a fifteen-year-old female, when he was 26 years old."

State's Exhibit 5 was not provided to this Court.

guidelines for presentation of evidence at *Grady* hearings, nevertheless, there must be sufficient record evidence to support the trial court's conclusion that SBM is reasonable as applied to *this particular defendant*.

In concluding that SBM is reasonable, the trial court heavily relied on *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016).[6] However, the circumstances in *Belleau* are starkly different from those in the instant case. In *Belleau*, the 7th Circuit upheld lifetime GPS monitoring of a 73-year-old man who, from 2004-2010, had been civilly committed as a "sexually violent person" by the state of Wisconsin. *Id.* at 931 (citing Wis. Stat. §§ 980.01(7), 980.06); *see also id.* at 935 ("[P]ersons who have demonstrated a compulsion to commit very serious crimes and have been civilly determined to have a more likely than not chance of reoffending must expect to have a diminished right of privacy as a result of the risk of their recidivating[.]"). In holding that "Wisconsin's ankle monitoring of Belleau is reasonable[,]" *id.* at 937, the Court considered a plethora of record evidence regarding the plaintiff's long history of molesting prepubescent children, *id.* at 931; his medical diagnosis as a pedophile and documented inability to "reduce[] his sexual deviance . . . [and] suppress or manage his deviant arousal," *id.* at 934; the plaintiff's statistical likelihood of reoffending, as determined by his evaluating psychologist, *id.*; and studies regarding the general recidivism rates of sex offenders and serious underreporting of sex crimes against children, *id.* at 933-34.[7]

By contrast, here, the State failed to present any evidence concerning its specific interest in monitoring defendant, or of the general

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6. The trial court also relied on *People v. Hallak*, 873 N.W.2d 811 (Mich. Ct. App. 2015), *rev'd on other grounds*, 876 N.W.2d 523 (Mich. 2016) (mem.). However, that case is readily distinguishable. The *Hallak* defendant, a medical doctor, was sentenced to lifetime electronic monitoring due to his conviction for second-degree criminal sexual conduct for improperly touching a 12-year-old patient. *See* 873 N.W.2d at 826 ("[A]lthough this monitoring lasts a lifetime, the Legislature presumably provided shorter prison sentences for these . . . convictions because of the availability of lifetime monitoring."). Unlike Michigan's electronic monitoring program, North Carolina's SBM program is civil and nonpunitive in nature. *Compare id.* at 825 ("[I]t is evident that in enacting this monitoring provision, the Legislature was seeking to provide a way in which to both punish and deter convicted child sex offenders and to protect society from a group known well for a high recidivism rate."), *with Bowditch*, 364 N.C. at 342, 700 S.E.2d at 6 ("[T]he legislative objective in enacting SBM was to establish a nonpunitive, regulatory program.").

7. The concurring judge would have upheld Wisconsin's monitoring program as a reasonable special needs search. *See Belleau*, 811 F.3d at 940 (Flaum, J., concurring) ("[T]he GPS monitoring provided under the Wisconsin law occurs constantly, lasts indefinitely, and is the subject of periodic government scrutiny. Accordingly, this monitoring program is uniquely intrusive, likely more intrusive than any special needs program upheld to date by the Supreme Court." (citations omitted)).

procedures used to monitor unsupervised offenders. Instead, the State submitted copies of the two sex offense judgments and defendant's criminal record, arguing that defendant himself was "Exhibit Number 1" of SBM's success in deterring recidivists, because "[s]ince he's been monitored, guess what: He hasn't recommitted, he hasn't been charged with another sex offense." However, Officer Pace, the State's sole witness, testified that the ET-1 cannot actually prevent an offense from occurring. And although knowledgeable about the ET-1 and monitoring supervised offenders, Officer Pace was unaware of the procedures used to monitor unsupervised offenders such as defendant, "because [he] do[es]n't deal with those" cases. "[P]eople out of Raleigh" monitor unsupervised offenders, and Officer Pace did not know "their requirements [for] checking their system."

We acknowledge the State's compelling interest in protecting the public, particularly minors, from dangerous sex offenders. Of course, it is axiomatic that "the sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. And it is clear that a legislature may pass valid laws to protect children and other victims of sexual assault from abuse." *Packingham v. North Carolina*, 582 U.S. __, __, 198 L. Ed. 2d 273, 281 (2017) (citations and quotation marks omitted). "The government, of course, need not simply stand by and allow these evils to occur. But the assertion of a valid governmental interest cannot, in every context, be insulated from all constitutional protections." *Id.* (citations and quotation marks omitted); *see also id.* at __, 198 L. Ed. 2d at 283 (holding that N.C. Gen. Stat. § 14-202.5—banning registered sex offenders from accessing "a commercial social networking Web site" known to permit minors "to become members or to create or maintain personal Web pages"—violates the First Amendment).

At the time of defendant's remand hearing, the SBM program had been in effect for approximately ten years. However, the State failed to present any evidence of its efficacy in furtherance of the State's undeniably legitimate interests. The State conceded this point on 8 August 2017 during oral arguments before this Court. Defendant, however, presented multiple reports authored by the State and federal governments rebutting the widely held assumption that sex offenders recidivate at higher rates than other groups. Although the State faulted defendant for presenting statistics about supervised offenders, the State bears the burden of proving reasonableness at *Grady* hearings. *Blue*, __ N.C. App. at __, 783 S.E.2d at 527. Here, we are compelled to conclude that the State failed to carry its burden.

We emphasize, however, that our holding is limited to the facts of this case. We reiterate the continued need for individualized determinations of reasonableness at *Grady* hearings. As we held in *Greene*, the State will have only one opportunity to prove that SBM is a reasonable search of the defendant. __ N.C. App. at __, 806 S.E.2d at 344-45 (reversing without remanding the lifetime SBM order where "[t]he State offered no further evidence beyond defendant's criminal record"). And the defendant will have one opportunity to assert a Fourth Amendment challenge or risk appellate waiver of the issue. *See Bishop*, __ N.C. App. at __, 805 S.E.2d at 370 ("Bishop is no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step.").

IV. Conclusion

As a recidivist sex offender, defendant's expectation of privacy is appreciably diminished as compared to law-abiding citizens. However, the State failed to present any evidence of its need to monitor defendant, or the procedures actually used to conduct such monitoring in unsupervised cases. Therefore, the State failed to prove, by a preponderance of the evidence, that lifetime SBM of defendant is a reasonable search under the Fourth Amendment. Because we have determined that the trial court erred by concluding that SBM is a reasonable search of defendant, we need not address the parties' remaining arguments. We reverse the trial court's order.

REVERSED.

Judge STROUD concurs.

Judge BRYANT dissents in a separate opinion.

BRYANT, Judge, dissenting.

I firmly believe that unless the statutes enacting North Carolina's satellite-based monitoring (SBM) program are deemed to be unconstitutional on their face, the State's burden of proof to show that SBM is a reasonable search in accordance with the Fourth Amendment is not so high as the majority has set forth. By requiring the State to establish an interest in monitoring defendant and the efficacy of the

SBM program beyond that which has been defined and codified by our General Assembly, the majority asks the State to meet a burden of proof greater than our General Assembly envisioned as necessary and greater than Fourth Amendment jurisprudence requires. For these reasons, I respectfully dissent.

The Fourth Amendment sets forth "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462 (2015) (citing *Samson v. California*, 547 U.S. 843, 165 L. Ed. 2d 250 (2006); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995)). "Whether a search is reasonable 'is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' " *Samson*, 547 U.S. at 848, 165 L. Ed. 2d at ___ (citing *United States v. Knights*, 534 U.S. 112, 118–19, 151 L. Ed. 2d 497 (2001)).

Defendant's Privacy

"The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.' " *Vernonia Sch. Dist. 47J*, 515 U.S. at 654, 132 L. Ed. 2d at 575; *see, e.g.*, *Samson*, 547 U.S. 843, 165 L. Ed. 2d 250 (upholding warrantless search of parolee); *Knights*, 534 U.S. 112, 151 L.Ed.2d 497 (upholding warrantless search of probationer's home based on reasonable suspicion and condition of probation); *Griffin v. Wisconsin*, 483 U.S. 868, 875–80, 97 L.Ed.2d 709, 718–22 (1987) (upholding warrantless search of probationer's home based on special needs).

The physical limitations imposed by the SBM system's ET-1 monitoring device are minimal: it weighs 8.7 oz., can be worn under socks, can be worn in the water, does not prohibit physical activity or travel, but must be charged daily. The majority deems these limitations "more inconvenient than intrusive," and I agree. The issue is to what degree continuous monitoring—which generates a history of the wearer's movements—intrudes upon a legitimate expectation of privacy.

As to this defendant, the majority concludes that his expectation of privacy is diminished as compared to that of a law-abiding citizen. I agree. Due to defendant's enrollment in North Carolina's sex offender registry,[1] defendant's name, sex, address, physical description, picture, conviction date, offense for which registration was required, sentence imposed as a result of conviction, and registration status are made available to the public. N.C. Gen. Stat. § 14-208.10(a).

Next, I consider the State's interests.

Legitimate Governmental Interest

> "Sex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32, 153 L.Ed.2d 47 (2002) (plurality opinion). "[T]he victims of sex assault are most often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault." *Id.*, at 32–33 . . . . **[E]very . . . State, has responded to these facts by enacting a statute designed to protect its communities from sex offenders and to help apprehend repeat sex offenders**.

Connecticut Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4, 155 L. Ed. 2d 98, 103 (2003).

The U.S. Supreme Court has noted "[t]here is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals" and that "[t]here is also conflicting evidence on the point." *United States v. Kebodeaux*, 570 U.S. ___, ___, 186 L. Ed. 2d 540, 549 (2013) (citations omitted). Our General Assembly has determined that those convicted of specific sex offenses or those who have multiple convictions for specific sex offenses pose a danger to the public safety and welfare that is to be guarded against in the form of public registries for sex offenders and in some categorical cases, SBM programs available to law enforcement agencies.

In the enabling language of our Sex Offender and Public Protection Registration Programs, our General Assembly stated the purpose of these programs.

> The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and

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1. Defendant's prior record reflects a 2004 conviction for failure to register as a sex offender. Also, defendant's 1996 and 2006 convictions, both determined to be sexually violent offenses qualify him for enrollment in the Sex Offender and Public Protection Registration Program. *See* N.C. Gen. Stat. § 14-208.6A.

> that protection of the public from sex offenders is of paramount governmental interest.
>
> The General Assembly also recognizes that persons who commit certain other types of offenses against minors . . . pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. Release of information about these offenders will further the governmental interests of public safety so long as the information released is rationally related to the furtherance of those goals.
>
> Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5 (2017).

In this effort, the General Assembly directed the Division of Adult Correction and Juvenile Justice of the Department of Public Safety to establish a SBM program to monitor *three categories of sex offenders*.

> Any offender who is convicted of a reportable conviction as defined by G.S. 14-208.6(4) [(an offense against a minor or a sexually violent offense)] and who is required to register under Part 3 [("Sexually Violent Predator Registration Program")] of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a *recidivist*, or was convicted of an aggravated offense as those terms are defined in G.S. 14-208.6.

Id. § 14-208.40(a)(1) (emphasis added). Additionally, "[i]f the court finds that the offender . . . is a *recidivist* . . . , the court *shall* order the offender to enroll in a satellite-based monitoring program for life." *Id.* § 14-208.40A(c) (emphasis added).[2] Defendant does not challenge on appeal the legitimacy of these governmental interests.

The majority concludes that the State failed to put forth any evidence establishing a specific interest in monitoring defendant and the efficacy of the SBM program. I submit that our General Assembly has categorically determined and described those with a threat of reoffending significant enough to warrant SBM. The SBM statutes specifically describe three categories of sex offenders the program is designed to monitor. *See id.* § 14-208.40(a). So long as the State presents sufficient evidence to establish that a defendant meets the requisite statutory definitions and criteria for a court to order the defendant be enrolled in our SBM program, the State has presented sufficient evidence to establish a specific interest in monitoring the defendant.

During the bring-back hearing, the State presented evidence that defendant's convictions were reportable, sexually violent convictions, and that defendant met the statutory definition of a recidivist. And it should be noted that upon making these findings, the trial court was bound by statute to order defendant to enroll in SBM for life. *See id.* § 14-208.40A(c) ("If the court finds that the offender . . . is a recidivist, . . . the court shall order the offender to enroll in a satellite-based monitoring program for life.").

Defendant's prior record of reportable, sexually violent convictions, as well as his status as a recidivist in conjunction with our General Assembly's codified categorical assessment that offenders who meet those criteria are to be enrolled in our SBM program to better assist law enforcement agencies' efforts to protect communities, *see id.* § 14-208.40(a)(1), establishes the State's interest in monitoring this particular defendant.

Weighing Expectation Against Interest

The question is whether the State's interest in protecting the public from defendant, a recidivist sex offender who qualifies for participation in our State's SBM program, outweighs defendant's diminished expectation of privacy. I believe that it does.

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2. "An offender . . . who is required to submit to satellite-based monitoring for the offender's life may file a request for termination of monitoring requirement with the Post-Release Supervision and Parole Commission." N.C. Gen. Stat. § 14-208.43(a) (2017). Thereafter, while required initially, SBM for life does not necessarily mean one is monitored for life.

The evidence before the trial court as to defendant was as follows: In 1996, defendant pled no contest to second-degree sex offense (a Class C felony); and in 2006, defendant was indicted on charges of statutory rape and indecent liberties with a child before he pled guilty to taking indecent liberties with a child (a Class F felony) and admitted that the victim was impregnated as a result of his actions.[3] The trial court found both offenses to be "sexually violent offenses," as defined by N.C. Gen. Stat. § 14-208.6, and further found defendant met the definition of a "recidivist" under the same statute. *See id.* § 14-208.6(2b), (5). By statute, the trial court was compelled to order defendant's enrollment in our SBM program. *See id.* § 14-208.40A(c) ("If the court finds that the offender . . . is a recidivist, . . . the court shall order the offender to enroll in a satellite-based monitoring program for life."). Therefore, our General Assembly had determined that the State's burden of proof is not so high as the majority would require.[4]

Weighing the degree to which participation in the SBM program intrudes upon defendant's privacy and, on the other hand, the degree to which SBM participation promotes legitimate governmental interests—the prevention of criminal conduct or the apprehension of defendant should he reoffend—the trial court's determination that the intrusion upon defendant's privacy was outweighed by the legitimate governmental interest was supported by the evidence in this case. Given the totality of the circumstances—including the nature of the search (the collection of location data for a recidivist sex offender), the purpose of the search (to protect the public against sex offenses), and the extent to which the search intrudes upon defendant's diminished expectations of privacy (an accumulated history of defendant's movements[5])—I believe defendant's participation in the SBM program is reasonable and in accordance with our statutory scheme. Accordingly, I would affirm the trial court's order.

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3. Though not germane to the statutory scheme for SBM enrollment, it should be noted that in 2004, defendant was convicted of failing to register as a sex offender.

4. The majority notes that the State "failed to present any evidence of [the] efficacy [of the SBM program which had been in effect for approximately ten years] in furtherance of its undeniably legitimate interest," and that defendant presented evidence rebutting the assumption of the high rate of recidivism by sex offenders. While this may be a valid legislative argument, I do not believe it to be a persuasive argument that defendant's participation in the SBM program, when viewed as a search, was unreasonable.

5. While there may be an argument that over a long course of time accumulated location data of an individual revealing no criminal conduct will become more burdensome than the Fourth Amendment can tolerate, I do not believe we need to address this argument at this point. Presently, defendant has been convicted of two sexually violent offenses and designated a recidivist and does not have a lengthy history devoid of assaults on minors.

STATE OF NORTH CAROLINA
v.
MOLLIE ELIZABETH B. McDANIEL

No. COA17-856

Filed 15 May 2018

Larceny—doctrine of recent possession—sufficiency of evidence—possession of stolen property

Defendant's mere possession of stolen property by briefly transporting it in her truck approximately two weeks after it was alleged to have been stolen was not sufficient evidence to support her convictions for breaking and entering and larceny after breaking and entering under the doctrine of recent possession, where the State failed to demonstrate defendant's possession was to the exclusion of all persons not party to the crime.

Judge TYSON dissenting.

Appeal by Defendant from judgments entered 24 January 2017 by Judge J. Thomas Davis in Superior Court, McDowell County. Heard in the Court of Appeals 22 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Deborah M. Greene, for the State.

Gilda C. Rodriguez for Defendant.

McGEE, Chief Judge.

Mollie Elizabeth B. McDaniel ("Defendant") appeals her convictions for felonious breaking and entering and larceny after breaking and entering. For the reasons discussed below, we vacate Defendant's convictions.

I. Factual and Procedural Background

Daniel Sheline ("Mr. Sheline") inherited five acres of real property and a three-bedroom house located at 30 Woody Street in Marion, North Carolina, in February 2014. Mr. Sheline visited the house at 30 Woody Street on 20 March 2014 to "check on it, [and] make sure nothing had been bothered." Mr. Sheline observed a number of items of personal property in the house during the 20 March 2014 visit, including an aluminum ladder and push lawnmower, both in the basement; an unrestored cuckoo clock; miscellaneous furniture; aluminum pots and pans; heirloom china; an Atari electronic gaming system; and a monitor heater, located behind the front door of the house, which was wired and plumbed through copper tubing to a kerosene oil tank outside the house. The monitor heater was in working order, the copper tubing was intact, and there was kerosene in the outside oil tank.

When Mr. Sheline left the house on 20 March 2014, he locked the front door's knob lock. Mr. Sheline did not have a key to the deadbolt lock, which could only be locked from the inside, so he left the deadbolt unlocked. The door to the basement of the house was pulled shut and secured from the inside with a padlock that "had a screwdriver through it [so that] nobody could open it from the outside." Mr. Sheline testified "[t]he only way . . . [to] open [the basement door] would be to crawl through a window or have a key and go down the [interior] steps and open it [from inside the house]." The house also had a side door that was nailed shut. Mr. Sheline posted a "no trespassing" sign on the front door of the house, and stated that, as of 20 March 2014, "[n]o one [else] had permission to go into the house at all."

When Mr. Sheline returned to the house at 30 Woody Street on 1 April 2014, the deadbolt to the front door was locked and the doorknob lock was unlocked. The basement door and a window next to the basement door were both open, and the padlock to the basement door was missing. As Mr. Sheline walked up the stairs from the basement into the house, he smelled a strong odor of kerosene. He "found the whole living room floor was full of [leaked] kerosene and the monitor heater was missing." The piping from the heater to the outside oil tank had been cut and the copper tubing was missing. Mr. Sheline noticed that other items were missing from the house, including the aluminum ladder, lawnmower, and cuckoo clock. The house's electrical wiring had been ripped from the electric box and removed, and various plumbing fixtures were also missing. Mr. Sheline's wife called the police to report the stolen property.

Lieutenant Detective Andy Manis ("Lt. Det. Manis") of the McDowell County Sherriff's Office ("MCSO") received information on 2 April 2014 that the property missing from the house at 30 Woody Street was located at a house at 24 Ridge Street. Lt. Det. Manis went to investigate and found a monitor heater, lawnmower, aluminum ladder, pipes, and wiring outside the residence at 24 Ridge Street. Lt. Det. Manis knocked on the door. Stephanie Rice ("Ms. Rice") answered the door and provided information to Lt. Det. Manis indicating a person driving a white pickup truck had unloaded the property at 24 Ridge Street earlier that day.

Mr. Sheline later identified the items found at 24 Ridge Street as the property missing from 30 Woody Street.

Detective Jason Grindstaff ("Det. Grindstaff") of the MCSO received a report on 4 April 2014 that someone had again entered the house at 30 Woody Street, left in a white pickup truck, and turned down Ridge Street. Det. Grindstaff went to Ridge Street and found a white Chevrolet pickup truck parked directly across the street from the house at 24 Ridge Street. Defendant was sitting in the driver's side of the truck. Det. Grindstaff asked Defendant for identification and permission to search the vehicle. With Defendant's permission, Det. Grindstaff searched the truck's interior cabin and outer truck bed. He found an Atari gaming system, glassware, china, and an antique clock in the bed of the truck. Det. Grindstaff arrested Defendant. Mr. Sheline later confirmed the items found in the truck were property from 30 Woody Street. Mr. Sheline testified the property found in the white pickup truck on 4 April 2014 "might have been" in the house at 30 Woody Street when he was there on 1 April 2014.

According to Det. Grindstaff, Defendant said she "got [the property in the pickup truck] from a residence on Woody Street[,]" but indicated "[s]omeone gave her . . . permission to go inside the residence and get the property." Defendant stated that a friend of hers, Michael Nichols ("Nichols") "told her a neighbor [of] Mr. Sheline [] gave them permission to enter the residence." Defendant also told Det. Grindstaff that Nichols had been at 24 Ridge Street shortly before Det. Grindstaff arrived, but "had just left the residence . . . [and] she did not know where [Nichols] was going."

Defendant testified she met Nichols in 2012 and worked with him "doing some salvage work at [an] old abandoned place at 50 Woody Street[,] . . . going through and taking some old metal and stuff, working together on that." Defendant stated she and Nichols went to the residence at 30 Woody Street in October 2013 and spoke to an elderly man who answered the door. According to Defendant, the elderly man gave Nichols and Defendant permission to remove a plow and some scrap metal from the basement at 30 Woody Street. Nichols and Defendant took the items to the building at 50 Woody Street, where they were collecting scrap metal to sell. Defendant stopped working with Nichols in late 2013. She collected unemployment benefits for several months and, when those benefits ended, she began working with Nichols again.

Defendant testified that on 2 April 2014, at Nichols's request, she drove a white pickup truck to the building at 50 Woody Street and "loaded some stuff on the truck" from a crawl space underneath the building, including a ladder, monitor heater, "and various other things that were all under there in that spot." Defendant testified she believed the items belonged to a friend of Nichols who was storing them at 50 Woody Street. Nichols asked Defendant "to bring the truck up and carry [the property] down [the hill] for him." Defendant testified she drove the items to 24 Ridge Street and deposited them outside the residence, "up against the side of the building."

Defendant testified Nichols called her on 4 April 2014 and

> asked me to give him a ride to the scrap yard. He said he had a load of aluminum or something. I got to his house and he said he wasn't ready to go yet, but that I could go up the hill [to the building at 50 Woody Street]. There was still a bunch of stuff over there in the house he thought I might be interested in. . . . In the meantime, [Nichols said] if I wanted to go up there and look around and see if there [was] anything that I might be interested in, there was still a lot of stuff up there at the house at 50 [Woody Street]. . . . So I went up there and got the items that [Det. Grindstaff found] on my truck out of the attic of [the] house at [50 Woody Street] at that time.

Defendant stated she drove the truck to 24 Ridge Street, where she saw Nichols and another man loading bags of aluminum cans into the trunk of a car. According to Defendant, Nichols and the man drove away hurriedly and, as Nichols was driving away, Defendant saw Det. Grindstaff approaching. Defendant admitted she told Det. Grindstaff that she had recently removed the property in her truck from a house "on Woody Street," but testified she was referring to the building at 50 Woody Street. Defendant testified she had not been to the house at 30 Woody Street since going there with Nichols in October 2013.

Defendant was charged by separate indictments on 21 July 2014 with (1) one count of felony breaking and entering and one count of larceny after breaking and entering, on or about 20 March 2014, in connection with the lawnmower, aluminum ladder, monitor heater, kerosene, electrical wiring, flooring, and cuckoo clock found at 24 Ridge Street on 2 April 2014; and (2) one count of felony breaking and entering and one count of larceny after breaking and entering, on 4 April 2014, in connection with the Atari game system, heirloom china, and antique radio found in Defendant's truck on that date. The charges were joined for trial.

At the close of the State's evidence, Defendant moved to dismiss the charges related to the alleged 20 March 2014 breaking and entering and larceny based on insufficiency of the evidence. The State conceded it was

> a circumstantial case, obviously, that [Defendant was] the one that broke into the house [at 30 Woody Street] the first time and brought the items and deposited them at [24] Ridge Street, and then two days later [] broke[] in [to the house at 30 Woody Street] again and [came] back to Ridge Street with another load.

Nevertheless, the State contended the evidence that, on 4 April 2014, Defendant was found in possession of certain stolen property from a purported second break-in was sufficient to show Defendant was "also responsible for the larceny [of the other property] and the break-in for the first time because it[] [was] Ridge Street [again]." Defense counsel noted Defendant was not present when the stolen property was discovered at 24 Ridge Street on 2 April 2014, and further observed "it wasn't [Defendant's] residence[.]"

The trial court initially indicated it would allow Defendant's motion to dismiss with respect to the 20 March 2014 charges only. Before the presentation of Defendant's evidence, however, the court revisited the matter, stating it "may have dismissed the wrong one[.]" The court expressed some confusion over the dates of the alleged offenses:

> TRIAL COURT: I did dismiss the [20 March 2014 breaking and entering charge], but what I am telling you is I may have gotten them backwards. I should have dismissed the April 4 [2014] [breaking and entering charge] and left the March 20 [2014] [charge] in place based on this evidence. I want to make sure I have time to correct that since nothing has happened at this point in time. . . . The way I see it is the only testimony as to opening the window, the door [at 30 Woody Street], all the situations are from one incidence. We don't have any testimony there was any sort of entry that second time, and that admission that [Defendant] makes was not peculiar to win. The evidence that [the State] brought out [that] somebody reported seeing the [white pickup truck], I think all that does is goes to the state of mind of this officer. I think it's only offered for that purpose. . . . [T]herefore, it cannot be used as substantive evidence of any particular crime. As a result

> [], I may have dismissed – by dismissing the April 4 [2014] allegation, I am basically – I may have committed error to the State because that's the later one, and it would be hard for you to relate the original breaking and entering that was testified to today to that indictment because it was the wrong date. I may have missed [sic] the wrong one. . . . I can correct it right now without any prejudice to [] [D]efendant. I was thinking it over through lunch and I may have dismissed the wrong one.

After further discussion, the trial court concluded the State had presented insufficient evidence to support two separate charges of breaking and entering. The court reinstated both charges in the indictment dated 20 March 2014, *i.e.*, one count of felonious breaking and entering and one count of larceny after breaking and entering. It dismissed the 4 April 2014 charge of breaking and entering, but left in place the 4 April 2014 charge of larceny after breaking and entering, finding there was "evidence to show that the [property found in Defendant's possession on 4 April 2014] was acquired as a result of the original breaking and entering [that allegedly occurred on 20 March 2014]." However, the court indicated that, if the jury ultimately convicted Defendant of both larcenies, it "would have to entertain whether or not arrested judgment would be appropriate to combine those larcenies into [a] single larceny[.]"

Defendant was found guilty of one count of felony breaking and entering and two counts of larceny after breaking and entering on 24 January 2017. The trial court arrested judgment on the 4 April 2014 larceny conviction. Defendant was sentenced to an active sentence of four months' imprisonment, to be followed by sixty months of supervised probation. Defendant appeals.[1]

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1. Defendant filed a petition for writ of *certiorari* with this Court on 11 September 2017 in light of procedural defects in her notice of appeal. Defendant failed to comply with N.C.R. App. P. Rule 4, which provides that a party entitled to appeal in a criminal case may do so by (1) giving oral notice of appeal at trial, or (2) filing a written notice of appeal with the clerk of superior court within fourteen days of entry of judgment. *See* N.C.R. App. P. 4(a). In the present case, Defendant failed to comply with either provision. Defendant contends she gave oral notice of appeal after the trial concluded and after defense counsel had left the courtroom. Thus, although the trial court entered appellate entries dated 24 January 2017, Defendant's notice of appeal was not recorded and does not appear in the trial transcript. *See, e.g.*, *State v. Hughes*, 210 N.C. App. 482, 485, 707 S.E.2d 777, 778 (2011) ("Although the record includes appellate entries . . . which indicate through boilerplate that defendant gave notice of appeal, mere appellate entries are insufficient to preserve the right to appeal." (citation and quotation marks omitted)). Defendant also did not file a written notice of appeal with the clerk of court. *See, e.g.*, *State v. Blue*, 115 N.C. App. 108, 113, 443 S.E.2d 748, 751 (1994) (concluding defendant did not preserve right to appeal

II. Defendant's Appeal

Defendant argues the trial court erred by denying her motion to dismiss because the State presented insufficient evidence Defendant was the perpetrator of a breaking and entering or a larceny that allegedly occurred on or about 20 March 2014. We agree.

A. *Standard of Review*

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "The standard of review for a motion to dismiss in a criminal case 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." *State v. Irons*, 189 N.C. App. 201, 204, 657 S.E.2d 733, 735 (2008) (citation and internal quotation marks omitted). The trial court should consider the evidence in the light most favorable to the State, and "the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. Burke*, 185 N.C. App. 115, 118, 648 S.E.2d 256, 258-59 (2007) (citation and internal quotation marks omitted). However, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations and quotation marks omitted).

B. *Analysis*

Defendant was convicted for felonious breaking and entering and larceny after breaking and entering that allegedly occurred on or about 20 March 2014. "The elements of felonious breaking and entering under [N.C. Gen. Stat.] § 14-54(a) are (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *State v. Poore*, 172 N.C. App. 839, 841, 616 S.E.2d 639, 640 (citation and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 14-54(a)

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convictions where record "contained no written notices of appeal as required by Rule 4 of the Rules of Appellate Procedure."). Defendant failed to preserve her right to appeal, subjecting the appeal to dismissal. *See State v. Briley*, 59 N.C. App. 335, 337, 296 S.E.2d 501, 503 (1982) ("Rules of Appellate Procedure are mandatory and failure to observe them is grounds for dismissal of an appeal." (citations omitted)). The State did not raise the issue of defective notice. We exercise our discretion to issue the writ of *certiorari* and reach the merits of Defendant's appeal. *See State v. Hammonds*, 218 N.C. App. 158, 162-63, 720 S.E.2d 820, 823 (2012).

(2017). "The essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Wilson*, 154 N.C. App. 686, 690, 573 S.E.2d 193, 196 (2002) (citations omitted). "[W]here larceny is committed pursuant to breaking and entering, it constitutes a felony without regard to the value of the property in question." *State v. Richardson*, 8 N.C. App. 298, 301, 174 S.E.2d 77, 79 (1970) (citation omitted); *see also* N.C. Gen. Stat. § 14-72(b)(2) (2017).

In the present case, the State conceded at trial its evidence against Defendant was entirely circumstantial. The State advanced the doctrine of recent possession, which our Supreme Court has described as

> a rule of law that, upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property. The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and the discovery of them in [a] defendant's possession. Furthermore, when there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering.

State v. Maines, 301 N.C. 669, 673-74, 273 S.E.2d 289, 293 (1981) (citations omitted). "For the doctrine of recent possession to apply, the State must show: (1) the property was stolen, (2) [the] defendant had possession of the property, subject to his control and disposition to the exclusion of others, and (3) the possession was sufficiently recent after the property was stolen[.]" *State v. McQueen*, 165 N.C. App. 454, 460, 598 S.E.2d 672, 676-77 (2004) (citations omitted); *see also State v. Pickard*, 143 N.C. App. 485, 487, 547 S.E.2d 102, 104 (2001) (noting State must prove each element of recent possession "beyond a reasonable doubt." (citation omitted)).

The "mere possession of stolen property is insufficient to raise a presumption of guilt." *McQueen*, 165 N.C. App. at 460, 598 S.E.2d at 677 (citations omitted). This Court has held that "[e]xclusive possession does not necessarily mean sole possession. Exclusive possession means possession *to the exclusion of all persons not party to the crime*." *State v. Foster*, 149 N.C. App. 206, 209, 560 S.E.2d 848, 851 (2002) (citation and internal quotation marks omitted) (emphasis added). "The possession must be so recent after the breaking or entering and larceny as to show that the possessor could not have reasonably come by it, except by stealing it himself or by his concurrence." *State v. Hamlet*, 316 N.C. 41, 43, 340 S.E.2d 418, 420 (1986) (citations omitted).

As an initial matter, we observe that Defendant was not convicted of breaking and entering, or sentenced for larceny, in connection with the stolen property *actually found in her possession* on 4 April 2014. Defendant was convicted on charges stemming from a breaking and entering and larceny that, according to the relevant indictment, occurred "on or about" 20 March 2014. That indictment specifically described the property stolen on that date as "a Sears pushmower, aluminum ladder, monitor heater, 100 gallons of kerosene, electrical wiring, flooring[,] and a German [cuckoo] clock." These items were discovered by Lt. Det. Manis at 24 Ridge Street on 2 April 2014, outside Defendant's presence, although Defendant admitted she drove a short distance with the property in her truck earlier that day. Thus, the State's own evidence suggested that up to two weeks may have passed between the alleged breaking and entering and larceny, on or around 20 March 2014, and the discovery of the stolen property, on 2 April 2014, and the property was not actually found in Defendant's possession.

In *Maines*, which the dissent cites for its statement of the elements of recent possession, our Supreme Court explicitly defined the second element of the doctrine as follows: "[T]he stolen goods were found in [the] defendant's custody and subject to his control and disposition *to the exclusion of others* though not necessarily found in [the] defendant's hands or on his person so long as he had *the power and intent to control* the goods[.]" 301 N.C. at 674, 273 S.E.2d at 293 (emphases added). "Exclusive" possession may include joint possession by "co-conspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all." *Id.* at 675, 273 S.E.2d at 294. Regardless, under *Maines*, "the evidence must show the person accused of the theft had *complete dominion, which might be shared with others, over the property* . . . which sufficiently connects the accused person to the crime[.]" *Id.* (emphasis added).

Defendant acknowledged she was briefly in possession of the stolen property on 2 April 2014, when she transported it a few blocks from a building at 50 Woody Street, where the property was being stored, to the residence at 24 Ridge Street. The dissent appears to conclude this constituted "requisite actual possession and control over the recently stolen property" sufficient to connect Defendant with the theft that occurred two weeks prior. As noted above, however, "mere possession of stolen property is insufficient to raise a presumption of guilt." *McQueen*, 165 N.C. App. at 460, 598 S.E.2d at 677 (citations omitted). In *Maines*, the mere fact that the defendant "was driving the car [containing the stolen property] and presumably in control of it and its contents" was insufficient to support an inference that he was the thief based on the doctrine of recent possession. *Maines*, 301 N.C. at 676, 273 S.E.2d at 294. In this case, like the *Maines* defendant, Defendant testified she did not know the property was stolen, and believed it belonged to a friend of Nichols, when she put it in her truck on 2 April 2014. She also testified that, as of 2 April 2014, her last contact with Nichols was in "November or early December of 2013." There was no evidence tending to show Defendant possessed, controlled, or exercised dominion over the stolen property during the two weeks between the date of the alleged theft and her admitted transport of that property. *Compare with State v. Lytton*, 88 N.C. App. 758, 759, 365 S.E.2d 6, 7 (1988) (holding evidence was sufficient to raise recent possession doctrine where "evidence [did] not suggest that anyone other than [the] defendant and [another individual who was party to the crime] possessed, controlled, or had anything to do with the [stolen property]; instead . . . only they had and controlled the [stolen property] by showing [it] to [a third party], offering to sell [it], setting their price, and receiving the purchase money.").

Moreover, the State was required to demonstrate Defendant possessed the stolen property "to the exclusion of all persons *not party to the crime*." *Maines*, 301 N.C. at 675, 273 S.E.2d at 294 (emphasis added). The dissent asserts that, in this case, "[n]o one disputes Nichols was a party to taking the [stolen] items hidden underneath 50 Woody Street[.]" We note the record does not indicate whether Nichols was charged in connection with the stolen property identified in either indictment, and the State did not assert a criminal conspiracy between Defendant and Nichols. However, even assuming *arguendo* that Nichols *was* a party to the crime, the State failed to show that, between 20 March 2014 and 2 April 2014, the possession of the stolen property by Defendant and/or Nichols was "to the exclusion of all persons *not party to the crime*." *Id.* The evidence suggests the stolen property was stored at an abandoned building at 50 Woody Street after its theft and before Defendant took it to 24 Ridge Street two weeks later. There was no evidence tending to show that, between 20 March 2014 and 2 April 2014, Defendant possessed, controlled, or even knew of the stolen property located at 50 Woody Street. The evidence also did not show the stolen property was not possessed or controlled by any third parties unconnected to the crime during those two weeks. In the absence of such showing, the

State's evidence was insufficient to support an inference that Defendant broke into Mr. Sheline's residence on 20 March 2014 and stole the property she transported to 24 Ridge Street two weeks later.

This case is factually distinguishable from *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985), and *State v. Foster*, 149 N.C. App. 206, 560 S.E.2d 848 (2002), cases cited by the dissent. In *Wilson*, our Supreme Court held "[i]t is not always necessary that the stolen property be actually in the hands of the defendant in order to trigger the inference that [the defendant was] the thief. The doctrine [of recent possession] is equally applicable where the stolen property is *under the defendant's personal control*." *Id.* at 536, 330 S.E.2d at 464 (citations omitted) (emphasis added). In *Wilson*, the Court held the jury was properly instructed on the doctrine of recent possession where a stolen watch "was seen [after the theft] *only* in the hands of the [defendant's girlfriend] or the defendant until it was sold by the defendant." *Id.* (emphasis in original). The defendant's girlfriend was seen wearing the watch "two or three weeks after the crime[] [was] committed[,] [and a] week later the watch was seen in the hands of the defendant." *Id.* at 535, 330 S.E.2d at 463-64. Under these circumstances, a jury instruction on recent possession was appropriate, notwithstanding "the intervening possession of the watch by [the defendant's girlfriend][.]" *Id.* at 535, 330 S.E.2d at 464.

In *Foster*, the defendant was seen driving a truck containing stolen property mere hours after the property was stolen. There were two passengers in the truck. On appeal, the defendant did not argue the jury was improperly instructed on the doctrine of recent possession; he contended the trial court erroneously refused to include the instruction that "the [stolen] goods must be found in [the] defendant's possession 'to the exclusion of others.' " 149 N.C. App. at 209, 560 S.E.2d at 850. This Court held the trial court properly denied the defendant's request for the additional instruction because "[t]he evidence [did] not suggest that anyone other than [the] defendant or the other passengers possessed or controlled the [stolen property] seen in the back of the truck [the] defendant was driving." *Id.* at 209, 560 S.E.2d at 851.

Unlike in *Wilson*, there was no evidence in the present case connecting the property found at 24 Ridge Street on 2 April 2014 to Defendant during the two weeks between its theft and her admitted transport of the property from 50 Woody Street to 24 Ridge Street. There was no evidence Defendant went to 50 Woody Street during those two weeks, or that the stolen property was otherwise under Defendant's "personal control." Further, even assuming possession of the property by Nichols could be imputed to Defendant, the State did not establish that *only*

Nichols possessed or controlled the property after it was stolen, *i.e.*, to the exclusion of any third parties not connected to the crime.

The dissent also cites *State v. Johnson*, 60 N.C. 235 (1864), in which stolen property was found six weeks after its theft in a house occupied exclusively by the defendant and his wife. Our Supreme Court affirmed the trial court's jury instruction that

> owing to the length of time which had elapsed from the stealing of the goods until the discovery of them in the possession of the defendant, *no presumption could arise that [the defendant] had stolen them*; but the fact of his having them in possession was evidence which [the jury] would consider with the other evidence in the cause in determining [the defendant's] guilt or innocence.

60 N.C. at 236 (emphasis added). The Court explicitly held that, although the defendant's possession of stolen goods was "evidence to be considered[,]" the mere fact of possession *did not* "raise a legal presumption of the taking[.]" *Id.* at 237. *Johnson* thus offers little guidance in the present case, because the precise question before us is whether the State's evidence *did* "raise a legal presumption" of Defendant's guilt based on the theory of recent possession.

The State's argument that Defendant broke into Mr. Sheline's residence around 20 March 2014 and stole the items that were found at 24 Ridge Street on 2 April 2014 was based entirely on the evidence that Defendant admitted transporting the property on 2 April 2014, and, two days later, Det. Grindstaff found Defendant in a white pickup truck, parked across from the house at 24 Ridge Street, in possession of entirely different personal property that was also missing from the house at 30 Woody Street.[2] We find this evidence insufficient to support Defendant's convictions on the 20 March 2014 charges based on the doctrine of recent possession. Defendant admitted the stolen property found outside the house at 24 Ridge Street was briefly in her possession on 2 April 2014. However, the State presented no evidence that, other than that brief period of time on 2 April 2014, the property was in Defendant's possession or subject to Defendant's control, much less "to the exclusion of all persons not party to the crime." *See Foster*, 149 N.C. App. at 209, 560 S.E.2d at 851 (citation and quotation marks omitted). As discussed above, there was no evidence suggesting Defendant had exclusive possession or control of the stolen property during the two

2. We note Defendant was not charged with possession of stolen property in either indictment at issue in this case.

weeks that elapsed between the alleged crimes, on or about 20 March 2014, and Defendant's admitted transport of the property on 2 April 2014.

The State contends that, because Defendant "ha[d] the power and intent to control the access to and use of [her truck][,] [she] ha[d] possession of the [vehicle's] known contents[]" when, by her own admission, she transported the stolen property on 2 April 2014. According to the State, Defendant was "the driver and only authorized user of the truck[,]"[3] and "there [was] no evidence that [] Nichols was present in the truck at the time [Defendant] had possession of the stolen items."[4] Even taking these statements as true, they do not establish exclusive possession.

In *Maines*, our Supreme Court held that "the fact [that the defendant] was driving the car [containing stolen property] and presumably in control of its contents" was alone insufficient to support an inference that "he was the thief who stole [the property] based on the possession of stolen goods." *Maines*, 301 N.C. at 676, 273 S.E.2d at 294. In that case, the State failed to show the stolen goods found in the defendant's possession were "subject to his control and disposition to the exclusion of others." *Id.* at 675, 273 S.E.2d at 294. In this case, Defendant testified she did not know the property was stolen when Nichols told her it belonged to a friend and asked her to drive it to another residence. She also testified that, prior to 2 April 2014, she last spoke with Nichols in November or December 2013. Under *Maines*, the mere fact that Defendant transported stolen property did not demonstrate the property was "subject to [her] control and disposition to the exclusion of others." *Id.*

Because the State failed to prove beyond a reasonable doubt the second element[5] of the doctrine of recent possession, the evidence was

3. The State did not present evidence Defendant was the "only authorized user of the truck[.]" Defendant testified the white pickup truck "belonged to [her] father[.]" When asked whether "[she was] the one driving [the truck] all the time," Defendant stated: "I [] borrowed it during that week [in April 2014]. I didn't drive it all the time, but [my father] let me borrow it occasionally."

4. The parties dispute whether Defendant ever represented that Nichols was a passenger in the truck when she transported the stolen property to 24 Ridge Street on 2 April 2014, but Defendant submits that she "was not charged with conspiracy, nor was the jury instructed on acting in concert, [so] [] Nichols was 'not a party to the crime' and his [hypothetical] possession of the alleged[ly] stolen items could not be attributed to [Defendant]."

5. The dissent contends that "[w]hether the two weeks, which may have passed between the breaking and entering and larceny and the discovery of the property being stolen, and Defendant's admitted possession, is too remote to apply the doctrine of recent possession was a proper question for the jury[.]" We note that whether a defendant's possession of stolen property was sufficiently "recent" after the larceny is the third element of the doctrine of recent possession, and our holding in this case "turns upon the second

insufficient to support Defendant's convictions for the breaking and entering and larceny that allegedly occurred on or about 20 March 2014. Accordingly, we vacate Defendant's convictions. As a result, we need not address Defendant's remaining argument regarding the length of her probation. *See*, *e.g.*, *State v. Martin*, 222 N.C. App. 213, 222, 729 S.E.2d 717, 724 (2012).

VACATED.

Judge DAVIS concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion correctly states the applicable standard of review of the trial court's ruling on Defendant's motion to dismiss, yet erroneously concludes the State failed to introduce any competent evidence tending to show, and as the jury found, an essential element of the doctrine of recent possession and reverses Defendant's convictions for breaking and entering and larceny. My review and vote concludes no error occurred in Defendant's conviction by the jury or in the judgment entered thereon. I respectfully dissent.

I. Possession of Recently Stolen Goods

Defendant's recent possession of stolen goods raises a presumption of guilt, where the State's evidence tends to show the stolen goods were in Defendant's custody or control recently after the larceny thereof. The elements of this crime are:

> (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and (3) the possession was recently

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element [of the doctrine]: whether the stolen goods were found in [D]efendant's custody and subject to [her] control and disposition to the exclusion of others." *See Maines*, 301 N.C. at 675, 273 S.E.2d at 294. Because we have concluded the State failed to prove exclusive possession, it is unnecessary to consider whether Defendant's possession of the stolen property was "too remote to apply the doctrine of recent possession[.]"

> after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

State v. Maines, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981) (citations omitted).

In *Maines*, our Supreme Court held the recent possession doctrine did not apply to that defendant. The stolen items were found inside a vehicle the defendant was driving. *Id.* at 670, 273 S.E.2d at 291. Three other individuals were also present inside the car, including the registered owner of the vehicle. *Id.* at 676, 273 S.E.2d at 294.

The Supreme Court noted the "[d]efendant did not have actual or personal possession of the stolen property. None of the goods were on his person[.]" *Id.* The Court found that the defendant's possession of the stolen goods was "at most constructive, based on the fact he was driving the car and presumably in control of it and its contents." *Id.* The Supreme Court reversed the defendant's conviction because this analysis was "based on stacked inferences." *Id.* The jury was required to infer that the defendant possessed the recently stolen goods from the lone fact that he was driving the car with the car's owner and others inside, and then the jury was required to further infer he was the perpetrator who had broken and entered and stolen the items. *Id.*

Here, and as acknowledged in the majority's opinion, it is both admitted and undisputed that Defendant traveled alone to 50 Woody Street, loaded the items onto her truck with Nichols' assistance, and while again alone, with actual and exclusive possession, drove the stolen items to 24 Ridge Street. It is also undisputed when she was approached by Detective Grindstaff, Defendant actually and exclusively possessed other items, which had also been recently stolen from exactly the same location.

The State's evidence was properly admitted and tends to show: "[D]efendant had possession of the [recently stolen] property, subject to [her] control and disposition to the exclusion of others." *State v. McQueen*, 165 N.C. App. 454, 460, 598 S.E.2d 672, 677 (2004).

The defendant's constructive possession in *State v. Maines* is factually distinguishable from Defendant's admitted and actual possession of recently stolen goods.

II. *State v. Foster*

The majority's opinion cites *State v. Foster*, 149 N.C. App. 206, 560 S.E.2d 848 (2002), and asserts Defendant's possession was not "to the exclusion of all persons not party to the crime," and the presumption of guilt, spawned by her recent possession, would not apply. In *Foster*, the store owner locked his doors on 10 December. *Id.* at 207, 560 S.E.2d at 849. When he returned on 11 December, items including a Lawn Boy mower, trailer, tires, rims, and other items were missing. In the interim early morning hours, police had observed the defendant-Foster and two other individuals in the defendant's truck. The Lawn Boy and tires and rims were in the truck at the time. *Id.*

This Court recognized, "[e]xclusive possession does not necessarily mean sole possession. Exclusive possession means possession to the exclusion of all persons *not party to the crime*." *Id.* (citations omitted) (emphasis supplied). The evidence in *Foster* showed the defendant and the two other passengers in the truck were all parties to the crime. The evidence did "not suggest that anyone other than defendant or the other passengers possessed or controlled the tires, rims, and Lawn Boy seen in the back of the truck defendant was driving." *Id.*

Whether Defendant possessed the recently stolen items to the exclusion of anyone else, who was not a party to the crime is not the issue before us. No one disputes Nichols was a party to taking the items hidden underneath 50 Woody Street and loading them into Defendant's truck. Defendant admits Nichols was involved with the stolen items.

In *State v. Lytton*, 88 N.C. App. 758, 365 S.E.2d 6 (1988), the defendant was charged with and convicted by a jury of felony larceny. This Court held evidence was sufficient to raise the recent possession doctrine where another man, in addition to the charged defendant, was a party to the crime and the evidence did not suggest that anyone other than the defendant and this other man "possessed, controlled, or had anything to do with" the stolen guns; instead, it tended "to show that only they had and controlled the stolen guns." *Id.* at 759, 365 S.E.2d at 7. Defendant's argument, asserting she was not charged with conspiracy and the jury was not instructed on acting in concert, and "no other persons party to the crime[s]" were charged for the jury to consider, is irrelevant to the issue before us on her motion to dismiss.

Once the stolen items were loaded into her truck, Defendant had the requisite actual possession and control over the recently stolen property. Whether Nichols could have also controlled the stolen property is irrelevant to the sufficiency of the State's evidence to overcome and deny Defendant's motion to dismiss and to support the jury's verdict of Defendant's guilt under the doctrine of recent possession of stolen goods. *See id.*

Further, the majority's opinion acknowledges Defendant was briefly in possession of the stolen property. The length of time Defendant possessed the stolen property is not material to the State's evidence tending to show and raising the presumption that Defendant was the thief, who had stolen the goods under the doctrine of recent possession to sustain her motion to dismiss.

III. *State v. Wilson*

In *State v. Wilson*, the Supreme Court recognized no bright line test exists for the length of time to allow the inference of guilt of the theft spawned by the recent possession of the goods stolen. *State v. Wilson*, 313 N.C. 516, 536, 330 S.E.2d 450, 464 (1985). The Court recognized "[t]here is no specific period, however, beyond which possession can no longer be considered 'recent.' Rather, the term is a relative one and will depend on the circumstances of each case." *Id.* (citations omitted).

In light of all of the other circumstances in *Wilson*, our Supreme Court held the defendant and his girlfriend's possession of the stolen watch, one to three weeks after the victim had been stabbed and his watch was stolen "was sufficiently recent to support a reasonable inference of the defendant's guilt under the doctrine of recent possession." *Id.* at 536-37, 330 S.E.2d at 464.

Here, Defendant admitted she alone had transported the items that had been stolen on or about 20 March 2014 in her truck and she had unloaded them at the Ridge Street address. Her possession of the recently stolen goods was exclusive and 100% within her control at that time. Whether the two weeks, which may have passed between the breaking and entering and larceny and the discovery of the property being stolen, and Defendant's admitted possession, is too remote to apply the doctrine of recent possession was a proper question for the jury and does not support vacating Defendant's conviction as a matter of law. *See id.* at 536-37, 330 S.E.2d at 464.

IV. Conclusion

The State's evidence tended to show Defendant's exclusive possession of recently stolen goods. The trial court correctly submitted the case to the jury. The jury considered and weighed the evidence and properly convicted Defendant. *See State v. Johnson*, 60 N.C. 235, 237-38 (1864) (upholding larceny conviction where goods were stolen six weeks prior to when they were found in a house rented by the defendant and his wife). “It appears to have been fairly laid before the jury, according to the view here taken, and the jury have come to a conclusion with which we have no right to interfere, if we had the inclination.” *Id.*

Correctly applying the standard of review to Defendant’s motion to dismiss, Defendant has failed to show any prejudicial and reversible errors occurred at trial which would entitle her to a new trial. I find no error in the jury’s conviction or in the judgment entered thereon. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
HOWARD A. SHARPE, Defendant

No. COA17-602

Filed 15 May 2018

Probation and Parole—revocation—sufficient basis—clerical error

While the trial court made a clerical error by checking a box on the revocation form referring to multiple violations of probation, only one of which could be an independent basis for revocation pursuant to statute, it was clear from the court’s rendition and order as a whole that the court properly based revocation on the commission of a criminal offense and not the other two violations of failure to pay court indebtedness and probation supervision fees.

Appeal by defendant from judgment entered on or about 5 December 2016 by Judge Walter H. Godwin, Jr. in Superior Court, Wilson Court. Heard in the Court of Appeals 11 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Jason R. Rosser, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

STROUD, Judge.

Defendant appeals the revocation of his probation. We affirm and remand for correction of a clerical error.

On 2 November 2016, while on probation for another offense, defendant was convicted of possession of drug paraphernalia. Probation Officer Noah Kearney filled out a probation violation report noting three violations: "arrears $800.00 in court indebtedness[,]" "$720.00 in probation supervision fees[,]" and conviction of the 2 November 2016 offense. (Original in all caps.) Defendant appeared *pro se* before the trial court and admitted that he had violated his probation as alleged in the probation violation report, but explained to the trial court he had pled guilty in order to receive a reduced sentence,

> And as far as the new conviction, I know you can see it was a really large drop in the case so I received 120 days on it. So I had a decision to make, whether to go to trial and face eight years, or take 120 days. It was pretty sure for me so I just took that.[1]

In December of 2016, the trial court entered an order revoking defendant's probation. Defendant appeals.

Defendant's only argument on appeal is that "the trial court abused its discretion, and acted under a misapprehension of the law, when it revoked defendant's probation based on three alleged violations of which only one provided a statutory basis for revocation." (Original in all caps.)

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.

State v. Jones, 225 N.C. App. 181, 183, 736 S.E.2d 634, 636 (2013) (citation omitted).

---

1. Defendant does not raise the argument of lack of willfulness on appeal, nor is there a legal basis for the argument. "Once convicted, whether as a result of a plea of guilty, nolo contendere, or of not guilty (followed by trial), convictions stand on the same footing, unless there be a specific statute creating a difference." *State v. Outlaw*, 94 N.C. App. 491, 494, 380 S.E.2d 531, 533 (1989) (citation omitted), *aff'd*, 326 N.C. 467, 390 S.E.2d 336 (1990).

Defendant's argument is based upon his contention that the trial court mistakenly believed that *each* of the violations was a sufficient basis upon which to revoke probation, although only one of the violations – commission of a crime while on probation – is actually a proper basis for revocation of probation. *See* N.C. Gen. Stat. §§ 153A-1343(b)(1), -1344(a) (2017). On the Judgment and Commitment Upon Revocation of Probation – Felony, Form AOC-CR-607, Rev. 12/13, the trial court checked the box for the second sentence of Finding 4:

> Each of the conditions violated as set forth above is valid; the defendant violated each condition willfully and without valid excuse; and each violation occurred at a time prior to the expiration or termination of the period of the defendant's probation.
>
> ☒ *Each* violation is, in and of itself, a sufficient basis upon which this Court should revoke probation and activate the suspended sentence.

(Emphasis added.)

Probation can be revoked under North Carolina General Statute § 15A-1343(b)(1) if the defendant commits a "criminal offense in any jurisdiction" while on probation. N.C. Gen. Stat. § 15A-1343(b)(1). North Carolina General Statute § 153A-1344(a) provides in pertinent part that "[t]he court may only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1)[.]" N.C. Gen. Stat. § 15A-1344(a). Because defendant committed a criminal offense while on probation, the trial court could properly revoke his probation on that ground. *See* N.C. Gen. Stat. §§ 153A-1343(b)(1), -1344(a); *see also State v. Seay*, 59 N.C. App. 667, 670–71, 298 S.E.2d 53, 55 (1982) ("It is sufficient grounds to revoke the probation if only one condition is broken.").

Although defendant acknowledges that the trial court could have exercised its discretion to revoke probation based only upon the criminal offense, he argues that "the trial court's decision to revoke probation based on two violations that could not support an order revoking probation likely influenced the trial court's decision to revoke probation." It is true that the trial court could not have revoked probation based upon the other two violations of failure to pay court indebtedness and probation supervision fees. *See generally* N.C. Gen. Stat. § 15A-1344(a). Defendant is also correct that because the trial court checked the box for the second sentence of Finding 4, it found that "[*e*]*ach violation is, in and of itself*, a sufficient basis" for revocation of probation. (Emphasis added.) Defendant argues:

> Given that we do not know which alleged violation, or combination thereof, was the basis for the trial court's revocation, and that only one of the three alleged violation[s] provides a statutory basis for revocation, Mr. Sharpe's probation revocation sentence must be vacated and remanded back to the trial court for a new hearing.

Contrary to defendant's argument, we do know the trial court's basis for the revocation of probation, and it was the commission of a criminal offense. It is apparent from the trial court's rendition and the order as a whole that the trial court did not act under a misapprehension of law that *each* violation alone could have been sufficient to revoke defendant's probation. But there is a clerical error in the order because the trial court checked the box in Finding 4, which was unnecessary based upon the trial court's rendition and Finding 5. Finding 5 states the basis for revocation: "5. The Court may revoke defendant's probation . . . (a) for the willful violation of the condition(s) that he/she not commit any criminal offense, G.S. 15A-1343(b)(1) . . . as set out above." In addition, the trial court stated during rendition of the ruling:

> I find and conclude that the Defendant violated the conditions as set forth in the violation report. Each of those conditions is valid. You violated those conditions willfully, without valid excuse, prior to the expiration of the probationary period. *One of the violations is in and of itself sufficient to justify revocation and the activation of the suspended sentence.* Therefore, probation is revoked and the sentence is activated.

(Emphasis added.)

The trial court recognized that "[o]*ne* of the violations is in and of itself sufficient to justify revocation and the activation of the suspended sentence." That "one violation" was committing another criminal offense, as noted in Finding 5. The trial court did not say "*each* of the violations" is sufficient to justify revocation. This difference in wording is significant, since it demonstrates that the trial court was basing the revocation on *one* of the violations, and the order notes in Finding 5 that the *one* violation justifying revocation was the commission of a criminal offense. But since the second sentence of Finding 4 should not have been checked, we remand for correction of this clerical error. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." (citation and quotation marks omitted)).

AFFIRMED and REMANDED for correction of clerical error.

Judges DILLON and INMAN concur.

STATE OF NORTH CAROLINA
v.
WADE LEON SHAW, DEFENDANT

No. COA17-1061

Filed 15 May 2018

Criminal Law—motion for post-conviction DNA testing—appropriate review—statutory factors

The trial court erroneously addressed defendant's motion for post-conviction DNA testing as a motion for appropriate relief, and consequently failed to conduct the relevant analysis of the factors contained in N.C.G.S. § 15A-269 to determine whether defendant satisfied the requirements for post-conviction DNA testing. Therefore, the Court of Appeals could not evaluate whether defendant's motion was properly denied, necessitating remand to the trial court to conduct a review under the appropriate statute.

Appeal by defendant from order entered 14 December 2015 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 8 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

ZACHARY, Judge.

Defendant Wade Leon Shaw appeals from the trial court's order denying his "Request for Post Conviction DNA Testing and Discovery" pursuant to N.C. Gen. Stat. § 15A-269. We vacate and remand.

Background

In June 2011, defendant was indicted for second-degree burglary, first-degree kidnapping, assault by strangulation, first-degree rape, first-degree sexual offense, and attaining habitual felon status. The matter was tried before a jury beginning on 30 January 2012.

The evidence presented at defendant's trial included, among other things, testimony by the State's expert in forensic DNA analysis concerning the DNA evidence that was recovered from the victim. The DNA analyst concluded that defendant's DNA "cannot be excluded as a contributor to the DNA mixture" that was recovered, and that "the chance of selecting an individual at random that would be expected to be included for the observed DNA mixture profile" was approximately, "for the North Carolina black population, 1 in 14.5 million[.]" Defendant was convicted on all charges, and this Court affirmed defendant's convictions in May 2013.

On 22 October 2015, defendant filed a *pro se* motion with the trial court entitled "Request for Post Conviction DNA Testing and Discovery N.C. Gen. Stat. § 15A-269, § 15A-902." This motion simply paraphrased the applicable statute, stating only that defendant was moving for post-conviction DNA testing "because the evidence is material to [his] defense, is related to the investigation or prosecution . . . , and it was previously tested and the requested DNA retesting would provide results that are significantly more accurate and probative, having a reasonable probability of contradicting prior test results." Defendant also provided a sworn affidavit maintaining his innocence.

Although defendant moved for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269, the trial court decided that "the caption of Defendant's Motion notwithstanding, this Court will review it as a Motion for Appropriate Relief" pursuant to N.C. Gen. Stat. § 15A-1411(c). The trial court then determined that defendant had not complied with the service and filing requirements provided for motions for appropriate relief in N.C. Gen. Stat. § 15A-1420(a)(2). The trial court also concluded that "Defendant does not allege newly discovered evidence or other genuine issues that would require an evidentiary hearing, and that the claims raised either were or could have been raised upon direct appeal[,]" which are grounds for denial of a motion for appropriate relief pursuant to N.C. Gen. Stat. § 15A-1419. The trial court denied defendant's motion on 14 December 2015.

On 29 June 2017, defendant filed a petition for writ of certiorari asking this Court to review the trial court's order denying his motion for post-conviction DNA testing. We granted certiorari on 10 July 2017.

On appeal, defendant argues that the trial court erred in denying his motion for post-conviction DNA testing because the facts at issue are sufficient to satisfy "the criteria for additional DNA testing" provided in N.C. Gen. Stat. § 15A-269. Defendant also argues that his motion for post-conviction DNA testing was denied in error by the trial court "based on a statute [pertinent to motions for appropriate relief] that was inapplicable to [defendant's] motion."

Discussion

In response to the ever-developing nature of DNA technology, N.C. Gen. Stat. § 15A-269 allows convicted defendants to submit requests for post-conviction DNA testing. Pursuant to N.C. Gen. Stat. § 15A-269,

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . if the biological evidence meets all of the following conditions:
>
> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.
>
> (b) The court shall grant the motion for DNA testing . . . upon its determination that:
>
> (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
>
> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and

(3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269(a) and (b) (2017).

I. Post-Conviction Procedures

A motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269 is distinct from a motion for appropriate relief under N.C. Gen. Stat. § 15A-1411, -1420. *State v. Howard*, ___ N.C. App. ___, ___, 783 S.E.2d 786, 793-94 (2016); *see also State v. Brown*, 170 N.C. App. 601, 607, 613 S.E.2d 284, 288, *disc. review denied*, 360 N.C. 68, 621 S.E.2d 882 (2005), *superseded by statute on other grounds as recognized in State v. Norman*, 202 N.C. App. 329, 332, 688 S.E.2d 512, 515, *disc. review denied*, 364 N.C. 439, 702 S.E.2d 792 (2010). Wholly separate from the post-conviction procedures that govern motions for appropriate relief, N.C. Gen. Stat. § 15A-269 "provide[s] a specific procedural vehicle for asserting, and obtaining relief on, claims for relief based on post-conviction DNA testing." *Howard*, ___ N.C. App. at ___, 783 S.E.2d at 794. In fact, even where a defendant files a motion for appropriate relief that contains multiple claims, one of which involves post-conviction DNA testing, the trial court must still "evaluat[e] each individual claim on the merits and under the applicable substantive law." *Id.* at ___, 783 S.E.2d at 795. Accordingly, where a defendant brings a motion for post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269, the trial court's task is to rule on the motion in accordance with the applicable substantive law as set forth in N.C. Gen. Stat. § 15A-269(b). A trial court may not supplant the analysis contemplated by N.C. Gen. Stat. § 15A-269(b) with the evaluation applicable to motions for appropriate relief.

In the instant case, defendant filed a motion entitled "Request for Post-Conviction DNA Testing" requesting relief pursuant to N.C. Gen. Stat. § 15A-269. As such, the trial court was obliged to resolve various questions under N.C. Gen. Stat. § 15A-269(b). For instance, the trial court was required to determine whether the biological evidence was material to the defense, N.C. Gen. Stat. § 15A-269(a)(1), whether the re-testing of the DNA would be "significantly more accurate and probative" than the prior testing, N.C. Gen. Stat. § 15A-269(a)(3)(b), and whether "there exist[ed] a reasonable probability that the verdict would have been more favorable to . . . defendant" had the requested testing been conducted, N.C. Gen. Stat. § 15A-269(b)(2). However, the trial court conducted no such inquiry, and denied defendant's motion on the grounds set forth in N.C. Gen. Stat. § 15A-1420(a)(2) and 1419(a) for evaluation of motions for appropriate relief. While the trial court in its order did note that defendant had "not allege[d] newly discovered evidence or other genuine issues[,]" the trial court was required to analyze the relevance of that deficit in light of the requirements of N.C. Gen. Stat. § 15A-269.

In that the trial court's order does not address the requisite factors provided in N.C. Gen. Stat. § 15A-269, we cannot determine whether defendant's motion for post-conviction DNA testing was properly denied. Accordingly, we vacate the trial court's order and remand for the trial court's review consistent with the provisions of N.C. Gen. Stat. § 15A-269.

II. Grounds to Grant Relief

Defendant also argues that sufficient grounds exist to warrant post-conviction DNA testing of the biological evidence in the instant case. Although defendant's motion merely paraphrases the statute, on appeal he submits a factual basis for the allegations of his motion. Most significantly, defendant maintains that the prior testing was not reliable because of the inability of the DNA analyst from the State Crime Laboratory who examined the biological evidence at issue in defendant's trial to pass the required certification examination.

In that this matter is being vacated and remanded to the trial court on other grounds, however, we decline to address defendant's additional arguments in support of his motion for post-conviction DNA testing.

Conclusion

For the reasons set forth above, the matter is

VACATED AND REMANDED.

Judges HUNTER, JR. and DIETZ concur.

STATE OF NORTH CAROLINA
v.
KAREEM STANLEY

No. COA17-1000

Filed 15 May 2018

Search and Seizure—knock and talk doctrine—back door

The trial court erred in denying defendant's motion to suppress where law enforcement officers violated his Fourth Amendment right against unreasonable searches by approaching the back door of an apartment to perform a knock and talk. Although the officers had observed their confidential informant using the back door on several occasions to purchase illegal drugs from the occupants of the apartment, the permission granted by a resident to certain individuals to use a door other than the front entrance does not automatically extend to members of the public, including law enforcement.

Appeal by defendant from judgment entered 13 February 2017 by Judge Beecher R. Gray in Durham County Superior Court. Heard in the Court of Appeals 19 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Martin T. McCracken, for the State.

Patterson Harkavy LLP, by Paul E. Smith, for defendant-appellant.

DAVIS, Judge.

This case presents the question of whether the Fourth Amendment permits law enforcement officers to conduct a knock and talk at the back door of a residence rather than at the clearly visible and unobstructed front door. Kareem Stanley ("Defendant") appeals from his convictions for trafficking in heroin by transportation; trafficking in heroin by possession; possession with intent to manufacture, sell, or deliver a Schedule I controlled substance; possession with intent to sell or deliver a Schedule II controlled substance; and possession of drug paraphernalia. On appeal, he argues that the trial court erred by denying his motion to suppress evidence of the drugs seized from his person as a result of an illegal knock and talk. Because we conclude that (1) the knock and talk was unconstitutional; and (2) the evidence obtained by the officers would not have been discovered but for the knock and talk, we reverse the trial court's denial of his motion to suppress.

Factual and Procedural Background

In 2015, Investigator Joseph Honeycutt was working for the Special Operations Division of the Durham Police Department. In December 2015, a confidential informant contacted the police department stating that he had purchased heroin from a person at Apartment A at 1013 Simmons Street ("Apartment A") in Durham. The informant identified James Meager as the person from whom he had bought heroin at Apartment A.

Investigator Honeycutt subsequently became aware that Apartment A belonged to an individual named James Hazelton. Investigator Honeycutt also learned that Meager did not actually live at the apartment.

Nevertheless, Investigator Honeycutt used the informant to conduct controlled drug sales involving Meager at Apartment A on three separate occasions. On 8 December 2015, Investigator Honeycutt observed the informant walk up the driveway to the back door of the apartment in order to purchase heroin from Meager. On 16 December 2015, Investigator Honeycutt once again used the informant to buy heroin from Meager at the back door of Apartment A. Finally, on a third occasion, Investigator Honeycutt observed the informant purchase heroin from the back door of the apartment.

On 1 March 2016, Investigator Honeycutt, Investigator Thomas Thrall, and four to five other members of the Durham Police Department approached Apartment A in order to locate Meager and serve him with a warrant for his arrest. They were dressed in protective vests with the word "Police" written across their chests. The officers did not possess a warrant to search the apartment.

Upon the officers' arrival at the apartment, they immediately walked down the driveway that led to the back of the apartment, and Investigator Honeycutt knocked on the back door. In response to an inquiry from a person inside Apartment A as to who was knocking, Investigator Honeycutt responded: "Joey."

Defendant, who had been staying with Hazelton as a houseguest at Apartment A from January through March of 2016, answered the door, and Investigator Honeycutt "immediately detected . . . the odor of marijuana." He stepped into the apartment and began conducting a protective sweep of the premises. One or two other officers also entered

Apartment A to assist him. During the protective sweep, the officers located Hazelton and handcuffed him. A "crack pipe" was discovered on the nightstand in one of the bedrooms of the residence. Investigator Honeycutt also observed a handgun laying on a couch in the living room.

In the meantime, Investigator Thrall waited with several other officers outside the back door. At some point, he directed Defendant to accompany him outside. After Defendant complied with his request, Investigator Thrall told him to take his hands out of his pockets and asked if he was carrying any weapons. Defendant denied possessing any weapons but kept his hands in his pockets. Investigator Thrall asked Defendant a second time to remove his hands from his pockets, and Defendant once again failed to do so.

At that point, Investigator Thrall pulled Defendant's hands out of his pockets, placed them on his head, and informed Defendant that he was going to search him for safety reasons. He then proceeded to conduct a pat-down of Defendant's person. While patting down Defendant's right pants pocket, he felt a bulge. He asked Defendant what was in the pocket, and Defendant responded that it was "some Vaseline." Investigator Thrall then patted down Defendant's left pants pocket and felt a larger bulge. He asked Defendant what was in that pocket, and Defendant replied that it was cocaine.

At that point, Investigator Thrall handcuffed Defendant and reached into Defendant's pockets to retrieve the items contained therein. Inside Defendant's left pants pocket, Investigator Thrall discovered a "plastic baggy that contained some small yellow baggies with a white substance that [he] believed . . . to be cocaine." He also found three smaller tan baggies that appeared to contain heroin. Investigator Thrall retrieved a small bag of marijuana from Defendant's right pants pocket.

After Defendant had been searched, Investigator Honeycutt returned to the back door with Hazelton in handcuffs. He informed Investigator Thrall that he was going to obtain a search warrant for the apartment. Investigator Thrall and the other officers then waited outside Apartment A with Hazelton and Defendant, both of whom remained handcuffed. Once a search warrant was obtained, the officers searched the apartment and found a digital scale near the crack pipe on the nightstand.

Defendant was arrested and charged with trafficking in heroin by transportation; trafficking in heroin by possession; possession with intent to manufacture, sell, or deliver a Schedule I controlled substance; possession with intent to sell or deliver a Schedule II controlled substance; and possession of drug paraphernalia. On 10 February 2017, Defendant filed a motion to suppress all of the evidence that had been seized from his pockets on the ground that the seizure violated his rights under the Fourth Amendment. A hearing was held before the Honorable Beecher R. Gray in Durham County Superior Court on 13 February 2017, and the trial court denied Defendant's motion.

On that same day, Defendant pled guilty to all of the charged offenses but expressly reserved his right to appeal the denial of his motion to suppress. The trial court consolidated all five offenses and sentenced Defendant to a term of 70 to 93 months imprisonment.

Analysis

Defendant's sole argument on appeal is that the trial court erred in denying his motion to suppress. Specifically, he argues that the officers violated his Fourth Amendment rights by (1) unlawfully conducting a knock and talk at the back door of Apartment A rather than the front door; (2) entering the apartment without the existence of probable cause and exigent circumstances; and (3) conducting an illegal pat-down search of his person.

"When a motion to suppress is denied, this Court employs a two-part standard of review on appeal: 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. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (citation and quotation marks omitted). "Unchallenged findings of fact are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review." *State v. Warren*, 242 N.C. App. 496, 498, 775 S.E.2d 362, 364 (2015) (internal citations and quotation marks omitted), *aff'd per curiam*, 368 N.C. 756, 782 S.E.2d 509 (2016).

In its written order denying Defendant's motion to suppress, the trial court made the following findings of fact:

> 1. On March 01, 2016, Investigator Honeycutt and other members of the Special Operations Division of the Durham Police Department conducted a knock and talk at 1013 Simmons Street, Apartment A to locate James Meagher [sic], for whom they had an outstanding arrest warrant and who had been identified by a confidential informant as the person the informant had purchased cocaine from on at least three (3) previous

occasions from the back door of the residence identified as Apartment A, 1013 Simmons Street in Durham, including cocaine purchases on December 08, 2015 and December 16, 2015.

2. Each time the confidential informant purchased narcotics under the surveillance and supervision of the investigators, the confidential informant went to the back door at 1013 Simmons Street, Apartment A. The back door of Apartment A is more hidden from public view than the front door of Apartment A at 1013 Simmons Street.

3. On March 01, 2016, Investigator Honeycutt went directly to the back door of 1013 Simmons Street, Apartment A and knocked, identifying himself as Joey Honeycutt.

4. Kareem Stanley (hereinafter "Defendant") opened the door.

5. As soon as the door was opened, Investigators could smell a strong odor of marijuana coming from inside of the residence. The police officers were wearing vests which had the word "Police" across the front of each vest. No weapons were drawn by police officers at any time during this visit to 1013 Simmons Street, Apartment A.

6. Officer Honeycutt and 1 or 2 other officers entered 1013 Simmons Street, Apartment A and conducted a safety sweep based on the odor of marijuana and prior drug sales occurring at 1013 Simmons Street, Apartment A. This safety sweep lasted an estimated one to one and one-half minutes in this small duplex apartment. During the safety sweep, Officer Honeycutt and other officers found a single individual identified as James Hazleton [sic], observed in plain view what appeared to be a crack pipe, and observed in plain view a handgun. James Meagher [sic], the object of an outstanding arrest warrant, was not in the apartment. Following the completion of this safety sweep, Officer Honeycutt departed 1013 Simmons Street in order to obtain a search warrant for the Apartment, the individuals found there, and any automobile located there.

7. As officers entered Apartment A to begin the safety sweep, the Defendant stepped out of the 1013 Simmons Street Apartment A, upon request by officer Thomas Thrall.

8. The Defendant had his hands in his pockets and was asked twice by Investigator Thrall to take his hands out of his pockets. Rather than comply with Investigator Thrall's request to remove his hands from his pockets for officer safety, Defendant pushed his hands deeper into his pockets.

9. After the Defendant did not comply with Investigator Thrall's requests[,] Investigator Thrall removed the Defendant's hands from his pockets and placed the Defendant's hands on top of his head, as he had been trained to do.

10. Investigator Thrall verbally notified the Defendant that he was about to conduct a pat down and then conducted a Terry frisk to check whether any kind of weapon was being concealed in the Defendant's pockets that could be used to harm Investigator Thrall or one of the other investigators present.

11. Investigator Thrall patted down on the Defendant's right front pocket and felt a small bulge. The Investigator asked about the bulge in Defendant's right front pocket and the Defendant responded "Vaseline." The bulge on the pat down of Defendant's right front pocket did not feel like Vaseline to Investigator Thrall, but since the item did not feel like a weapon when patted, Investigator Thrall moved on to the Defendant's left side front pocket.

12. Investigator Thrall patted down on the Defendant's left front pocket and felt an even larger bulge. When asked about the larger bulge in his left pocket, the Defendant said "cocaine."

13. After the Defendant told Investigator Thrall the bulge in his left front pocket was cocaine, the Defendant was handcuffed and placed in custody. Defendant was not questioned further, except for his identification, until after Investigator Honeycutt's search warrant

> was served on the Defendant at 1220 p.m. on March 01, 2016; he was transported to the Durham Police Department; and given Miranda warnings prior to being interrogated.

Based on these findings of fact, the trial court determined that the officers did not violate Defendant's Fourth Amendment rights by conducting the knock and talk, entering the apartment, or conducting a pat-down search of Defendant's person. Therefore, the court denied Defendant's motion to suppress.

As an initial matter, Defendant challenges the second sentence of Finding No. 2 to the extent it implies that (1) the front door was partially obstructed and not clearly visible from the street; and (2) the back door was not hidden from public view. We agree with Defendant that photographs of the apartment contained in the record on appeal reveal that the front door was, in fact, clearly visible from the street and unobstructed whereas the back door could not be seen.

The remaining pertinent findings of fact made by the trial court are unchallenged and, therefore, binding on appeal. *See Warren*, 242 N.C. App. at 498, 775 S.E.2d at 364 (holding that unchallenged findings in order denying motion to suppress are deemed to be supported by competent evidence and binding on appeal).

We first address Defendant's argument that the knock and talk conducted by the officers constituted an unlawful search for purposes of the Fourth Amendment.[1] "A 'knock and talk' is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant." *State v. Marrero*, __ N.C. App. __, __, 789 S.E.2d 560, 564 (2016). Our appellate courts "have recognized the right of police officers to conduct knock and talk investigations, so long as they do not rise to the level of Fourth Amendment searches." *Id.* at __, 789 S.E.2d at 564.

In *Florida v. Jardines*, 569 U.S. 1, 185 L. Ed. 2d 495 (2013), the United States Supreme Court explained the permissible scope of a knock and talk as follows:

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1. The State does not challenge the fact that Defendant possessed a reasonable expectation of privacy in Apartment A for purposes of the Fourth Amendment based on his status as a houseguest who had been living there for over a month. *See Minnesota v. Olson*, 495 U.S. 91, 96-97, 109 L. Ed. 2d 85, 93 (1990) (holding that defendant's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable").

> [T]he knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. . . . This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do.

Id. at 8, 185 L. Ed. 2d at 502 (internal citations, quotation marks, and footnote omitted).

"[I]n North Carolina, law enforcement officers may approach a front door to conduct 'knock and talk' investigations that do not rise to the level of a Fourth Amendment search." *State v. Smith*, __ N.C. App. __, __, 783 S.E.2d 504, 509 (2016) (citation and quotation marks omitted). We recently addressed the legality of a knock and talk conducted at the back door of a residence in *State v. Huddy*, __ N.C. App. __, __, 799 S.E.2d 650, 654 (2017). In *Huddy*, an officer was patrolling an area that he believed to be "at risk of home invasions" and observed a parked vehicle with the car doors open at the end of a long driveway leading to the rear of the defendant's home. *Id.* at __, 799 S.E.2d at 653. The officer became suspicious and approached the front door of the house. He observed that the front door of the residence was covered in cobwebs and walked to the back of the residence. *Id.* at __, 799 S.E.2d at 653.

The officer entered the backyard and "approached a storm door on the rear porch, which was not visible from the street" in order to conduct a knock and talk. *Id.* at __, 799 S.E.2d at 653. As he got closer to the storm door, the officer smelled marijuana. He knocked on the back door and spoke to the defendant, who opened the door. Based on the odor of marijuana at the storm door, the officer later obtained a search warrant for the home. During a search of the residence, the officer ultimately discovered a large quantity of marijuana. The defendant was charged with possession of marijuana with intent to sell or deliver and moved to suppress the evidence seized from the home. *Id.* at __, 799 S.E.2d at 653.

On appeal, we held that the defendant's Fourth Amendment rights had been violated. In so ruling, we stated the following:

> We begin with the knock and talk doctrine. Because no search of the curtilage occurs when an officer is in a place where the public is allowed to be, *such as at the front door of a house*, officers are permitted to approach the *front* door of a home, knock, and engage in consensual conversation with the occupants. . . . Put another way, law enforcement may do what occupants of a home implicitly permit anyone to do, which is approach the home by the *front* path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.
>
> Importantly, law enforcement may not use a knock and talk as a pretext to search the home's curtilage. No one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search. *Likewise, the knock and talk doctrine does not permit law enforcement to approach any exterior door to a home.* An officer's implied right to knock and talk extends only to the entrance of the home that a reasonably respectful citizen unfamiliar with the home would believe is the appropriate door at which to knock. . . . This limitation is necessary to prevent the knock and talk doctrine from swallowing the core Fourth Amendment protection of a home's curtilage. Without this limitation, law enforcement freely could wander around one's home searching for exterior doors and, in the process, search any area of a home's curtilage without a warrant.

Id. at __, 799 S.E.2d at 654 (internal citations, quotation marks, and brackets omitted and emphasis added).[2]

Huddy is consistent with prior decisions from this Court in which we have held that knock and talks taking place at a home's back door were unconstitutional. *See, e.g.*, *State v. Gentile*, 237 N.C. App. 304, 310, 766 S.E.2d 349, 353 (2014) (motion to suppress properly granted where detectives briefly knocked on front door and then attempted knock and talk at back door); *State v. Pasour*, 223 N.C. App. 175, 179, 741 S.E.2d 323, 326 (2012) (trial court erred in denying motion to suppress where officers attempted knock and talk at back door after no one answered knock on front door).

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2. We note that the trial court did not have the benefit of our decision in *Huddy* at the time it denied Defendant's motion to suppress as *Huddy* was decided approximately two months later.

In the present case, the officers knew that Meager did not live at Apartment A but believed that they could either locate him at the apartment or learn more about his whereabouts by conducting a general inquiry of the occupants. Therefore, they elected to utilize a knock and talk. However, in order to pass constitutional muster, the officers were required to conduct the knock and talk by going to the front door, which they did not do. Rather than using the paved walkway that led directly to the unobstructed front door of the apartment, the officers walked along a gravel driveway into the backyard in order to knock on the back door, which was not visible from the street. Such conduct would not have been reasonable for "solicitors, hawkers [or] peddlers . . . ." *See Jardines*, 569 U.S. at 8, 185 L. Ed. 2d at 502 (citation and quotation marks omitted). Thus, it was also unreasonable for law enforcement officers.

The trial court determined that the officers had an implied license to approach the back door of Apartment A because a confidential informant had been observed purchasing drugs from Meager by utilizing the back door on three separate occasions. However, the fact that the resident of a home may choose to allow certain individuals to use a back or side door does not mean that similar permission is deemed to have been given generally to members of the public. As we made clear in *Huddy*, "[a]n officer's implied right to knock and talk extends only to the entrance of the home that a reasonably respectful citizen *unfamiliar with the home* would believe is the appropriate door at which to knock." *Huddy*, __ N.C. App. at __, 799 S.E.2d at 654 (citation and quotation marks omitted and emphasis added); *see also id.* at __, 799 S.E.2d at 656-57 (Tyson, J., concurring) ("The home's occupants, family, or frequent invitees may use a closer side or back door or a door within a garage to enter the home, rather than walk further to use a front door. Nonetheless, even a seldom-used front door is the door uninvited members of the public are expected to use when they arrive. . . . Even if the back door was the entrance primarily used by [the defendant] or regular visitors, an uninvited visitor would not necessarily acquire any 'implied license' to also use that door." (internal citation omitted)).

We recognize that the existence of unusual circumstances in some cases may allow officers to lawfully approach a door of a residence other than the front door in order to conduct a knock and talk. *See, e.g.*, *State v. Grice*, 367 N.C. 753, 754, 761, 767 S.E.2d 312, 314, 318 (2015) (holding that officers were "implicitly invited into the curtilage to approach the home" where front door was "inaccessible, covered with plastic, and obscured by furniture" and side door "appeared to be used as the main entrance"), *cert. denied*, __ U.S. __, 192 L. Ed. 2d 882 (2015). However, no such unusual circumstances are presented here. As a result, the knock and talk was unconstitutional.

Finally, it is clear from the record that absent the unlawful knock and talk at Apartment A the officers would not have had any contact at all with Defendant much less had occasion to conduct a pat-down search of his person resulting in the discovery of the drugs in his pockets. Thus, because the knock and talk itself was unlawful the evidence of the drugs seized from him as a result was required to be suppressed. *See State v. Jackson*, 199 N.C. App. 236, 244, 681 S.E.2d 492, 498 (2009) (holding that drugs "discovered as a direct result of the illegal search . . . should have been suppressed as fruit of the poisonous tree").

Therefore, the trial court erred in denying Defendant's motion to suppress. Accordingly, we reverse the trial court's order.[3]

Conclusion

For the reasons stated above, we reverse the trial court's order denying Defendant's motion to suppress and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges INMAN and MURPHY concur.

3. In light of our holding, we need not reach the other arguments raised by Defendant.

STATE OF NORTH CAROLINA
v.
TONI TURNAGE, Defendant

No. COA17-803

Filed 15 May 2018

Search and Seizure—motorist stopped in roadway—unmarked police car—no seizure without submission to show of authority

A law enforcement officer's activation of his blue lights fifteen seconds after defendant inexplicably stopped her vehicle in the middle of the road did not constitute a seizure where the officer was in an unmarked car, defendant had not violated any laws prior to stopping, and there was no evidence defendant knew or reasonably believed the individuals in the unmarked car were law enforcement. The evidence did not indicate defendant submitted to a show of authority until after a subsequent high-speed car chase, which ended when another law enforcement vehicle impeded defendant's progress.

Appeal by State of North Carolina from an order entered 29 March 2017 by Judge Joshua W. Willey, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 23 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Shultz, for defendant-appellee.

BERGER, Judge.

On October 3, 2016, the Duplin County Grand Jury indicted Toni Turnage ("Defendant") for fleeing to elude arrest, resisting a public officer, and two counts of child abuse. Defendant filed a Motion to Suppress in Duplin County Superior Court alleging law enforcement did not have reasonable suspicion to stop Defendant's vehicle, and the seizure of Defendant violated the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution. The trial court granted Defendant's motion. We reverse.

Factual and Procedural Background

Defendant's Motion to Suppress was heard in Duplin County Superior Court on March 21, 2017. The State's only witness at the suppression hearing was Detective Shane Miller of the Duplin County Sheriff's Department. Defendant did not put on any evidence.

The evidence tended to show that detectives with the Duplin County Sheriff's Department received several complaints regarding apparent drug activity at 155 John David Grady Road in Duplin County. On March 23, 2016, detectives conducted surveillance of the area. Lieutenant Chuck Weaver and Detective Allen Williams were in an unmarked Ford pickup truck with Detective Miller, while Detectives Michael Tyndall, Matthew Strickland, and Jay Lanier were in an unmarked Chevrolet pickup truck. The detectives were in plain clothes.

As Detective Miller was arriving to the area, Detective Tyndall's unit reported a burgundy van leaving 155 John David Grady Road. Detective Miller observed the burgundy van traveling west on John David Grady Road, approaching the intersection of Woodland Church Road. Detective Miller noticed the van was driven by a female and that there was a male passenger. Detective Miller followed the burgundy van for approximately one-half mile after the female driver turned onto Woodland Church Road.

Suddenly, and without warning, the burgundy van stopped in the middle of Woodland Church Road. Detective Miller waited approximately fifteen seconds, and activated the blue lights on the patrol unit because he "didn't want anybody coming down the road . . . [to] hit the vehicle, [and] cause a[n] accident." Detective Miller testified:

> Well, the van was obviously stopped in the roadway so we didn't know what was going on. We didn't know if the van had broken down or if there was a problem in the van or what was going on in the van. So at that point in time I activated my blue lights because there was a van in the roadway.

Detective Miller further elaborated that "[i]f a vehicle is stopped in the roadway, [blocking] traffic, impeding traffic, broke down, whatever, I want to know what's going on with that vehicle. So I activate my emergency equipment to let people know, hey, something going on here, be careful."

The Ford pickup truck driven by Detective Miller was located approximately fifteen feet from the burgundy van in the middle of the roadway. As Detective Miller attempted to approach the driver's side of the vehicle, he noticed a male subject exit the passenger side of the burgundy van. Detective Miller recognized the male subject to be Donnie Barton, an individual known to Detective Miller through prior law enforcement encounters. Detective Miller testified:

> I went to get out of the [patrol vehicle] and all of a sudden a male subject from the passenger side of the van gets out of the van, hands in pocket, and starts walking toward the patrol vehicle. At that point in time I told Detective Williams who was in the passenger side of my patrol vehicle to get out of the vehicle because he was approaching us with his hands in his pockets.
>
> . . . .
>
> We didn't know if there was a weapon in his pocket, if there were drugs in his pocket or what he was up to.

Mr. Barton then ran back to the van, yelling, "Go, go, go." The burgundy van sped away, and Detective Miller returned to the Ford pickup truck, activated the siren, and began pursuing the burgundy van.

During the mile and a half pursuit, Detective Miller observed the burgundy van run off the shoulder of the road, cross the center line, and travel in excess of eighty miles per hour in a fifty-five mile-per-hour zone. Deputy Anthony Toler positioned his vehicle at an intersection and prevented the burgundy van from advancing. Defendant was removed from the driver's seat. Detective Miller then heard two children, ages two and three, crying in the back of the burgundy van.

No illegal drugs or contraband were located in the burgundy van. Defendant was arrested for fleeing to elude arrest, resisting a public officer, and two counts of child abuse. The Department of Social Services was contacted by law enforcement and Mr. Barton's father assumed custody of the two children.

In open court, the trial court made findings of fact, including:

> The burgundy vehicle came to a stop on Woodland Church Road. The officer drove up behind the vehicle and activated his blue lights about 10 to 15 seconds after the vehicle had stopped.
>
> . . . .

> Immediately after stopping his vehicle, Detective Miller exited the driver's door and began approaching the driver's door of the burgundy van. Detective Williams exited from the passenger door of the law enforcement vehicle and began approaching the passenger door of the burgundy van.
>
> The male exited the passenger side of the burgundy van with his hands in his pockets. At some point after that, he turned, hollered to the driver of the van, "Go, go, go" and ran and jumped in the van. At this point, the van rapidly accelerated and sped off.

The trial court concluded that "there was a seizure of the van and its occupants when Detective Miller came up behind the stopped van and activated his blue lights." The trial court further concluded that there was no reasonable suspicion of criminal activity and Defendant's rights preserved under the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution had been violated.[1]

The State timely entered notice of appeal in open court immediately following the March 21, 2017 hearing on the motion to suppress. However, the trial court subsequently entered a written order on March 29, 2017, finding that "[s]topping the van was inconsistent with criminal activity inside the van[,]" and "[t]here was no objectively reasonable basis for Detective Miller to believe the van was disabled or that its occupants were in danger."

The trial court's written order concluded that a seizure of Defendant had occurred when Detective Miller pulled "behind the stopped van and activated his blue lights." The trial court further concluded "there was no reasonable suspicion of criminal activity to justify a stop or a seizure of the van or its occupants."

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1. The State did not argue during the pre-trial hearing or on appeal whether a defendant stopping a vehicle in the middle of a lane of travel on a public roadway, standing alone, constituted a moving violation justifying a stop. As such, this opinion does not address that issue, but rather whether a seizure occurs when a motorist inexplicably stops in the middle of a public roadway and an officer subsequently activates his blue lights.

In addition, the trial court made conclusions of law regarding the community caretaker exception which we need not address as the issue is not argued by the State on appeal, and because of our holding that Defendant was not seized when Detective Miller initially activated his blue lights.

Standard of Review

In determining whether the trial court properly granted a defendant's motion to suppress, our review "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cathcart*, 227 N.C. App. 347, 349, 742 S.E.2d 321, 323 (2013) (citation omitted). "Conclusions of law are reviewed *de novo*." *State v. Gerard*, ___ N.C. App. ___, ___, 790 S.E.2d 592, 594 (2016) (citation omitted).

The State does not challenge the trial court's findings of fact despite some difference with regards to Detective Miller's testimony. Thus, the trial court's findings are binding on appeal. *State v. McLeod*, 197 N.C. App. 707, 711, 682 S.E.2d 396, 398 (2009) ("Unchallenged findings of fact, where no exceptions have been taken, are presumed to be supported by competent evidence and binding on appeal." (citation, quotation marks, ellipses and brackets omitted)).

Analysis

The State argues the trial court erred in concluding a seizure of Defendant occurred when Detective Miller activated his blue lights approximately fifteen seconds after Defendant stopped the burgundy van in the middle of Woodland Church Road. We agree, and reverse the trial court.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

U.S. Const. amend. IV. "Article I, Section 20 of the Constitution of North Carolina likewise prohibits unreasonable searches and seizures and requires that warrants be issued only on probable cause." *State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 303 (2016). A seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968). There must be "a physical application of force or submission to a show of authority" for a seizure to be found. *State v. Cuevas*, 121 N.C. App. 553, 563, 468 S.E.2d 425, 431, *disc. review denied*, 343 N.C. 309, 471 S.E.2d 77 (1996) (citation omitted).

"The activation of blue lights on a police vehicle has been included among factors for consideration to determine when a seizure occurs." *State v. Baker*, 208 N.C. App. 376, 386, 702 S.E.2d 825, 832 (2010). However, a simple show of authority by law enforcement does not rise to the level of a seizure unless the suspect submits to that show of authority. *California v. Hodari D.*, 499 U.S. 621, 626, 113 L. Ed. 2d. 690, 697 (1991) ("The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.").

This Court held that an individual is not seized for Fourth Amendment purposes by a mere show of authority by law enforcement, but rather when that individual is physically restrained. *State v. Leach*, 166 N.C. App. 711, 717, 603 S.E.2d 831, 835 (2004), *appeal dismissed*, 359 N.C. 640, 614 S.E.2d 538 (2005). In *State v. Leach*, officers attempted to arrest the defendant on drug-related charges. *Id.* at 713, 603 S.E.2d at 833. The officers identified themselves as law enforcement, and surrounded the defendant in his vehicle. *Id.* The defendant fled and led officers on a high-speed chase that ended after he crashed the vehicle in a ditch and officers detained the defendant when he attempted to flee on foot. *Id.* At different points during the chase, the defendant threw away a firearm and a plastic bag containing cocaine. *Id.* In upholding the trial court's denial of the defendant's motion to suppress, this Court held that a seizure did not occur "until defendant was physically restrained." *Id.* at 717, 603 S.E.2d at 835.

In *State v. Mewborn*, officers drove alongside the defendant, who was walking in the roadway of a high-crime area. Neither defendant nor his companion were violating any laws at the time. *State v. Mewborn*, 200 N.C. App. 731, 732, 684 S.E.2d 535, 536 (2009). Officers asked the two if they would stop to talk for a few minutes. *Id.* at 733, 684 S.E.2d at 536. When officers were exiting the vehicle, the defendant ran away from the officers, and they began pursuit. *Id.* During the pursuit, the defendant threw a firearm on the ground. *Id.* at 733, 684 S.E.2d at 537. After he was apprehended, the defendant threw a plastic bag containing crack cocaine on the ground. *Id.* The defendant was charged with possession with intent to sell and deliver a controlled substance, carrying a concealed weapon, possession of a firearm by a felon, and resisting a public officer. *Id.* at 733-34, 684 S.E.2d at 537.

The defendant argued that he was unconstitutionally seized by officers when they asked him to stop and talk without reasonable suspicion. *Id.* at 734, 684 S.E.2d at 537. This Court noted that "[t]he dispositive issue in the case before us is a determination of whether [d]efendant was seized before or after he ran from the officers." *Id.* at 735, 684 S.E.2d at 537. This Court held that the defendant had not been seized when he initially fled because he did not submit to a show of authority, stating, "[T]he officers were in various stages of exiting the vehicle and that [d]efendant began to run away before stopping and submitting to their authority." *Id.* at 735-36, 684 S.E.2d at 538.

In *State v. Mangum*, officers received an anonymous tip concerning an impaired driver. *State v. Mangum*, ___ N.C. App. ___, ___, 795 S.E.2d 106, 109 (2016), *writ denied*, *disc. review denied*, *appeal dismissed*, 369 N.C. 536, 797 S.E.2d 283 (2017). Officers located the vehicle, and observed that it was traveling fifteen miles per hour below the speed limit, and that it stopped in the roadway on two occasions, once at an intersection where there were no traffic control devices, and subsequently at a railroad crossing without active traffic signals. *Id.* at ___, 795 S.E.2d at 110. The officer following the defendant activated his blue lights, but the defendant did not pull over immediately. *Id.* After approximately two minutes, the officer activated the siren on his patrol vehicle, and the defendant stopped in the roadway a short time later. *Id.* The defendant was arrested for driving while impaired. *Id.* This Court held the defendant was not seized when the officer activated his blue lights and siren, but rather when he stopped the vehicle, yielding to the officer's show of authority. *Id.* at ___, 795 S.E.2d at 116.

Here, no officer in the unmarked Ford pickup truck identified himself as a law enforcement officer before Defendant stopped her vehicle. While the trial court did find that "[t]he detective noted the driver and passenger look[ed] at him and seem[ed] to stare at him before" turning onto Woodland Church Road, there was no evidence that Defendant knew or reasonably believed the three individuals in the Ford pickup truck were law enforcement officers. Detective Miller was following Defendant in an unmarked vehicle, and Defendant had not violated any laws. There was no action on the part of law enforcement that caused Defendant to stop her vehicle or otherwise impede her movement. Defendant's motionless vehicle in the middle of a public roadway invited an encounter with any concerned motorist, including law enforcement officers.

"Police are free to approach and question individuals in public places when circumstances indicate that citizens may need help or mischief might be afoot." *State v. Icard*, 363 N.C. 303, 311, 677 S.E.2d 822, 828 (2009) (citations omitted). A vehicle inexplicably stopped in the middle of a public roadway is a circumstance sufficient, by itself, to indicate someone in the vehicle may need assistance, or that mischief is afoot. At the very least, it is a situation which warrants notice to other motorists and it is not the role of this, or any other court, to "indulg[e] in unrealistic second-guessing of [a] law enforcement [officer's] judgment call[]." *Mangum*, ___ N.C. App. at ___, 795 S.E.2d at 118 (citation and quotation marks omitted).

Here, Detective Miller waited behind Defendant's vehicle for approximately fifteen seconds before activating his blue lights. By his testimony, he was unsure if the vehicle had broken down, and was attempting to alert other possible motorists of a potential hazard in the roadway.

Further, for reasons known only to her and perhaps Mr. Barton, Defendant inexplicably stopped the burgundy van in the middle of Woodland Church Road prior to any show of authority from law enforcement. Detectives were not identified as law enforcement until Detective Miller activated his blue lights approximately fifteen seconds after Defendant stopped the burgundy van. Thus, the earliest point at which detectives made a show of authority was activation of the blue lights on the Ford pickup truck. Consistent with *Mangum*, the mere activation of the vehicle's blue lights did not constitute a seizure as Defendant did not yield to the show of authority.

Mr. Barton exited Defendant's vehicle as Detective Miller was attempting to approach. However, he instructed Defendant to flee. As in *Leach* and *Mewborn*, Defendant fled prior to submitting to a show of authority.

Defendant then led officers on a lengthy, high-speed chase with two small children in the vehicle. She did not submit to the officers' show of authority until she discontinued fleeing from officers and further movement was prevented by Deputy Toler's vehicle. It was at this point that Defendant was seized pursuant to the Fourth Amendment. The criminal activity observed by Detective Miller during the mile and a half car chase, and subsequently his observations of the two minor children in the van, justified Defendant's arrest for fleeing to elude arrest, resisting a public officer, and two counts of child abuse.

Conclusion

Defendant was not seized under the Fourth Amendment when Defendant stopped her burgundy van in the middle of Woodland Church Road. The trial court erred in granting Defendant's motion to suppress. Accordingly, we reverse and remand to the trial court.

REVERSED AND REMANDED.

Judges BRYANT and MURPHY concur.

PAUL W. SWAUGER, Petitioner
v.
UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE, Respondent

No. COA17-1303

Filed 15 May 2018

Jurisdiction—subject matter—administrative law judge's final decision—judicial review

The trial court properly dismissed, for lack of subject matter jurisdiction, a petition for judicial review of an administrative law judge's final decision in a contested case involving an employee's dismissal from a state university. Sections 7A-29(a) and 126-34.02(a) provided a legally sufficient method for obtaining judicial review by direct appeal to the Court of Appeals, and the plain language of section 150B-43 prohibited petitioner from seeking judicial review in the superior court.

Appeal by Petitioner from Order entered 10 July 2017 by Judge Martin B. McGee in Cabarrus County Superior Court. Heard in the Court of Appeals 3 May 2018.

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Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for Respondent-Appellee University of North Carolina at Charlotte.

INMAN, Judge.

Petitioner Paul Swauger ("Petitioner") appeals an order dismissing his petition for judicial review for lack of subject matter jurisdiction. Petitioner contends the Cabarrus County Superior Court erred in failing to review an Administrative Law Judge's final decision pursuant to Sections 150B-43 and 150B-45 of our General Statutes. Because Sections 7A-29(a) and 126-34.02(a) provided Petitioner with an adequate procedure for judicial review by direct appeal to this Court, we affirm the trial court's dismissal of Petitioner's petition.

I. FACTS AND PROCEDURAL HISTORY

Petitioner was a career state employee at the University of North Carolina at Charlotte (the "University"), where he worked as a mechanic.

During Petitioner's employment, the University switched its email provider from Microsoft Outlook to Google's Gmail. Petitioner refused to agree to Google's Terms of Service for Gmail and was dismissed from his job as a result.

Petitioner filed a petition for contested case hearing in the Office of Administrative Hearings ("OAH") on 5 May 2016, alleging he was dismissed without just cause. On 4 January 2017, the administrative law judge ("ALJ") that heard Petitioner's case issued a Final Decision concluding that the University sufficiently proved it had just cause to dismiss Petitioner.

On 2 February 2017, Petitioner filed a petition in Cabarrus County Superior Court for review of the ALJ's Final Decision. The University filed a motion to dismiss the petition, contending that the superior court did not have subject matter jurisdiction. On 10 July 2017, the trial court granted the motion to dismiss. Petitioner timely appealed the trial court's dismissal order to this Court.

II. ANALYSIS

A. *Standard of Review*

The standard of review for an appeal based on subject matter jurisdiction is *de novo*. *Country Club of Johnston Cty., Inc. v. United States Fid. & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002). Issues of statutory interpretation are also subject to *de novo* review. *Matter of Dippel*, ___ N.C. App. ___, ___, 791 S.E.2d 684, 685 (2016). This standard requires the Court to "consider the question anew, as if not previously considered or decided." *In re Soc'y for Pres. of Historic Oakwood*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002) (citation omitted).

B. *The Superior Court Was Without Jurisdiction to Hear Petitioner's Petition*

The University, as a state agency, is protected by sovereign immunity. *Guthrie v. N.C. State Ports Authority*, 307 N.C. 522, 532, 299 S.E.2d 618, 624 (1983). "It has long been established that an action cannot be maintained against the State of North Carolina *or an agency thereof* unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified.*" *Id.* at 534, 299 S.E.2d at 625 (emphasis in original) (citation omitted). The waiver of immunity by the State must not be considered lightly, and statutes waiving immunity shall be construed strictly and in favor of immunity. *Id.* at 537-38, 299 S.E.2d at 627.

It is not contested that North Carolina has waived its sovereign immunity for State employees to bring suit through the OAH. What the parties dispute, however, is the procedure required for an employee to pursue an appeal from an OAH decision.

Section 7A-29(a) of our General Statutes allows a party to immediately appeal "any final decision or order of . . . the [OAH] under [N.C. Gen. Stat. §] 126-34.02" to this Court. N.C. Gen. Stat. § 7A-29 (2017). Section 126-34.02 allows a former State employee to file a contested case with the OAH pursuant to the procedures set forth in Sections 150B-22 through 150B-37. N.C. Gen. Stat. § 126-34.02(a) (2017). Since its amendment in 2013, this same section also provides that "[a]n aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in [N.C. Gen. Stat. §] 7A-29(a)." N.C. Gen. Stat. § 126-34.02(a).

Section 150B-43 of our General Statutes also provides for judicial review of decisions by ALJs in contested cases. N.C. Gen. Stat. § 150B-43 (2017). This statute provides:

> Any party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article, *unless adequate procedure for judicial review is provided by another statute*, *in which case the review shall be under such other statute*.

N.C. Gen. Stat. § 150B-43 (emphasis added).

The University argues, and the superior court held below, that Petitioner's appeal falls outside the scope of Section 150B-43 and must be pursued as provided in Section 126-34.02, because that statute provides an adequate procedure for judicial review of OAH decisions regarding State employees.

Petitioner asserts that Section 126-34.02 is not an "adequate procedure for judicial review . . . provided by another statute[.]" N.C. Gen. Stat. § 150B-43. Petitioner relies on this Court's decision in *Harris v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, 798 S.E.2d 127, *aff'd per curiam*, ___ N.C. ___, 808 S.E.2d 142 (2017), which addressed whether the "adequate procedure" language in Section 150B-43 precluded the application of the standard of review contained in Section 150B-51 to an appeal pursuant to Section 7A-29(a). ___ N.C. App. at ___, 798 S.E.2d at 131-34. Petitioner asserts that *Harris* held that "Chapter 126 does not provide ‘an adequate procedure for judicial review[,]’ ” as the majority in that case wrote the following in addressing the dissent: “The separate opinion asserts N.C. Gen. Stat. § 126-34.02 is ‘another statute,’ which provides ‘an adequate procedure for judicial review.’ We disagree.” *Harris* at ___, 798 S.E.2d at 133.

Petitioner’s broad interpretation of *Harris* mistakenly considers the above language in that decision out of context. First, the appeal in *Harris* was itself pursuant to Section 7A-29(a), and we held that the “appeal is properly before us.” *Id.* at ___, 798 S.E.2d at 131. Presumably, if that statute did not provide an adequate means of review, this Court could not have addressed the merits of that appeal. Second, the issue raised by the dissent and addressed by the majority in *Harris* was not whether Section 7A-29(a) was an adequate procedure for judicial review, but whether the standard of review found in Section 150B-51 applies to this Court’s review of a decision on appeal pursuant to Sections 7A-29(a) and 126-34.02(a). *Harris* at ___, 798 S.E.2d at 133-34. The majority opinion in Harris explained why it held, unlike the dissent in that case, that the standard of review provisions in Chapter 150B should apply to an appeal from an employment claim:

> The scope and standard of review of this Court’s review of the ALJ’s final decision is expressly set forth in § 150B-51. Chapter 126 is silent on this issue. While Chapter 126 governs the proceeding before the ALJ and provides the aggrieved party the right to appeal to this Court, Chapter 150B sets forth our standard of review . . . .

Harris at ___, 798 S.E.2d at 133. In sum, *Harris* did not foreclose direct judicial review of an employment dispute by this Court pursuant to Sections 7A-29(a) and 126-34.02(a).

Petitioner also contends that the “adequate procedure” language in Section 150B-43 is ambiguous. We disagree. Ambiguity exists only where the statute is “fairly susceptible of two or more meanings[.]” *State v. Sherrod*, 191 N.C. App. 776, 778, 663 S.E.2d 470, 472 (2008) (internal quotation marks and citation omitted). Where there is no ambiguity, this Court does not employ the canons of statutory interpretation, and instead “giv[es] the words their plain and definite meaning.” *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted).

Petitioner fails to advance any alternative meaning for the language in question, instead conclusively asserting that the entire statutory framework for judicial review of ALJ decisions is ambiguous. Section 150B-43 is straightforward and susceptible of only one interpretation.

Giving the words "procedure[,]" "judicial review[,]" and "adequate" their ordinary meanings, N.C. Gen. Stat. § 150B-43, review by a superior court under Article 4 of Chapter 150B is not available when another statute provides "[a] specific method or course of action" for "[a] court's review of a lower court's or administrative body's factual or legal findings[,]" that is "[l]egally sufficient[.]" Black's Law Dictionary, 1241, 864, 42 (8th ed. 2004) (defining "procedure," "judicial review," and "adequate," respectively). Because Sections 7A-29(a) and 126-34.02(a) provide a legally sufficient method for obtaining judicial review of the ALJ's decision by direct appeal to this Court,[1] the plain language of Section 150B-43 prohibited Petitioner from seeking judicial review in superior court under Article 4 of Chapter 150B. N.C. Gen. Stat. § 150B-43. We therefore hold that the trial court properly dismissed Petitioner's petition.

III. CONCLUSION

The superior court correctly dismissed Petitioner's petition because it lacked subject matter jurisdiction to review the ALJ's final decision in the matter, as an adequate procedure for judicial review by direct appeal to this Court was provided by Sections 7A-29(a) and 126-34.02(a). As a result, the right to file a petition in superior court under Section 150B-43 was foreclosed by the plain language of that statute.

AFFIRMED.

Judges DAVIS and MURPHY concur.

1. Petitioner's brief asserts that a difference exists between "judicial review" under Sections 150B-43 and "appellate review" under Section 126-34.02(a). We see no distinction. Section 126-34.02 provides for "judicial review . . . by appeal to the Court of Appeals[,]" N.C. Gen. Stat. § 126-34.02(a), and Section 150B-43 prohibits review by a superior court under Article 4 of Chapter 150B where "judicial review is provided by another statute[.]" N.C. Gen. Stat. § 150B-43.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 15 May 2018)

BOWMAN v. BROS. AIR & HEAT, INC. No. 17-1203	Mecklenburg (16CVS20217)	Dismissed
CHURCH v. DECKER No. 17-1119	Caldwell (01CVD1391)	Dismissed
CHURCH v. DECKER No. 17-1120	Caldwell (01CVD1391)	Affirmed
DUNNIGAN v. MACK No. 17-1148	Watauga (13CVD579)	Affirmed
HEWITT v. HEWITT No. 17-791	Mecklenburg (14CVD1152)	Vacated and Remanded in Part; Affirmed in Part.
HILL v. HILL No. 17-1125	Buncombe (09CVD4748)	Affirmed
IN RE A.L. No. 17-1298	Durham (15J59-61)	Affirmed
IN RE E.D. No. 17-1254	Catawba (15JT263)	Affirmed
IN RE ESTATE OF WARD No. 17-454	New Hanover (13E901)	No error in part; Dismissed in part.
IN RE J.W. No. 17-1278	Harnett (17JA48)	Affirmed
IN RE S.P. No. 17-616	Wake (16SPC8520)	Affirmed
IN RE T.L.B. No. 17-1326	Wake (15JT280)	Affirmed
KISH v. FRYE REG'L MED. CTR. No. 17-1314	N.C. Industrial Commission (031980)	Affirmed
PRINCE v. UNDERGROUND CONSTR. CO., INC. No. 17-1195	N.C. Industrial Commission (13-731249)	Dismissed

PRYOR v. EXPRESS SERVS. No. 17-1060	N.C. Industrial Commission (X86647)	Affirmed
STATE v. BROWN No. 17-944	Stanly (15CRS1383)	NO ERROR AT TRIAL JUDGMENT VACATED AND REMANDED FOR RESENTENCING.
STATE v. CURLEE No. 17-1379	Davie (13CRS50224) (14CRS358)	Vacated and Remanded
STATE v. DANCY No. 17-1103	Cabarrus (13CRS56014)	Dismissed
STATE v. FORD No. 17-817	Guilford (13CRS100080) (13CRS100186-87) (14CRS24169)	No error in part; No plain error in part.
STATE v. GARLAND No. 17-1097	Davidson (14CRS2181-82) (14CRS53960)	No Error
STATE v. GIBSON No. 17-1012	Gaston (14CRS58642)	No Error
STATE v. GLADNEY No. 17-831	Guilford (14CRS23273) (14CRS87645)	No Error
STATE v. HINES No. 17-1141	Johnston (15CRS2030) (15CRS54562)	No Error
STATE v. HUNTER No. 17-1256	Wake (14CRS224200) (16CRS99)	Affirmed
STATE v. JIMENEZ No. 17-1050	Carteret (16CRS1485) (16CRS52297-98)	NO PLAIN ERROR.
STATE v. LUKER No. 17-886	Jackson (16CRS50084) (16CRS99)	No Error
STATE v. MACKINS No. 17-1277	Cabarrus (15CRS1126) (15CRS51906)	No Error

`STATE v. McCLELLAND No. 17-1231	Davidson (15CRS1548) (15CRS51334)	No Error
STATE v. MILLER No. 17-1049	Iredell (11CRS53855) (11CRS53915)	Affirmed
STATE v. MILLS No. 17-747	McDowell (09CRS51654)	REVERSED AND REMANDED WITH INSTRUCTIONS.
STATE v. MOORE No. 17-1225	Wake (16CRS210610-12)	Vacated and Remanded for Resentencing
STATE v. PAYNE No. 17-650	Forsyth (15CRS54023)	NO ERROR IN PART; DISMISSED IN PART
STATE v. PURSLEY No. 17-830	Macon (15CRS51402) (16CRS35)	Affirmed
STATE v. SMITH No. 17-925	Gaston (15CRS55427) (15CRS55430) (16CRS6)	NO PREJUDICIAL ERROR.
STATE v. STROUPE No. 17-1059	Graham (15CRS308-309)	No Error
STATE v. TRUESDALE No. 18-3	Mecklenburg (16CRS219217)	No Error
STATE v. TWINE No. 17-1094	Washington (15CRS50069-70)	No Error
STATE v. XIONG No. 17-1185	Cleveland (16CRS204)	DISMISSED in part; NO ERROR in part.
SUTTON v. ESTATE OF SHACKLEY No. 17-824	Pitt (13CVS2887)	Affirmed
TALLEY v. PRIDE MOBILITY PRODS. CORP. No. 17-896	Lee (16CVS348)	Affirmed
WHITMAN v. STIMPSON No. 17-922	Forsyth (16CVS342)	Affirmed

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