259 N.C. App.—No. 4 Pages 735-940

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

MARCH 10, 2020

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OF
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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 5 JUNE 2018

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ATTORNEY FEES—Continued

by objecting to the trial court's findings of fact as not being based on new evidence. Although the trial court did not allow new evidence at the hearing on attorney fees, the court did not abuse its discretion in awarding fees based on findings made in prior hearings dealing with matters of support and custody and where the content of the findings was supported by voluminous filings in the record on appeal. **Beasley v. Beasley, 735.**

Statutory award—sufficiency of findings—counsel's affidavit—The trial court erred in its award of attorney fees in a suit for breach of a commercial lease by finding as fact that the plaintiffs' counsel charged a customary fee for like work where the counsel's affidavit did not address comparable rates by other attorneys in the same field of practice. **WFC Lynnwood I LLC v. Lee of Raleigh, Inc., 925.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Neglect—past injurious environment—failure to remedy—The trial properly adjudicated infant juvenile J.A.M. neglected upon evidence that the mother: (1) continued to fail to acknowledge her role in her rights being terminated as to her six other children; (2) denied the need for social services for J.A.M.'s case; and (3) became involved with the father, despite his past engagement in domestic violence, which contributed to the removal of the other children from the home. This evidence, along with the parents' failure to remedy the injurious environment they created for their children, was sufficient to show a substantial risk of future abuse or neglect of J.A.M. **In re J.A.M., 810.**

CONTRACTS

Breach—commercial real estate financing—There was no issue of material fact regarding the breach of a commercial real estate financing plan where there was no issue as to whether defendant failed to provide initial funding or was not obligated to provide an initial amount under a Change in the Terms of Agreement. Moreover, plaintiff did not produce any writing or agreement indicating that defendant underfunded the loan. Plaintiff waived any claims relating to a purported delay in funding change-order requests and nothing in the terms of the commitment, Loan Agreement, or related modifications obligated defendant to provide take-out loans. **French Broad Place, LLC v. Asheville Sav. Bank, S.S.B., 769.**

Commercial lease—default—liquidated damages—burden of proof—Despite an argument by defendants tenant and guarantors that the liquidated damages provision in a commercial lease was a double damage provision and therefore void, the trial court did not err in awarding liquidated damages where defendants failed to meet their burden of showing that the damages from the breach of the lease were not difficult to ascertain, that the amount stipulated was not a reasonable estimate, or that the amount stipulated was not reasonably proportionate to plaintiffs' actual damages. **WFC Lynnwood I LLC v. Lee of Raleigh, Inc., 925.**

Implied covenant of good faith and fair dealing—commercial loan—no breach—There was no breach of the implied covenant of good faith and fair dealing in a commercial real estate loan where the undisputed terms of the note and deed of trust indicated that defendant had disbursed all of the loan funds it was contractually obligated to disburse under the agreement and modifications. **French Broad Place, LLC v. Asheville Sav. Bank, S.S.B., 769.**

SEARCH AND SEIZURE

Probable cause—supporting affidavit—sufficiency of factual support—The trial court erred in denying defendant's motion to suppress evidence of a shotgun in his residence in a prosecution for possession of a firearm by a felon where the law enforcement officer's supporting affidavit did not contain adequate factual information to establish probable cause for a search warrant. The officer's bare assertion that he observed a pipe "used for methamphetamine," without information regarding the officer's training and experience in distinguishing between a pipe used for lawful versus unlawful purposes, any detail about the appearance of the pipe, or any other information connecting defendant or his home to drug use, was insufficient to support the issuance of a search warrant. Where defendant's conviction was based solely on the discovery of the shotgun in his home, the trial court's denial of the motion to suppress evidence of the shotgun amounted to plain error. **State v. Lenoir, 857.**

Search warrant—probable cause—drugs in residence—There was a substantial basis for a warrant to search defendant's residence where a police detective's warrant application stated there were marijuana-related items in defendant's trash dumpster, defendant had a history of drug charges, and database searches linked defendant to the residence to be searched. **State v. Teague, 904.**

Search warrant—probable cause—nexus between objects sought and place to be searched—The application for a warrant to search defendant's house and vehicles for evidence of counterfeit merchandise established a sufficient nexus between the objects sought and the place to be searched where the accompanying affidavit stated that counterfeit merchandise had previously been delivered to the home, defendant was continuing to conduct a business selling counterfeit merchandise despite previous warnings and arrests, and the officer had substantiated that defendant resided at the home. **State v. Howard, 848.**

Search warrant—staleness of evidence—prior criminal activity—The Court of Appeals rejected defendant's argument that the only evidence in a search warrant application linking her residence with criminal activity was stale as a matter of law since it was a crime that occurred twenty months earlier. Because of the history and continuous nature of defendant's business selling counterfeit merchandise, the evidence of the prior crime was not so far removed as to be considered stale. **State v. Howard, 848.**

Traffic stop—crossing double yellow lines—reasonable suspicion—The trial court's unchallenged findings of fact that a law enforcement officer observed defendant committing a traffic violation by driving across the double yellow lines in the center of the road were sufficient to support a conclusion that the officer had reasonable suspicion to conduct a traffic stop. **State v. Sutton, 891.**

Traffic stop—reasonable suspicion to extend—beyond initial reason—The trial court properly concluded a law enforcement officer had reasonable suspicion to extend defendant's traffic stop beyond the initial reason for the stop upon multiple circumstances, including (1) the officer was on patrol due to complaints about drug activity near a particular road, (2) the officer had been advised to look out for defendant based upon reports defendant would be transporting large quantities of methamphetamine, (3) defendant appeared to be under the influence, and (4) another person known to the officer approached during the stop and gave information that the vehicle may be carrying drugs. **State v. Sutton, 891.**

Disability payments—employer-funded accident-and-sickness plan—credit awarded to employer—The N.C. Industrial Commission did not err in awarding credit to defendants employer and insurer for disability payments made to plaintiff employee under the employer-funded accident-and-sickness plan where competent evidence, included as an exhibit to the record on appeal, showed the frequency and amount of payments made to the employee under the plan. **Haulcy v. Goodyear Tire & Rubber Co., 791.**

Issue preservation—award of credit to employer—disability payments—The N.C. Industrial Commission did not err in awarding defendants employer and insurer a credit for weekly disability payments paid to the employee under an employer-funded disability plan where defendants appropriately challenged the deputy commissioner's award of benefits. Even if the issue had not been properly preserved, the Commission has the power to amend an award. **Haulcy v. Goodyear Tire & Rubber Co., 791.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2020:

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

BEASLEY v. BEASLEY

[259 N.C. App. 735 (2018)]

BRIAN CARTER BEASLEY, PLAINTIFF
v.
KATHERINE LEIGH BEASLEY, DEFENDANT

No. COA17-787

Filed 5 June 2018

1. Appeal and Error—interlocutory appeal—family law—significant amount of attorneys' fees—substantial right

Although N.C.G.S. § 50-19.1 does not list orders for attorney fees as immediately appealable while other claims in a family matter remain pending, an issue regarding attorney fees is not a pending "claim" for purposes of that statute. Even if interlocutory, an order that completely disposes of the issue of attorney fees is immediately appealable as affecting a substantial right—particularly where, as here, the award orders a party to make immediate payment of a significant amount.

2. Attorney Fees—findings of fact—sufficiency of evidence—reliance on prior orders

Plaintiff appropriately preserved a challenge to an award of attorney fees in a family law case by objecting to the trial court's findings of fact as not being based on new evidence. Although the trial court did not allow new evidence at the hearing on attorney fees, the court did not abuse its discretion in awarding fees based on findings made in prior hearings dealing with matters of support and custody and where the content of the findings was supported by voluminous filings in the record on appeal.

3. Attorney Fees—conclusions of law—dependent spouse—sufficiency of findings

The trial court's detailed findings of fact supported its conclusion that defendant wife was a dependent spouse with insufficient means to defray the cost of her legal expenses and that she was entitled to an award of attorney fees incurred in this action for child support and custody. The trial court's determination of the amount of attorneys' fees to be awarded was not an abuse of discretion.

Judge BERGER concurring in the result only.

Judge MURPHY dissenting.

Appeal by plaintiff from order entered 28 December 2016 by Judge Lisa V.L. Menefee in Forsyth County District Court. Heard in the Court of Appeals 6 February 2018.

Jones Law PLLC, by Brian E. Jones, for plaintiff-appellant.

Halvorsen Bradshaw, PLLC, by Ruth I. Bradshaw for defendant-appellee.

BRYANT, Judge.

Where the trial court's order for attorney's fees effectively disposes of plaintiff's claim for attorney's fees as they relate to the issues of child support and child custody; and plaintiff's interlocutory appeal affects a substantial right, we review plaintiff's appeal. Where the trial court's findings of fact are supported by competent evidence and in turn support the conclusion that defendant is entitled to receive a portion of her attorney's fees, we affirm the order of the trial court.

Plaintiff Brian Carter Beasley and defendant Katherine Leigh Beasley were married for sixteen years. The parties separated on 2 September 2015. They have one minor child, currently seven years old.

Plaintiff initiated the instant lawsuit on 25 September 2015 by filing claims for child custody, child support, motion for medical records of defendant, and attorney's fees. Defendant filed a Motion to Strike, Answer, and Counterclaims on 23 November 2015. Meanwhile, the parties were unable to reach a mediated parenting agreement as to child custody.

When the cross-claims for child custody came on for hearing on 18 February 2016, the parties resolved the issue by consent in a Memorandum of Judgment/Order entered that same day. A consent order for child custody was entered on 29 July 2016 *nunc pro tunc* 18 February 2016, which reserved any and all pending claims, including but not limited to attorney's fees. Pursuant to the consent order, the parties also agreed that defendant would relocate from Winston-Salem, North Carolina, to Madison County, Alabama, in May 2016. In April, the parties entered into a Consent Order to Sell Former Marital Residence, in which they agreed the funds from the sale of the marital home would be held in the parties' attorneys' trust accounts until resolution of the pending cross-claims for equitable distribution.

Plaintiff and defendant again reached an impasse at private mediation. On 31 May, the parties proceeded to a hearing before the

Honorable Lisa V. L. Menefee, Chief Judge presiding in Forsyth County District Court on the pending cross-claims for child support and defendant's claim for post-separation support. Judge Menefee rendered an oral ruling for plaintiff to pay defendant child support and post-separation support. Thereafter, the trial court entered its written order on 5 July 2016 *nunc pro tunc* 31 May 2016 which detailed that beginning on 1 June 2016 "and continuing on the first day of the month thereafter," plaintiff was to pay defendant $3,445.93 in post-separation support and $1,116.00 in child support.

On 12 July 2016, defendant filed a motion for contempt, attorney's fees, and a show cause order asking the trial court to hold plaintiff in civil and/or criminal contempt for failing to pay child support or post-separation support. Defendant's motion alleged that plaintiff owed defendant "at least $1,116 in child support arrears and at least $5,168.91 in post-separation support arrears." Defendant alleged that as of the date of filing the motion,

> [p]laintiff ha[d] failed to comply with the Order in that the only money [p]laintiff has given [d]efendant is one check on June 8, 2016 in the amount of $1,116 for child support. Defendant cashed the check on June 9 or 10th at State Employees' Credit Union (SECU). On or about June 14, 2016, [d]efendant received a call from SECU notifying her that [p]laintiff's BB&T check bounced. SECU began seeking fees and reimbursement from [d]efendant.

That same day, the trial court entered a show cause order, ordering plaintiff to appear in Forsyth County District Court on 25 July 2016.

On 22 July 2016, plaintiff filed a motion to continue, stating that he had moved to Alabama where he had taken a new job and that he had been unemployed for several weeks leading up to his move. As such, plaintiff argued, he was financially unable to comply with the 5 July 2016 order. Plaintiff's motion was denied. When plaintiff failed to appear on 25 July on the show cause order, the Honorable Camille Banks-Payne, Judge presiding, entered a Commitment Order for Civil Contempt against plaintiff.

On 31 August 2016, defendant noticed for hearing the issue of attorney's fees related to her resolved claims for child custody, child support, and post-separation support, and the hearing was set for 26 October 2016. At the hearing, the court received into evidence, without objection, the affidavit of attorney's fees of defendant's counsel. On 28 December 2016 *nunc pro tunc* 26 October 2016, the trial court entered

its Order for Attorney's fees, stating it had considered the "voluminous pleadings of record to include[,] but not limited to[,] the Order for Child Support and Order for Post-Separation Support[,] . . . the Consent Order for Child Custody[,]. . . the motions to continue, . . . the verified Affidavit of Attorney's fees presented by Defendant's counsel, and arguments of counsel[.]" The trial court ordered that "Plaintiff shall pay directly to Defendant's attorneys . . . attorney's fees in the total amount of $48,188.15 by no later than December 31, 2016." Plaintiff appeals.

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[1] Plaintiff concedes that his appeal from the trial court's Order for Attorney's Fees is interlocutory, as other claims in this case remain outstanding. We first address the interlocutory nature of plaintiff's appeal.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Musick v. Musick*, 203 N.C. App. 368, 370, 691 S.E.2d 61, 62–63 (2010) (quoting *McIntyre v. McIntyre*, 175 N.C. Ap. 558, 561–62, 623 S.E.2d 828, 831 (2006)).

> While a final judgment is always appealable, an interlocutory order may be appealed immediately only if (i) the trial court certifies the case for immediate appeal pursuant to N.C.G.S. § 1A-1, Rule 54(b), or (ii) the order "affects a substantial right of the appellant that would be lost without immediate review."

Id. at 370, 691 S.E.2d at 63 (quoting *McIntyre*, 175 N.C. App. at 562, 623 S.E.2d at 831). As the trial court in the instant case did not certify the order for attorney's fees pursuant to N.C. Gen. Stat. § 1A–1, Rule 54(b), plaintiff's right to an immediate appeal, if one exists, necessarily depends on whether the trial court's order denying his motion affects a substantial right. *See id.* (citation omitted).

"The burden is on the appellant to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001) (citation omitted). "Th[e] [substantial right] rule is grounded in sound policy considerations. Its goal is to 'prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.' " *Id.* at 165, 545 S.E.2d at 261–62 (quoting *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980)).

However, "an order which completely disposes of one of several issues in a lawsuit affects a substantial right." *Case v. Case*, 73 N.C. App. 76, 78, 325 S.E.2d 661, 663 (1985) (citation omitted) (allowing immediate appeal of the trial court's entry of summary judgment on the defendant's counterclaim for equitable distribution as it affected a substantial right, even though claims for absolute divorce, child custody, and child support were still pending in the trial court).

In August 2013, the following statutory provision ("Maintenance of certain appeals allowed") became effective and applies to the instant appeal:

> Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action. A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in this section. An appeal from an order or judgment under this section shall not deprive the trial court of jurisdiction over any other claims pending in the same action.

N.C. Gen. Stat. § 50-19.1 (2017). In other words, this provision creates a kind of intermediate class of "quasi-interlocutory" orders that would be final if considered in isolation, but would technically not otherwise be "final" under Rule 54(b) because another related claim (or "issue") is still pending in the larger action. *See id.*

In *Comstock v. Comstock*, this Court dismissed attempted interlocutory appeals from an injunction order and domestic relations order on the grounds that these types of orders "are not included on the list of immediately appealable interlocutory orders." 240 N.C. App. 304, 322, 771 S.E.2d 602, 615 (2015) (citing N.C.G.S. § 50–19.1). Based on this reasoning and interpretation of section 50-19.1, it appears this Court was guided by the doctrine of *expressio unius est exclusio alterius*, which, in the context of statutory construction, "provides that the mention of such specific exceptions implies the exclusion of others." *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (citations omitted). In other words, this reasoning in *Comstock* implies that only the types of orders specifically included on the list in

Section 50-19.1—absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution—may be appealed pursuant to N.C. Gen. Stat. § 50-19.1. Not "specifically included on the list" of claims in section 50-19.1 are any of the provisions for attorney's fees included in Chapter 50. *See*, *e.g.*, N.C. Gen. Stat. § 50-13.6 (2017) ("Counsel fees in actions for custody and support of minor children"); N.C. Gen. Stat. § 50-16.4 (2017) ("Counsel fees in actions for alimony, post-separation support"). Following the reasoning in *Comstock* and the doctrine of *expressio unius est exclusio alterius*, it could be inferred that the legislature's intent in excluding orders for attorney's fees from section 50-19.1 means these issues are not appealable (when interlocutory) under this provision. *See Comstock*, 240 N.C. App. at 322–23, 771 S.E.2d at 615.

However, *Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013), which was decided in June 2013—two months before N.C. Gen. Stat. § 50-19.1 was enacted, *see* N.C. Sess. Laws 2013-411, § 2, eff. Aug. 23, 2013—possibly complicates this issue.

In *Duncan*, the Supreme Court "clarif[ied] the effect of an unresolved request for attorney's fees on an appeal from an order that otherwise fully determines the action." 366 N.C. at 545, 742 S.E.2d at 800. The Supreme Court held that

> [o]nce the trial court enters an order that decides all *substantive* claims, the right to appeal commences. Failure to appeal from that order forfeits the right. Because *attorney's fees and costs are collateral to a final judgment on the merits*, an unresolved request for attorney's fees and costs does not render interlocutory an appeal from the trial court's order.

Id. (emphasis added). In other words, (1) "attorney's fees" is a non-substantive "issue," and not a substantive "claim" (at least in relation to a claim for alimony); and (2) entry of an alimony order constitutes entry of a final order for purposes of Rule 54(b), notwithstanding the fact that a related attorney's fees "issue" might still be pending. *See id.* at 546, 742 S.E.2d at 801 ("Though an open request for attorney's fees and costs necessitates further proceedings in the trial court, the unresolved issue does not prevent judgment on the merits from being final." (internal citations omitted)). Thus, per the analysis set forth in *Duncan*, a pending attorney's fees "issue" would not count as a pending "claim" for purposes of Section 50-19.1. *See id*; *but see* N.C. Sess. Laws 2013-411, § 2, eff. Aug. 23, 2013 (enacting N.C. Gen. Stat. § 50-19.1 two months

after *Duncan* was decided). Notably, neither *Duncan* nor *Comstock* (nor any other case) has interpreted N.C. Gen. Stat. § 50-19.1 through the particular factual lens facing us in the instant appeal.

Here, the trial court's order as to attorney's fees has effectively (and completely) disposed of the "issue" of attorney's fees relating to the parties' "claims" for child support, child custody, and post-separation support. These substantive "claims" (for child support, child custody, and post-separation support), *see Duncan*, 366 N.C. at 545–46, 742 S.E.2d at 800–01, have been fully litigated and decided, as has the "issue" of attorney's fees as it relates to the aforementioned claims. The parties' claims for equitable distribution, however, remain pending before the trial court. Thus, the question we are presented with is whether an order for attorney's fees, which completely disposes of that issue as it relates to other substantive claims, is immediately appealable pursuant to N.C. Gen. Stat. § 50-19.1; particularly where, as here, it is nevertheless "an order which completely disposes of one of several issues in a lawsuit," and it arguably "affects a substantial right." *See Case*, 73 N.C. App. at 78, 325 S.E.2d at 663 ("[A]n order which completely disposes of one of several issues in a lawsuit affects a substantial right." (citation omitted)).

In *Case*, the trial court's order for partial summary judgment "concluded that [a] separation agreement [between the plaintiff and the defendant] was valid" and therefore the agreement served as "a bar to the [defendant's] counterclaim for equitable distribution[.]" *Id.* at 78–79, 325 S.E.2d at 663. In other words, the order "completely dispose[d] of the issue of equitable distribution," including the defendant's counterclaim for equitable distribution, "thereby affecting a substantial right of [the] defendant and rendering the appeal reviewable." *Id.*; *see Honeycutt v. Honeycutt*, 208 N.C. App. 70, 75, 701 S.E.2d 689, 692–93 (2010) (discussing the reasoning in *Case* regarding why an interlocutory appeal should be heard and how it affected a defendant's substantial right).

Here, the trial court's order as to attorney's fees functions in a similar way as did the order in *Case*, which barred the defendant's counterclaim for equitable distribution—it effectively disposes of plaintiff's claim for attorney's fees as they relate to the litigating of the issues of child support, child custody, and post-separation support. In plaintiff's original complaint,[1] he included a claim for attorney's fees.

1. On 9 January 2016, plaintiff filed a motion to amend his complaint in order to include a claim for equitable distribution. There is nothing in the record to indicate whether this motion to amend was allowed by the court.

The child support, child custody, and post-separation support claims have been fully litigated and decided, and the issue of attorney's fees as it relates to the aforementioned claims has also been finally determined. As such, to delay plaintiff's appeal from the order regarding attorney's fees until a final determination on the merits of all the parties' remaining claims would jeopardize plaintiff's substantial right not only because it is "an order which completely disposes of one of several issues in a lawsuit . . . ." *Case*, 73 N.C. App. at 78, 325 S.E.2d at 663 (citation omitted), but also because it orders plaintiff to pay a not insignificant amount—$48,188.15—in attorney's fees, *see Estate of Redden ex rel. Morely v. Redden*, 179 N.C. App. 113, 116–17, 632 S.E.2d 794, 798 (2006) ("The Order appealed affects a substantial right of [the] Defendant . . . by ordering her to make immediate payment of a significant amount of money; therefore this Court has jurisdiction over the Defendant's appeal pursuant to N.C. Gen. Stat. 1–277 and N.C. Gen. Stat. 7A–27(d)." (citations omitted)), *remanded on other grounds*, 361 N.C. 352, 649 S.E.2d 638 (2007).

Furthermore, this Court has allowed interlocutory family law appeals from orders which "affect a substantial right." In *Sorey v. Sorey*, this Court held that an order denying a claim for post-separation support (a claim not included in the list of immediately appealable claims in section 50-19.1) affected a substantial right and, thus, was subject to immediate interlocutory appeal. 233 N.C. App. 682, 684, 757 S.E.2d 518, 519 (2014) (relying on *Mayer v. Mayer*, 66 N.C. App. 522, 525, 311 S.E.2d 659, 662 (1984)); *see also McConnell v. McConnell*, 151 N.C. App. 622, 624–25, 566 S.E.2d 801, 803–04 (2002) (allowing an interlocutory appeal from a child custody order based on a "substantial right" where a child was deemed to be subject to an immediate threat of sexual molestation).

We conclude that while N.C. Gen. Stat. § 50-19.1 restricts interlocutory family law appeals to those claims listed in that section, an avenue for appeal nevertheless exists. Based on this Court's precedent, which has allowed interlocutory appeals in family law cases based on a "substantial right," we determine that the traditional "substantial right" exception may also apply to other interlocutory orders entered in a family law case—such as the one here for attorney's fees—but that do not appear listed in section 50-19.1. As such, we consider the merits of plaintiff's appeal.

Plaintiff argues (I) the trial court abused its discretion when it awarded $48,188.15 in attorney's fees because Findings of Fact 14–24

are unsupported by competent evidence and (II) the trial court's findings of fact do not in turn support the conclusion that defendant be awarded attorney's fees.

I

[2] Plaintiff first argues Findings of Fact 14–24 are unsupported by competent evidence. Specifically, plaintiff contends that the findings are unsupported by competent evidence because the trial transcript indicates that "the trial court heard no evidence of any kind . . . . There was no testimony taken at the hearing, and no evidence that would establish that [defendant] is the dependent spouse or that she lacked means and ability to defray the cost of the litigation." However, defendant argues that plaintiff has waived his right to review of this issue because he failed to properly preserve for appellate review his challenges to Findings of Fact 14–24. We first address defendant's waiver argument.

" 'In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired' and must have 'obtain[ed] a ruling upon the party's request, objection, or motion.' " *In re J.H.*, 224 N.C. App. 255, 269, 789 S.E.2d 228, 239 (2015) (alteration in original) (quoting N.C. R. App. P. 10(a)(1)).

A. Finding of Fact 14

In the instant case, plaintiff's attorney objected to the trial court's decision to not hear evidence and to incorporate findings from affidavits and prior hearings:

> [Plaintiff's attorney]: . . . I just wanted to object for the record to findings being incorporated from a prior hearing. I don't believe that hearing -- I could be wrong. I don't believe that hearing was noticed for attorney's fees.
>
> THE COURT: You are correct. It was not noticed for attorney's fees. Attorney's fees were reserved for a later date. However, continue.
>
> [Plaintiff's attorney]: Just again for the record, so I would object to any findings being incorporated from a prior hearing at this point because of facts that existed at the time that that hearing was for [post-separation support] are different from the facts that exist today. The motion for attorney's fees was noticed for today. So we are here to adjudicate facts as they exist today, primarily [defendant's]

> allegation that she does not have the means and ability to defray the cost of litigation. So I would argue that I have the -- I should be able to require that [defendant] take the stand and present evidence in the form of testimony or otherwise and I have the opportunity to cross-examine her on that evidence, testimony or otherwise.
>
> I -- I do not have the opportunity to do that, and I would just argue that that would need to be the basis for which the Court makes its findings of fact and so that is my sole objection at this point.

Plaintiff's attorney objected again at the end of the hearing:

> I had no contention whatsoever about a single minute that [defendant's attorney] is alleging that she or her staff or anyone in her office spent on this case. None of my objection is rooted in that, so I just want to make that clear.
>
> My objection is simply limited to the vary narrow proposition that the facts need to be provided today in this hearing for the Court to make its findings of fact, and there is no testimony today and no -- therefore, no facts upon which the Court can make its findings of fact. I understand the Court's position, but I'm just making that limited objection and that anything that [defendant's attorney] says in the form of facts about the case I would -- I would object to that because [defendant's attorney] can't testify as a witness.
>
> But none of my objections are aimed at any amount of time that [defendant's attorney] or her office or staff has -- has had to partake to get these things to whatever phases they had to . . . .

Defendant appears to challenge plaintiff's failure to object to specific findings of fact—14–24—but ignores the crux of plaintiff's objection, which was that no additional evidence was presented to the trial court; and therefore, no basis existed upon which the court could make those findings of fact. As such, plaintiff's objection to the trial court's method of making its findings without hearing evidence is sufficient to preserve his challenge on appeal to the substance of the trial court's findings of fact as not supported by competent evidence. Accordingly, we conclude plaintiff properly preserved his objection to Findings of Fact 14–24 for appellate review, and we next address the merits of plaintiff's argument.

Pursuant to N.C. Gen. Stat. § 50-16.4, a party is entitled to attorney's fees for a post-separation support claim if the party is "(1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Barrett v. Barrett*, 140 N.C. App. 369, 374, 536 S.E.2d 642, 646 (2000) (citing *Clark v. Clark*, 301 N.C. 123, 135–36, 271 S.E.2d 58, 67 (1980)). Pursuant to N.C. Gen. Stat. § 50-13.6, in a case involving claims for child custody and child support, the trial court has authority to award a party attorney's fees after first finding that the party seeking attorney's fees was "(1) acting in good faith and (2) has insufficient means to defray the expense of the suit." *Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (citation omitted). "When the statutory requirements have been met, the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." *Id.* (quoting *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980)).

In *Schneider v. Schneider*, this Court determined that where a trial court held a hearing on the issue of attorney's fees, considered documentary exhibits, and, *inter alia*, "explicitly noted that the order was based not just on this hearing, but also on the evidence presented at the hearings regarding the other matters at issue[,]" the findings of fact in a trial court's order awarding attorney's fees was supported by competent evidence. ___ N.C. App. ___, ___, 807 S.E.2d 165, 167 (2017). Similarly, in the instant case, the trial court noted in its order that it "considered the voluminous pleadings of record to include but not be limited to the Order for Child Support and Order for Post-Separation Support . . . the Consent Order for Child Custody . . . the motions to continue, . . . the verified Affidavit of Attorney's fees presented by Defendant's counsel, and arguments of counsel . . . ."

However, unlike the hearing in *Schneider*, at which the party challenging the trial court's award of attorney's fees testified, in the instant case, neither party testified at the hearing. Instead, as the trial court stated in Finding of Fact 14, which plaintiff challenges on appeal, the trial court found as follows:

> 14. The Court is not in receipt of any additional evidence and is relying upon the Findings of Fact as set forth in the Custody Order and the Support Order. Additionally, the Court incorporates the Findings of Fact as set forth in the Custody Order and the Support Order into this Attorney's fees Order as set forth fully herein.

In other words, the trial court allowed no new evidence (aside from the affidavit for attorney's fees) and otherwise relied solely on the findings of fact in other orders, which regarded issues of custody and support and were not related to attorney's fees.

These differences between the order for attorney's fees entered in the instant case and the one entered in *Schneider* notwithstanding, we conclude that the trial court did not abuse its discretion when it relied on the voluminous pleadings and the court record, including the Custody and Support Orders, neither of which have been challenged or appealed by plaintiff. Nevertheless, plaintiff challenges the following findings of fact in the trial court's order, including Finding of Fact 14 discussed above, as not supported by competent evidence, and we address each finding in turn.

B. Findings of Fact 15–16

> 15. Upon information and belief, Plaintiff left his employment at BB&T and moved to Alabama. The Court has received no information as to his current income nor his individual and shared expenses.
>
> 16. As addressed in the Custody Order and Support Order, Defendant relocated from North Carolina to Alabama in June 2016, and the Support Order includes a finding of fact that Defendant estimated her expenses after the move to Madison, Alabama would equate those of the former marital residence to ensure the minor child attends a comparable school to Vienna Elementary and to maintain her accustomed standard of living for herself and the minor child.

These findings are supported by the trial court's Custody Order, Support Order, and plaintiff's own motion to continue filed in July 2016, in which he stated he had moved to Alabama and begun a new job there. In his amended complaint, which included a motion for attorney's fees, plaintiff did not include an affidavit detailing those fees, nor did he include updated information as to his current income since his move to Alabama. Thus, these findings are supported by the evidence.

C. Findings of Fact Nos. 17, 19–20, 22

> 17. A review of the Affidavit for Attorney's fees presented by Defendant movant through counsel includes a summary of attorney's fees as of September 30, 2016, as follows:

a. Total fees related to Child Custody equal $32,199.00;

b. Total fees related to Child Support equal $16,722.15;

c. Total fees related to Post-Separation Support equal $16,700.41; and

d. Total costs related to child custody, child support, and post-separation support equal $3,566.00.

. . . .

19. The normal and reasonable value of the legal services rendered on behalf of Plaintiff for an attorney of the experience and expertise of Ruth I. Bradshaw is $250 per hour and for legal assistant/ paralegal time is at least $75 per hour. The law firm of Halvorsen Bradshaw, PLLC having spent over 100 hours in connection with Plaintiff, a reasonable fee through September 30, 2016, would be at least $64,928.78 for Defendant's claims for child custody, child support, and post-separation support. These fees and hourly rates are customary in this area.

20. Defendant is an interested party acting in good faith who has insufficient means to defray the expense of this suit, including attorney's fees, and Plaintiff should be required to pay a portion of the expense of this suit, including attorney's fees. Counsel for Defendant's use of paralegals and legal assistants was appropriate and consistent with how staff members are utilized and billed in matters like Defendant's claims for child custody, child support, and post-separation support. This Court reviewed the Affidavit for Attorney's fees, and the amount of time that was spent by Ms. Bradshaw and her staff to prepare for the trial of child custody a minimum of three times custody, to prepare for the trial of child support and post-separation support, to prepare for hearing only for the hearings to be continued, to prepare for depositions, to issue, reissue, and reissue subpoenas, respond to motions, and overall the time and energy spent in dealing with what had become a highly litigious matter.

. . . .

> 22. As set forth in the Affidavit for Attorney's fees filed on October 26, 2016, by Defendant's counsel, from the beginning of representation concerning Defendant's counterclaims for child custody, child support, post-separation support, and attorney's fees, the attorneys have consulted with Defendant, counseled and advised Defendant, prepared pleadings and other documents, and otherwise prepared for the hearings of these matters. From the beginning of this litigation, Defendant's counsel has conferred with her at length and at frequent intervals. The nature of the litigation, its difficulty, and its substance required these conferences and necessitated preparation for litigation.

The Affidavit for Attorney's fees lists the total fees related to child custody as $32,199.22, the total fees related to child support as $16,722.15, and the total fees related to post-separation support as $16,007.41. In sum, these fees total $64,928.78, the exact amount listed in Finding of Fact 19. Findings of Fact 19 and 22 are also supported by paragraphs 2 and 6, respectively, in the Affidavit for Attorney's fees. Thus, Findings of Fact 17, 19, and 22 are supported by the evidence.

The first sentence of Finding of Fact 20, however, is actually a conclusion of law and will be reviewed as such and addressed in Section II, *infra*. *See China Grove 152, LLC v. Town of China Grove*, 242 N.C. App. 1, 5, 773 S.E.2d 566, 569 (2015) ("[T]he labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." (quoting *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012)). As for the remainder of this finding, it is supported by the extensive filings present in the record before this Court and before the trial court. The record contains almost 400 pages of motions and trial court orders, including several amended filings of notices of depositions, motions for extensions of time, and four motions to continue; three of which were filed by plaintiff. Accordingly, this finding is supported by competent evidence.

D. Findings of Fact 18 & 23

> 18. Defendant's attorney's fees are reasonable in light of the parties' respective earnings (wherein Defendant earns approximately 0% of the income and Plaintiff earns approximately 100% of the income) and all facts set forth in the Custody Order and Support Order.

. . . .

> 23. Defendant is unable to employ adequate counsel in order to proceed as a litigant to meet Plaintiff as a litigant in this action[.]

These findings are supported by the evidence namely, the Support Order, which states that "Plaintiff earns 100% of the combined income. Defendant earns 0% of the combined income."

E. Findings of Fact 21 & 24

> 21. Counsel for Plaintiff is holding approximately $85,000 in his trust account and Counsel for Defendant is also holding approximately $85,000 in her trust account, with said total equaling approximately $170,000 representing the proceeds from the sale of the former marital residence. The Court finds that both parties may have access to some funds in relation to the sale of the former marital residence, which could be utilized to pay their respective fees. The parties' claims for equitable distribution have not been resolved or decided by the Court. The Court is taking into consideration each parties' access to the funds held in trust by counsel in the determination of allocation of attorney's fees.
>
> . . . .
>
> 24. As it relates to the claims for child custody Defendant has the means, ability, and some responsibility for a portion of her attorney's fees, the Court allocates to Plaintiff attorney's fees in the amount of $21,466.00.

Plaintiff challenges Finding of Fact 21 as tending to "disprove the conclusion that defendant lacks sufficient means" to defray the cost of the litigation. However, as to the trial court's determination of whether the statutory requirements have been met as a matter of law in order to award attorney's fees, "[d]isparity of financial resources and the relative estates of the parties is not a required consideration." *Cox v. Cox*, 133 N.C. App. 221, 231, 515 S.E.2d 61, 68 (1999) (citing *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996)). As such, where this finding is supported by the evidence in the record, and the trial court's Finding of Fact 24 plainly contemplates the amount of funds available to defendant in her trust account, plaintiff's argument on this point is overruled.

Accordingly, where the competent evidence supported the trial court's Findings of Fact 14–24, *see Beall v. Beall*, 290 N.C. 669, 673, 228 S.E.2d 407, 409 (1976) ("When the trial judge is authorized to find the facts, his findings, if supported by competent evidence, will not be disturbed on appeal despite the existence of evidence which would sustain contrary findings." (citations omitted)), we now address whether these findings support the trial court's conclusion that defendant is entitled to receive a portion of her attorney's fees from plaintiff.

II

[3] Plaintiff also argues that the trial court's findings of fact do not support the trial court's conclusion of law that defendant should be awarded attorney's fees. Specifically, plaintiff argues the Order for Attorney's fees does not establish that defendant is in fact a dependent spouse or that she lacks sufficient means to defray the costs of her legal expenses. We disagree.

> In a custody suit or a custody *and* support suit, the trial judge . . . has the discretion to award attorney's fees to an interested party when that party is (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. The facts required by the statute must be alleged and proved to support an order for attorney's fees. Whether these statutory requirements have been met is a question of law, reviewable on appeal. When the statutory requirements have been met, the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion.

Hudson, 299 N.C. at 472, 263 S.E.2d at 723–24 (internal citations omitted).

The order for attorney's fees contains detailed findings of fact, *see* Section I, *supra*, which clearly establish and support the trial court's conclusion of law that defendant is a dependent spouse with insufficient means to defray the cost of her legal expenses incurred in this litigation. The trial court specifically found that "Defendant is the 'dependent spouse,' " and "Plaintiff is the 'supporting spouse,' " two findings which plaintiff does not challenge on appeal and are therefore presumed correct and binding on appeal. *See In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008). These findings are also supported by the trial court's Support Order (incorporated by reference), which plaintiff did not appeal, and which ordered plaintiff to pay post-separation support to defendant in the amount of $3,445.93 per month.

Thus, where the trial court's findings of fact support its conclusion that defendant "is the dependent spouse, is entitled to post-separation support and has insufficient means to defray her expenses and taking into account Plaintiff is the supporting spouse and his ability to pay . . . Defendant is entitled to receive a portion of her attorney's fees[,]" and where "the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion[,]" *Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (emphasis added) (quoting *Hudson*, 299 N.C. at 472, 263 S.E.2d at 724), we affirm the order of the trial court.

AFFIRMED.

Judge BERGER concurs in the result only.

Judge MURPHY dissents in a separate opinion.

MURPHY, Judge, dissenting.

In reaching the merits of this appeal, the Majority concludes that the order requiring plaintiff to pay $48,188.15 in attorney fees affects a substantial right warranting immediate appellate review because it is "an order which completely disposes of one of several issues in a lawsuit" and "it orders plaintiff to pay a not insignificant amount—$48,188.15—in attorney's fees." I respectfully dissent from the Majority's exercise of jurisdiction over this interlocutory appeal because I do not believe that plaintiff has met his burden to demonstrate that the order for $48,188.15 in attorney fees affects a substantial right.

Initially, I note plaintiff's theory of substantial right, upon which the Majority predicates the exercise of jurisdiction, was not included in plaintiff's opening brief; it was only addressed in his reply brief. Under our Rules of Appellate Procedure, the appellant's brief shall contain a "statement of the grounds for appellate review[,]" and when an appeal is interlocutory "the statement must contain *sufficient facts* and *argument* to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4) (emphasis added). It is the appellant's "burden to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order[.]" *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 804 (2002).

The Statement of the Grounds for Appellate Review in the opening brief provides no substantive argument explaining how the order for attorney fees affects a substantial right of the party seeking review. Rather, the opening brief contains a single conclusory statement that the order affects a substantial right and a citation to *Peeler v. Peeler*, a case overruled over 35 years ago. *Peeler v. Peeler*, 7 N.C. App. 456, 172 S.E.2d 915 (1970), *overruled by Stephenson v. Stephenson*, 55 N.C. App. 250, 285 S.E.2d 281 (1981). *Stephenson* overruled *Peeler* and other prior decisions recognizing a right of immediate appeal from awards *pendente lite* and held that these orders and awards were interlocutory decrees that "necessarily do not affect a substantial right from which lies an immediate appeal pursuant to [N.C. Gen. Stat. §] 7A-27(d)." *Stephenson*, 55 N.C. App. at 252, 285 S.E.2d at 282.

Ordinarily, conclusory statements and "bare assertions" such as this are insufficient to confer appellate jurisdiction. *See, e.g.*, *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009) ("The appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right.").

Presumably in response to defendant's brief, which cited *Stephenson* and argued this Court was without jurisdiction to hear this appeal, plaintiff used his reply brief to take another bite at the apple and attempt to demonstrate how the order affects a substantial right. The reply brief contends that the "present order is nonetheless appealable . . . [because] it requires the payment of a considerable sum of money in a very short span of time." However, since the appellee typically has no opportunity to respond to the reply brief, it is not the proper place for an appellant to make completely new arguments.

Procedural issues notwithstanding, the jurisdictional argument contained in plaintiff's reply brief is still insufficient to demonstrate that the award of attorney fees in this case affects a substantial right of plaintiff's. Our jurisdictional inquiry is limited to the traditional "two-part test of the appealability of interlocutory orders under the 'substantial right' exception provided in [N.C. Gen. Stat. §] 1-277(a) and [N.C. Gen. Stat. §] 7A-27(d)(1)." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5, 362 S.E.2d 812, 815 (1987). "First, the right itself must be 'substantial.' " *Id.* Second, the appellant must demonstrate "that the right [will] be lost or prejudiced if not immediately appealed." *Id.* at 6, 362 S.E.2d at 816.

We have recognized that an interlocutory order may affect a substantial right when a party is required to "make immediate payment

of a significant amount of money." *See, e.g.*, *Estate of Redden v. Redden*, 179 N.C. App. 113, 117, 632 S.E.2d 794, 798 (2006) (concluding that an order for partial summary judgement requiring the defendant to pay the sum of $150,000.00 and costs affected a substantial right). However, the mere fact that plaintiff here would have to expend thousands of dollars to comply with the terms of this order does not alone satisfy his burden to show how the right affected is "substantial." Since our substantial right precedent requires a "case by case" analysis, *Stafford v. Stafford*, 133 N.C. App. 163, 165, 515 S.E.2d 43, 45 (1999), where an appellant argues that an interlocutory order affects a substantial right because that order requires him to pay a certain sum of money, we cannot properly assess the merits of that argument without some explanation as to why the sum owed is significant in light of the financial resources and constraints of the appellant. The amount at issue here–$48,188.15–may be the annual earnings for one litigant, or the monthly salary for another.

More importantly, the appellant seeking review must also show why "the right [will] be lost or prejudiced if not immediately appealed." *J & B Slurry Seal Co.*, 88 N.C. App. at 6, 362 S.E.2d at 816. In *Hanna v. Wright*, the defendant appealed an interlocutory order which allowed the plaintiff to repossess a piece of heavy equipment, a "track loader." *Hanna v. Wright*, ____ N.C. App. ____, ____, 800 S.E.2d 475, 476 (2017). The defendant alleged that the loss of the track loader would irreparably prejudice him and, thus, affected a substantial right. However, the defendant did not allege how the loss of the track loader would cause such prejudice. *Id.* Nor did the defendant "argue that losing possession of the [t]rack [l]oader would prevent [the defendant] from practicing his livelihood *as a whole*." *Id.* We held that the defendant's argument "does not evince sufficient grounds for an interlocutory appeal." *Id.*

Here, plaintiff failed to explain how the payment of $48,188.15 particularly affects him in light of his financial resources. He has also failed to explain why he would be "irremediably adversely affected" if the order for attorney fees is not immediately reviewed by this court. *See McConnell*, 151 N.C. App. at 625, 566 S.E.2d at 804. Plaintiff merely asserts that the order requires the payment of a considerable sum of money in a very short span of time. The Majority relies on this undeveloped argument and finds additional support for it by adopting an overly broad interpretation of *Case v. Case*, 73 N.C. App. 76, 325 S.E.2d 661 (1985). In *Case*, we held that the granting of plaintiff's motion for partial summary judgment affected his substantial right because the order concluded that a separation agreement was valid and thus posed a bar to defendant's

counterclaim for equitable distribution. *Id.* at 82, 325 S.E.2d at 665. I agree that the *Case* opinion does state and stand for the general proposition that "[i]t has been held that an order which completely disposes of one of several issues in a lawsuit affects a substantial right." *Id.* at 78, 325 S.E.2d at 663. However, the Majority goes too far in its reliance on *Case* by concluding that this order for attorney fees "completely disposes of one of several issues in a lawsuit" and "arguably affects a substantial right." *Case* does not control here, because this interlocutory order is for attorney fees, and the one in *Case* was a summary judgment order containing a legal conclusion that would absolutely bar a "substantive" counterclaim.[1] Plaintiff has not made the necessary showing that error, if any, cannot be corrected through the course of a timely appeal. We do not have jurisdiction to hear this premature appeal.

I also have great concern with the Majority's conclusion that N.C. Gen. Stat. § 50-19.1 is applicable to the instant appeal. First, this is not an argument advanced by plaintiff, and our inquiry should stop there. Second, the statute is not applicable because the present appeal is not from a final order adjudicating a claim for child custody, child support, alimony, or equitable distribution. This case is an appeal from an interlocutory order for attorney fees, a subject left unaddressed by the authors of N.C. Gen. Stat. § 50-19.1, and the statute has no direct application to the resolution of this appeal. Third, "[i]t is not the role of this Court . . . to flush out incomplete arguments[,]" *Estate of Hurst v. Jones*, 230 N.C. App. 162, 178, 750 S.E.2d 14, 25 (2013), and it is "not the duty of this Court to construct arguments for or find support for appellant's right to appeal." *Slaughter v. Swicegood*, 162 N.C. App. 457, 463, 591 S.E.2d 577, 581 (2004) (alterations and citations omitted).

Furthermore, our law governing interlocutory appeals seeks to discourage "piecemeal litigation." *Whiteco Indus., Inc. v. Harrelson*, 111 N.C. App. 815, 818, 434 S.E.2d 229, 232 (1993). "[J]udicial economy favors the hearing of petitioner's motion for attorney's fees only after the judgment has become final, thereby avoiding piecemeal litigation of the issue." *Id.* Further, interlocutory appeals are disfavored in order to "prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to [resolve] a case fully and finally before it is presented to the appellate division." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). There are two substantive claims

1. The Majority opinion recognizes that attorney fees are a "non-substantive issue" and not a "substantive claim."

still outstanding in the present action, one for alimony and another for equitable distribution, and attorney fees could still be awarded for those claims. *See* N.C. Gen. Stat. §§ 50-16.4 (permitting recovery of counsel fees in actions for alimony) and 50-21(e)(1) (permitting award of attorney fees as sanction against party in equitable distribution action who has "willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding"). Since these claims are yet to be resolved, it is plausible that plaintiff may file another appeal in the coming months challenging those resolutions and/or another order for attorney fees arising out of the same civil action.

Plaintiff's opening brief failed to sufficiently state the grounds for appellate review over this interlocutory order, and we should not consider arguments advanced for the first time in a reply brief. However, even if it were proper to reach plaintiff's jurisdictional argument, I believe that he has failed to demonstrate that the interlocutory order for attorney fees affects a substantial right in this case and/or satisfies N.C. Gen. Stat. § 50-19.1. I respectfully dissent.

WILLIAM P. EMERSON, JR., PLAINTIFF
v.
CAPE FEAR COUNTRY CLUB, INCORPORATED, DEFENDANT

No. COA17-1149

Filed 5 June 2018

1. Corporations—nonprofits—membership—termination—notice and opportunity to be heard

The Nonprofit Corporation Act does not require prior notice and an opportunity to be heard whenever a nonprofit terminates a person's membership. Even assuming that the relevant statute, N.C.G.S. § 55A-6-31(a), required notice and an opportunity to be heard in the particular case of plaintiff, whose country club membership was summarily terminated by the club's board of directors, plaintiff's claim for damages was barred by his failure to mitigate damages because he declined to attend a subsequent meeting to which the board invited him for the purpose of speaking on his own behalf regarding his termination.

2. Declaratory Judgments—relief—mootness

Where the Court of Appeals held that plaintiff's claim for compensatory and punitive damages against a country club was barred by his failure to mitigate damages, his two other claims, which were made under the Declaratory Judgment Act and which sought only a determination that a board of directors' actions were unlawful and did not seek any form of relief, were rendered moot.

Chief Judge McGEE concurring in result with separate opinion.

Appeal by Plaintiff from order entered 5 June 2017 by Judge Andrew Heath in New Hanover County Superior Court. Heard in the Court of Appeals 5 March 2018.

Block, Crouch, Keeter, Behm & Sayed, LLP, by Daniel Lee Brawley and Auley M. Crouch, III, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, LLP, by Benton L. Toups and Elizabeth C. King, for defendant-appellee.

MURPHY, Judge.

N.C.G.S. § 55A-6-31(a) calls for nonprofit corporations to act "in a manner that is fair and reasonable and . . . in good faith" when they terminate or suspend a membership. N.C.G.S. § 55A-6-31(a) (2017). However, it does not require a country club's board of directors, in all situations, to provide a member with prior notice or an opportunity to be heard regarding the termination of a membership.

Plaintiff, William P. Emerson, Jr. ("Emerson"), appeals from the trial court's order granting summary judgment in favor of Defendant, Cape Fear Country Club, Inc. ("Club"), a nonprofit corporation, on all of Emerson's three claims. In his Complaint, filed 21 April 2016, Emerson sought declaratory judgments as to (1) Emerson's membership status in the Club and (2) whether the Club could, in alleged compliance with N.C.G.S. § 55A-6-31(a), conduct a curative hearing after Emerson's membership had been terminated. Emerson's third claim for relief sought compensatory and punitive damages for his hypothetical expenses in joining a comparable country club and for the Club's purportedly wrongful and malicious termination of his membership.

Below, we address (1) the statutory requirement of N.C.G.S. § 55A-6-31(a), (2) Emerson's failure to mitigate his alleged damages, and

(3) the mootness of Emerson's remaining claims. While we hold that the statute does not require prior notice and a participatory hearing in all situations, even if notice and a hearing are required here, Emerson failed to mitigate his alleged damages resulting from the Club's alleged violation of N.C.G.S. § 55A-6-31(a). Thus, Emerson is barred from recovering the compensatory and punitive damages sought in his Complaint. Due to our resolution of Emerson's third claim for relief, his first two claims under the Declaratory Judgment Act are moot, and we decline to address them. Accordingly, we affirm the trial court's grant of summary judgment in favor of the Club on each of Emerson's claims.

BACKGROUND

On 1 January 2016, Emerson, who had been a member of the Club for approximately 30 years, had a disagreement with an employee in the golf shop.[1] The employee reported the incident to the Club's General Manager, Mary Geiss, who brought the matter to the attention of the Executive Committee by email on 2 January 2016. This was not Emerson's first act of misbehavior, and Club President Buck Beam and other members of the Executive Committee met on 5 January 2016 to discuss the incident. The Executive Committee then called a special meeting of the Board of Directors ("Board"), which met and voted on 7 January 2016 to terminate Emerson's membership.

It is uncontested that Emerson was aware neither of the Executive Committee's nor the Board's deliberations until 8 January 2016, when the Club President and two other Board members called Emerson to advise him of his termination. Emerson also received a letter from the Club President dated 8 January 2016 informing him of his termination. The letter provided the grounds for termination, stating that it was "in response to [Emerson's] actions on club property on January 1, 2016 and [Emerson's] cumulative disciplinary history while a member of Cape Fear Country Club." Emerson's disciplinary history at the Club included one incident on or about 27 February 2005 and another incident on 29 April 2007.

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1. The nature and content of the 1 January 2016 incident are somewhat in dispute. In his affidavit, the Club President relayed the contents of an email from the Club Manager, who wrote that Emerson used expletives in his conversations with Club employees and in front of Club guests during the 1 January 2016 exchange and declared, "[T]his is war," to one of the Club employees. In his deposition testimony, Emerson claimed that he was not shouting or cursing during the exchange and disagreed with one Club employee's characterization of the exchange between Emerson and the employee. Later in his deposition, Emerson did not object to another witness's description of the incident as a "profanity-laced tirade" by Emerson.

In the February 2005 incident, Emerson got in an argument with another Club member, which resulted in damage to Club property. Emerson also threatened a Club employee's job. In response to the 2005 incident, Emerson was suspended for thirty days, placed on a twelve-month probation period, given a twelve-month alcohol prohibition, fined $1,500, and required to replace the damaged property and apologize to the employees involved. Emerson appealed and was given an opportunity to appear before the Board. The Club eliminated the twelve-month probationary period, the twelve-month alcohol prohibition, and the $1,500 fine as conditions of Emerson's punishment. Although the record reflects that Emerson came on to Club premises during his suspension, thus violating its terms, his written apology of 3 June 2005 prompted the Club's then-President to lift Emerson's suspension.

In the April 2007 incident, Emerson had some sort of dispute with another Club member in the Card Room after a disagreement over a golf bet. As a result, Emerson's membership was suspended for six months. Emerson's initial readmittance was unsuccessful after Emerson's "address at the Board of Directors meeting," and the Board decided to extend Emerson's suspension for an additional six months. The Board received letters on Emerson's behalf from other Club members and decided to invite Emerson back to his membership approximately two months after imposing the additional six-month suspension.

In the instant matter, after notifying Emerson of the termination of his membership by letter dated 8 January 2016, the Club President sent Emerson another letter dated 5 February 2016. This subsequent letter advised Emerson that the Board "[was] prepared to provide [Emerson] an opportunity to speak on [his] behalf concerning the termination of [his] membership." Emerson acknowledged receipt by letter on 12 February 2016 but declined to attend the proposed 15 February 2016 meeting.

Emerson filed his Complaint on 21 April 2016. After discovery and depositions, the trial court disposed of Emerson's claims by entering summary judgment in favor of the Club. Emerson timely appealed.

ANALYSIS

"The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56

(2017). Additionally, we draw all inferences of fact in favor of the nonmoving party. *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385.

Emerson's Complaint raises questions about the procedural requirement of N.C.G.S. § 55A-6-31, which governs the termination, expulsion, and suspension of an individual's membership in a nonprofit corporation.

N.C.G.S. § 55A-6-31 states:

> (a) No member of a corporation may be expelled or suspended, and no membership may be terminated or suspended, except in a manner that is fair and reasonable and is carried out in good faith.
>
> (b) Any proceeding challenging an expulsion, suspension, or termination shall be commenced within one year after the member receives notice of the expulsion, suspension, or termination.
>
> (c) A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made by the member prior to expulsion or suspension.

Emerson's Complaint alleges various deficiencies with the Board's termination, including: the failure to notify Emerson of the 7 January 2016 meeting, the lack of opportunity for Emerson to appear, hear, or present evidence at the meeting, and the alleged failure by the Board to hear from witnesses against Emerson at the meeting.

Our only precedent interpreting the requirement of N.C.G.S. § 55A-6-31(a) has involved First Amendment issues not argued here.[2] *See Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 330, 605 S.E.2d 161, 165 (2004) ("A church's criteria for membership and the manner in which membership is terminated are core ecclesiastical matters protected by the First and Fourteenth Amendments of the United States Constitution and section 13 of Article I of the Constitution of the State of North Carolina."). Because this case does not implicate core ecclesiastical matters and no other First Amendment arguments are before us, we proceed to consider Emerson's arguments regarding the procedural requirement of N.C.G.S. § 55A-6-31(a).

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2. Although our opinion in *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 509, 512-13, 714 S.E.2d 806, 809, 811 (2011) cited N.C.G.S. § 55A-6-31, we did not interpret the "fair and reasonable and . . . good faith" requirement of the statute in that case.

A. Compensatory and Punitive Damages

[1] To determine whether N.C.G.S. § 55A-6-31 includes participatory rights—the purported violation of which forms the basis of Emerson's claim for compensatory and punitive damages—we begin with the text of the statute. *See Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) ("Legislative purpose is first ascertained from the plain words of the statute."). The terms "fair and reasonable and . . . good faith" do not have a statutory definition, so it is useful to look to the enactment of the statute to discover legislative intent. Our Supreme Court has interpreted legislative intent based on the similarity between model legislation submitted to the General Assembly and the statutory provisions ultimately adopted. *See Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 51-52, 56, 213 S.E.2d 563, 565-66, 568-69 (1975) (considering the applicability of N.C.G.S. § 31A-3(3), in light of the Model Act upon which it was based, to a person convicted of involuntary manslaughter).

The General Assembly enacted the first version of the North Carolina Nonprofit Corporation Act in 1955 ("1955 Act"). *See* 1955 N.C. Sess. Laws 1239 (amended 1993). The 1955 Act borrowed many provisions from the A.B.A. Model Nonprofit Corporation Act ("Model Act"), which had been created in 1952. *See* Comm. on Corp. Laws of the Section of Corp., Banking, and Bus. Law of the A.B.A., *Model Non-Profit Corporation Act* (1952). The early versions of the Model Act and the 1955 Act lacked provisions describing procedures for member expulsion or termination. *See* 1955 N.C. Sess. Laws 1250-52 (defining membership and quorum, describing procedures to protect property rights of expelled members, and providing for meetings, notice of meetings, and voting); Comm. on Corp. Laws of the Section of Corp., Banking, and Bus. Law of the A.B.A, *supra*, at 8-11 (providing for membership, meetings, notice of meetings, voting, and quorum).

Both the 1955 Act and the Model Act have been amended over the years. The A.B.A. adopted the Revised Model Nonprofit Corporation Act in 1987 ("Revised Model Act"). *See* Subcomm. on the Model Nonprofit Corp. Law of the Bus. Law Section, A.B.A., *Revised Model Nonprofit Corporation Act* (1988). The General Assembly then amended the 1955 Act in 1993, which added many new provisions and re-codified the North Carolina Nonprofit Corporation Act ("1993 Act") to mimic the Revised Model Act in many ways. *See* 1993 N.C. Sess. Laws 1334.

For example, Section 6.20 of the Revised Model Act states:

(a) A member may resign at any time.

> (b) The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made prior to resignation.

Subcomm. on the Model Nonprofit Corp. Law of the Bus. Law Section, *supra*, at 112-13. N.C.G.S. § 55A-6-30 provides:

> (a) Any member may resign at any time.
>
> (b) The resignation of a member does not relieve the member from any obligations incurred or commitments made to the corporation prior to resignation.

N.C.G.S. § 55A-6-30; *see also* 1993 N.C. Sess. Laws 1359. Accordingly, the General Assembly was aware of the Revised Model Act at the time of the enactment of N.C.G.S. § 55A-6-31, which was added as a part of the 1993 amendments. *See* 1993 N.C. Sess. Laws 1359. The 1993 session laws included N.C.G.S. § 55A-6-21, the language of which mimics § 6.21 in the Revised Model Act, although N.C.G.S. § 55A-6-21 ultimately became effective on 1 July 1994 as N.C.G.S. § 55A-6-31. *See* N.C.G.S. § 55A-6-31; 1993 N.C. Sess. Laws 1359, 1428.

When the General Assembly adopts verbatim some provisions of a model code and rejects others, we assume that the General Assembly consciously chose to author its own alternate provisions. *See Newbold v. Globe Life Ins. Co.*, 50 N.C. App. 628, 633-34, 274 S.E.2d 905, 908-09 (1981) (concluding that the General Assembly's rejection of one model provision in light its verbatim adoption of other Model Act language "indicated a specific intent to reject the Model Act provision").

Here, although the General Assembly adopted some parts of the Revised Model Act's § 6.21 in N.C.G.S. § 55A-6-31, other parts of N.C.G.S. § 55A-6-31 deviated from the Revised Model Act's language. N.C.G.S. § 55A-6-31(a) provides: "No member of a corporation may be expelled or suspended, and no membership may be terminated or suspended, except in a manner that is fair and reasonable and is carried out in good faith."

In contrast, the Revised Model Act's § 6.21(b) provides:

> (b) A procedure is fair and reasonable when either:
>
> (1) The articles or bylaws set forth a procedure that provides:

(i) not less than fifteen days prior written notice of the expulsion, suspension or termination and the reasons therefore; and

(ii) an opportunity for the member to be heard, orally or in writing, not less than five days before the effective date of the expulsion, suspension or termination by a person or persons authorized to decide that the proposed expulsion, termination or suspension not take place; or

(2) It is fair and reasonable taking into consideration all of the relevant facts and circumstances.

Subcomm. on the Model Nonprofit Corp. Law of the Bus. Law Section, *supra*, at 114. Omitting these procedural considerations, the General Assembly copied almost all the Revised Model Act's language for the remaining sections of N.C.G.S. § 55A-6-31. N.C.G.S. § 55A-6-31(b) and (c) are nearly identical to the Revised Model Act's § 6.21(d) and (e), respectively. *Compare* N.C.G.S. § 55A-6-31(b)-(c), *with* Subcomm. on the Model Nonprofit Corp. Law of the Bus. Law Section, *supra*, at 114.[3]

3.

The General Assembly adopted the following language from the Revised Model Act: (b) Any proceeding challenging an expulsion, suspension, or termination *shall* be commenced within one year after the *member receives notice* of the expulsion, suspension, or termination. (c) A member who has been expelled or suspended may be liable to the corporation for dues, assessments, or fees as a result of obligations incurred or commitments made *by the member* prior to expulsion or suspension. N.C.G.S. § 55A-6-31(b)-(c) (emphasis added). N.C.G.S. § 55A-6-31(b) replaces "must" with "shall" and allows for members to challenge decisions within one year of notice. The italicized portion of N.C.G.S. § 55A-6-31(c) does not appear in § 6.21(e) of the Revised Model Act.	The Revised Model Act provides: (d) Any proceeding challenging an expulsion, suspension or termination, *including a proceeding in which defective notice is alleged*, *must* be commenced within one year after the *effective date* of the expulsion, suspension or termination. (e) A member who has been expelled or suspended may be liable to the corporation for dues, assessments or fees as a result of obligations incurred or commitments made prior to expulsion or suspension. Subcomm. on the Model Nonprofit Corp. Law of the Bus. Law Section, *supra*, at 114 (emphasis added). The italicized portion of § 6.21(d) does not appear in N.C.G.S. § 55A-6-31(b).

The General Assembly had the opportunity to codify a notice or hearing procedure within N.C.G.S. § 55A-6-31(a)—as expressly provided in the Revised Model Act, upon which N.C.G.S. § 55A-6-31 is based—and declined to do so. Therefore, the General Assembly did not intend to provide for the Revised Model Act's notice or hearing procedures in N.C.G.S. § 55A-6-31(a). *See Newbold*, 50 N.C. App. at 633-34, 274 S.E.2d at 908-09. As a result, we decline to hold that prior notice or a participatory hearing is a per se requirement in all cases in order for a nonprofit corporation to comply with the "fair and reasonable and . . . good faith" requirement of N.C.G.S. § 55A-6-31(a).

Assuming *arguendo* that N.C.G.S. § 55A-6-31(a) as applied to the situation here required the Club to provide Emerson with prior notice and a hearing—the lack of which forms the basis of Emerson's claim for compensatory and punitive damages—Emerson failed to mitigate his damages allegedly resulting from the Club's failure to provide notice and a hearing. "Under the law in North Carolina, an injured plaintiff must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If plaintiff fails to mitigate his damages, 'for any part of the loss incident to such failure, no recovery can be had.' " *Lloyd v. Norfolk S. Ry. Co.*, 231 N.C. App. 368, 371, 752 S.E.2d 704, 706 (2013) (quoting *Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 73-74 (1968)). For example, when a plaintiff asserts a claim for wrongful discharge from at-will employment, we have considered the diligence with which a plaintiff seeks and accepts comparable employment. *See Blakeley v. Town of Taylortown*, 233 N.C. App. 441, 449-50, 756 S.E.2d 878, 884-85 (2014). However, "the failure to mitigate damages is *not* an absolute bar to all recovery; rather, a plaintiff is barred from recovering for those losses which could have been prevented through the plaintiff's *reasonable efforts*." *Smith v. Childs*, 112 N.C. App. 672, 683, 437 S.E.2d 500, 507 (1993) (emphasis in original).

Here, Emerson acknowledged that the Club offered him "an opportunity to speak on [his] behalf," and Emerson chose not to attend this proposed meeting on 15 February 2016. Rather, Emerson claimed that the meeting was "a disingenuous effort to validate an invalid termination." Even assuming that the Club's failure to provide Emerson with notice and an opportunity to be heard violated N.C.G.S. § 55A-6-31(a), Emerson had an obligation to "lessen the consequences of the [the Club]'s wrong." *See Lloyd*, 231 N.C. App. at 371, 752 S.E.2d at 706. Under the circumstances, attending the meeting and contesting the termination decision from which Emerson's compensatory damages supposedly flow would have been reasonable. Emerson's failure to mitigate the damages

that he claims resulted from the Club's alleged violation of N.C.G.S. § 55A-6-31(a) was unreasonable and bars his recovery here. *See Lloyd*, 231 N.C. App. at 371, 752 S.E.2d at 706; *Smith*, 112 N.C. App. at 683, 437 S.E.2d at 507. The trial court did not err in entering summary judgment on his claim for damages.

B. Declaratory Judgment Act

[2] Emerson's claims for declaratory judgments are rendered moot by our determination that Emerson failed to mitigate his alleged damages. A cause of action may be moot under the Declaratory Judgment Act when a litigant seeks only a determination that some action was unlawful without seeking some form of relief from the allegedly unlawful conduct. *See Hindman v. Appalachian State Univ.*, 219 N.C. App. 527, 530, 723 S.E.2d 579, 581 (2012); *Citizens Addressing Reassignment & Educ., Inc. v. Wake Cty. Bd. of Educ.*, 182 N.C. App. 241, 246, 641 S.E.2d 824, 828 (2007). "[A] moot question is not within the scope of our Declaratory Judgment Act." *Morris v. Morris*, 245 N.C. 30, 36, 95 S.E.2d 110, 114 (1956). Unlike in federal courts, where mootness is a jurisdictional issue, our state courts decline to answer moot questions as an exercise of judicial restraint. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). We apply a "traditional mootness analysis" to an action filed under the Declaratory Judgment Act. *Citizens*, 182 N.C. App. at 246, 641 S.E.2d at 827. A moot question "presents only an abstract proposition of law," and the resolution of a moot question is one that would have "no practical effect on the controversy." *Id.* at 246, 641 S.E.2d at 828.

In *Citizens*, we declined to decide an "abstract proposition of law" where plaintiffs sought a legal determination that a building was unlawful but did not seek closure of the building. *Id.* at 827-28. There, plaintiffs sought a declaratory judgment that the school board had violated N.C.G.S. § 115C-521(d) by entering into a lease agreement and arranging for a modular school to be placed on land not owned by the school board. *Id.* We held that the school was already operating and that a declaration that the building was unlawful—absent some effort by the plaintiffs to close the school—"would have no practical effect on the controversy" and was thereby moot. *Id.*

Similarly, in *Hindman*, plaintiff professors at Appalachian State University ("University") sued their employer for its failure to pay the salary provided in plaintiffs' employment contracts. *Hindman*, 219 N.C. App. at 528, 723 S.E.2d at 579-80. The professors sued for breach of contract and for a declaratory judgment that the University had breached the employment contracts with the professors and other similarly

situated faculty members. *Id.* at 528, 723 S.E.2d at 580. However, in *Hindman*, "[professors] did not seek any damages or any form of relief or redress for the alleged breach of contract." *Id.* We affirmed the trial court's grant of summary judgment in favor of the University because a legal determination that the University had breached the employment contract would not "have any practical effect." *Id.* at 530, 723 S.E.2d at 581 (quoting *Citizens*, 182 N.C. App. at 246, 641 S.E.2d at 827). We noted that the "breach was in the past, is not alleged to be likely to recur, is the only redress [professors] seek, and [professors] are barred from bringing further action on this same claim or issue." *Id.*

Here, Emerson's first claim for relief in his Complaint states that "Emerson is entitled to a declaratory judgment relating to the status of his membership in [the Club]." Emerson's second claim for relief states that "Emerson is entitled to a declaratory judgment as to whether or not the Board can now conduct a curative hearing in a manner that is fair and reasonable and carried out in good faith, having previously terminated his membership in violation of [N.C.G.S. § 55A-6-31(a)]."

Were we to issue a judgment stating that the manner of Emerson's membership termination fell short of the "fair and reasonable and . . . good faith" requirement in N.C.G.S. § 55A-6-31(a) or that post-termination hearings are impermissible under N.C.G.S. § 55A-6-31(a), such determinations would have no practical effect in this case. Unlike *Hindman*, where the plaintiff professors sought a declaratory judgment without any other remedy or damages, Emerson does seek compensatory and punitive damages alongside the declaratory judgments. *See Hindman*, 219 N.C. App. at 528, 723 S.E.2d at 580. However, as discussed above, Emerson failed to mitigate his purported damages and is therefore barred from recovery. As a result, the questions about which Emerson sought a declaratory judgment are moot notwithstanding his claim for damages.

Emerson seeks declaratory relief with respect to the *manner* of his termination from the Club, and such a declaration would not alter the rights or obligations of the parties.[4] Similar to *Citizens* and *Hindman*,

4. Emerson's Complaint did not seek injunctive relief in the form of reinstated membership. Had Emerson sought a mandatory injunction requiring reinstatement, the declaratory judgment may not have been moot because this remedy would constitute further relief, which was lacking in *Citizens* and *Hindman*. However, without deciding issues not present, we observe that the question of judicial reinstatement of membership in a nonprofit corporation may implicate a nonprofit corporation's First Amendment associational rights. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48, 120 S. Ct. 2446, 2451 (2000) ("Government actions that may unconstitutionally burden [the right to associate]

it may be possible here to identify a violation of N.C.G.S. § 55A-6-31(a), but the proposition would be abstract or academic, like a judgment that a school building is unlawful or that a contract has been breached when no further relief is sought. *See Hindman*, 219 N.C. App. at 530-31, 723 S.E.2d at 581; *Citizens*, 182 N.C. App. at 246, 641 S.E.2d at 827.

CONCLUSION

Emerson failed to mitigate his alleged damages and is barred from recovering compensatory and punitive damages for the Club's alleged violation of N.C.G.S. § 55A-6-31(a). Accordingly, the issues presented in Emerson's requests for declaratory judgments are moot, as a resolution of these questions would not have any practical effect on the controversy, and we decline to address them. The trial court's grant of summary judgment in favor of the Club on each of Emerson's claims is affirmed.

AFFIRMED.

Judge CALABRIA concurs.

Chief Judge McGEE concurs in result with separate opinion.

McGEE, Chief Judge, concurring in result with separate opinion.

I agree the trial court properly granted summary judgment in favor of Defendant. However, I write separately to respectfully express my view that this Court's analysis should be limited to the issues specifically raised by Plaintiff's appeal. It is sufficient to conclude Plaintiff has failed to show that N.C.G.S. § 55A-6-31(a) requires prior notice and a hearing *as a matter of law*.

Plaintiff asserts in his appellate brief that the termination of his club membership (1) was neither fair and reasonable nor executed in good faith, as required by N.C.G.S. § 55A-6-31(a); and (2) was inconsistent with various other sources of non-binding authority. Plaintiff begins by noting the general proposition that

> [t]o determine whether the established facts [show a] termination [was] in a manner that [was] fair and reasonable and [was] carried out in good faith, this Court

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may take many forms, one of which is 'intrusion into the internal structure or affairs of an association' like a 'regulation that forces the group to accept members it does not desire.'") (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 3252 (1984)).

> is left to "[t]he first maxim of statutory construction [which] is to ascertain the intent of the legislature. To do this[,] this Court should consider the statute as a whole, the spirit of the statute, the evils it is designed to remedy, and what the statute seeks to accomplish."

(quoting *State v. Johnson*, 298 N.C. 47, 56, 257 S.E.2d 597, 606 (1979)). Plaintiff then states that, "[i]n doing so, [this] Court may look to other authorities of import, including industry standards, decisions from other jurisdictions, and other recognized authorities."

By its plain language, N.C.G.S. § 55A-6-31(a) does not provide that a termination or suspension of membership will *only* be deemed "fair and reasonable" and "carried out in good faith" *if* the member subject to termination or suspension is afforded prior notice and an opportunity to be heard. Nevertheless, Plaintiff asks this Court to hold that Defendant violated N.C.G.S. § 55A-6-31(a) *as a matter of law* by not providing him "notice of the charges against him and a hearing or an opportunity to respond to those charges prior to termination [of his membership][.]" " 'The primary rule of statutory construction is that the intent of the [L]egislature controls the interpretation of a statute.' " *Belk v. Belk*, 221 N.C. App. 1, 9, 728 S.E.2d 356, 361 (2012) (quoting *Tellado v. Ti-Caro Corp.*, 119 N.C. App. 529, 533, 459 S.E.2d 27, 30 (1995)). "In ascertaining the legislative intent courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish. Other indicia considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption[.]" *Carter-Hubbard Pub'lg Co. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 625, 633 S.E.2d 682, 685 (2006) (citations and quotation marks omitted).

Notably, in his appellate brief, Plaintiff offers no substantive discussion of "the text, structure, and policy of [N.C.G.S. § 55A-6-31(a)]," the statute's legislative history, or the purpose of our General Assembly in enacting it. *See Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 295 (1991). Plaintiff asserts various public policy arguments why corporations *should be* required to provide prior notice and an opportunity to be heard before suspending or terminating a membership, but "these arguments are more properly directed to the [L]egislature. The sole issue before this Court is one of statutory construction," *see State v. Anthony*, 351 N.C. 611, 618, 528 S.E.2d 321, 325 (2000), and we are not persuaded that N.C.G.S. § 55A-6-31(a) implicitly imposes *per se* notice and hearing requirements.

In support of his argument that prior notice and an opportunity to be heard are mandatory under N.C.G.S. § 55A-6-31(a), Plaintiff relies *entirely* upon the following sources of authority: (1) guidelines and recommendations published by the Club Managers Association, a professional trade association; (2) case law from other jurisdictions, interpreting and applying non-North Carolina law and legal principles; (3) Robert's Rules of Order; and (4) statements purportedly made by attorneys who were members of Defendant's Board during internal discussions about Plaintiff's termination. These sources are insufficient to support a violation of N.C.G.S. § 55A-6-31(a). Plaintiff has not argued, for example, that the General Assembly intended N.C.G.S. § 55A-6-31(a) to reflect or incorporate the "industry standards" he cites. Defendant's alleged failure to follow Robert's Rules of Order, and the internal discussions of its own attorneys regarding the termination of Plaintiff's membership, likewise lack relevance to the question of statutory construction. Plaintiff does not explain why Defendant's alleged violation of Robert's Rules of Order constituted a violation of N.C.G.S. § 55A-6-31(a); Plaintiff argues only that Defendant "failed to follow its [own] requirements or guidelines." Similarly, the opinions expressed by attorneys serving on Defendant's Board that, prior to the termination of Plaintiff"s membership, "there should be some due process[,]" and that the Board "may want to allow [Plaintiff] an opportunity to . . . speak on his actions[,]" do not establish that such measures were *mandated by N.C.G.S. § 55A-6-31(a)*, or that the Board violated the statute by deciding not to follow those recommendations. Finally, while this Court may consider the non-binding decisions of other jurisdictions if we find such authority "instructive[,]" *see Carolina Power & Light Co. v. Employment Sec. Comm'n of N.C.*, 363 N.C. 562, 569, 681 S.E.2d 776, 780 (2009), the out-of-state and federal cases cited by Plaintiff "have very little persuasive weight" here, in light of various factual, procedural, and legal distinctions among the cases. *See Wal-Mart Stores E., Inc. v. Hinton*, 197 N.C. App. 30, 44, 676 S.E.2d 634, 645 (2009).

Plaintiff has failed to identify any controlling or persuasive authority to support his proposed construction of N.C.G.S. § 55A-6-31(a) as imposing *per se* notice and hearing requirements and, as discussed by the majority, aspects of the statute's legislative history suggest our General Assembly intentionally omitted *per se* notice and hearing requirements from the plain language of the statute. This concludes our inquiry. It is unnecessary to address Plaintiff's alleged failure to mitigate damages, since Plaintiff's claim for damages is premised upon a violation of N.C.G.S. § 55A-6-31(a) and, absent a statutory violation, those claims necessarily fail. It is also important to note that our holding

in the present case does not *preclude* a finding that, under the facts and circumstances of a particular case, a lack of prior notice and/or hearing could violate the "fair and reasonable" and "good faith" language in N.C.G.S. § 55A-6-31(a). Plaintiff has simply failed to persuade this Court that the statute mandates prior notice and a hearing in *all* instances.

FRENCH BROAD PLACE, LLC, PLAINTIFF
v.
ASHEVILLE SAVINGS BANK, S.S.B., DEFENDANT

No. COA17-1087

Filed 5 June 2018

1. Appeal and Error—record—supplement—consideration of documents contained therein

In an appeal from a summary judgment, the Court of Appeals was not required to consider documents contained within a Rule 11(c) supplement to the record filed on appeal where the additional documents were served with the motion to supplement the brief but were not offered into evidence or filed with the superior court. Rule 56 requires that summary judgment be decided on the materials on file. Moreover, plaintiff did not make a timely objection.

2. Contracts—breach—commercial real estate financing

There was no issue of material fact regarding the breach of a commercial real estate financing plan where there was no issue as to whether defendant failed to provide initial funding or was not obligated to provide an initial amount under a Change in the Terms of Agreement. Moreover, plaintiff did not produce any writing or agreement indicating that defendant underfunded the loan. Plaintiff waived any claims relating to a purported delay in funding change-order requests and nothing in the terms of the commitment, Loan Agreement, or related modifications obligated defendant to provide take-out loans.

3. Contracts—implied covenant of good faith and fair dealing—commercial loan—no breach

There was no breach of the implied covenant of good faith and fair dealing in a commercial real estate loan where the undisputed terms of the note and deed of trust indicated that defendant had

disbursed all of the loan funds it was contractually obligated to disburse under the agreement and modifications.

4. Unfair Trade Practices—commercial real estate loan—summary judgment

There was no genuine issue of material fact in a claim for unfair or deceptive trade practices where there was no issue that defendant had breached any of the parties' agreements.

5. Fiduciary Relationship—commercial real estate loan—no fiduciary relationship

The trial court properly granted summary judgment for defendant on a claim for breach of fiduciary duty arising from a commercial real estate transaction. There was no genuine issue that plaintiff and defendant were in a debtor-creditor relationship, which is not per se a fiduciary relationship and, although plaintiff argued that its will was so thoroughly dominated by defendant that a fiduciary relationship existed, nothing tended to show that the relationship was anything other than an agreement between two sophisticated commercial entities dealing at arm's length.

6. Negotiable Instruments—note—counterclaim on payment

Summary judgment was properly granted on defendant's counterclaim on a commercial real estate note where plaintiff did not present any evidence to contradict an affidavit that plaintiff was in default.

Appeal by plaintiff from order entered 30 January 2017 by Judge Robert C. Ervin in Transylvania County Superior Court. Heard in the Court of Appeals 2 May 2018.

Johnston, Allison & Hord, P.A., by Martin L. White and Scott R. Miller, for plaintiff-appellant.

Long, Parker, Warren, Anderson, Payne & McClellan, P.A., by Ronald K. Payne and Thomas K. McClellan, for defendant-appellee.

TYSON, Judge.

French Broad Place, LLC ("Plaintiff") appeals the trial court's order granting summary judgment to Asheville Savings Bank, S.S.B. ("Defendant") and dismissing all of Plaintiff's claims. We affirm the trial court's order.

I. Background

A. The Project

Plaintiff initiated development of a mixed-use construction and development project in downtown Brevard, North Carolina, called "French Broad Place" (the "Project") in 2007. The Project was planned as a four-story building, which would include office space, retail space, restaurants, residential condominiums, and an attached parking garage. The project's estimated cost was approximately $19,000,000. Plaintiff sought a construction lender to finance the Project, and eventually selected Defendant as a lender.

Plaintiff alleges Defendant proposed a tiered or "waterfall financing structure" that involved financing the Project in phases of development. Phase 1 allegedly included financing for purchasing the land for the Project, designing and constructing the building, and completion of the building shells of the individual units to the extent that a certificate of occupancy could be obtained. Phase 1 was projected to cost approximately $14,000,000.

Phase 2 was to allegedly include financing for finishing the build-out of the residential units and finishing certain common areas. Phase 2 was projected to cost approximately $5,000,000.

Plaintiff and Defendant executed a loan commitment dated 6 December 2007 (the "Loan Commitment"). The Loan Commitment specified Defendant would loan Plaintiff the sum of $9,950,000. Defendant denies that the loan it proposed to Plaintiff was to be phased, tiered, or include "waterfall financing."

The Loan Commitment included several conditions required to be met before closing. One Loan Commitment condition required Plaintiff to obtain $700,000 in "pre-sales" funds.

The "pre-sales" requirement of the Loan Commitment specifically states,

> Prior to any Bank funding Borrower shall provide copies of purchase agreements totaling a minimum of $8,820,000 with a minimum of 10% non-refundable deposits. Of these pre-sales a minimum of $4,300,000 must be either commercial or office space. All purchase agreements must be reviewed and deemed acceptable by Asheville Savings Bank prior to Bank funding.
>
> Asheville Savings Bank shall be given first right of refusal on all pre-sales or sales to affiliated buyers. On those

> loans where Bank does not exercise that right, the Bank must receive and approve any and all written takeout commitments as well as any applicable lease agreements.

Plaintiff alleges that after execution of the Loan Commitment, "Defendant agreed to accept commercial leases with options to purchase in lieu of regular pre-sale contracts, and agreed to count the leases with purchase options toward the 'pre-sale contract requirement' " in the Loan Commitment. Plaintiff purportedly relied upon Defendant's alleged allowing of the lease-option contracts to count towards the Loan Commitment's pre-sales requirement, and it continued development and construction of the Project.

According to the affidavit of Joshua Burdette, a principal of Plaintiff, on 20 March 2008, several principals of Plaintiff purportedly met with officers of Defendant, to discuss the method by which Defendant would apply the lease-option contracts to meet Plaintiff's pre-sale requirements under the Loan Commitment. At that meeting, Defendant's officers purportedly explained to Plaintiff's principals:

> [T]hat the lease option contracts alone could not be counted [towards] the required pre-sales under the Loan Commitment, but that [Defendant] could convert Plaintiff's construction loan into individual "Takeout Loans," . . . on any commercial units which were secured by a lease option contract, in lieu of a presale, and that the commercial units could simply be retained by Plaintiff as investment property to satisfy the presale requirements of the Loan Commitment.

Around 10 June 2008, Bradley Hines, a vice-president of Defendant, contacted members of Plaintiff, and informed them that the "Takeout Loans" arrangement would have to change. Plaintiff alleges Defendant instructed it to establish a separate legal entity to purchase the commercial units for which Plaintiff had previously obtained lease-option contracts: (1) the new entity was to establish deposit accounts in an entirely different bank than Defendant; (2) the new entity would enter into purchase agreements with Plaintiff for the commercial units that were subject to lease-option contracts; (3) the new entity would be pre-qualified to obtain take-out loans from Defendant on the commercial units secured by lease-option contracts; and, (4) Plaintiff's guarantors were to seek out and obtain financing term sheets from other banks to demonstrate the marketability of the commercial units.

Plaintiff followed Defendant's purported recommendations, and several of Plaintiff's officers and guarantors formed LBS Properties, LLC ("LBS") and implemented the steps allegedly proposed by Defendant.

In addition to the pre-sales requirement, another specific condition of the Loan Commitment provided Defendant was to "seek participant funding for no less than $2,000,000 from a participant Bank." Plaintiff alleges it did not understand the $9,950,000 loan commitment to be contingent upon Defendant actually obtaining the participation from another bank. Prior to the loan closing, Defendant informed Plaintiff that it had not been able to obtain the participation from another bank, and, as a result, that it would only be funding $7,750,000 of the $9,950,000 amount specified in the Loan Commitment. Defendant also requested Plaintiff to seek a replacement lender for the un-funded $2,000,000 of the loan.

Plaintiff had commenced construction on the Project well in advance of the loan closing. Plaintiff owed Metromont Corporation ("Metromont"), a subcontractor on the Project, for portions of the Project, which had already been erected. Plaintiff convinced Metromont to subordinate its contractor's lien for $2,200,000 for costs incurred in exchange for a secured interest in the Project.

On 8 August 2008, Plaintiff and Defendant closed on the construction loan agreement (the "Loan Agreement") in the specific amount of $7,750,000.00 (the "Loan"). The Loan was evidenced by a promissory note (the "Note") and deed of trust in favor of Defendant. Plaintiff asserts the Loan Commitment required Defendant to loan the sum of $9,950,000, but that Defendant required Metromont to provide $2,200,000 in order to close. Plaintiff also alleges Defendant underfunded the Loan by approximately $300,000 at closing on 8 August 2008, and then wrongfully deducted another $300,000 from a draw Plaintiff sought on the Loan for October 2008.

In November 2008, Plaintiff submitted a change order request to Defendant in the amount of $725,801. Defendant approved the request and the parties agreed to a written loan modification (the "First Change in Terms Agreement"), which increased the stated total amount of the Loan outstanding from $7,750,000 to $8,475,801. Plaintiff alleges Defendant unnecessarily delayed in approving the change order until closing in January 2009.

By March 2009, three businesses were opening on the ground floor of the Project, several more were being constructed, and initial condominium sales were several months away from closing. Plaintiff

alleges that in March 2009, Defendant began to refuse to finance the continued construction of the Project under the alleged phased or tiered funding, or "waterfall financing structure," as Defendant had allegedly promised. Defendant also refused to provide the allegedly promised take-out loans, which Plaintiff avers ultimately caused the Project to fail due to lack of funding.

Pursuant to a modification agreement the parties executed on 8 June 2009 (the "Second Change in Terms Agreement"), Defendant waived the required payment of the first $1,000,000 in release fees, due to Defendant upon the sale of commercial units in the Project, to help Plaintiff complete the construction on the Project. As required by the Second Change in Terms Agreement, the parties also executed a modification of Plaintiff's note, deed of trust and related loan documents regarding the Project. This Modification was recorded at Book 510, Page 398 of the Transylvania County Registry ("Modification of Note and Deed of Trust").

According to the express terms of this Modification, as of 8 June 2009:

> The total amount of all funds disbursed by Lender to Borrower to date under said Note, CLA [Construction Loan Agreement] and Deed of Trust, as amended by the LMA [Loan Modification Agreement] and Modification of Deed of Trust, included those funds deposited in the Interest Reserve Account, is $8,475,801.00. There are presently no Construction Loan funds left to be disbursed.

B. The Complaint

Plaintiff filed a verified complaint against Defendant on 28 December 2011. In its complaint, Plaintiff asserts claims for breach of contract, unfair trade practices, and breach of a fiduciary duty. Defendant filed a motion to dismiss, an answer and counterclaim on 12 March 2012. In its counterclaim, Defendant seeks payment in full on the Note and asserts Plaintiff had failed to pay the balance Defendant is owed.

Upon a joint motion of the parties, the Chief Justice of North Carolina designated the matter as an exceptional case pursuant to Rule 2.1 of the General Rules of Practice of the Superior and District Courts on 1 October 2012.

Following discovery, Defendant filed a motion for summary judgment on 15 November 2016. Attached to Defendant's motion for summary judgment was an affidavit of Brian Gillespie, an employee of Defendant, and an affidavit of David A. Kozak, an executive vice-president of

Defendant. In response to Defendant's affidavits, Plaintiff submitted affidavits of Joshua Burdette and Scott Latell, principals of Plaintiff.

The trial court entered an order granting summary judgment in favor of Defendant on all of Plaintiff's claims and also granting summary judgment in favor of Defendant on its counterclaim against Plaintiff. Plaintiff filed timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017) as an appeal from a final judgment of the superior court.

III. Standard of Review

Upon ruling on a motion for summary judgment, the court views the evidence in the light most favorable to the non-moving party and engages in a two-part analysis of whether:

> (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.
>
> Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party.

Erthal v. May, 223 N.C. App. 373, 377-78, 736 S.E.2d 514, 517 (2012) (citations and quotation marks omitted), *disc. review denied*, 366 N.C. 421, 736 S.E.2d 761 (2013).

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating

> specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citations and quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

An order granting summary judgment is reviewed *de novo* on appeal. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The trial court's interpretation of a contract is also reviewed *de novo*, because it involves a question of law. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000).

IV. Analysis

A. Materials Considered by the Trial Court

[1] Plaintiff argues this Court should not consider documents contained within a Rule 11(c) supplement to the record on appeal filed by Defendant. Plaintiff contends Defendant only filed four documents in support of its motion for summary judgment: (1) the motion, (2) Defendant's unverified answer, (3) the affidavit of Brian Gillespie, and (4) the affidavit of David A. Kozak.

Rule 56(c) of the N.C. Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017).

The proposed record on appeal was settled by agreement between the parties on 15 September 2017 and filed with this Court on 2 October 2017. The parties stipulated that they disagreed on whether numerous documents constituting Defendant's Rule 11(c) supplement are properly part of the record on appeal. Plaintiff contends, while Defendant *served* the additional documents contained in and constituting its Rule 11(c) supplement with its brief in support of its motion for summary judgment upon opposing counsel and the trial court, Defendant did not *offer* the documents into evidence nor *file* the documents with the clerk of superior court. Defendant did present a copy to the trial court.

Presuming, *arguendo*, the trial court did consider the materials attached to Defendant's brief submitted to the court, Plaintiff failed to

make any timely objection. Plaintiff argues it did not have to object, because the materials were not "filed" or "offered into evidence," even though they were provided in advance to Plaintiff and attached to Defendant's brief in support of its motion and were submitted to the trial court.

To support its assertion that it did not have to object to the documents at issue, Plaintiff cites the reasoning of Judge Greene's dissenting opinion in *Barnhouse v. Am. Exp. Fin. Advisors, Inc.*, 151 N.C. App. 507, 566 S.E.2d 130 (2002), as non-binding, but persuasive, authority. *Barnhouse* involved a pre-trial motion to stay proceedings and compel arbitration. 151 N.C. App. at 507, 566 S.E.2d at 131. The trial court denied the defendants' pre-trial motion to stay the proceedings and compel arbitration. *Id.* at 507-08, 566 S.E.2d at 130. On the defendants' motion to stay and compel arbitration, the trial court had conducted a hearing and the defendants had submitted a brief in support of their motion and attached the alleged arbitration agreement to their brief. *Id.* at 510, 566 S.E.2d at 133.

The trial court denied the defendants' motion to stay and compel arbitration. *Id.* On appeal, this Court noted there was "no indication that the trial court made any determination regarding the existence of an arbitration agreement" and the "dispositive issue is whether the trial court properly denied [the] defendants' motion to stay proceedings without first determining whether or not an agreement to arbitrate existed between the parties." *Id.* at 508, 509, 566 S.E.2d at 131-32. This Court reversed the trial court's order because the trial court had not made a determination as to whether or not an agreement to arbitrate existed, and remanded to the trial court to make that determination. *Id.* at 509, 566 S.E.2d at 132.

Judge Greene disagreed with the majority's opinion that the trial court was to make findings regarding the existence of an arbitration agreement. *Id.* at 510, 566 S.E.2d at 132 (Greene, J., dissenting). He stated the "dispositive issue is whether defendants met their burden of showing the existence of a written agreement to arbitrate." *Id.* at 511, 566 S.E.2d at 133.

> Although defendants' attorney attached a copy of the alleged agreement to the memorandum submitted to the trial court, the memorandum does not qualify as a Rule 56(e) affidavit for two reasons: it was not sworn to, and it does not "show affirmatively that [the attorney] is competent to testify" with respect to the agreement. *See* N.C.G.S.

> § 1A-1, Rule 56(e). Furthermore, the attachment to the memorandum does not qualify as documentary evidence because the memorandum was not filed with the trial court or otherwise presented into evidence.

Id. at 512, 566 S.E.2d at 134 (footnote omitted). Without reference to any authority, the dissenting opinion argued,"[b]ecause [the arbitration agreement] was neither presented into evidence nor filed with the trial court, plaintiff had no obligation to lodge an objection to its consideration." *Id.* at 512, n. 6, 566 S.E.2d at 134, n. 6. Judge Greene voted to affirm the trial court's order denying the defendants' motion to stay the proceedings and compel arbitration. *Id.* at 512, 566 S.E.2d at 134.

Judge Greene's reasoning in *Barnhouse* is inapplicable to the case at bar for several reasons. *Barnhouse* involved a motion to stay the proceedings and to compel arbitration, not a motion for summary judgment. *See id.* at 507, 566 S.E.2d at 131. The majority's opinion in *Barnhouse* did not instruct the trial court to disregard the unverified agreement in determining whether an agreement to arbitrate existed upon remand, despite the dissenting opinion's viewpoint that the trial court could not and properly did not consider the unverified agreement to arbitrate, attached to the defendant's memorandum. *Id.* at 509, 566 S.E.2d at 132.

Plaintiff also cites *Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co. of Hartford* to support its assertion that it did not have to object to Defendant's submission of the documents at issue provided for the trial court's consideration. 192 N.C. App. 376, 665 S.E.2d 505 (2008). *Gemini* involved a bench trial on the plaintiff's contractual claims. *Id.* at 378-80, 665 S.E.2d at 507-08. On appeal, the defendant argued "the trial court erred by rejecting and refusing to consider certain exhibits that defense counsel had marked as exhibits but did not formally offer into evidence." *Id.* at 386, 665 S.E.2d at 511. This Court noted, "[d]uring the trial, defendant marked twenty-seven exhibits, but only formally offered into evidence five of them." *Id.*

The defendant claimed its trial counsel had used the same language to enter into evidence the five admitted exhibits as it had eleven of the non-admitted exhibits "but, 'without Trial Counsel's notice, the Court's manner of reply changed, effectively denying admission even though the gist of the Court's response suggested that the documents were entered as evidence.' " *Id.* (emphasis omitted). The defendant asserted the trial judge had made the comment, "All the evidence has now been presented. Anything which was marked but not offered into evidence is

not in evidence in this particular case[,]" right as the trial judge left the bench, leaving the defendant no opportunity to request the trial court to consider the exhibits that had not been formally offered into evidence. *Id.*

This Court, after reviewing the trial record, concluded the defendant "had ample opportunity to clarify and rectify the situation[,]" because the trial judge did not make the comment in question, quoted above, literally as the trial judge was leaving the bench, but before closing arguments. *Id.* After the trial judge made the comment in question, "[b]oth attorneys conversed with [the trial judge] before he closed court and [the trial judge] specifically asked defense counsel if there was '[a]nything else' that he wanted the court to consider." *Id.* at 387, 665 S.E.2d at 512.

Gemini is easily distinguished from the case at bar and does not support Plaintiff's argument. The issue in *Gemini* regarded the trial exhibits and did not involve a motion for summary judgment. *See id.* The exhibits in *Gemini* had been presented at trial, and were not documents submitted in support of a pre-trial motion for summary judgment. *See id.*

The reasoning of *Gemini* actually rebuts Plaintiff's argument. The trial court in *Gemini* put the defendant on notice that it would not consider exhibits that had been marked, but not offered into evidence. *Id.* On appeal, this Court overruled the defendant's assignment of error, because the defendant had "an ample opportunity to clarify and rectify the situation." *Id.*

The materials at issue were not "on file" with the trial court because they had not been filed with the clerk of court in accordance with Rule 5(d) of the Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 5(d). Plaintiff does not deny the documents at issue were served upon it and attached to Defendant's brief in support of Defendant's motion for summary judgment in accordance with Rule 5(a1) of the Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 5 (2017) (requiring briefs or memoranda in support of summary judgment, and other dispositive motions, to be served upon each of the parties at least two days before the hearing on the motion). Defendant repeatedly referred to material in the documents at issue during the trial court's hearing on its motion for summary judgment, in which Plaintiff had ample opportunity to object to Defendant's submission of the documents.

Plaintiff has failed to cite any binding authority, which supports its assertion that it was not required to object to Defendant's submission of the documents at issue. Rule 56 of the Rules of Civil Procedure indicates a trial court is to only consider "the pleadings, depositions,

answers to interrogatories, and admissions *on file*" in deciding whether to grant or deny summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56 (emphasis supplied).

In other contexts, this Court has repeatedly held that a party's failure to object to materials submitted to a trial court, which do not comply with the requirements of Rule 56, waives that party's objection. *See Yamaha Int'l Corp. v. Parks*, 72 N.C. App. 625, 629, 325 S.E.2d 55, 58 (1985) (stating that, "[o]n a motion for summary judgment, uncertified or otherwise inadmissible documents may be considered if not challenged by timely objection."); *Whitehurst v. Corey*, 88 N.C. App. 746, 748, 364 S.E.2d 728, 729-30 (1988) (stating that "failure to object to form or sufficiency of pleadings and affidavits waives objection on summary judgment" and an "affidavit not conforming to Rule 56(e) is subject to motion to strike," but objection is waived absent the motion); *Crocker v. Roethling*, 217 N.C. App. 160, 165, 719 S.E.2d 83, 87-88 (2011) (holding, in part, that the plaintiff waived ten-day procedural notice requirement of Rule 56(c) by participating in summary judgment hearing); *N. Carolina Nat. Bank v. Harwell*, 38 N.C. App. 190, 192, 247 S.E.2d 720, 722 (1978) (stating that "[f]ailure to make a timely objection to the form of affidavits supporting a motion for summary judgment [under Rule 56] is deemed a waiver of any objections." (citations omitted)).

Plaintiff acknowledges the materials were timely served upon it in connection with Defendant's brief in support of its motion for summary judgment accordance with Rule 5(c). N.C. Gen. Stat. § 1A-1, Rule 5(c). Plaintiff had adequate notice of the materials because of Defendant's repeated reference to them during the hearing on the motion for summary judgment. Plaintiff has offered no argument to support its notion that this Court should treat the disputed materials here any differently than other materials that do not conform to the requirements of Rule 56, and for which a party fails to make a timely objection before the trial court. Plaintiff was required to object to the disputed material's failure to be filed and failed to do so. *See Yamaha*, 72 N.C. App. at 629, 325 S.E.2d at 58; *Whitehurst*, 88 N.C. App. at 748, 364 S.E.2d at 729-30; *Crocker*, 217 N.C. App. at 165, 719 S.E.2d at 87-88; *Harwell*, 38 N.C. App. at 192, 247 S.E.2d at 722. Plaintiff's argument is overruled.

B. Affidavit of Scott Latell

Defendant challenges the trial court's consideration of the affidavit of Scott Latell and two attached telephone conversation transcripts submitted by Plaintiff to the trial court. Although the trial court ultimately granted summary judgment in favor of Defendant, Defendant contends

the trial court erred in admitting and considering the affidavit and the two attached transcripts. In light of our holding to affirm the trial court's order granting summary judgment to Defendant, it is not necessary, and we decline, to address Defendant's objection to the trial court's consideration of Scott Latell's affidavit and the two attached transcripts.

C. Breach of Contract

[2] Plaintiff argues genuine issues of material fact exist in regard to its breach of contract claim. "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000).

Plaintiff's verified complaint alleges Defendant committed several breaches of the agreements the parties had entered into with regard to financing the Project, including:

a. failing to provide the required amount of initial financing;

b. underfunding the loan;

c. delaying change-order requests;

d. refusing to finance the Take-Out Loans as promised; and

e. violating the covenant of good faith and fair dealing.

We analyze each alleged breach in turn.

1. Failure to Provide the Required Amount of Initial Financing

Plaintiff asserts the parties' Loan Commitment required Defendant to provide $9,950,000 in funds for initial financing from the Loan Agreement instead of the $7,750,000 provided and advanced at closing. Viewing the evidence in the light most favorable to Plaintiff including the loan documents attached to Plaintiff's complaint, no genuine issue of material fact exists of whether Defendant failed to provide the initial amount of financing. When the parties closed on the loan on 8 August 2008, in addition to the Loan Agreement, they executed a notice of final agreement containing a merger clause indicating it supersedes the earlier executed Loan Commitment. Specifically, the notice of final agreement states, in relevant part:

> BY SIGNING THIS DOCUMENT EACH PARTY REPRESENTS AND AGREES THAT: *(A) THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES*, (B) THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE

> PARTIES, AND (C) THE WRITTEN LOAN AGREEMENT MAY NOT BE CONTRADICTED BY EVIDENCE OF ANY PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OR UNDERSTANDINGS OF THE PARTIES. [Emphasis supplied].

In addition, the Loan Agreement provides:

> RELATIONSHIP TO THE AGREEMENT: *The terms and provisions of this Agreement, the Note and the Related Documents supersede any inconsistent terms and conditions of Lender's construction loan commitment letter to Borrower*, provided that all obligations of Borrower under this commitment to pay any fees to Lender or any costs and expenses relating to the Loan on the commitment shall survive the execution and delivery of this Agreement, the Note and the Related Documents. [Emphasis supplied].

The plain language in the Loan Agreement, which Plaintiff does not contest it executed, indicates the Loan Agreement's provision for $7,750,000 in financing supersedes the earlier Loan Commitment's provision for $9,950,000.

The parties also executed the Second Change in Terms Agreement in June 2009, several months after Plaintiff alleges Defendant had failed to provide the initial amount of financing. The Second Change in Terms Agreement provides in relevant part:

> 13. Ratification of all Loan Documents, as Modified. Borrower and Lender agree that the Note, Deed of Trust, *CLA [Construction Loan Agreement] and all other Loan Documents*, as modified by the LMA [Loan Modification Agreement], the Modification of Deed of Trust and this Modification, are hereby ratified and confirmed to be in full force and effect and Borrower further confirms and agrees that there presently exists no defenses, offsets, or other claims with respect to the same, as modified hereby. [Emphasis supplied].

Based upon the clear and unambiguous language of the Loan Agreement and the two Change in Terms Agreements, Defendant was not obligated to provide the $9,950,000 in financing initially specified by the Loan Commitment. Presuming, *arguendo*, Defendant was obligated to provide the $9,950,000 under the Loan Agreement, Plaintiff waived

any claims it may have had for Defendant's failure to provide the initial amount of financing in the Second Change in Terms Agreement. Plaintiff does not dispute they entered into these agreements. No genuine issue of material fact exists with respect to this alleged breach. Defendant's argument is overruled.

2. Underfunding the Loan

Plaintiff also alleges Defendant breached the parties' loan contracts by underfunding the Loan. According to the Modification of Note and Deed of Trust executed by the parties on 18 June 2009, Defendant had disbursed all of the loan funds it was required to disburse under the parties' Loan Commitment, Loan Agreement, and later modifications. The Modification of Note and Deed of Trust both parties executed specifically provides:

> The total amount of all funds disbursed by Lender to Borrower to date under said Note, CLA [Construction Loan Agreement] and Deed of Trust, as amended by the LMA [Loan Modification Agreement] and Modification of Deed of Trust, including those funds deposited in the Interest Reserve Account, is $8,475,801.00. There are presently no Construction Loan funds left to be disbursed.

Plaintiff has failed to produce any writing or agreement contradicting the Modification of Note and Deed of Trust to indicate Defendant underfunded the loan. Plaintiff has not alleged Defendant entered into any subsequent modification of the Loan Agreement after 18 June 2009, which obligated Defendant to loan additional funds beyond the stated amount. Plaintiff's arguments regarding Defendant's alleged underfunding of the loan are overruled.

3. Delaying Change Order Requests

Plaintiff also alleges Defendant breached the parties' loan agreements by its delay in approving Plaintiff's November 2008 change order request for $725,801. The Loan Agreement does not indicate Defendant was required to loan any more money at the time Plaintiff submitted its change order request. The Modification of Note and Deed of Trust executed by the parties and attached to Plaintiff's verified complaint specifically states:

> WHEREAS, at the request of Borrower, Lender agreed to lend Borrower an additional $725,801.00 by increasing the amount of the Construction Loan from $7,750,000 to $8,475,800.00. To reflect this increase in the amount of the

> Construction Loan, Borrower and Lender entered into a Change In Terms Agreement dated January 23, 2009 (the "LMA") increasing the amount of the Construction Loan, and the principal amount of the Note, from $7,750,000.00 to $8,475,801.00.

As analyzed above, Plaintiff specifically waived claims relating to the parties' obligations under the Loan Agreement and related documents in the Modification of Note and Deed of Trust, which states:

> Borrower and Lender agree that the Note, Deed of Trust, CLA [Loan Agreement] and all other Loan Documents, as modified by the LMA [Change in Terms Agreement], the Modification of Deed of Trust and this Modification, are hereby ratified and confirmed to be in full force and effect and Borrower further confirms and agrees that there presently exists no defenses, offsets or other claims with respect to the same, as modified hereby.

Plaintiff has specifically waived any claim asserting Defendant has breached the Loan Agreement and related agreements by its purported delay in funding Plaintiff's change order request. The Loan Agreement and related modifications, which Plaintiff does not deny it executed and which are attached and referenced in its verified complaint, establish no genuine issue of material fact exists with regard to Defendant's alleged breach due to any purported delay in funding Plaintiff's change order request. Plaintiff's arguments are overruled.

4. Refusing to Finance Take-Out Loans

Plaintiff also alleges Defendant breached its loan agreements by failing to provide take-out financing for the purchase of commercial units by LBS, the additional ownership entity established by Plaintiff. Nothing in the terms of the Loan Commitment, Loan Agreement, and any related modifications obligated Defendant to provide take-out loans to either Plaintiff or LBS.

Brian Gillespie's affidavit, submitted by Defendant in support of its motion for summary judgment, states, in relevant part:

> 18. Shortly after the closing, Bradley Hines, with whom I worked on this project, and I began to make inquiry of French Broad Place, LLC as to how it was going with respect to obtaining loan commitments for the purchases by LBS. These communications continued over a period of time and we were constantly told that LBS had a lot of

> interest from other lenders to make the "take-out loans" to LBS.
>
> 19. Thereafter, an email was sent to Lyle Priest who had sent two emails requesting loans for take-outs for LBS and Mr. Priest was informed that certain documentation would be needed in order for the LBS loan requests to be considered by Asheville Savings Bank.
>
> 20. Subsequent to the request for financial information sought in an email dated February 17, 2010 from Bradley Hines, neither LBS nor any of the principals submitted any of the requested information necessary for Asheville Savings Bank to determine whether or not such loan could be approved.

Viewing the evidence in the light most favorable to Plaintiff, nothing in the record challenges or contradicts Brian Gillespie's sworn statement that the LBS financial information requested by Defendant was not provided. Additionally, Plaintiff has not provided written documents detailing the specific terms of any take-out loans that Defendant allegedly agreed to make, only an affidavit of Joshua Burdette, recollecting the essential terms of potential take-out loans discussed between the parties on 20 March 2008. As discussed *supra*, when the parties closed on the construction loan on 8 August 2008, they executed a notice of final agreement which states, in relevant part:

> BY SIGNING THIS DOCUMENT EACH PARTY REPRESENTS AND AGREES THAT: (A) THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES, (B) *THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES*, AND (C) THE WRITTEN LOAN AGREEMENT MAY NOT BE CONTRADICTED BY EVIDENCE OF ANY PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OR UNDERSTANDINGS OF THE PARTIES. [Emphasis supplied].

Plaintiff has failed to produce or indicate the existence of any written agreement, which obligated Defendant to provide the alleged take-out loans. To the extent Defendant or its representatives may have orally promised to provide take-out financing prior to the execution of the Loan Agreement, the notice of final agreement entered into between the parties expressly disclaims the existence of any oral agreement or contract obligating Defendant to do so.

Additionally, any commitment to make a commercial loan in excess of $50,000 must be in writing and signed by the parties pursuant to the relevant statute of frauds. N.C. Gen. Stat. § 22-5 (2017).

Undisputed evidence indicates LBS did not make requests for take-out loans until February 2010, when it made requests for two loans. Both of these requests were for take-out loans of $460,000 and $797,000, respectively, well in excess of the $50,000 limit to trigger the statute of frauds.

Any commitment Defendant would have made to provide take-out loans in excess of $50,000 was required to be in writing and signed by the parties. *Id.* Plaintiff has not produced any such writing nor alleged such a writing exists. Plaintiff has failed to demonstrate any genuine issue of material fact exists that Defendant breached an agreement to provide take-out loans.

5. Violating the Implied Covenant of Good Faith and Fair Dealing

[3] Plaintiff alleges Defendant breached their loan agreements by violating the implied covenant of good faith and fair dealing. "In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Authority v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation omitted).

The undisputed terms of the parties' Modification of Note and Deed of Trust indicates Defendant had disbursed all of the loan funds it was contractually obligated to disburse under the parties' Loan Agreement and related modifications. Defendant exceeded the initial terms of the parties' Loan Agreement by agreeing to waive the first $1,000,000 in release fees owed in order to help Plaintiff. Plaintiff has failed to demonstrate any genuine issue of material fact that Defendant breached the covenant of good faith and fair dealing.

D. Unfair or Deceptive Trade Practices

[4] Plaintiff alleges Defendant engaged in unfair or deceptive trade practices based upon Defendant's alleged breaches of the loan agreements. "Breach of contract, even if intentional, can only create a basis for an unfair [or] deceptive trade practices claim if substantial aggravating circumstances attend the breach." *Rider v. Hodges*, __ N.C. App. __, __, 804 S.E.2d 242, 249 (2017) (citing *Watson Elec. Constr. Co. v. Summit Cos., LLC*, 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003)).

We decline to address if aggravating circumstances tend to support Plaintiff's unfair or deceptive trade practices claim. Plaintiff has failed

to demonstrate any genuine issues of material fact exist that Defendant breached *any* of the parties' loan agreements. *See id.*

E. Breach of Fiduciary Duty

[5] Plaintiff alleges Defendant owed it a fiduciary duty "to act in good faith and with due regard to the interests of Plaintiff" and that Defendant breached its fiduciary duty by: (1) failing to provide the required amount of initial financing; (2) underfunding the loan; (3) delaying change-order requests; and (4) refusing to finance take-out loans as promised.

> For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. Such a relationship has been broadly defined by this Court as one in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . [and] it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.

Dalton v. Camp, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001) (internal quotation marks omitted).

To establish a claim for breach of a fiduciary duty, claimants are "required to produce evidence that (1) defendants owed them a fiduciary duty of care; (2) defendants . . . violat[ed] . . . their fiduciary duty; and (3) this breach of duty was a proximate cause of injury to plaintiffs." *Farndale Co., LLC v. Gibellini*, 176 N.C. App. 60, 68, 628 S.E.2d 15, 20 (2006). In North Carolina, the general rule holds:

> Ordinary borrower-lender transactions . . . are considered arm's length and do not typically give rise to fiduciary duties. In other words, the law does not typically impose upon lenders a duty to put borrowers' interests ahead of their own. Rather, borrowers and lenders are generally bound only by the terms of their contract and the Uniform Commercial Code.

Dallaire v. Bank of Am., N.A., 367 N.C. 363, 368, 760 S.E.2d 263, 266-67 (2014) (internal citations omitted); *see Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 95, 143 S.E.2d 270, 276 (1965) ("There was no fiduciary relationship; the relation was that of debtor and creditor.").

"Nonetheless, because a fiduciary relationship may exist under a variety of circumstances, it is possible, at least theoretically, for a particular bank-customer transaction to give rise to a fiduciary relation given the proper circumstances." *Id.* at 368, 760 S.E.2d at 267 (internal citations and quotation marks omitted). To establish a fiduciary relationship in the creditor-debtor context, there "must [be] some additional fact which tends to elevate the relationship above that of a typical debtor and creditor." *Lynn v. Federal Nat. Mort. Ass'n*, 235 N.C. App. 77, 82, 760 S.E.2d 372, 376 (2014).

> A fiduciary duty, in the context of a financing party to a corporation, arises only when the evidence establishes *that the party providing financing to a corporation completely dominates and controls its affairs. Edwards v. Bank*, 39 N.C. App. 261, 277, 250 S.E.2d 651, 662 (1979); *Pappas v. NCNB Nat. Bank of North Carolina*, 653 F.Supp. 699, 704 (M.D.N.C. 1987). Further, to justify the imposition of a fiduciary obligation on a party financing the affairs of a corporation, it must be shown that the financing party essentially dominated the will of its debtor. *In re Prima Co.*, 98 F.2d 952 (7th Cir. 1938), *cert. denied*, 305 U.S. 658, 83 L.Ed. 426 (1939).

Multifamily Mortg. Tr. 1996-1 v. Century Oaks Ltd., 139 N.C. App. 140, 146, 532 S.E.2d 578, 581-82 (2000) (emphasis supplied).

Here, there is no genuine issue that Plaintiff and Defendant were in a debtor-creditor relationship, which is not *per se* a fiduciary relationship. *See Dallaire*, 367 N.C. at 368, 760 S.E.2d at 266-67. Plaintiff alleges and argues Defendant so thoroughly dominated the will of Plaintiff with respect to the Project that a fiduciary relationship existed between them.

Plaintiff asserts the following facts tend to show Defendant dominated and controlled Plaintiff's affairs: Defendant's control of distribution and withdrawals to members and all buy/sell agreements between the members for membership interests, Defendant's giving of legal advice regarding how to set up LBS, Defendant's dictating of financing regarding Metromont, Defendant's promise to make take-out loans upon which Plaintiff relied, and Plaintiff's utter dependence on Defendant's financing.

"As a matter of law, there can be no fiduciary relationship between 'parties in equal bargaining positions dealing at arm's length, even though they are mutually interdependent businesses.' " *Dreamstreet Investments, Inc. v. MidCountry Bank*, 842 F.3d 825, 831 (4th Cir. 2016)

(quoting *Strickland v. Lawrence*, 176 N.C. App. 656, 662, 627 S.E.2d 301, 306 (2006)).

Reviewing the evidence in the light most favorable to Plaintiff, nothing tends to show the relationship between Plaintiff and Defendant was anything other than an agreement between two sophisticated commercial entities dealing at arm's length. Undisputed evidence in the record indicates Plaintiff's development team members had accumulated nearly 150-years' worth of combined experience in commercial real estate construction and development before entering into the loan agreements with Defendant.

Additionally, Mark Latell, a principal of Plaintiff, indicated in his deposition that Plaintiff had retained a consultant, Lyle Preest, to help them find lenders for the Project. Mr. Latell described Mr. Preest as "very knowledgeable with banking and lending and borrowing." Numerous emails submitted to the trial court show correspondence between Mr. Preest and Bradley Hines, the vice-president of commercial lending of Defendant, dating from before and after the closing of the Loan Agreement. These emails discuss several critical matters relating to the loan agreements, including Plaintiff obtaining third-party financing, obtaining take-out financing, and the pre-sales of commercial units.

Nothing indicates Plaintiff reposed any sort of special confidence in Defendant to create a fiduciary relationship. *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707. Plaintiff's consultation with Lyle Preest as an outside expert is inconsistent with a fiduciary relationship. *See Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (1992) (finding no fiduciary relationship on action for summary judgment where party asserting fiduciary relationship with bank consulted with banker and accountant before entering into agreement); *see also Sullivan v. Mebane Packaging Grp., Inc.*, 158 N.C. App. 19, 33, 581 S.E.2d 452, 462 (2003) (finding evidence that complaining party obtained outside counsel rebuts existence of fiduciary relationship necessary for constructive fraud claim). Furthermore, nothing in the record indicates Plaintiff was foreclosed from consulting with an attorney, or other advisors of its choice, prior to executing the Loan Commitment and Loan Agreement with Defendant.

No evidence tends to show Defendant "essentially dominated the will" of Plaintiff or "completely dominate[d] and control[led]" Plaintiff's affairs. *Multifamily Mortg.*, 139 N.C. App. 140, 146, 532 S.E.2d 578, 581-82 (2012) (citations omitted).

No genuine issue of material facts exists of whether Plaintiff and Defendant were in a fiduciary relationship. Plaintiff has not produced evidence tending to show this essential element of a breach of fiduciary relationship claim. The trial court's order properly granted Defendant summary judgment on this claim.

F. Defendant's Counterclaim on Promissory Note

[6] Plaintiff argues the trial court erred in granting Defendant's motion for summary judgment on Defendant's counterclaim for payment on the promissory note. The promissory note was executed by Plaintiff on 8 August 2008 for the principal amount of $7,750,000.00. This note was modified by the First Change in Terms Agreement on 23 January 2009, and the principal amount was increased to $8,475,801.00. On 8 June 2009, Plaintiff executed a Second Change in Terms Agreement, which altered the formula used to calculate the interest rate.

In support of Defendant's motion for summary judgment, Defendant submitted the affidavit of David A. Kozak, executive vice-president of Defendant. David A. Kozak stated that Defendant was owed $10,491,440.16 along with interest and attorney's fees per the parties' Loan Agreement and that Plaintiff had defaulted.

Plaintiff argues due to Defendant allegedly breaching its obligations under the loan agreements, Plaintiff is not obligated to pay on the note. The uncontradicted evidence in the form of the parties' 18 June 2009 Modification of Note and Deed of Trust shows Defendant disbursed all funds it was required to loan under the agreements evidenced by the note. Plaintiff has not presented any evidence to contradict David A. Kozak's affidavit stating Plaintiff was in default.

Based upon our holding to affirm the trial court's determination that Defendant is entitled to summary judgment on Plaintiff's breach of contract claims, no genuine issue of material fact exists with regard to Defendant's counterclaim for collection on the stated and uncontested sums in the note with interest and contractually-agreed attorney's fees. Plaintiff's arguments are overruled.

V. Conclusion

Viewing the evidence in the light most favorable to Plaintiff, Plaintiff has failed to establish any genuine issue of material fact exists with regard to its claims for breach of contract, unfair or deceptive trade practices, and breach of fiduciary duty. Plaintiff has also failed to demonstrate any genuine issue of material fact exists with respect to Defendant's counterclaim for contribution on the promissory note.

Defendant is entitled to summary judgment as a matter of law with respect to Plaintiff's claims and its counterclaim. The trial court's order granting summary judgment to Defendant is affirmed. *It is so ordered.*

AFFIRMED.

Judges ELMORE and ZACHARY concur.

JENNIFER L. HAULCY, EMPLOYEE, PLAINTIFF
v.
THE GOODYEAR TIRE & RUBBER CO., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA17-844

Filed 5 June 2018

1. Workers' Compensation—compensable injury—material aggravation of pre-existing condition—sufficiency of evidence

The N.C. Industrial Commission's determination that plaintiff employee's aggravation of a prior back injury while moving tires constituted a compensable injury stemming from a specific workplace incident was supported by competent evidence, including doctors' testimony which took into account the employee's history, a physical examination, and diagnostic studies in shaping their opinion that the injury resulted from the new incident.

2. Workers' Compensation—compensable injury—causal link—sufficiency of evidence

The N.C. Industrial Commission's determination that plaintiff employee's back injury sustained while moving tires was a compensable injury was supported by competent evidence establishing a causal link between a specific workplace incident and the employee's lower back injuries. Testimony by two doctors showed that causation was based not merely on the temporal relationship between the workplace incident and the aggravation of the employee's pre-existing condition but also on the employee's medical history, a physical examination, and diagnostic evidence.

3. Workers' Compensation—issue preservation—award of credit to employer—disability payments

The N.C. Industrial Commission did not err in awarding defendants employer and insurer a credit for weekly disability payments

paid to the employee under an employer-funded disability plan where defendants appropriately challenged the deputy commissioner's award of benefits. Even if the issue had not been properly preserved, the Commission has the power to amend an award.

4. Workers' Compensation—disability payments—employer-funded accident-and-sickness plan—credit awarded to employer

The N.C. Industrial Commission did not err in awarding credit to defendants employer and insurer for disability payments made to plaintiff employee under the employer-funded accident-and-sickness plan where competent evidence, included as an exhibit to the record on appeal, showed the frequency and amount of payments made to the employee under the plan.

Appeals by plaintiff and by defendants from opinion and award entered 25 April 2017 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 24 January 2018.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner; and Law Office of David P. Stewart, by David P. Stewart, for plaintiff-appellant and plaintiff-appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Matthew J. Ledwith, for defendant-appellees and defendant-appellants.

ELMORE, Judge.

In this workers' compensation case, employer Goodyear Tire & Rubber Co. and carrier Liberty Mutual Ins. Co. (defendants), and employee Jennifer L. Haulcy (plaintiff), both appeal from an opinion and award of the North Carolina Industrial Commission, which awarded Haulcy retroactive workers' compensation benefits and awarded defendants a credit for disability payments paid to Haulcy under an employer-funded accident-and-sickness (A&S) disability plan during that time.

In defendants' appeal, they assert the Commission's conclusion that Haulcy suffered a compensable injury in the form of a material aggravation of her pre-existing lower back condition while maneuvering a fifty-five pound tire during the course of her employment on 23 April 2014 was unsupported by competent evidence and its findings. In Haulcy's appeal, she asserts the Commission erred by awarding defendants the A&S credit because they failed to preserve the issue, and

because the Commission's dispositive finding supporting its conclusion on the matter was unsupported by competent evidence.

Because competent evidence supports the dispositive findings that support the challenged conclusions, we affirm the Commission's opinion and award in full.

I. Background

The Commission's opinion and award reveals the following facts. Jennifer Haulcy is forty-six years old and has worked with Goodyear Tire for the last eighteen years. During her employment there, Haulcy has worked as a tire sorter, a Banbury operator, and, since 2007, a paint machine operator.

Paint machine operators work in pairs. When the paint machine is working properly, one operator removes tires from an elevated flatbed and places them onto an entrance conveyor, where the tires move under the paint machine to be sprayed with lubricant. When the lubricated tires exit the conveyor, the other operator puts the tires back onto the elevated flatbed, a process known as "throwing" tires. If a paint machine breaks down, the tires need to be manually lubricated. One operator picks up a tire, hangs it on a hook, spins the tire while brushing it with the lubricant, and then throws it back on the elevated flatbed. The other operator pushes the flatbed of tires to and from the lubricating area.

On 19 March 2013, Haulcy injured her back while attempting to push a flatbed with a stuck wheel. She presented to the on-site medical clinic, was diagnosed with a low back strain, and was put on modified duty until 3 May, when she was released to return to full duty and prescribed to wear a back brace. Haulcy returned to work, continued to wear her back brace, and never filed a workers' compensation claim for that incident. Haulcy's medical records do not reveal she received any further treatment for her lower back after 3 May 2013.

On 23 April 2014, Haulcy and her paint-machine-operator partner were manually lubricating larger tires that weighed approximately fifty-five pounds because their paint machine was inoperable. At that time, Haulcy was wearing her back brace, throwing the tires, and lubricating them, while her partner was pushing the flatbed of tires to and from the area. Around 8:00 a.m., Haulcy leaned back to throw a tire and felt pain in her lower back. She attempted to throw a few more tires but her back pain increased as she continued to twist her body to throw the tires onto the elevated flatbed. Haulcy asked her partner to change positions, and she started pushing the flatbed before determining she needed

to present to the on-site medical facility for her back pain. MRIs later revealed, *inter alia*, a small disc herniation at L5-S1 and facet arthropathy at L4-L5, and Haulcy was diagnosed with multiple injuries to her lumbar spine. Haulcy started working modified duty on 24 April 2014.

On 29 April 2014, Haulcy filed a Form 18 "Notice of Accident," alleging she sustained a back injury at work. On 27 May, defendants filed a Form 63 "Notice to Employee of Payment of Medical Benefits Only." In accordance with Goodyear Tire's 90-day modified-duty policy, Haulcy worked modified duty until that policy expired on 4 August, when Goodyear Tire prohibited her from working because she had neither been released to full duty work nor had she been assigned permanent restrictions to allow a job match. Starting 14 August 2014, Goodyear Tire paid Haulcy weekly disability payments from an employer-funded A&S disability plan.

On 17 September, Haulcy filed a Form 33 "Request for Hearing" because defendants had failed to accept or deny her workers' compensation claim, and were directing her medical care but refused to pay workers' compensation benefits when she was out of work. On 27 February 2015, defendants filed a Form 61 "Denial of Workers' Compensation Claim." Following physical therapy, steroid injections, and radio frequency intervention for her lower back pain and symptoms, Haulcy eventually returned to work with Goodyear Tire on 4 November 2015, earning wages at or above her pre-April 2014 incident wages.

After the hearing arising from Haulcy's Form 33, Deputy Commissioner Wanda Blanche Taylor entered an opinion and award on 29 December 2015. In her opinion and award, Deputy Commissioner Taylor concluded Haulcy sustained a compensable injury on 23 April 2014 and awarded her continuing weekly workers' compensation benefits, but did not address Haulcy having returned to work or the A&S disability payments she received during the period the deputy commissioner awarded her retroactive workers' compensation benefits. After defendants' motion to add evidence and to reconsider the deputy commissioner's opinion and award was denied, they appealed to the Commission.

After a hearing, the Commission entered its opinion and award on 25 April 2017. The Commission concluded Haulcy sustained a compensable injury on 23 April 2014 and awarded her retroactive workers' compensation benefits from 5 August 2014 until 3 November 2015. It further concluded defendants were entitled to a $15,521.90 credit for the weekly A&S disability payments they furnished to Haulcy

during that period and awarded defendants that credit. Both defendants and Haulcy appeal.

II. Review Standard

" 'In reviewing an opinion and award from the Industrial Commission, the appellate courts are bound by the Commission's findings of fact when supported by any competent evidence; but the [Commission's] legal conclusions are fully reviewable.' " *Harrison v. Gemma Power Sys., LLC*, 369 N.C. 572, 580, 799 S.E.2d 855, 861 (2017) (quoting *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 90, 106, 530 S.E.2d 54, 60 (2000)).

III. Defendants' Appeal

Defendants assert the Commission erred by concluding Haulcy sustained a compensable injury because (1) Haulcy "did not prove . . . an actual 'injury' occurred," and (2) "the medical evidence concerning the causal link between [Haulcy's] incident and her employment . . . is not competent to support a conclusion of causation."

A. Challenged FOFs

[1] Defendants challenge the Commission's findings of fact (FOF) nos. 9, 11, 13, 14, 16, 17, 18, and 20, "as these findings detail [Haulcy's] complaints following her alleged injury at work." The challenged FOFs follow:

> 9. Plaintiff received medical treatment at the on-site medical clinic following the April 23, 2014 incident. On May 7, 2014, Dr. Perez-Montes examined Plaintiff and assessed chronic, recurrent back pain, prescribed tramadol, and restricted Plaintiff to modified duty work. Plaintiff underwent lumbar and thoracic MRIs without contrast on May 15, 2014. On May 28, 2014, Plaintiff underwent a thoracic MRI with contrast. Dr. Perez reviewed the MRIs and assessed multi-level degenerative facet arthropathy, a disc bulge with left nerve root encroachment at L5-S1, and thoracic myelomalacia with a small syrinx at T4-T5. Dr. Perez continued modified duty and referred Plaintiff to pain management.
>
> . . . .
>
> 11. On August 6, 2014, Plaintiff presented to Dr. Larry Carson of FirstHealth Neurosurgery. Dr. Carson is board-certified in neurosurgery and plastic surgery. Plaintiff reported she was placing a tire onto a rack when she

extended too far overhead and felt back pain. Plaintiff also reported her 2013 incident which required her to use a back brace. Plaintiff's symptoms were pain in the back and right leg and weakness in the right leg. Plaintiff's physical examination was consistent with the lumbar MRI findings and suggestive of an acute issue rather than a chronic issue. Dr. Carson assessed lumbar disc degeneration and felt Plaintiff's pain symptoms were emanating from her lumbar spine condition.

. . . .

13. On January 16, 2015, Plaintiff presented to Dr. Paul Singh of Carolina Spine Center. Dr. Singh is a board certified physiatrist. Plaintiff complained of low back pain radiating to her right anterior thigh to the knee. Dr. Singh noted Plaintiff had symptoms in 2013 that improved and she was able to return to work with the use of a back brace, but then exacerbated her condition on April 23, 2014. Dr. Singh reviewed the lumber MRI and interpreted it as revealing a small disc herniation at L5-S1 and facet arthropathy at L4-L5. Dr. Singh's opinion was that Plaintiff's symptoms were due to the facet arthropathy at L4-L5. He recommended Plaintiff "close out her case from a workman's comp perspective, and she can seek treatment for her facet joint pain that is largely arthritic in nature, not likely related to work related injury, and is largely exacerbated by her challenge with obesity."

14. At his deposition, Dr. Singh was asked to confirm his opinion that Plaintiff[']s facet joint pain was not likely related to her April 23, 2014 injury. In response, Dr. Singh testified that Plaintiff has arthritic changes based upon the fact that she has worked for 18 years doing physically demanding jobs with Defendant-Employer. He further testified that given Plaintiff had an episode in 2013, received treatment and was able to return to work, her exacerbation in symptoms after putting a tire on top of a flatbed in April 2014 is probably related to the job. Dr. Singh further explained his reasoning in stating in his medical record that it was not work related was because he did not feel that Plaintiff would ever be able to return to her job and it would be best for her to settle her claim and obtain medical treatment under private health insurance.

Ultimately, Dr. Singh again testified that, "when it comes down to it," when Plaintiff leaned back to place the tire on the top level of the flatbed, she performed an extension-type movement, which can exacerbate an underlying arthritic condition in a facet joint.

. . . .

16. The parties deposed Dr. Carson on June 1, 2015. After the August 6, 2014 evaluation, Plaintiff returned to Dr. Carson on April 13, 2015 and reported improvement in her pain following physical therapy, steroid injections, and radio frequency intervention. Dr. Carson recommended repeat electrodiagnostic testing, which was completed on May 29, 2015. Dr. Carson reviewed the results of the May 29, 2015 EMG and nerve conduction studies at his deposition, and testified that the results showed Plaintiff had a permanent irritation, but it was a less than complete study.

17. Dr. Carson testified, to a reasonable degree of medical certainty, that Plaintiff aggravated her prior back injuries when she was lubricating and throwing tires on April 23, 2014 and that this incident, more likely than not, caused Plaintiff's back symptoms that he treated in August 2014 and April 2015. Dr. Carson's opinion was based upon Plaintiff's history, his physical examination findings, and the findings of the MRIs and electrodiagnostic studies. On cross-examination, Dr. Carson was questioned as to whether his opinion was solely based upon Plaintiff reporting that her back pain was worse following the April 23, 2014 incident than it was prior to the incident. In response, Dr. Carson reiterated his opinion was based on Plaintiff's history, including her report of the 2013 incident and her symptoms resulting from it, and his findings on examination, which indicated an acute problem rather than a chronic condition, were consistent with the mechanism of the April 23, 2014 incident, and were consistent with the results of the diagnostic studies.

18. Based upon the preponderance of the credible evidence and competent expert opinions, Plaintiff sustained a compensable injury by accident arising out of and in the course of her employment on April 23, 2014 and sustained an injury in the form of a material aggravation to her pre-existing low back condition as a result.

. . . .

> 20. The medical treatment Plaintiff has received for her low back condition since April 23, 2014, has been reasonably necessary to effect a cure, provide relief, or lessen Plaintiff[']s period of disability. Defendant paid for all Plaintiffs medical treatment received following the April 23, 2014 incident up until approximately May 2015.

However, defendants have failed to specifically argue how any of these findings were unsupported by competent evidence. Rather, they argue the Commission's findings are insufficient because they are limited to "back pain" or "symptoms" caused by the April 2014 incident, not any particular "injury." Defendants cite to *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985), to support their position that, because the Commission never made "a finding of an 'injury,' " its conclusion that Haulcy suffered a compensable injury was unsupported.

In *Jackson*, we held the Commission's finding that an employee "experienced pain," standing alone, was insufficient to support a conclusion that the employee suffered a compensable injury, since "pain is not in and of itself a compensable injury." *Id.* at 414, 337 S.E.2d at 111–12. Because "no specific finding was made that [the employee] sustained an injury or that determined the nature of that injury, if any," we reversed the opinion and award, and remanded for "specific findings of fact regarding the injury, if any, sustained by [the employee] and the nature of that injury." *Id.* at 414, 337 S.E.2d at 112. Here, contrarily, in FOF no. 18 the Commission explicitly found Haulcy suffered a "compensable injury . . . in the form of a material aggravation to her pre-existing low back condition." Accordingly, *Jackson* is inapplicable. Further, the Commission's finding of injury is supported by its FOF nos. 14 and 17, which are supported by competent evidence.

As to FOF no. 14, when Dr. Singh was asked whether the April 2014 incident caused Haulcy's current medical condition, he replied: "The cause is multifactorial." He elaborated that Haulcy "probably had some arthritic changes relating to 18 years being in Goodyear, doing physical work, then she got an injury[,]" but "when it comes down to it, . . . this particular [April 2014] incident, . . . is a work-related injury, in my opinion." When asked why Dr. Singh's medical record indicated the April 2014 injury was not work-related, he explained he believed Haulcy's injury should be treated quickly and that she would be unable to return to her job, so he thought it best she close out her workers' compensation claim

and receive necessary treatment through private insurance. Finally, Dr. Singh confirmed the "facet[ ] . . . pain acceleration" Haulcy described when treating her was "a result of the [April 2014] incident" because the body mechanics involved in "putting a tire up" creates "an extension" of the lumbar spine, and such an "extension-type movement can exacerbate an underlying arthritic condition in a facet joint[.]" FOF no. 14 is therefore supported by competent evidence.

As to FOF no. 17, Dr. Carson confirmed "within a reasonable degree of medical certainty" the April 2014 incident "was a materially exacerbating factor in the exacerbation of [Haulcy's] back pain" and "symptoms," and that incident "more likely than not" "cause[d] [Haulcy's] symptoms and back pain for which [he] treated her . . . ." Dr. Carson rejected the suggestion that his opinion was merely based on Haulcy's report that her lower back pain and symptoms worsened after the April 2014 incident and explained his opinion was based upon "the history provided, [his] physical examination, and the diagnostic studies available to [him] at the time." He confirmed that even if the Commission found Haulcy had persistent lower back pain from the 2013 March incident until the April 2014 incident, it would not "invalidate [his] opinion that there was an aggravation or acceleration of her pre-existing condition" and reiterated his diagnosis was "based on history confirmed by the physical exam and then supported by . . . diagnostic tests." Finally, when asked "was there anything in the physical examination findings that gave [him] reason to believe . . . [Haulcy's] back condition was related to a[n] acute trauma versus an active degenerative disc disease," Dr. Carson opined that "because [Haulcy] had decreased range of motion and tenderness, that suggested . . . it was more acute . . . than all—just chronic[.] . . ." Accordingly, FOF no. 17 is supported by competent evidence.

Because FOF nos. 14 and 17 support the portion of the Commission's FOF no. 18 that Haulcy sustained a compensable "injury" in the form of a "material aggravation to her pre-existing low back condition," we overrule this argument.

B. Causation

[2] Defendants next assert the Commission's conclusion of compensability was unsupported because no competent evidence established the requisite causal link between the April 2014 incident and Haulcy's lower back injuries. They argue Drs. Singh's and Carson's expert opinions on medical causation were insufficient because they were based merely on the temporal relationship between the April 2014 incident and

Haulcy's reported exacerbation of her back pain and symptoms. Thus, defendants continue, the doctors committed the logical fallacy of *post hoc, ergo propter hoc*—that is, confusing sequence with consequence. Defendants cite to *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 538 S.E.2d 912 (2000), for support.

In *Young*, the only evidence linking an employee's fibromyalgia diagnosis to a work-related accident was an expert who testified he related the two " 'primarily because . . . it was not there before and she developed it afterwards. *And that's the only piece of information that relates the two*.' " *Id.* at 232, 538 S.E.2d at 916 (emphasis added). Our Supreme Court determined that the expert's opinion was grounded upon "[t]he maxim " *'post hoc, ergo propter hoc*,' [which] denotes 'the fallacy of . . . confusing sequence with consequence,' and assumes a false connection between causation and temporal sequence." *Id.* (quoting *Black's Law Dictionary* 1186 (7th ed. 1999)). After noting fibromyalgia is a diagnostically unidentifiable illness of unknown etiology, *id.* at 231, 538 S.E.2d at 915, our Supreme Court held that "[i]n a case where the threshold question is the cause of a controversial medical condition, the maxim of '*post hoc, ergo propter hoc*,' is not competent evidence of causation." *Id.* at 232, 538 S.E.2d at 916.

Here, contrarily, as defendants' concede, Dr. Carson explicitly rejected the suggestion his expert opinion on causation was based only on temporality, but reiterated it was grounded in his consideration of Haulcy's medical history, the reported incident, his physical exam, and the diagnostic evidence. Nor did Dr. Singh testify his causation opinion was based only on temporality. Rather, both doctors testified their opinions were based on other diagnostic evidence. Additionally, unlike the injury in *Young*, Haulcy's lower back injuries can be, and were, diagnostically identifiable. Further, the exacerbation of Haulcy's pre-existing lower back condition could be precisely identified based on diagnostic evidence, her medical history, her reported pain and symptoms, and the reported movements she made while throwing tires during the April 2014 incident, implicating the exact mechanism by which that incident may have exacerbated her pre-existing lower back condition. Accordingly, *Young* is inapplicable. Because competent evidence supported FOF nos. 14 and 17, which established the requisite causal link, we overrule this argument.

In summary, because competent evidence supported the Commission's dispositive FOFs challenged on appeal, which in turn supported its challenged conclusion that Haulcy suffered a compensable

injury on 23 April 2014, we affirm the Commission's opinion and award with respect to defendants' appeal.

IV. Plaintiff's Appeal

In her appeal, Haulcy asserts the Commission erred by awarding defendants a credit for $15,521.90 in weekly disability payments Goodyear Tire paid her through an employer-funded A&S disability plan. Under N.C. Gen. Stat. § 97-42 (2017), the Commission may credit an employer for disability payments made to an employee under an employer-funded disability plan if it awards retroactive workers' compensation benefits during that period. Haulcy does not dispute that defendants would be eligible for a credit for disability benefits paid under a plan fully-funded by Goodyear Tire during the time she was eligible for workers' compensation benefits. She argues (1) the Commission lacked jurisdiction to award the A&S credit because defendants failed to preserve this issue, and (2) its finding that the disability plan was fully funded by Goodyear Tire was unsupported by competent evidence.

A. Issue Preservation

[3] Haulcy first asserts the Commission lacked jurisdiction to award defendants the A&S credit because they failed to preserve this issue in their pretrial agreement to the deputy commissioner and again in their Form 44 "Application for Review" to the Commission. We disagree.

On 29 April 2014, the parties entered into a pretrial agreement stipulating to facts and exhibits to be used by the deputy commissioner in deciding whether Haulcy suffered a compensable injury and, if so, what benefits she is due. In the pretrial agreement, defendants argued Haulcy did not sustain a compensable injury but requested, alternatively, that if she did, the deputy commissioner determine "what benefits [she is] entitled." The deputy commissioner's opinion and award demonstrates she considered "Stipulated Exhibit 2," which included "Goodyear Accident & Sickness Payment Information," but she never addressed the A&S credit issue in her opinion and award. On 13 January 2016, defendants filed a "Motion to Add Evidence and Reconsider Opinion & Award," explicitly moving, *inter alia*, for the Commission to revise the deputy commissioner's opinion and award "to document . . . an A&S credit in the amount set forth in [the] Stipulated Exhibit[.]"

On 14 January 2016, Haulcy filed a response to defendants' motion in which she, *inter alia*, acknowledged the stipulated "Goodyear Accident and Sickness Payment Information" exhibit and argued "defendants failed to properly preserve the issue of a credit[,]" but "nevertheless

[agreed to] abide by the [Commission's] discretion" as to the A&S credit. After the deputy commissioner denied the motion on 1 February 2016, defendants filed a Form 44 to appeal to the Commission. While defendants never specifically claimed entitlement to the A&S credit in their Form 44, they did challenge the deputy commissioner's award of benefits.

Even if defendants failed to preserve this issue, the Commission has "the duty and responsibility to decide all matters in controversy between the parties." *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). Haulcy's argument that defendants waived this issue by failing to specifically raise it in the pretrial agreement fails because in reviewing a deputy commissioner's opinion and award, the Commission has the "power . . . , if proper, to amend the award," *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962), even based on an issue not presented to the deputy commissioner. *See, e.g.*, *Penegar v. United Parcel Serv.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, slip op. at 20–22 (May 1, 2018) (No. 17-404) (rejecting a similar argument that the Commission lacked jurisdiction to amend an aspect of a deputy commissioner's opinion and award based on an issue not raised by either party). Haulcy's argument that defendants waived this issue by failing to raise it in their Form 44 to the Commission also fails.

Although Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission contemplates that a Form 44 "shall state the grounds for . . . review . . . . with particularity" and that "[g]rounds for review not set forth in the Form 44 . . . are deemed abandoned," our Supreme Court has explained these "rules do not limit the power of the Commission to review[or] modify . . . the findings of fact found by a Deputy Commissioner . . . ." *Brewer*, 256 N.C. at 182, 123 S.E.2d at 613. Accordingly, the Commission had jurisdiction to amend the deputy commissioner's opinion and award by making findings on the A&S credit issue and adjudicating the matter even if it were not adequately presented. *See Penegar*, ___ N.C. App. at ___, ___ S.E.2d at ___, slip op. at 22 ("[T]he Commission was well within its authority and therefore had jurisdiction to amend an aspect of the Deputy Commissioner's opinion and award, even those not raised by either party on appeal."). Accordingly, we overrule this argument.

B. A&S Credit

[4] Haulcy argues, alternatively, that even if the A&S credit issue was preserved, the Commission erred by awarding the credit because its dispositive finding, FOF no. 24, was unsupported by competent evidence. We disagree.

In challenged FOF no. 24, the Commission found in relevant part:

> 24. Beginning August 14, 2014, Plaintiff began receiving weekly disability payments from an accident and sickness disability plan provided by Defendant-Employer. As of April 12, 2015, Plaintiff had received $15,521.90 through the Defendant-Employer-funded plan.

Based on this finding, the Commission concluded:

> 6. . . . Defendants are entitled to a credit for the employer-funded accident and sickness disability benefits received by Plaintiff beginning August 11, 2014 for any weeks in which Plaintiff is entitled to indemnity compensation pursuant to the below award of the Commission. . . .

Here, in defendants' 13 January 2016 motion to revise the deputy commissioner's opinion and award, they sought a credit for the A&S disability benefits paid to Haulcy because the program was "fully funded by Employer-Defendant" and "[s]uch credit is established through numerous Opinions & Award of the Commission in relation to Goodyear's A&S program." The A&S records, labeled "Goodyear Accident and Sickness Payment Information," were included as an exhibit on appeal. That exhibit establishes the A&S records were generated from "Human Resource Management Systems," lists "A&S / SWC Benefit Records from 4/14/14 to present," and details forty-one payments to "employee Haulcy, Jennifer L" for periods beginning 11 August 2014 and ending 12 April 2015, totaling $15,521.90. (Original in all caps.) Accordingly, competent evidence supported the Commission's FOF no. 24, which in turn supported its COL no. 6. We therefore overrule this argument.

V. Conclusion

As to defendants' appeal, competent evidence supported the Commission's dispositive FOFs, which supported its conclusion Haulcy suffered a compensable injury on 23 April 2014 and its award of workers' compensation benefits. As to Haulcy's appeal, the Commission properly addressed and adjudicated the A&S credit issue, and competent evidence supported the dispositive FOF, which supported its conclusion defendants were entitled to the A&S credit and its award of that credit. Therefore, we affirm the Commission's 25 April 2017 opinion and award in full.

AFFIRMED.

Judges HUNTER, JR. and DIETZ concur.

IN RE A.J.C.

[259 N.C. App. 804 (2018)]

IN THE MATTER OF A.J.C.

No. COA18-41

Filed 5 June 2018

Termination of Parental Rights—jurisdiction—personal—service of summons—service by publication

The trial court lacked personal jurisdiction over a father in a termination of parental rights proceeding where the county Department of Social Services (DSS) attempted service by publication after personal service by the deputy sheriff was unsuccessful, because DSS failed to file an affidavit showing the circumstances warranting the use of service by publication and counsel's mere act of notifying the court of her client's absence did not constitute a general appearance by the father.

Appeal by respondent-father from order entered 11 October 2017 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 10 May 2018.

No brief filed for petitioner-appellee New Hanover County Department of Social Services.

Winston & Strawn LLP, by Joanna C. Wade and Elizabeth J. Ireland, for guardian ad litem.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Joyce L. Terres, for respondent-appellant father.

ARROWOOD, Judge.

Respondent-father appeals from an order terminating his parental rights in the minor child "Alex."[1] Because the trial court lacked personal jurisdiction over respondent-father, we vacate the order.

I. Background

In March 2016, New Hanover County Department of Social Services ("DSS") obtained non-secure custody of three-year-old Alex and filed a

1. A pseudonym chosen by the parties is used to protect the identity of the juvenile.

juvenile petition alleging he was neglected and dependent. At the time the petition was filed, Alex was living with respondent-father and his girlfriend, Ms. H. Respondent-mother had not been in contact with Alex for two years, and her location was unknown. DSS alleged it had received a series of child protective services ("CPS") reports regarding substance abuse by respondent-father, domestic violence by Ms. H., and general "parenting concerns." Respondent-father acknowledged to DSS that he was taking Ms. H.'s subutex prescription and "needed the Department to take custody of [Alex] so he could go to substance abuse treatment." However, he declined an inpatient treatment bed arranged by DSS and did not seek outpatient treatment. Ms. H., who was Alex's primary caretaker, had served time in prison for felony child abuse and had additional convictions for cocaine possession and "multiple domestic violence related charges."

Based on the parties' stipulation to the petition's allegations, the trial court adjudicated Alex neglected and dependent by order entered 29 April 2016. The court ordered respondent-father to comply with conditions of his Family Services Agreement ("FSA") with DSS by following all recommended mental health and substance abuse treatment; submitting to random drug screens requested by DSS or the guardian *ad litem* ("GAL"); taking all medications as prescribed; completing an approved parenting course; maintaining stable employment and housing; and attending scheduled visitations with Alex. If respondent-father chose to remain in a relationship with Ms. H., the court ordered them to attend couples counseling and follow any recommendations. It further ordered Ms. H. to complete an approved parenting course.

In January 2017, the trial court established concurrent permanent plans for Alex of reunification with respondent-mother and reunification with respondent-father. Based on respondents' lack of progress with their FSAs, the court on 2 June 2017 changed the concurrent permanent plans to adoption and reunification and ordered DSS to file for termination of parental rights.

DSS filed a petition to terminate the parental rights of respondent-mother and respondent-father on 19 June 2017. On 11 July 2017, the trial court granted a motion to withdraw filed by respondent-father's appointed counsel in the neglect and dependency proceeding. By order entered 18 July 2017, the court appointed counsel Dawn Oxendine to represent respondent-father in the termination proceeding. *See* N.C. Gen. Stat. § 7B-1101.1(a) (2017).

The trial court held a hearing on the petition to terminate respondent-father's parental rights on 11 September 2017.[2] When respondent-father did not appear at the hearing, the court released his appointed counsel, Ms. Oxendine. The court heard testimony from the CPS worker and foster care social worker assigned to Alex's case and adjudicated the existence of grounds for termination of respondent-father's parental rights for neglect pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2017). The court received the GAL's report with regard to disposition and determined that Alex's best interest would be served by termination. It entered its order terminating respondent-father's parental rights on 11 October 2017. Respondent-father filed timely notice of appeal.

II. Discussion

On appeal, respondent-father challenges the trial court's conclusion that it obtained personal jurisdiction over him in the termination proceeding. He contends he was not properly served with the petition and summons in accordance with N.C. Gen. Stat. § 1A-1, Rule 4(j) (2017). We agree with respondent-father that the trial court lacked personal jurisdiction in this cause and that its order must be vacated.

The relevant law was summarized by this Court in *In re C.A.C.*, 222 N.C. App. 687, 731 S.E.2d 544 (2012):

> Upon the filing of a petition to terminate parental rights, N.C. Gen. Stat. § 7B-1106(a)(1) (201[7]) requires that a summons regarding the proceeding be issued to the parents of the juvenile. Issuance of the summons is necessary to obtain personal jurisdiction over the parents. "Service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j)." N.C. Gen. Stat. § 7B-1106(a) (201[7]). However, when the whereabouts of a parent are unknown, service may be by publication in accordance with N.C. Gen. Stat. § 1A-1, Rule 4(j1).

Id. at 688, 731 S.E.2d at 545 (citations omitted).[3]

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2. The court continued the hearing with regard to respondent-mother in order to allow DSS additional time to effect service upon her by publication. *See* N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2017).

3. As ordered by the trial court, DSS filed a petition for termination of respondents' parental rights. We note DSS could have filed a motion in the ongoing neglect and dependency proceeding under N.C. Gen. Stat. § 7B-1102(a) (2017). Absent circumstances listed in N.C. Gen. Stat. § 7B-1102(b) (2017), a motion is subject only to the notice requirements of N.C. Gen. Stat. § 7B-1106.1 (2017) and may be served by the less exacting methods authorized by N.C. Gen. Stat. § 1A-1, Rule 5(b) (2017), rather than

Here, a summons was issued on the date the petition was filed by DSS, 19 June 2017, but was returned unserved on respondent-father on 12 July 2017. The deputy sheriff who attempted to serve respondent-father noted on the summons that respondent-father "does not stay" at the address listed on the summons or at a second address tried by the deputy.

After failing to obtain personal service, DSS attempted to serve respondent-father by publication under Rule 4(j1) by publishing a notice for three consecutive weeks in *The Duplin Times* between 27 July 2017 and 10 August 2017. When respondent-father did not appear at the termination hearing on 11 September 2017, counsel for DSS advised the trial court as follows:

> Your Honor, we're here for the termination of parental of rights on [Father] on [Alex]. We do have service by publication on the father. We attempted at least three or four addresses to serve him personally. We were under the impression that he lives in Duplin County I believe, and the social worker has made many visits out there. He has lived there, we've been unable to get personal service. It was returned from the Sheriff's Department saying that he was not living there, so we did serve via publication.

The court found that respondent-father "was served with Notice of the Termination of Parental Rights Proceeding by publication in Duplin County . . . pursuant to the North Carolina Rules of Civil Procedure Rule 1A-1, Rule 4([j1])," and that "[a]ll Summons, Service of Process and Notice requirements have been met as to Respondent-Father."

"A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void." *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980) (citing *Sink v. Easter*, 284 N.C. 555, 202 S.E.2d 138 (1974)). The following requirements are set forth in Rule 4(j1):

> A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. . . . If the party's post-office address is known or can with reasonable

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Rule 4(j). However, as DSS did not comply with even the lesser notice and service requirements for a motion in the cause, its decision to proceed by petition is of no consequence.

> diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(a)(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

N.C. Gen. Stat. § 1A-1, Rule 4(j1). "Failure to file an affidavit showing the circumstances warranting the use of service by publication is reversible error." *Cotton v. Jones*, 160 N.C. App. 701, 703, 586 S.E.2d 806, 808 (2003) (citation omitted).

The record before this Court contains "no affidavit showing the circumstances warranting a use of service by publication, or showing [DSS's] due diligence in attempting to locate defendant." *Id.* Although counsel for DSS filed an "Affidavit of Service by Publication" on 16 August 2017, the affidavit merely identifies the affiant as DSS counsel and affirms that notice was run for three consecutive weeks in *The Duplin County Times* on the dates listed. The affidavit did not satisfy Rule 4(j1) because it included no statement of facts regarding diligent attempts to locate respondent-father. *Cotton*, 160 N.C. App. at 703, 586 S.E.2d at 808. We further note DSS adduced no evidence of its compliance with the rule at the termination hearing. Accordingly, the service of respondent-father by publication was invalid. *Id.* at 704, 586 S.E.2d at 808. ("As service by publication on defendant was invalid, the trial court did not have personal jurisdiction over [respondent-father].").

Despite a defect in service, "a court 'may properly obtain personal jurisdiction over a party who consents or makes a general appearance[.]' " *In re C.A.C.*, 222 N.C. App. at 688, 731 S.E.2d at 545 (quoting *In re K.J.L.*, 363 N.C. 343, 346, 677 S.E.2d 835, 837 (2009)). " '[A]ny act which constitutes a general appearance obviates the necessity of service of summons and waives the right to challenge the court's exercise of personal jurisdiction over the party making the general appearance.' "*In re A.J.M.*, 177 N.C. App. 745, 752, 630 S.E.2d 33, 37 (2006) (quoting *In re A.B.D.*, 173 N.C. App. 77, 83, 617 S.E.2d 707, 712 (2005)). Moreover, "it has long been the rule in this jurisdiction that a general appearance by a party's attorney will dispense with process and service." *Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E.2d 25, 27 (1980).

Here, respondent-father did not attend the termination hearing and did not otherwise make a general appearance in the proceeding. Although his appointed counsel was present at calendar call the morning of the hearing, she was released by the trial court after the following exchange:

> MS. OXENDINE: I have not been able to contact with [respondent-father]. We do have an interpreter. I don't think he's here yet or we can -- or if we're expecting him, but I sent a letter to him that wasn't returned and hasn't responded to my letter.
>
> THE COURT: All right. I'll come back to that in just a minute, and before I release you, I'll just ask you to step out in the lobby one last time.
>
> MS. OXENDINE: Absolutely.
>
> (Other matters heard 9:42 a.m. until 9:50 a.m.)
>
> THE COURT: Ms. Oxendine, have you checked.
>
> MS. OXENDINE: I did. He's not [*inaudible*].
>
> THE COURT: All right, then you're released. Thank you.
>
> MS. OXENDINE: Thank you.

Contrary to the GAL's argument on appeal, counsel's mere act of notifying the court of her client's absence does not constitute a general appearance:

> No instance can be found in which a party has been held to have impliedly bound himself to submission, without having asked or received some relief in the cause or *participated in some step taken therein*. Mere presence in the courtroom when the case is called, or examination of the papers in it filed in the clerk's office, is not enough. Nor could a conversation with plaintiff's counsel or the judge of the court, about the case, be regarded as an appearance . . . . The test, . . . is whether the defendant became *an actor in the cause*. . . .

Williams, 46 N.C. App. at 789, 266 S.E.2d at 27 (internal quotation marks and citation omitted; emphasis and ellipses in original); *see also Woodard & Woodard v. Tri-State Milling Co.*, 142 N.C. 98, 100, 55 S.E. 70, 71 (1906) ("The character of the appearance is to be determined by what the attorney actually did when he appeared in Court, at the call of the case.").

"A judgment against a defendant is void where the court was without personal jurisdiction." *Macher v. Macher*, 188 N.C. App. 537, 539, 656 S.E.2d 282, 284, *aff'd per curiam*, 362 N.C. 505, 666 S.E.2d 750 (2008). Absent proper service of process or a waiver of service by general appearance, the trial court did not obtain personal jurisdiction over respondent-father. Accordingly, we vacate the termination order. *See In re C.A.C.*, 222 N.C. App. at 689, 731 S.E.2d at 545-46.[4]

VACATED.

Judges CALABRIA and INMAN concur.

IN THE MATTER OF J.A.M.

No. COA16-563-2

Filed 5 June 2018

Child Abuse, Dependency, and Neglect—neglect—past injurious environment—failure to remedy

The trial properly adjudicated infant juvenile J.A.M. neglected upon evidence that the mother: (1) continued to fail to acknowledge her role in her rights being terminated as to her six other children; (2) denied the need for social services for J.A.M.'s case; and (3) became involved with the father, despite his past engagement in domestic violence, which contributed to the removal of the other children from the home. This evidence, along with the parents' failure to remedy the injurious environment they created for their children, was sufficient to show a substantial risk of future abuse or neglect of J.A.M.

Judge TYSON dissenting.

On remand by order of Supreme Court in *Matter of J.A.M.*, __ N.C. __, 809 S.E.2d 579 (2018), reversing and remanding the unanimous decision of the Court of Appeals in *Matter of J.A.M.*, __ N.C. App. __, 795 S.E.2d 262 (2016). Originally appealed by respondent from order entered

4. In light of our holding, we do not address respondent-father's additional claim that he was denied effective assistance of counsel.

30 March 2016 by Judge Louis A. Trosch in Mecklenburg County District Court. Originally heard in the Court of Appeals 5 December 2016.

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

Richard Croutharmel for respondent-appellant.

Poyner Spruill LLP, by Caroline P. Mackie, for guardian ad litem.

ARROWOOD, Judge.

This case comes before us on remand from the North Carolina Supreme Court for reconsideration and for proper application of the appellate standard of review to the trial court's findings and conclusions of law. On remand, we consider respondent-mother's appeal from an order adjudicating her daughter, juvenile J.A.M., neglected and ceasing all future reunification efforts with respondent-mother. After careful review, we affirm.

I. Background

Respondent-mother has a long history of involvement with Mecklenburg Department of Social Services, Youth and Family Services ("YFS") that began in 2007 due to allegations of domestic violence. Since then, YFS' involvement with respondent-mother has been primarily related to her history of violent relationships with the fathers of her previous six children, in which the children witnessed domestic violence, and also were caught in the middle of physical altercations. During this time, respondent-mother repeatedly declined YFS services and continued to deny, minimize, and avoid talking about the violence. The most serious incident of violence occurred in June 2012 when "following another domestic violence incident between herself and" one of her children's father, respondent-mother placed one of her children "in an incredibly unsafe situation sleeping on the sofa with [his father] for the night, which resulted in [the child] suffering severe, life-threatening injuries, including multiple skull fractures, at the hands of [the father.]" *Matter of J.A.M.*, __ N.C. at __, 809 S.E.2d at 580. After observing the severity of the injuries the following morning, respondent-mother "did not dial 911 for over two hours[,]" and, "[a]fterwards, she refused to acknowledge [the child's] 'significant special needs' that resulted from his injuries, claiming 'there is nothing wrong with him,' and proceeded to have another child with [the same father] in 2013 when he was out

on bond for charges of felony child abuse." *Id.* at __, 809 S.E.2d at 580. Subsequently, on 21 April 2014, respondent-mother's parental rights were terminated to her six children, largely because she failed "to take any steps to change the pattern of domestic violence and lack of stability for the children since 2007." *Id.* at __, 809 S.E.2d at 580 (internal quotation marks omitted).

YFS received a report on 25 February 2016 that respondent-mother had given birth to J.A.M. On 29 February 2016, DSS filed a juvenile petition alleging neglect of J.A.M. The trial court conducted a contested adjudication hearing on 30 March 2016. The trial court received the adjudication and termination of parental rights orders for respondent-mother and J.A.M.'s father's other children into evidence. J.A.M.'s father's criminal record was also admitted into evidence.

Respondent-mother testified at the hearing, vaguely acknowledging that she made " 'bad decisions' and 'bad choices' in the past, without offering specific examples except for 'giv[ing] men benefits of the doubts.' " *Matter of J.A.M.*, __ N.C. at __, 809 S.E.2d at 580. She also testified:

> Q. Why were your rights terminated?
>
> A. Because when my child came back into -- my kids came back into custody, due to my child being physical injury [*sic*] by his father [ ]. That's --
>
> Q. So your understanding is that your rights to your six other children was -- were terminated because of one child being physically abused?
>
> A. Oh, yes, ma'am. . . .
>
> Q. And what role do you think you played in your child getting hurt by that father?
>
> A. I was upstairs sleeping.
>
> Q. Okay.
>
> A. I didn't have -- I didn't have a role into what my child being hurt [*sic*]. I didn't play a role in that.
>
> Q. And so basically, do you feel that your rights to the six other children, your rights were unjustly terminated?
>
> A. Yes, ma'am. I do feel that way.

On 30 March 2016, the trial court entered an order finding that J.A.M.'s parents had failed to make any substantive progress in their prior cases, and both parents declined to work with YFS and reported not needing any services. The trial court also found:

> Previously [respondent-mother]'s children were returned to her care and ended up back in [YFS'] custody due to the abuse of one of the juveniles and it appeared [respondent-mother] was not demonstrating skills learned by service providers. [Father] did not dispute allegations in the petition. [Respondent-mother] has a [history] of dating violent men and [father] in this case has been found guilty at least twice for assault on a female. [Respondent-mother] acknowledged being aware [father] had been charged [with] assaulting his sister but [respondent-mother] said she never asked [father] if he assaulted his sister despite testifying about the "red flags" she learned in DV servs. [Respondent-mother] testified to having a child [with] the man who abused one of her kids. Dept. [*sic*] received a total of 12 referrals regarding [respondent-mother] and at least 11 referrals pertained to domestic violence. Ct. [*sic*] took into consideration all the exhibits (1-4) submitted by YFS when making its decision. To date, [respondent-mother] failed to acknowledge her role in the juvs. [*sic*] entering custody and her rights subsequently being terminated.

Based on these findings of fact, the trial court adjudicated J.A.M. neglected:

> The child(ren) is/are neglected in that Juv. [*sic*] resides in an environment in which both parents have a [history] of domestic violence/assault and each parent had a child enter [YFS] custody that was deemed abused while in the care of each parent. All of juveniles' siblings were adjudicated [n]eglected. No evidence the parents have remedied the injurious environment they created for their other children.

The trial court placed J.A.M. in DSS custody and ceased all future reunification efforts with respondent-mother. Respondent-mother appeals.

In Matter of J.A.M., __ N.C. App. __, 795 S.E.2d 262 (2016) ("*J.A.M. I*"), this Court first considered respondent-mother's appeal, reversing the trial court's order, holding the findings did not support the conclusion that J.A.M. was neglected, and the trial court's findings of fact were

not supported by clear, cogent, and convincing evidence. *Id.* at __, 795 S.E.2d at 266. The Supreme Court determined that our Court misapplied the standard of review in *J.A.M. I*, and remanded to our Court for reconsideration and proper application of the standard of review. *Matter of J.A.M.*, __ N.C. at __, 809 S.E.2d at 581.

II. Discussion

On appeal, respondent-mother argues the trial court erred in adjudicating J.A.M. to be a neglected juvenile because this conclusion of law is not supported by sufficient findings of fact that are supported by clear and convincing competent evidence. Specifically, she argues there was insufficient evidence related to the care and supervision of J.A.M., and that the trial court erred by relying almost exclusively on the prior neglect adjudications of respondent-mother and J.A.M.'s father's other children. We disagree.

As noted by the Supreme Court, "[i]n a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re J.A.M.*, __ N.C. at __, 809 S.E.2d at 580 (citations and internal quotation marks omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010) (citation and internal quotation marks omitted).

A neglected juvenile

> does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare . . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2017). Under N.C. Gen. Stat. § 7B-101(15), "evidence of abuse of another child in the home is relevant in determining whether a child is a neglected juvenile." *Matter of Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994). "[T]he statute affords the trial judge some discretion in determining the weight to be given such

evidence." *Id.* at 94, 440 S.E.2d at 854. The decision "must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

Here, the trial court's determination that J.A.M. is a neglected juvenile was based primarily on events that took place before J.A.M. was born. The trial court previously terminated respondent-mother's parental rights as to six children on grounds of neglect, willfully leaving the children in foster care or placement outside the home for more than twelve months, and willfully failing to pay a reasonable portion of the cost of care. The trial court also adjudicated J.A.M.'s father's other child, from a previous relationship, as abused and neglected. The records of these past adjudications were incorporated into J.A.M.'s adjudication order by reference. Our Supreme Court held "there was clear and convincing evidence to support the trial court's finding of fact that respondent 'failed to acknowledge her role' both in her previous six children 'entering custody' and in 'her rights subsequently being terminated.' " *In re J.A.M.*, __ N.C. at __, 809 S.E.2d at 581.

The evidence at the adjudication hearing "tended to show that respondent has a long history of violent relationships with the fathers of her previous six children, in which [her] children not only witnessed domestic violence, but were caught in the middle of physical altercations." *Matter of J.A.M.*, __ N.C. at __, 809 S.E.2d at 580 (internal quotation marks omitted). In the most serious incident, one of her children suffered life-threatening injuries, including multiple skull fractures, and, the morning following the abuse, respondent-mother did not dial 911 for over two hours. *Id.* at __, 809 S.E.2d at 580. The trial court found "[n]o evidence the parents have remedied the injurious environment they created for their other children."

In predicting risk of future neglect in a newborn case, the trial court "must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case" and can consider the parents' failure to remedy conditions as evidence of future neglect. *See In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127. Nonetheless, citing *In re A.K.*, 178 N.C. App. 727, 637 S.E.2d 227 (2006), respondent-mother argues that the trial court erred by relying on the prior neglect adjudications of her, and J.A.M.'s father's, children.

In *In re A.K.*, A.K. was adjudicated neglected based upon a previously adjudicated child's neglect and his father's continued failure to

acknowledge the cause of the injuries suffered by the previously adjudicated child. *Id.* at 731, 637 S.E.2d at 229. On appeal, this Court determined that due to the passage of time, the trial court could not find that A.K. was at " 'substantial risk of neglect' because of the father's failure to acknowledge the cause of [the father's other child's] injuries[,]" as the most recent findings that the parents' failed to acknowledge the cause of the injuries "were based on a hearing date nine (9) months before the date A.K. was removed from the home and as many as fifteen (15) months before the petition alleging A.K. was a neglected juvenile came on for hearing." *Id.* at 731, 637 S.E.2d at 229.

The case before us is factually distinguishable from *In re A.K.* Unlike the instant case, the trial court in *In re A.K.* did not receive evidence besides records from the prior adjudication, the "parents were actively involved in the juvenile cases . . . and were cooperating with social workers and reunification requirements established by the [trial] court[,]" and there was no evidence that the conditions that led to the prior adjudication still existed. *See id.* at 729, 731-32, 637 S.E.2d at 228-30.

After our Court decided *In re A.K.*, we considered a case more similar to the *case sub judice*, *In re N.G.*, 186 N.C. App. 1, 650 S.E.2d 45 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008), and distinguished *In re A.K.* therein. In *In re N.G.*, we affirmed an adjudication of neglect based in part on a previously adjudicated child where the parents' continued refusal to accept responsibility for injury to previously adjudicated child and an unwillingness to engage in recommended services or to work with or communicate with DSS was evidence that was predictive of future neglect. *See In re N.G.*, 186 N.C. App. at 9-10, 650 S.E.2d at 51. *In re N.G.* specifically noted that the evidence of the parents' unwillingness to work and communicate with DSS, and failure to engage in DSS' services was not present in *In re A.K. Id.* at 9-10, 650 S.E.2d at 51.

Therefore, similarly, the trial court's findings in the case at bar that respondent-mother (1) continued to fail to acknowledge her role in her rights being terminated to her six other children, (2) denied the need for any services for J.A.M.'s case, and (3) became involved with the father, who engaged in domestic violence, resulting in at least two convictions, even though domestic violence was one of the reasons her children were removed from her home, constitute evidence that the trial court could find was predictive of future neglect. *See In re N.G.*, 186 N.C. App. at 9-10, 650 S.E.2d at 51.

Despite these findings, which are supported by clear and competent evidence, the dissent maintains that the trial court neither found

nor cited evidence that the parents had not remedied the prior injurious environment. We disagree. The trial court found that respondent-mother continued to refuse to work with YFS, failed to acknowledge her role in her rights being terminated to her other six children, and became involved with the father, who the trial court found engaged in domestic violence, even though that was one of the reasons her other children were removed from her home. It was within the trial court's discretion to weigh this evidence in light of the severity of past neglect towards her other children, including the uncontroverted evidence that one child was nearly killed while living in the home, and other children were traumatized. In accordance with our case law, this evidence is consistent with a substantial risk of future injury in the home. *See In re N.G.*, 186 N.C. App. at 9-10, 650 S.E.2d at 51.

The cumulative weight of the trial court's findings are sufficient to support an adjudication of neglect, and our Court may not reweigh the underlying evidence on appeal. Accordingly, we affirm the adjudication of neglect.

AFFIRMED.

Judge BRYANT concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion concludes the trial court's findings support the trial court's conclusion that J.A.M. was neglected. I disagree and respectfully dissent.

I. Definition of Neglect

North Carolina statutes and precedents have consistently required departments of social services to prove by clear and convincing competent evidence that "there be some physical, mental or emotional impairment of the juvenile or substantial risk of such impairment as a consequence of the [parent's] failure to provide 'proper care, supervision, or discipline.' " *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citation omitted). "[T]he decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re E.N.S.*, 164 N.C. App. 146, 151, 595 S.E.2d 167, 170 (2004) (citation omitted).

"[H]istorical facts of the case" necessarily means the current case and not past or closed cases involving other juveniles. *See id.* Petitioner cannot assert a *post hoc ergo propter hoc* fallacy from prior cases to avoid its burden of proof or to overcome the mandates of statutory and case law "procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]"N.C. Gen. Stat. § 7B-100 (2017).

While N.C. Gen. Stat. § 7B-101(15) provides evidence of abuse of another child in the home is *relevant* in determining whether a child is a neglected juvenile, it does not require nor support, standing alone, a determination of present or future neglect. *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994). That fact, while relevant, cannot overcome the parent's constitutional rights and serve as the only basis to support a finding of current neglect or the probability of future neglect of a different child, who is not impacted by the past neglect. *See id.* This lack of support is particularly clear where all other evidence before the court shows no neglect of the child at issue has occurred, and where, as here, YFS' evidence shows the parents are meeting and exceeding the needs of the child. Cases cited in the majority's opinion are inapposite and do not control the facts and conclusions before us.

II. *In re E.N.S.*

In the case of *In re E.N.S.*, the respondent's older child had been removed from her custody. 164 N.C. App. at 148, 595 S.E.2d at 168. The respondent gave birth to E.N.S., while the respondent was a resident in a residential drug treatment facility, and the child was immediately removed from her care. *Id.* Soon after E.N.S.' birth, the respondent violated her established curfew at the treatment facility and took a sleeping pill, which was considered a violation of the facility's policy. *Id.* at 149, 595 S.E.2d at 169.

The respondent subsequently stayed out all night again and smoked marijuana. *Id.* at 151, 595 S.E.2d at 170. The respondent was discharged from the treatment facility. *Id.* Further evidence established that the respondent "still struggle[d] with substance abuse." *Id.* This Court recognized the evidence revealed that the respondent's behavior had not improved and "the trial court carefully weighed and assessed the evidence regarding a past adjudication of neglect and the likelihood of its continuation in the future before concluding that E.N.S. would be at risk if allowed to remain with respondent." *Id.* Unlike those facts, here the evidence shows Respondent gave birth to another healthy child who was taken to an appropriate home. Nothing shows Respondent is taking

drugs or engaging in any activities to put J.A.M. at risk for neglect. All evidence shows J.A.M. is receiving proper care from both parents. *In re E.N.S.* provides no support for the trial court's order or the analysis and conclusions in the majority's opinion.

III. *In re C.G.R.*

In the case of *In re C.G.R.*, 216 N.C. App. 351, 360, 717 S.E.2d 50, 56 (2011), and also unlike the facts before us, "the trial court's finding that Mary was a neglected juvenile was not based only on respondent's prior neglect of Charlie." The trial court made additional findings that the respondent had failed to maintain stable employment and housing and continued to be dependent upon others. *Id.*

In light of the respondent's prior neglect of another child in *C.G.R. and* her demonstrated ongoing inability to maintain housing and employment to support her current child, this Court held "the trial court's finding that Mary 'is at a substantial risk of continued neglect as a result of [the respondent's] failure to provide and maintain stable housing and maintain employment' was supported by the evidence and findings." *Id.*

Here, the trial court's order contains no findings of fact, which are supported by any evidence, and certainly not "clear and convincing competent evidence," that J.A.M. is presently at substantial risk of neglect by Respondent-mother. The trial court's decision "must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child *based on the historical facts of the case*." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999) (emphasis supplied). The historical and current facts *of this case*, regarding J.A.M's care, shows no evidence to support either YFS' allegations or an adjudication of neglect. YFS' allegations of neglect of J.A.M. cannot be validated solely on what occurred to Respondent's other children in a wholly different past and closed case where all evidence before the court shows J.A.M. is receiving proper care. *See id.*

IV. Lacking Findings of Fact

The trial court neither found nor cited *any* evidence presented by YFS that either of the parents had not remedied the issues that caused the prior injurious environments. I do not diminish Respondent's prior history in a closed and unrelated case with her other children, and the fact one of her children was seriously injured by that child's father, while Respondent slept. However, the uncontroverted testimony both YFS and Respondent presented at J.A.M.'s adjudication hearing "on the historical facts of the case" shows she has not been neglected by either parent. *See id.*

The court did not find J.A.M. had suffered from any neglect or abuse, or that there is any future probability that she is at a substantial risk to suffer from any physical, mental, or emotional impairment as a consequence of living in Respondent-mother's home. *See In re M.P.M.*, 243 N.C. App. 41, 52, 776 S.E.2d 687, 694 (2015) *aff'd per curiam*, 368 N.C. 704, 782 S.E.2d 510 (2016). The trial court also made no findings of fact regarding any current domestic violence. No evidence was presented of any instances of domestic violence between Respondent-mother and J.A.M.'s father or anyone else, or that either parent had engaged in domestic violence while in J.A.M.'s presence.

The uncontroverted testimony at the adjudication hearing showed Respondent's home is safe and appropriate for J.A.M., that she was "well-cared-for" by both parents, that no evidence of domestic violence between the parents had been displayed, and that the police had never been called to their residence.

A YFS supervisor testified that Respondent refused to sign their safety assessment, which was solely based upon YFS' previous history with Respondent and her other children, and in direct conflict with the findings from the home visit and subsequent supervised visits. The YFS supervisor testified that when her social worker went to Respondent's home, Respondent reported "she had gone through services, she didn't need any services, and that there was no domestic violence going on[.]" The supervisor testified the home was appropriate for the child, with adequate supplies for her, and there were utilities, adequate food, clothing and a bed.

All the evidence before the trial court shows Respondent-mother and J.A.M.'s father maintained an appropriate home, and both denied any YFS services were required to meet J.A.M.'s needs, or to correct conditions in their home or its suitability for J.A.M. Based upon the home visits and interviews with both parents, YFS had no evidence any such services were needed or authorized. No evidence in the record and no findings support any lack of suitability of J.A.M.'s current home environment or J.A.M.'s need for YFS' intervention in this case.

The trial court's order further does not reflect any current or continuing concern regarding domestic violence involving J.A.M.'s father, as the court's disposition order directs a primary plan of care for J.A.M. to be "reunification with father." Given the intervening years between the prior cases and the record facts found before us, the trial court's findings do not support a legal conclusion that J.A.M. is a neglected juvenile. *See In re A.K.*, 178 N.C. App. 727, 732, 637 S.E.2d 227, 230 (2006) (holding

the trial court erred in relying solely upon nine- and fifteen-month-old orders concluding a juvenile's sibling was neglected to support a conclusion that the juvenile was also neglected).

These findings do not support any conclusion that J.A.M. is a neglected juvenile because she lives in an environment injurious to her welfare. YFS has failed to show any current neglect or "a substantial risk of future abuse or neglect of [J.A.M.] based on the historical facts of the case[.]" *In re E.N.S.* at 151, 595 S.E.2d at 170.

The trial court makes no findings of fact, which are supported by "clear and convincing competent evidence" to support an adjudication that J.A.M. is presently at substantial risk of neglect by Respondent-mother to warrant YFS' intervention. Respondent-mother and J.A.M.'s father have the absolute constitutional, statutory, and natural rights as parents to refuse YFS' services or involvement in raising and parenting their daughter in the absence of any statutory basis for YFS' intervention. *Troxel v. Granville*, 530 U.S. 57, 68-69, 147 L. Ed. 2d 49, 58 (2000), *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982), *In re Stumbo*, 357 N.C. 279, 286, 582 S.E.2d 255, 261 (2003).

YFS failed to provide any "clear and convincing competent evidence" of any provision in the statute to either trigger and mandate their intervention and new involvement. The *only* evidence YFS received and acted upon was a report that Respondent had given birth to another child. YFS' follow-up visit to that report at the home showed J.A.M. was healthy and receiving proper care from both parents, and the conditions in the home were appropriate.

The trial court's disposition order directs a primary plan of care for J.A.M. to be "reunification with father," even though he had also had his parental rights terminated to another child, not involving Respondent-mother. Father's adjudication is not before us.

At this initial adjudication disposition, the trial court failed to allow any unsupervised or meaningful visitation between the parents and their child, notwithstanding that the YFS' court summary admitted at the disposition hearing indicated that the visits between Respondent-mother and J.A.M. were positive and entirely appropriate. The trial court also failed to find or provide for J.A.M.'s reunification with Respondent-mother as either a primary or alternative plan for J.A.M.'s care, custody, or control. This failure, in light of all the "clear and convincing competent evidence" of J.A.M. receiving proper care from both parents in an appropriate home, is deeply troubling, and is a *de facto* termination of

Respondent's parental rights. The majority's opinion fails to recognize, reconcile and properly apply our statutes and case law to this case.

V. Conclusion

A prior and closed case with other children and a different father, standing alone, cannot support an adjudication of current or future neglect of J.A.M by Respondent. The majority's opinion presumes Respondent's continued lack of being a fit and proper parent, based upon past adjudications of her other children. YFS has no authority to intervene and inject itself into these parents' care, custody and control of their child in an appropriate home or to demand a services agreement in the absence of a statutory basis to compel their involvement.

On remand from the Supreme Court of North Carolina for proper application of the appellate standard of review to the trial court's findings and conclusions of law, the majority's opinion wholly fails to follow the statutory and constitutional mandates. Both the Constitution of the United States, the North Carolina Constitution, and the General Assembly's public policy, expressed in the statutes, demands YFS and the trial court to provide "procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]" N.C. Gen. Stat. § 7B-100; *Troxel v. Granville*, 530 U.S. at 68-69, 147 L. Ed. 2d at 58.

YFS failed to carry its burden to show any evidence to support an adjudication of any neglect. The trial court's findings do not support its conclusion to adjudicate J.A.M. as neglected. Exercising the applicable standard of review, Respondent's constitutional and statutory rights as a parent, and the Supreme Court's mandate, the trial court's order is properly reversed. The majority opinion's analysis and conclusions are erroneous. I respectfully dissent.

JOHNSON v. JOHNSON

[259 N.C. App. 823 (2018)]

ERNIE FRANKLIN JOHNSON, PLAINTIFF
v.
KRISTY HUMPHREY JOHNSON, DEFENDANT

No. COA17-502

Filed 5 June 2018

1. Appeal and Error—interlocutory order—substantial right—separation agreement

The trial court's order denying defendant wife's motion to set aside a separation agreement, while interlocutory, affected multiple substantial rights including child custody, division of marital property acquired over sixteen years, and spousal support and was therefore immediately appealable.

2. Divorce—separation agreement—consideration—mutual benefits

A separation agreement was not void for lack of consideration where both parties received items of value and benefits and the agreement included a provision explicitly acknowledging the sufficiency of the consideration.

3. Divorce—separation agreement—date of separation—sufficiency of evidence

There was competent evidence regarding a husband and wife's intention to live separate and apart so as to support the trial court's finding that they separated on the date the separation agreement was signed.

4. Divorce—separated spouses—reconciliation—totality of circumstances

Despite defendant wife's assertion that she and her husband resumed marital relations when she moved back into the home after the parties' date of separation, there was competent evidence to support the trial court's finding that the parties had not reconciled. Where there is conflicting evidence regarding the resumption of marital relations, it is within the province of the trial judge to weigh the evidence and credibility of the witnesses.

5. Divorce—separation agreement—unconscionability

Procedural unconscionability of a separation agreement was not established where the trial court made an unchallenged finding of fact based upon competent evidence that the parties had discussed separation for several weeks prior to preparing the agreement and

that defendant understood what she was signing, and where there was no evidence that defendant was forced to sign the agreement without legal representation or under duress. Further, the agreement was not substantively unconscionable even though plaintiff received most of the marital property where defendant willingly and voluntarily signed the agreement, under which she received benefits such as visitation rights to the children, beneficiary status under plaintiff's life insurance policy, health insurance, and any personal property from the marital residence.

Appeal by defendant from an order entered on 14 December 2016 by Judge Deborah P. Brown in Iredell County District Court. Heard in the Court of Appeals 2 November 2017.

Tharrington Smith, LLP, by Evan B. Horwitz and Jeffrey R. Russell, for plaintiff-appellee.

Homesley, Gaines, Dudley, & Clodfelter, LLP, by Leah Gaines Messick and Christina E. Clodfelter, for defendant-appellant.

BERGER, Judge.

Kristy Humphrey Johnson ("Defendant") appeals from an order entered on December 14, 2016 denying her motion to set aside a separation agreement executed by the parties on May 19, 2015. Defendant argues the trial court erred because the separation agreement (1) lacks consideration, (2) is void as a matter of public policy, and (3) is procedurally and substantively unconscionable. Defendant further argues her marital relationship with Ernie Franklin Johnson ("Plaintiff") was reconciled, thereby voiding the separation agreement. We disagree and affirm the trial court.

Factual and Procedural Background

Plaintiff and Defendant were married on October 16, 1999, and two minor children were born of the marriage. Defendant was convicted of larceny in 2014, and was subject to supervised probation during the last year of the marriage. In January 2015, Plaintiff engaged an attorney to begin drawing up a separation agreement due to familial problems over the Christmas holiday. Plaintiff and Defendant began discussing separation due to Defendant's criminal activity and drug addiction, resulting in the execution of the Separation Agreement on May 19, 2015. Defendant moved out of the marital residence on that day.

In June 2015, Plaintiff allowed Defendant to return to the marital residence under the condition that she not expose the family to drug use or other illegal activity. Defendant lived in the marital residence from June 2015 until August 14, 2016. Upon learning of Defendant's arrest for felonious hit and run on August 14, 2016, Plaintiff changed the locks on the residence. Defendant was incarcerated for one week, and on August 20, 2016, attempted to return to the residence, but was denied entry. Defendant moved to a motel in Statesville where she was employed at the time.

On August 26, 2016, Plaintiff filed a complaint for child custody and child support, and a motion for immediate temporary custody of the minor children. The trial court entered an *ex parte* order granting Plaintiff temporary custody until September 6, 2016. On September 12, 2016, the trial court entered an order granting both Plaintiff and Defendant shared custody of the minor children. Both parties were ordered to complete a Partners in Parenting Education class.

On September 7 and 14, 2016, Defendant filed an answer and counterclaims and an amended answer and counterclaims, respectively, for child custody, child support, post-separation support and alimony, equitable distribution, and attorney's fees. Defendant also filed a motion to set aside the Separation Agreement. On September 12, 2016, the trial court held a hearing on Defendant's motion. On December 14, 2016, the trial court entered an order denying Defendant's motion to set aside the Separation Agreement, finding that the Separation Agreement was enforceable, and that Defendant had not proven by a preponderance of the evidence that the parties had reconciled. From this order, Defendant timely appeals.

Analysis

Defendant argues that the trial court erred in (1) finding the Separation Agreement was supported by consideration; (2) finding that Plaintiff and Defendant did not reconcile; and (3) finding that the Separation Agreement is enforceable because it is not procedurally and substantively unconscionable. We disagree.

I. Jurisdiction

[1] Initially, we must consider if this Court has jurisdiction to hear Defendant's appeal. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Kanellos v. Kanellos*, ___ N.C. App. ___, ___,

795 S.E.2d 225, 228 (2016) (citation and quotation marks omitted). "Generally, there is no right to appeal from an interlocutory order." *Id.* (citation and quotation marks omitted). Here, the appealed order did not resolve all issues of this case and is interlocutory. Defendant had pending claims of child custody, child support, post-separation support, alimony, equitable distribution, and attorney's fees. The trial court had not made a final determination of all rights of all parties in this action.

"An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding . . . ." N.C. Gen. Stat. § 1-277(a) (2017); *see also Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). A two-part test has evolved to evaluate whether a substantial right is implicated: "(1) the right itself must be substantial, and (2) the enforcement of the substantial right must be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *Beroth Oil Co. v. NC Dept. of Transp.*, ___ N.C. App. ___, ___, 808 S.E.2d 488, 496 (2017) (citation and quotation marks omitted).

In the case *sub judice*, Defendant appeals from an order denying Defendant's motion to set aside the Separation Agreement in an action for child custody, child support, post-separation support and alimony, equitable distribution, and attorney's fees. Certainly, Defendant's interests in custody, division of marital property acquired over sixteen years, and spousal support are substantial rights. *See Case v. Case*, 73 N.C. App. 76, 78-79, 325 S.E.2d 661, 663, *disc. rev. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985) (holding that a summary judgment order validating a separation agreement affected equitable distribution as a substantial right and thus was proper for interlocutory review). The trial court's determination of the validity and enforceability of the Separation Agreement directly impacts those rights in this action as Defendant stands to gain or lose rights associated with the Separation Agreement. The trial court's order affected Defendant's substantial rights, and this Court has jurisdiction to consider Defendant's appeal.

II. Separation Agreement

"In reviewing a trial judge's findings of fact, we are 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 . . . ." *Reeder v. Carter*, 226 N.C. App. 270, 274, 740 S.E.2d 913, 917 (2013) (citation and internal quotation marks omitted).

"Findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary." *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (citation, quotation marks, brackets, and ellipses omitted), *rehearing denied*, 364 N.C. 442, 702 S.E.2d 65 (2010).

A. Consideration

[2] Defendant contends the Separation Agreement is void for lack of consideration because both parties did not receive a valuable bargained-for exchange at the execution of their Separation Agreement on May 19, 2015. We disagree.

> Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b).

N.C. Gen. Stat. § 52-10.1 (2017). "[A] separation agreement is void and unenforceable unless it was executed in the manner and form required by N.C.G.S. § 52-10.1." *Raymond v. Raymond*, ___ N.C. App. ___, ___, 811 S.E.2d 168, 174 (2018) (citation, internal quotation marks, and brackets omitted). "A separation agreement is a contract," and must be supported by consideration. *Id.*; *see Harris v. Harris*, 50 N.C. App. 305, 314, 274 S.E.2d 489, 494, *appeal dismissed*, 302 N.C. 397, 279 S.E.2d 351 (1981). Generally, separation agreements establish consideration through the material terms of the mutual promises entered into between the parties. *McDowell v. McDowell*, 61 N.C. App. 700, 704-05, 301 S.E.2d 729, 731 (1983); 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 14.8 (5th rev. ed. 2002).

In the case *sub judice*, the parties entered into a Separation Agreement on May 19, 2015, in which both parties acknowledged there was sufficient consideration at the time of its execution. The contract included a provision defining consideration as "the promises, undertakings and agreements herein contained, as well as other good and valuable consideration, the receipt of which is hereby acknowledged." The Separation Agreement established benefits and rights for both Plaintiff and Defendant, including language giving Defendant rights to child custody and visitation for both minor children, property settlement and distribution, and insurance policy benefits. The Separation Agreement is not void due to a lack of consideration because both parties received

items of value and benefits accorded to them through the execution of the contract.

B. Separation

[3] Defendant next contends the trial court erred by finding the parties separated at the time of the signing of the Separation Agreement, thereby rendering the Separation Agreement void. We disagree.

A separation agreement is valid if it is "executed while the parties are separated or are planning to separate immediately." *Napier v. Napier*, 135 N.C. App. 364, 367, 520 S.E.2d 312, 314 (1999) (citation and internal quotation marks omitted), *disc. review denied*, 351 N.C. 358, 543 S.E.2d 132 (2000). "[S]eparation agreements entered into while the parties are still living together but *planning to separate* may be valid." *Newland v. Newland*, 129 N.C. App. 418, 420, 498 S.E.2d 855, 857 (1998) (citation, internal quotation marks, and ellipses omitted). "The heart of a separation agreement is the parties' intention and agreement to live separate and apart forever[.]" *Williams v. Williams*, 120 N.C. App. 707, 710, 463 S.E.2d 815, 818 (1995) (citation, quotation marks, brackets, and ellipses omitted), *aff'd per curiam*, 343 N.C. 299, 469 S.E.2d 553 (1996).

Here, Plaintiff and Defendant separated on May 19, 2015 when the Separation Agreement was executed. The trial court heard evidence that tended to show Defendant moved out of the marital residence immediately after the execution of the Separation Agreement with no intention of returning. The trial court found Defendant moved out for at least "several weeks," but also recognized that "no other testimony by any other witness . . . substantiate[d] either the Plaintiff's or Defendant's claims."

Despite Defendant's testimony that she never left the marital residence, it is the "trial judge [that] passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (citation and internal quotation marks omitted), *rehearing denied*, 337 N.C. 807, 449 S.E.2d 750 (1994). "[W]e cannot reweigh the evidence and credibility of the witnesses." *Romulus v. Romulus*, 215 N.C. App. 495, 502, 715 S.E.2d 308, 314 (2011). The trial court's finding that the parties separated on May 19, 2015 is supported by competent evidence.

C. Reconciliation

[4] Defendant next contends that if this Court holds the parties separated on May 19, 2015, the parties subsequently reconciled upon Plaintiff moving back into the marital residence a few weeks thereafter. We disagree.

Section 52-10.2 sets the standard of reconciliation between separated spouses: " 'Resumption of marital relations' shall be defined as voluntary renewal of the husband and wife relationship, as shown by *the totality of the circumstances*. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations." N.C. Gen. Stat. § 52-10.2 (2017) (emphasis added). "There are two lines of cases regarding the resumption of marital relations: those which present the question of whether the parties hold themselves out as man and wife as a matter of law, and those involving conflicting evidence . . . ." *Schultz v. Schultz*, 107 N.C. App. 366, 369, 420 S.E.2d 186, 188 (1992), *disc. review denied*, 333 N.C. 347, 426 S.E.2d 710 (1993). If there is conflicting evidence as to whether reconciliation occurred, "the issue of the parties' mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation." *Hand v. Hand*, 46 N.C. App. 82, 87, 264 S.E.2d 597, 599, *disc. review denied*, 300 N.C. 556, 270 S.E.2d 107 (1980) (citation, quotation marks, and brackets omitted).

Here, the trial court made findings of fact that Defendant lived in the marital home at some point in June 2015 until her subsequent arrest and incarceration on or about August 14, 2016. The specific instances of possible reconciliation were found to be unreliable by the trial court, and are specifically addressed in Finding of Fact #7 in the order on appeal:

> Both parties testified that the Defendant moved out of the marital residence for several weeks. The Defendant claims that she moved back in and resumed the marital relationship, including sexual relations. The Plaintiff testified that the last time the Parties had sexual intercourse was in February of 2015, prior to the separation. The Plaintiff allowed the Defendant to live in the marital home at the urging of family members, because the Defendant had no place to live and was struggling to support herself after losing her job at the Department of Social Services. The Defendant, at that time, had a number of criminal charges related to her addiction issues. While the Defendant alleges that she and the Plaintiff shared a bedroom, the Plaintiff testified that they did not share a bedroom, and that the Defendant shared a bedroom with one of their daughters. The Plaintiff did agree that the Defendant went on a family vacation with the Plaintiff and the children, but the Defendant shared a room with the girls. There was no other testimony by any other witness to substantiate either Plaintiff's or Defendant's claims; and, as the

> Defendant has the burden of proof, the Court cannot find there was a reconciliation.

Although there was evidence to the contrary, the competent evidence supports the trial court's finding that the parties did not reconcile after Defendant moved back into the marital residence. *See Sisk*, 364 N.C. at 179, 695 S.E.2d at 434. Plaintiff testified:

> My family and I had discussions that she really had no place to go, nothing--no family. I talked to her dad, her dad wouldn't allow her in her home--or in their home. It ended up where we offered--stay here, we're not reconciling. There will be no marriage. We'll help, but no drugs, no trouble, no money, no money loss, it can't continue.

It is not this Court's role to "reweigh the evidence and credibility of the witnesses." *Romulus*, 215 N.C. App. at 502, 715 S.E.2d at 314. "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." *Phelps*, 337 N.C. at 357, 446 S.E.2d at 25 (citations and quotation marks omitted). The trial court's findings that the parties did not reconcile is supported by competent evidence and is conclusive on appeal. *See Sisk*, 364 N.C. at 179, 695 S.E.2d at 434. Accordingly, we hold the trial court did not err in determining Plaintiff and Defendant did not reconcile because the trial court's findings of fact are supported by competent evidence, despite some evidence to the contrary.

Because we hold the parties did not reconcile, we do not reach Defendant's argument that the reconciliation clause in the Separation Agreement is void under public policy. For the clause to be implemented, reconciliation would have had to occur. Therefore, this issue is dismissed.

D. Unconscionability

[5] Defendant next contends the Separation Agreement is unenforceable as a whole because (1) it is procedurally unconscionable since Defendant signed the Separation Agreement under duress and without legal representation; and (2) it is substantively unconscionable because Plaintiff received too much of the marital property and Defendant waived her rights of post-separation support and alimony. We disagree.

"Unconscionability is an affirmative defense, and the party asserting it bears the burden of establishing it." *Rite Color Chemical Co. v. Velvet*

Textile Co., 105 N.C. App. 14, 20, 411 S.E.2d 645, 649 (1992) (citation omitted). "The question of unconscionability must be determined as of the time the contract was executed, N.C.G.S. § 52B-7(a)(2), and after any issues of fact are resolved, presents a question of law for the court." *King v. King*, 114 N.C. App. 454, 458, 442 S.E.2d 154, 157 (1994) (citation omitted).

"Separation and/or property settlement agreements are contracts and as such are subject to recission on the grounds of (1) lack of mental capacity, (2) mistake, (3) fraud, (4) duress, or (5) undue influence." *Sidden v. Mailman*, 137 N.C. App. 669, 675, 529 S.E.2d 266, 270 (2000) (citation omitted). "Furthermore, these contracts are not enforceable if their terms are unconscionable." *Id.* (citations omitted). "Procedural unconscionability involves bargaining naughtiness in the formation of the contract, i.e., fraud, coercion, undue influence, misrepresentation, inadequate disclosure[,] [while] [s]ubstantive unconscionability involves the harsh, oppressive, and one-sided terms of a contract, i.e. inequality of the bargain." *King*, 114 N.C. App. at 458, 442 S.E.2d at 157 (citations, internal quotation marks, and ellipses omitted).

The trial court made a finding addressing the execution of the Separation Agreement between the parties. Unchallenged Finding of Fact #5 states:

> That both Parties testified that they had been discussing separation for several weeks prior to the separation agreement preparation. The Plaintiff wanted to separate because of the Defendant's addiction to pain medication, and her resulting criminal activity due to her addiction. The Defendant admitted that she has been addicted to opiates, but that she had begun suboxone treatments prior to the preparation of the separation agreement. The *Defendant insisted that she was not under the influence of pain medication when she signed the agreement and that she understood what she was signing.*

(Emphasis added). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). Because Defendant does not challenge Finding of Fact #5, we accept that she understood what the Separation Agreement terms meant and included.

Defendant argues procedural unconscionability because of her lack of legal representation. Defendant's lack of legal representation does not impute a lack of capacity amounting to procedural unconscionability.

See Weaver v. St. Joseph of the Pines, Inc., 187 N.C. App. 198, 213, 652 S.E.2d 701, 712 (2007). "[T]he law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing, or that he has made an improvident contract, when he could inform himself and has not done so." *Leonard v. Power Co.*, 155 N.C. 10, 14, 70 S.E. 1061, 1063 (1911). Both parties testified that Plaintiff offered to pay for Defendant's legal representation while separating if she so chose, but Defendant declined. Defendant's failure to engage legal representation does not afford her a remedy under the theory of procedural unconscionability. Accordingly, we find no error.

Defendant contends that she was under duress at the time of signing and that Plaintiff failed to adequately disclose assets and financial holdings to her at the execution of the Separation Agreement. Defendant alleges Plaintiff did not accurately represent his assets in his personal businesses, retirement accounts, and personal income.

"Duress exists where one, by the *unlawful* act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." *Stegall v. Stegall*, 100 N.C. App. 398, 401, 397 S.E.2d 306, 307 (1990) (citation and quotation marks omitted), *disc. review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991); *Duress*, *Black's Law Dictionary* (8th ed. 2004) ("[D]uress is considered a species of fraud in which compulsion takes the place of deceit in causing injury.").

"A duty to disclose arises . . . [when] a fiduciary relationship exists between the parties to the transaction." *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119, *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986). "The relationship of husband and wife creates such a duty." *Id.* (citation omitted). However, "[t]ermination of the fiduciary relationship is firmly established when one or both of the parties is represented by counsel." *Id.* (citations omitted).

The trial court found that Defendant signed the Separation Agreement after reviewing it at Plaintiff's attorney's office. The trial court heard competent evidence that Defendant read the agreement, declined Plaintiff's offer to pay for an attorney to represent her, and that she knew what the Separation Agreement contained and put in effect. Through Plaintiff's testimony, and corroboration by Defendant's own admission, the parties had been in separation negotiations for weeks prior to the execution of the Separation Agreement.

The trial court made the conclusion of law that Defendant "failed to show by the preponderance of the evidence, that . . . the separation agreement was signed as a result of coercion, duress or undue influence or inadequate disclosure; or that the terms of the separation agreement are unconscionable." We hold that the trial court's conclusion of law is supported findings of fact that are supported by competent evidence. For the reasons stated above, we hold there was no procedural unconscionability, including lack of capacity, duress, or inadequate disclosure, present at the execution of the Separation Agreement.

Defendant next contends the Separation Agreement was substantively unconscionable because it contains "harsh, one-sided, and oppressive terms." We disagree.

For a contract to be substantively unconscionable, the "inequality of the bargain . . . must be so manifest as to shock the judgment of a person of common sense, and the terms so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *King*, 114 N.C. App. at 458, 442 S.E.2d at 157 (citation, quotation marks, and ellipses omitted). "[T]here is no requirement for the trial court to make an independent determination regarding the fairness of the substantive terms of the agreement, so long as the circumstances of execution were fair." *Id.* (citation and quotation marks omitted).

The trial court made the following finding of fact:

> That the [c]ourt finds that while the separation agreement gives a vast majority of the marital assets to the Plaintiff, the Defendant did receive certain benefits, such as health insurance and remained beneficiary of the Plaintiff's life insurance. The Plaintiff also agreed that the Defendant could have any of the personal property that she wanted. The Defendant testified that she received virtually no personal property. However, the Defendant was arrested on August 14, 2016 after being involved in a Felonious Hit and Run, and stayed in jail for a week before making bond. The Plaintiff changed the locks to the residence after her arrest and did not allow the Defendant to return. The Plaintiff has offered to bring the Defendant any property she wants, but says that she will not indicate what property she wants.

The trial court heard evidence that Defendant willingly and voluntarily signed the Separation Agreement. Defendant received visitation

rights to the minor children, beneficiary status from Plaintiff's life insurance policy, health insurance, and any personal property from the marital residence. The trial court's findings were supported by competent evidence and it is not this Court's role to reweigh the value of the contract's substantive terms. Accordingly, we hold that the Separation Agreement was not substantively unconscionable.

Conclusion

The Separation Agreement was not void for lack of consideration, as both parties received items of value upon its execution. The trial court's findings of fact are supported by competent evidence that the parties did separate after the execution of the Separation Agreement. There is not sufficient evidence on appeal to find the trial court erred in finding the parties did not reconcile. Defendant has not put forth evidence that tends to show she did not understand the material terms of the Separation Agreement or that she was forced into signing it without legal representation or under duress. For the foregoing reasons, we hold that the Separation Agreement signed by Plaintiff and Defendant was not substantively unconscionable.

AFFIRMED.

Judges DAVIS and ZACHARY concur.

CHARLENE PERHEALTH STANDRIDGE, Plaintiff
v.
JAMES EDWARD STANDRIDGE, Defendant

No. COA17-493

Filed 5 June 2018

Divorce—equitable distribution—claims filed prior to separation date—no jurisdiction

Where the parties filed their claims for equitable distribution prior to their stipulated date of separation, the trial court had no subject matter jurisdiction to enter an equitable distribution order.

Appeal by plaintiff from order entered 31 January 2017 by Judge Regina M. Joe in District Court, Richmond County. Heard in the Court of Appeals 4 October 2017.

Buckner Law Office, PPLC, by Richard G. Buckner, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

STROUD, Judge.

Plaintiff Charlene Perhealth Standridge ("Wife") appeals from the trial court's equitable distribution order. Wife argues that the trial court erroneously concluded that it could not consider for equitable distribution funds defendant James Edward Standridge ("Husband") had deposited into his personal account and farm account but later withdrew. Because no claim for equitable distribution was filed after the parties' date of separation, the trial court did not have subject matter jurisdiction to enter the equitable distribution order, so we do not reach this issue on appeal and instead must vacate the order.

Background

Husband and Wife were married on 26 November 1992. On 15 April 2015, Wife filed her complaint for divorce from bed and board and equitable distribution of the marital property. On 15 June 2015, Husband filed a motion to dismiss, answer, and counterclaims for divorce from bed and board and equitable distribution.

A pretrial order was entered on 14 April 2016 and the parties stipulated to several facts, including their date of separation, 12 September 2015. On 21 January 2017, following a hearing, the trial court entered an equitable distribution order. In the order, the trial court found as fact that "although this action was filed on April 15, 2015, the final date of separation of the parties for purposes of this trial and of this Order is by stipulation of the parties September 12, 2015." Wife timely appealed to this Court.

Subject Matter Jurisdiction

Neither party raised a question of jurisdiction on appeal, but where the record shows subject matter jurisdiction does not exist, this Court should address it *ex mero motu*:

> The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court. When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. Every court necessarily has the inherent judicial

> power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction.

Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 580, 350 S.E.2d 83, 85-86 (1986) (citations omitted). *See also Carpenter v. Carpenter*, 245 N.C. App. 1, 8, 781 S.E.2d 828, 835 (2016) ("It is well settled that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." (Citation and quotation marks omitted)). In addition, if a court does not have subject matter jurisdiction over a claim, the parties cannot confer jurisdiction on the court by their agreement to have the court rule on their case. *See State v. Fisher*, 270 N.C. 315, 318, 154 S.E.2d 333, 336 (1967) ("It is well established law that the parties cannot, by consent, give a court jurisdiction over *subject matter* of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver or estoppel.").

Under the North Carolina General Statutes, a party may assert a claim for equitable distribution only after the parties have separated:

> (a) *At any time after a husband and wife begin to live separate and apart from each other*, a claim for equitable distribution may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f).

N.C. Gen. Stat. § 50-21(a) (2017) (emphasis added). Where a claim for equitable distribution is filed prior to the date of separation, the trial court does not have subject matter jurisdiction over the claim. *See Atkinson v. Atkinson*, 132 N.C. App. 82, 510 S.E.2d 178 (J. Greene, dissenting), *reversed for the reasons stated in the dissent*, 350 N.C. 590, 516 S.E.2d 381 (1999) (per curiam).[1] The timing of the pleadings created

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1. Judge Greene's dissent, which the Supreme Court adopted as its majority, stated: "I accept the general premise that Judge Smith, who entered the order in dispute dismissing plaintiff's claim for equitable distribution (ED), could not overrule Judge Cobb's earlier order denying defendant's motion to dismiss plaintiff's ED claim. It appears the basis for both motions (*i.e.*, that plaintiff and defendant were not separated at the time the ED claim was filed and it therefore was premature) was the same. . . . In addressing the merits of the motion to dismiss, Judge Smith concluded that plaintiff's ED claim was not asserted after the date of separation and before the entry of the divorce, thus making it invalid. I agree. There are findings to support this conclusion and those findings are supported in

the same jurisdictional defect in *Miller v. Miller*, __ N.C. App. __, __, 799 S.E.2d 890, 893 (2017), where the wife filed a complaint for divorce from bed and board and equitable distribution while the parties were still living together, and the husband filed an answer which also alleged "the parties were 'not living separate and apart.' " *Id.* at __, 799 S.E.2d at 893. The parties did not begin living separate and apart until months after the filing of the complaint and answer. *Id.* at __, 799 S.E.2d at 893. While the trial court had no jurisdiction to enter an equitable distribution order based upon the initial pleadings, the final outcome in *Miller* was different because the jurisdictional defect was addressed at the trial court level and ultimately the equitable distribution claim was preserved. *Id.* at __, 799 S.E.2d at 899.

This Court has found subject matter jurisdiction where an original request for equitable distribution was filed prior to the parties' actual date of separation, but a party later filed a counterclaim requesting equitable distribution after the date of separation. *See Gurganus v. Gurganus*, __ N.C. App. __, __, 796 S.E.2d 811, 815 ("Concerning the required separation of the parties as a prerequisite for jurisdiction to adjudicate an equitable distribution claim, there is no indication in the record that the parties were separated at the time plaintiff filed her complaint. The record does show, however, that the parties separated on or about 22 March 2001, before defendant filed his answer and counterclaim. . . . Therefore, regardless of whether the parties were separated at the time plaintiff filed the complaint, the record is clear that the parties were separated by the time defendant asserted his claim for equitable distribution. Therefore the trial court did have subject matter jurisdiction to equitably distribute the marital property."), *disc. rev. denied*, 369 N.C. 753, 799 S.E.2d 621 (2017).

But the present case differs from *Gurganus* because both claims for equitable distribution here occurred prior to the date of separation. Wife filed her complaint on 15 April 2015 requesting a divorce from bed and board from Husband. In her complaint, Wife noted that the parties

> were married on November 26, 1992 in Richmond County, North Carolina, and lived together as husband and wife until sometime in 2004, and since that time, although they have continued to live under the same roof, they have

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this record. Because plaintiff had no valid ED claim prior to the time she dismissed it, the refiling of that same claim is also invalid." *Atkinson*, 132 N.C. App. at 90, 510 S.E.2d at 182 (J. Greene, dissenting) (citations omitted).

> been living in a constant state of separation from each other, and have at no time since 2004 resumed the marital relationship which formerly existed between them.

Wife's 15 April 2015 complaint requested an equitable distribution of the marital property of the parties. Husband filed his motion, answer, and counterclaim -- including a claim for equitable distribution -- on 15 June 2015. Husband alleged that the parties "are not separated and continue to reside with one another in the same house as a married couple." Wife filed her reply to the Husband's counterclaim on or about 14 July 2015 and admitted "that the parties continue to live in the same house[.]" The parties stipulated in the pretrial order that their date of separation was 12 September 2015 -- roughly five months after Wife's complaint was filed and three months after Husband's counterclaim. Thus, while both parties raised a claim for equitable distribution, both raised it *prior* to the date of separation.

No claim for equitable distribution was made after the date of separation, so the trial court did not have subject matter jurisdiction over equitable distribution of the marital property. We must vacate the trial court's order.

Conclusion

For reasons stated above, we vacate the trial court's order on equitable distribution.

VACATED.

Judges HUNTER and TYSON concur.

STATE v. CLAPP

[259 N.C. App. 839 (2018)]

STATE OF NORTH CAROLINA
v.
JOHN CLAPP III, DEFENDANT

No. COA17-1104

Filed 5 June 2018

1. Motor Vehicles—driving while impaired—probable cause—findings of fact

Three of the four findings of fact challenged by the State regarding defendant's second encounter with a law enforcement officer for impaired driving in the same night were not supported by competent evidence. Defendant was stopped for impaired driving 30 minutes after being released from his first arrest for impaired driving, not 40 minutes; there was no evidence defendant was wearing a leg brace on the night in question so as to induce the officer to inquire about mobility issues; and the evidence did not support a finding that the officer observed no other signs of defendant's impairment.

2. Motor Vehicles—driving while impaired—probable cause—totality of circumstances

The trial court erred in granting defendant's motion to suppress evidence regarding his second driving while impaired arrest in the same night where there was sufficient and uncontroverted evidence establishing probable cause. The law enforcement officer observed several signs that defendant had been drinking and was under the influence of alcohol, defendant admitted that he had driven his car after being released from his first arrest for impaired driving, and the officer had personal knowledge of defendant's blood alcohol level one hour and forty minutes prior to the second encounter. The officer testified that according to the standard elimination rate of alcohol for an average person, he believed defendant was still impaired during the second encounter. These factors, taken as a whole, were sufficient to support a reasonable basis for believing defendant committed the offense of impaired driving.

Appeal by the State of North Carolina from an order entered 31 May 2017 by Judge Patrice A. Hinnant in Wilkes County Superior Court. Heard in the Court of Appeals 16 April 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellee.

BERGER, Judge.

John Leonard Clapp III ("Defendant") was arrested on September 5, 2015 for driving while impaired. Less than three hours later, Defendant was again arrested for driving while impaired and, because of his first arrest, driving while license revoked. Defendant moved to suppress evidence which the State planned on using to prove his second driving while impaired arrest, and the trial court granted this motion. The State appeals, arguing that the uncontroverted evidence was sufficient to establish probable cause for Defendant's arrest. We agree, and therefore reverse.

Factual and Procedural Background

Defendant's motion to suppress was heard in Wilkes County Superior Court on May 15, 2017. The State's witnesses at the suppression hearing were Officer Tyler Hall and Officer Craig Greer of the North Wilkesboro Police Department. Defendant did not introduce any evidence.

Evidence presented by the State tended to show that on September 5, 2015, officers with the North Wilkesboro Police Department pulled Defendant over at a Wendy's restaurant and arrested him for driving while impaired at approximately 9:30 p.m. Officer Hall parked Defendant's BMW 750i in the Wendy's parking lot and locked the vehicle.

Officer Hall transported Defendant to the county jail, where Defendant provided a breath sample for analysis at 10:25 p.m. Defendant's blood alcohol concentration based on the EC/IR II breath analysis was 0.16 grams of alcohol per 210 liters of breath. Defendant was then transferred to the magistrate's office where he was notified his license had been revoked because of his arrest. He signed a written promise to appear for his court date, and was released from the county jail at 11:35 p.m.

Thirty minutes later, at 12:05 a.m. on September 6, 2015, Officer Hall saw Defendant in the driver's seat of his BMW at a gas station approximately one-half mile from the Wendy's. No one else was in the vehicle and the engine was running. Defendant's fiancée was beside him in a different vehicle. Officer Hall testified:

> [The State:] Can you tell the Court about your observations of [Defendant's] physical appearance on the second occasion and what you observed?

[Officer Hall:] [Defendant] had an odor of alcohol coming from his person, he had slurred speech, red, glassy eyes and he was unsteady on his feet.

[The State:] You said an odor of alcohol, how strong was the odor of alcohol?

[Officer Hall:] It was a moderate odor of alcohol.

[The State:] Where did you observe these physical appearances; was he inside or outside of the car?

[Officer Hall:] He was outside of the car.

[The State:] Where was the odor of alcohol coming from?

[Officer Hall:] From his breath, it was coming from his person.

[The State:] Prior to arresting [Defendant], did he make any statements to you?

[Officer Hall:] Yes, he made a few statements.

[The State:] Can you tell the Court what statements he made to you, Officer Hall?

[Officer Hall:] He repeatedly quoted, "How am I supposed to leave a $75,000 car sitting in the Wendy's parking lot?" That's in quote.

[The State:] Did he say anything else to you?

[Officer Hall:] Yes. He also informed me that he was just driving the vehicle to where his son was staying or where his son was at the time.

[The State:] Anything else that you remember?

[Officer Hall:] He also asked if I would follow him the rest of the way.

[The State:] You did not perform any field sobriety tests on him; is that correct?

[Officer Hall:] No. Due to [Defendant's] safety, he was unable to safely stand on his feet.

. . . .

> Basically, the fact that he had just an hour and 40 minutes prior blew a positive reading, and for the fact that he was unsteady on his feet, he couldn't safely perform the task. He was not asked to perform the standardized field sobriety testing.

In response to questions on cross examination, Officer Hall testified about standard elimination rates for alcohol in the blood:

> For the average person, which I believe [Defendant] is an average person, a person's blood-alcohol concentration after reaching a peak value, which his peak value was around 16 when he quit drinking, will drop by about 0.015 an hour. For example, if he was to reach a maximum blood-alcohol level of a 15 which he blew a 16, it would take about 10 hours to completely eliminate that alcohol from his bloodstream.
>
> . . . .
>
> Due to the positive reading, we formed the opinion that he still had plenty of alcohol still in his bloodstream.

At the conclusion of the hearing, the trial court stated, "Upon presentation of evidence, review of the cases and contentions of counsel, it appears a basis hasn't been established to allow the Court in its discretion to grant the motion in its entirety."

However, the trial court filed a written order on June 8, 2017 granting the motion to suppress. The trial court made findings of fact that Defendant had a blood alcohol concentration of 0.16 one hour and forty minutes prior to the second encounter with Officer Hall, and that Officer Hall issued an affidavit and revocation report which stated he observed that "Defendant was unsteady on his feet, had a moderate odor of alcohol coming from his person, had red glassy eyes, and had slurred speech."

In granting the motion to suppress, the trial court concluded that "the facts and circumstances known to Officer [Hall] as a result of his observations . . . are insufficient, under the totality of [the] circumstances, to form an opinion in the mind of a reasonable, objective, and prudent officer that there was probable cause to arrest the Defendant for the offense of driving while impaired."

The State entered timely notice of appeal, and argues the trial court erred in granting Defendant's motion to suppress. We agree.

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).

Analysis

I. Trial Court's Findings of Fact

[1] First, the State challenges the trial court's findings of fact in the written order. Specifically, the State argues that the following findings of fact are not supported by competent evidence:

> 10. Officer [Hall] encountered the Defendant at the Wilco-Hess gas station public vehicular area approximately one hour and 40 minutes after the Defendant had blown a 0.16 breath alcohol concentration on the Intoximeter EC/IR-II, and approximately 40 minutes after the Defendant had been released on the initial DWI charge.
>
> . . . .
>
> 12. Officer [Hall] noted in an affidavit to support his traffic report items that were not included in his traffic report – which were that he observed the Defendant was unsteady on his feet, had a moderate odor of alcohol coming from his person, had red glassy eyes, and had slurred speech.
>
> 13. Officer [Hall] did not administer any field sobriety tests to the Defendant. Officer [Hall] did not administer a portable breath test to the Defendant. Officer Hall observed that Defendant was unsteady during the 10-15 minutes of the encounter. Officer Hall did not inquire whether Defendant had any mobility problems although Defendant had a leg brace; whether he had consumed any food, beverage or medication in the interim; what he had done nor where he had been.
>
> . . . .

> 16. Except as noted herein, Officer [Hall] did not observe any other signs of impairment during the second encounter with the Defendant.

The State contends finding of fact 10 is inaccurate because it states that Defendant encountered Officer Hall on the second occasion "approximately 40 minutes after the Defendant had been released on the initial DWI charge." We agree. The uncontroverted evidence was that Defendant had been released from the jail at 11:35 p.m. and Officer Hall approached Defendant in the gas station parking lot at 12:05 a.m. Finding of fact 10 is not supported by competent evidence, and is not binding on this Court.

The State next challenges finding of fact 12 "out of an abundance of caution." The trial court's finding of fact that Officer Hall included his observations that Defendant "was unsteady on his feet, had a moderate odor of alcohol coming from his person, had red glassy eyes, and had slurred speech" in an affidavit and revocation report was supported by competent and uncontroverted evidence. The trial court noted the observations were not in Officer Hall's incident report, but the trial court found they were included in an affidavit and revocation report. This Court is bound by the trial court's finding that Officer Hall issued an affidavit and revocation report which included his observations that Defendant "was unsteady on his feet, had a moderate odor of alcohol coming from his person, had red glassy eyes, and had slurred speech."

The State next argues finding of fact 13 is not supported by competent evidence. We agree. There was no evidence presented that Defendant wore a leg brace or had mobility issues related thereto on September 5-6, 2015. The trial court found as fact that "Defendant had a leg brace" without any evidence to support that finding. On cross examination, Officer Hall testified:

> [Defense Counsel:] Now, [he's] unsteady on his feet, we've had a prior hearing and you know his brace, can you see his brace?
>
> [Officer Hall:] I cannot see his brace.
>
> [Defense Counsel:] May he stand up? Sir, just come right here so you can see his brace. You never seen his brace?
>
> [Officer Hall:] I never seen his brace.

> [Defense Counsel:] Did you ask him before, when he was unsteady on his feet, if he had any mobility problems?
>
> [Officer Hall:] I do not recall.

The trial court's finding that Defendant wore a leg brace at any time relevant to Defendant's arrest for impaired driving is not supported by competent evidence. That Defendant wore a leg brace to a court proceeding seventeen months after his arrest, without more, is irrelevant at best. By his testimony, Officer Hall did not observe any medical device worn by Defendant during their encounters on September 5-6, 2015. Finding of fact 13, as it relates to Defendant's leg brace, is not supported by competent evidence and is not binding on this Court.

The State also argues finding of fact 16 is not supported by competent evidence because there was additional evidence of Defendant's impairment during the second encounter that was known and available to Officer Hall when he arrested Defendant for the second driving while impaired charge. We agree.

Officer Hall's knowledge of Defendant's prior blood alcohol concentration and his observation of the time that had elapsed since the administration of the EC/IR II breath test were signs that Defendant was still impaired during the second encounter. Officer Hall testified that because of Defendant's positive reading less than two hours prior to the second encounter, he believed Defendant "still had plenty of alcohol still in his bloodstream." Officer Hall's opinion was based upon the training he received that the average person eliminates alcohol from the body at a rate of 0.015 per hour from the peak blood alcohol concentration result. Officer Hall observed that Defendant was an average-sized person. Based on his observations of Defendant, his personal knowledge of the time that had passed since Defendant's breath analysis, and his training on alcohol elimination rates, Officer Hall concluded Defendant would still be impaired. Since it should take approximately ten hours for the alcohol in Defendant's blood to be removed from his system, this was a red flag to Officer Hall and a sign that Defendant was probably impaired at the time of the second encounter. The trial court's finding that Officer Hall did not observe any other signs of impairment is not supported by competent evidence, and is therefore not binding on this Court.

Moreover, the uncontroverted evidence presented by the State does not support the trial court's conclusion of law that "the facts and circumstances known to Officer [Hall] as a result of his observations on September 6, 2015, of the Defendant are insufficient, under the totality of [the] circumstances" to establish probable cause.

II. Probable Cause

[2] An officer may arrest an individual if the officer has probable cause to believe that individual has committed a criminal offense. N.C. Gen. Stat. § 15A-401(b) (2017). Our Supreme Court has stated that

> [p]robable cause is defined as those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.

State v. Biber, 365 N.C. 162, 168-69, 712 S.E.2d 874, 879 (2011) (citations and quotation marks omitted). To establish probable cause, "it is not necessary to show that the offense was actually committed, only that the officer had a reasonable ground to believe it was committed." *State v. Tappe*, 139 N.C. App. 33, 36, 533 S.E.2d 262, 264 (2000) (citation omitted). "Probable cause is a flexible, common-sense standard[,]" *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984), that "deals with probabilities and depends on the totality of the circumstances." *State v. Overocker*, 236 N.C. App. 423, 433, 762 S.E.2d 921, 927, *writ denied*, *disc. review denied*, 367 N.C. 802, 766 S.E.2d 686 (2014) (citation and quotation marks omitted).

The offense of driving while impaired for which Defendant was arrested is committed when an individual

> drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
>
> (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 20-138.1 (2017).

Here, the State presented sufficient and uncontroverted evidence establishing probable cause to arrest Defendant for driving while

impaired. Defendant admitted to Officer Hall that he had driven his BMW between their two encounters. During the second encounter, Officer Hall observed that Defendant had red-glassy eyes, a moderate odor of alcohol, slurred speech, and that Defendant was unsteady on his feet to the extent that it was not safe to conduct standard field sobriety tests. While Officer Hall did not observe Defendant's driving behavior, he did have personal knowledge that Defendant had a blood alcohol concentration of 0.16 one hour and forty minutes prior to the second encounter. Officer Hall testified that based upon the standard elimination rate of alcohol for an average individual, Defendant would probably still be impaired. Thus, there was a reasonable basis for Officer Hall to believe that Defendant had driven his BMW while under the influence of alcohol.

The information available to Officer Hall, along with his personal observations of Defendant, when taken as a whole, provided Officer Hall with probable cause to believe Defendant had probably committed the offense of driving while impaired.

Conclusion

Based upon the totality of the circumstances, probable cause existed to justify Defendant's second arrest for impaired driving. The trial court erred in granting Defendant's motion to suppress. Accordingly, we reverse and remand to the trial court.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
TAMMY RENEE HOWARD

No. COA17-1143

Filed 5 June 2018

1. Search and Seizure—search warrant—probable cause—nexus between objects sought and place to be searched

The application for a warrant to search defendant's house and vehicles for evidence of counterfeit merchandise established a sufficient nexus between the objects sought and the place to be searched where the accompanying affidavit stated that counterfeit merchandise had previously been delivered to the home, defendant was continuing to conduct a business selling counterfeit merchandise despite previous warnings and arrests, and the officer had substantiated that defendant resided at the home.

2. Search and Seizure—search warrant—staleness of evidence—prior criminal activity

The Court of Appeals rejected defendant's argument that the only evidence in a search warrant application linking her residence with criminal activity was stale as a matter of law since it was a crime that occurred twenty months earlier. Because of the history and continuous nature of defendant's business selling counterfeit merchandise, the evidence of the prior crime was not so far removed as to be considered stale.

3. Criminal Law—motion to suppress—entry of conclusions of law—statutory requirement

Where the trial court failed to provide any explanation for the denial of defendant's motion to suppress evidence obtained in connection with a search of her home, the Court of Appeals remanded the case to the trial court for entry of appropriate conclusions of law pursuant to N.C.G.S. § 15A-977(f).

Appeal by defendant from judgment entered 16 March 2017 by Judge Daniel A. Kuehnert in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Torrey D. Dixon, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

TYSON, Judge.

Tammy Renee Howard ("Defendant") appeals from judgment entered upon a jury's conviction of felonious use or possession of counterfeit trademark goods with intent to sell and having a value exceeding $10,000. We find no error in the trial court's denial of Defendant's motion to suppress. We remand to the trial court to enter appropriate conclusions of law.

I. Background

On 22 June 2015, North Carolina Secretary of State's Trademark Enforcement Division Special Agent Derek Wiles ("Agent Wiles") obtained a search warrant to search the residence and vehicles located at 13606 Coram Place in Charlotte, North Carolina. During the search of the premises, Agent Wiles and his team discovered counterfeit items located in the house, garage, and inside a van parked adjacent to the house. The officers seized hundreds of counterfeit items, including handbags, watches, and sunglasses, as well as over 2700 designer labels, with an approximate suggested retail value of two million dollars.

Defendant was indicted for felony criminal use of counterfeit trademark on 19 January 2016. On 13 March 2017, she filed a motion to suppress all the evidence recovered and all statements made in connection with the search of 13606 Coram Place. The trial court denied Defendant's motion. Defendant failed to object to the subsequent entry and admission at trial of evidence obtained as a result of the search.

The jury returned a verdict finding Defendant guilty of felony use or possession of counterfeit trademark goods. Defendant was sentenced to 6-17 months imprisonment, which was suspended for 36 months of supervised probation. Defendant was required to serve an active sentence of 45 days during the first 12 months of her probation. Defendant entered timely notice of appeal.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court erred by denying her motion to suppress, and in the alternative, the trial court erred by failing to provide its rationale during its ruling from the bench.

IV. Motion to Suppress

A. Standard of Review

Defendant failed to object at trial to the entry of the evidence obtained from the search of 13606 Coram Place to preserve the error, but has assigned plain error review on appeal. *See State v. Miller*, 198 N.C. App. 196, 198, 678 S.E.2d 802, 805 (2009).

To show plain error, "a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation and internal quotation marks omitted).

B. Probable Cause for Search

Defendant argues the trial court erred in denying her motion to suppress. She asserts no reasonable grounds existed to believe the search would reveal evidence of criminal activity at 13606 Coram Place. We disagree.

A search warrant cannot be constitutionally issued absent a finding of probable cause. U.S. Const. amend. IV; N.C. Const., art. I, § 20. "Probable cause means that there must exist a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Lindsey*, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982) (citation and internal quotation marks omitted).

Our statutes mandate that an application for a search warrant must include a statement under oath that probable cause exists to believe items subject to seizure may be found at the described place that is the subject of the search, and allegations of fact supporting the statement, which may be further supported by one or more affidavits. N.C. Gen. Stat. § 15A-244 (2017). The affidavit "must establish a nexus between the objects sought and the place to be searched. Usually this connection is made by showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are

observed at a certain place." *State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (internal citations and quotation marks omitted).

The Supreme Court of the United States has established a "totality of the circumstances" test to determine whether the State has proved that probable cause exists. *Illinois v. Gates*, 462 U.S. 213, 230, 76 L. Ed. 2d 527, 543 (1983). The Supreme Court of North Carolina adopted this same test. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260-61 (1984). When applying the "totality of the circumstances" test, an "affidavit is sufficient if it supplies reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *Id.* at 636, 319 S.E.2d at 256 (citation omitted).

The affidavit Agent Wiles submitted to establish probable cause for the warrant contains the following information: Agent Wiles possessed twenty-six years of law enforcement experience, during which time he had investigated thousands of cases involving counterfeit merchandise. At the time of the application, he was employed and assigned to the Secretary of State's Trademark Enforcement Division.

On 8 May 2013, a Mecklenburg County police officer informed Agent Wiles that Defendant had been found to be in possession of possible counterfeit items. She was charged with a violation of Charlotte's peddler's license ordinance. The items seized were later confirmed to be counterfeit.

As part of a compliance check/counterfeit merchandise interdiction operation at the DHL International Hub in Charlotte on 7 October 2013, Agent Wiles intercepted two packages from a known counterfeit merchandise distributor in China, addressed to Defendant at 13606 Coram Place. The boxes were inspected and were found to contain counterfeit handbags, wallets, watches, and headphones. Agent Wiles attempted a "controlled delivery" of the packages to 13606 Coram Place, but no one was home. Two other packages previously delivered by DHL were present on the porch. Agent Wiles contacted Defendant, who agreed to meet with him and consented to him bringing the other two packages with him. Defendant consented to a search of the other two packages left at the address, which contained additional counterfeit merchandise. Defendant stated she did not realize the merchandise was counterfeit, voluntarily surrendered it all, and was issued a warning.

Agent Wiles was working as a part of a compliance check outside of the Bank of America Stadium during a Carolina Panthers football game

on 3 November 2013. Defendant, doing business as "Store on Wheels," was found selling counterfeit handbags, wallets, and other items from two SUVs. Defendant was charged with felony criminal use of a counterfeit trademark, and pled guilty to the lesser included misdemeanor charge on 4 March 2014.

During another compliance check, outside of the Charlotte Convention Center on 30 May 2015, Agent Wiles found a booth rented by a business called "Store on Wheels." The booth was unmanned, but contained a large display of counterfeit items. Business cards were found at the booth with the "Store on Wheels" business name on them, along with the name "Tammy" listed as the owner. Prior to applying for the search warrant, Agent Wiles substantiated the address of 13606 Coram Place "to be the location of the [sic] Tammy Renee Howard."

C. Location of Counterfeit Items

[1] Defendant asserts the affidavit failed to contain sufficient evidence to support a reasonable belief that evidence of counterfeit items would be found at 13606 Coram Place.

Defendant argues *State v. Parsons*, __ N.C. App. __, 791 S.E.2d 528 (2016), controls the outcome of this case. In *Parsons*, the defendant was dropped off at a "burned residence and blue recreational vehicle/motor home located at 394 Low Gap Road" after allegedly purchasing decongestant used to manufacture methamphetamine. *Id.* at __, 791 S.E.2d at 538. The officers established surveillance at that location, and witnessed the defendant exiting the recreational vehicle. *Id.* The officers approached and asked the defendant to search the house and recreational vehicle, but the defendant refused. *Id.*

This Court found that those allegations in the affidavit were insufficient to connect the property location with any illegal activity. *Id.* Defendant asserts the finding that "[n]othing in the affidavit provides context to where Defendant's 'home' was or that his 'home' was 394 Low Gap Road" is similar to the situation in this case. *Id.* "[T]he simple fact that an individual is dropped off at a particular address does not establish probable cause to search that address *in the absence of other allegations of criminal activity*." *Id.* (emphasis supplied).

The affidavit in the present case included evidence of counterfeit merchandise being previously delivered to 13606 Coram Place, and evidence Defendant was continuing to conduct her business selling counterfeit items, after previous warnings and arrests, less than a month before the search warrant was executed. Agent Wiles also attested

under oath that he had substantiated Defendant resided at 13606 Coram Place. Even if Agent Wiles "did not spell out in exact detail" how he substantiated Defendant's address, the affidavit includes sufficient evidence connecting the presence of counterfeit materials with the address of 13606 Coram Place. *See State v. Edwards*, 185 N.C. App. 701, 705, 649 S.E.2d 646, 649 (2007).

After viewed in its totality, and not as singular instances or isolated events, sufficient evidence supports a reasonable cause to believe a search of 13606 Coram Place would produce contraband evidence of Defendant's criminal activity. *See Arrington*, 311 N.C. at 636, 319 S.E.2d at 256. Defendant's argument is overruled.

D. Evidence was not Stale

[2] Defendant also argues the evidence alleged in the affidavit was stale, and specifically asserts the only evidence linking the address of 13606 Coram Place with criminal activity allegedly took place in October 2013, some twenty months prior to the issuance of the search warrant.

"Generally, two factors determine whether evidence of previous criminal activity is sufficient to later support a search warrant: (1) the amount of criminal activity and (2) the time period over which the activity occurred." *McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358. No bright line rule exists governing the amount of time lapse considered reasonable, but such consideration depends "upon such variable factors as the character of the crime and the criminal, the nature of the item to be seized and the place to be searched." *Lindsey*, 58 N.C. App. at 566, 293 S.E.2d at 834 (citation omitted).

In cases where contraband is likely to be sold and disposed of, information obtained over a year prior has been held to be too stale to support probable cause to search. *Id.* at 567, 293 S.E.2d at 835. However, in cases where "the alleged crime is a complex one taking place over a number of years [and] [t]he place to be searched is an ongoing business," information that is fourteen months old is not considered stale. *State v. Louchheim*, 296 N.C. 314, 323, 250 S.E.2d 630, 636 (1979). "[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *McCoy*, 100 N.C. App. at 577, 397 S.E.2d at 358.

Defendant argues this case is more similar to the facts in *Lindsey*, as the evidence concerned counterfeit contraband, likely to be sold and disposed of. However, the evidence in *Lindsey* concerned marijuana, which is a substance not only likely to be sold, but is also "easily

concealed and moved about." 58 N.C. App. at 567, 293 S.E.2d at 835. It appears Defendant conducted her business out of multiple vehicles and a rented booth, making the counterfeit items easy to move. It is reasonable to believe Defendant kept a large stock of contraband inventory on hand for sale, requiring an appropriate storage location. The evidence tends to show Defendant had been conducting this business over a number of years, at numerous locations, and the process was complex, necessitating the acquisition of knock-off merchandise from China and the attachment of false designer labels.

The facts of this case are more similar to those in *Louchheim*, where information supporting the warrant that was fourteen months old was held not to be stale. 296 N.C. at 323, 250 S.E.2d at 636. Because of the history and apparent continuous nature of Defendant's business, evidence that occurred twenty months prior to the execution of the search warrant is not so far removed to be considered stale as a matter of law. Defendant's argument is overruled.

V. Findings of Fact and Conclusions of Law

[3] Defendant alternatively argues this matter should be remanded to the trial court for findings of fact and conclusions of law to support its ruling on her motion to suppress.

After a motion to suppress evidence is presented at the trial court, "[t]he judge *must set forth in the record* his findings of fact and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2017) (emphasis supplied). Our Supreme Court has held, "the absence of factual findings alone is not error because only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling." *State v. Faulk*, __ N.C. App. __, __, 807 S.E.2d 623, 630 (2017) (quoting *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015)) (internal quotation marks omitted). Even so, "it is still the trial court's responsibility to make the conclusions of law." *State v. McFarland*, 234 N.C. App. 274, 284, 758 S.E.2d 457, 465 (2014).

The State argues no material conflicts in the evidence exist, and the trial court's conclusion was clear from its ruling. The record of the suppression hearing reveals no material conflicts existed. Defense counsel called Agent Wiles as a witness, and introduced a copy of the search warrant and a photograph taken at the time the search warrant was executed.

Agent Wiles' testimony revealed that (1) the search warrant had initially included a typographical error, identifying the premise to be

searched as 13605 Coram Place in a few paragraphs; (2) some houses in the location were of a similar construction as Defendant's; and, (3) the warrant referenced past events, specifically the October 2013 incident, where multiple packages delivered by DHL to 13606 Coram Place were found to contain counterfeit evidence.

On cross-examination, the State did not dispute any of the evidence, but clarified that (1) the warrant also contained the correct address; (2) once Agent Wiles realized the typographical error, he had the area secured and returned to the magistrate to correct the address; and, (3) Agent Wiles experienced no issue identifying Defendant's house to execute the search warrant, because he had previously been to her house, specifically in October 2013.

"It previously has been determined that a material conflict in the evidence does not arise when the record on appeal demonstrates that defense counsel cross-examined the State's witnesses at the suppression hearing." *State v. Baker*, 208 N.C. App. 376, 383, 702 S.E.2d 825, 830 (2010). While Agent Wiles was called as Defendant's witness at the suppression hearing, he was a witness for the State in the subsequent trial. Defendant presented evidence at the hearing, which was given by the officer who had applied for and executed the search warrant, and none of which was contradicted by the State's cross-examination.

While no material conflicts exist in the evidence presented at the suppression hearing, the judge failed to provide any rationale from the bench to explain or support his denial of Defendant's motion. The only statement from the trial court concerning Defendant's motion was, "I'm going to allow the case to go forward with some reluctance, but – I'm going to deny the Motion to Suppress." This lack of rationale from the bench "precludes meaningful appellate review." *Faulk*, __ N.C. App. at __, 807 S.E.2d at 630.

The trial court's failure to articulate or record its rationale from the bench supports a remand. *McFarland*, 234 N.C. App. at 284, 758 S.E.2d at 465 ("The mandatory language of N.C. Gen. Stat. § 15A-977(f) . . . forces us to conclude that the trial court's failure to make any conclusions of law in the record was error.").

> Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial. If the trial court determines that the motion to suppress was properly

> denied, then defendant would not be entitled to a new trial because there would have been no error in the admission of the evidence, and his convictions would stand. If, however, the court determines that the motion to suppress should have been granted, defendant would be entitled to a new trial. We have found no other prejudicial error at defendant's trial. Therefore, the trial court's failure to make adequate conclusions to support its decision to deny defendant's motion to suppress does not require that we order a new trial.

McFarland, 234 N.C. App. at 284, 758 S.E.2d at 465 (internal citations and quotation marks omitted).

As in *McFarland* and *Faulk*, we remand for the trial court to make appropriate conclusions of law to substantiate its ruling upon Defendant's motion to suppress. *See id.*; *see also Faulk*, __ N.C. App. at __, 807 S.E.2d at 630.

VI. Conclusion

Applying the "totality of the circumstances" test, Agent Wiles' affidavit accompanying the application for the search warrant for 13606 Coram Place contained sufficient evidence to show the required nexus between the items sought and the location to be searched. *McCoy*, 100 N.C. App. at 576, 397 S.E.2d at 357. Due to the nature of the alleged, continuing criminal activity, the evidence presented in the affidavit was not stale and supports a finding of probable cause. *Id.* at 577, 397 S.E.2d at 358. Defendant has failed to show error, let alone plain error, in the trial court's denial of her motion to dismiss.

The statutorily mandated conclusions of law to support the trial court's denial were not met. N.C. Gen. Stat. § 15A-977(f). We remand to the trial court for entry of appropriate conclusions of law in accordance with the statute and consistent with the precedents cited above. *See McFarland*, 234 N.C. App. at 284, 758 S.E.2d at 465; *see also Faulk*, __ N.C. App. at __, 807 S.E.2d at 630. *It is so ordered.*

NO ERROR IN PART AND REMANDED.

Judges ELMORE and ZACHARY concur.

STATE v. LENOIR

[259 N.C. App. 857 (2018)]

STATE OF NORTH CAROLINA
v.
JESSE JAMES LENOIR

No. COA17-943

Filed 5 June 2018

1. Appeal and Error—issue preservation—motion to suppress—failure to object—plain error review

Defendant did not properly preserve for appellate review the issue of whether probable cause existed to support the issuance of a search warrant where he failed, after his motion to suppress was denied, to object to the introduction of evidence that a shotgun was found in his home. However, because he expressly sought review of the issue for plain error, the Court of Appeals conducted a plain error review.

2. Search and Seizure—probable cause—supporting affidavit—sufficiency of factual support

The trial court erred in denying defendant's motion to suppress evidence of a shotgun in his residence in a prosecution for possession of a firearm by a felon where the law enforcement officer's supporting affidavit did not contain adequate factual information to establish probable cause for a search warrant. The officer's bare assertion that he observed a pipe "used for methamphetamine," without information regarding the officer's training and experience in distinguishing between a pipe used for lawful versus unlawful purposes, any detail about the appearance of the pipe, or any other information connecting defendant or his home to drug use, was insufficient to support the issuance of a search warrant. Where defendant's conviction was based solely on the discovery of the shotgun in his home, the trial court's denial of the motion to suppress evidence of the shotgun amounted to plain error.

Appeal by defendant from judgment entered 16 March 2016 by Judge Robert G. Horne in Rutherford County Superior Court. Heard in the Court of Appeals 21 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Grande, for the State.

W. Michael Spivey for defendant-appellant.

DAVIS, Judge.

In this appeal, we revisit the issue of how much factual information a law enforcement officer's affidavit must contain in order to establish probable cause for the issuance of a search warrant. Because we conclude that the affidavit at issue in this case lacked sufficient detail, we reverse the trial court's denial of the defendant's motion to suppress and vacate his conviction.

Factual and Procedural Background

On 29 July 2013 at 1:45 p.m., Sergeant Chadd Murray of the Rutherford County Sheriff's Office — along with several other law enforcement officers — went to the home of Jesse James Lenoir ("Defendant") in Forest City, North Carolina to conduct a knock and talk. Defendant's brother, David Lenoir ("David"), answered the door and invited the officers into the residence.

Sergeant Murray asked David if there was anyone else in the house, and David responded that no one else was present. Sergeant Murray noticed that a light was on in a back bedroom and asked David if he could "check and make sure nobody was there" for the safety of the officers. David gave his consent, and Sergeant Murray walked to the back bedroom where he saw a woman lying on a bed. Sergeant Murray also observed a "glass smoke pipe" on a dresser in the bedroom.

That same day, Sergeant Murray applied for a search warrant for the residence and submitted a supporting affidavit that stated, in its entirety, as follows:

> On July 29, 2013 I went to 652 Byers Road Lot 10 Forest City, N.C. for a knock and talk. Once at the residence I spoke with the tenant at the residence David Lenoir. Lenoir stated he and his brother Jesse Lenoir both lived there. David consented to a search of the residence and stated no one was inside the residence. In a back bedroom was Dawn Bradley sleeping and I could see a smoke pipe used for methamphetamine in plain view. The bedroom she was in belonged to Jessie [sic] Lenoir. Jessie [sic] was unable to be reached. Dawn would not admit to the smoke pipe being hers but she did stated [sic] Jessie [sic] and Rebecca Simmons stayed in that bedroom as well.

Based upon this affidavit, a search warrant was issued.[1] The officers then conducted a search of the home and discovered a shotgun in the same bedroom where Sergeant Murray had observed the glass pipe. The weapon was hidden from view behind a "speaker box."

On 31 July 2013, Sergeant Murray questioned Defendant about the shotgun, and Defendant admitted that the gun belonged to him. Defendant was subsequently indicted by a grand jury on 4 November 2013 for possession of a firearm by a felon. A jury trial was held on 16 March 2016 before the Honorable Robert G. Horne in Rutherford County Superior Court. Before the trial began, a hearing was held to address an oral motion to suppress made by Defendant. Despite the fact that the motion was not in writing, the State did not object on procedural grounds to its consideration by the trial court, and the court agreed to hear Defendant's motion. Following the arguments of counsel, the trial court orally denied the motion to suppress.

At trial, counsel for Defendant failed to object to the admission of evidence as to the shotgun being found in the residence during the officers' search. On 16 March 2016, the jury found Defendant guilty of possession of a firearm by a felon. The trial court sentenced him to a term of 19 to 32 months imprisonment, suspended the sentence, and placed Defendant on supervised probation for 36 months.

Defendant filed an untimely notice of appeal on 8 April 2018. However, he filed a petition for writ of *certiorari* on 12 September 2016, and this Court granted the petition on 22 September 2016.

Analysis

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress. Specifically, he contends that the search warrant issued for his residence was not supported by probable cause based on the insufficiency of Sergeant Murray's supporting affidavit.

[1] As an initial matter, we must determine whether this issue was properly preserved for appeal. Defendant acknowledges that although he made a motion to suppress the evidence of the shotgun found in his

1. Approximately three hours after obtaining and executing this search warrant, Sergeant Murray obtained a second search warrant for the residence. However, the State did not offer at Defendant's trial any evidence that was seized by the officers while they were executing the second warrant. Therefore, we confine our review to the first search warrant obtained by Sergeant Murray.

home, he failed to object when the State sought to admit that evidence at trial. Our Supreme Court has explained that

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

State v. Golphin, 352 N.C. 364, 463, 533 S.E.2d 168, 232 (2000) (internal citations omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Accordingly, Defendant has not properly preserved this issue for appellate review.

However, in cases where a defendant fails to preserve for appellate review an issue relating to the suppression of evidence we conduct plain error review if the defendant specifically and clearly makes a plain error argument on appeal. *State v. Waring*, 364 N.C. 443, 467-68, 701 S.E.2d 615, 631-32 (2010), *cert. denied*, 565 U.S. 832, 181 L. Ed. 2d 53 (2011). Because Defendant expressly seeks such review in his appellate brief, we review for plain error the issue of whether probable cause existed to support the issuance of the search warrant obtained by Sergeant Murray.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

[2] In conducting plain error review, we must first determine whether the trial court did, in fact, err in denying Defendant's motion to suppress. *See State v. Oxendine*, __ N.C. App. __, __, 783 S.E.2d 286, 292, *disc. review denied*, __ N.C. __, 787 S.E.2d 24 (2016) ("The first step under plain error review is . . . to determine whether any error occurred at all.").

Normally, "[t]he 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). Here, however, the trial court summarily denied Defendant's motion to suppress without making any findings of fact or conclusions of law. Our Supreme Court has held that "only a material conflict in the evidence — one that potentially affects the outcome of the suppression motion — must be resolved by explicit factual findings that show the basis for the trial court's ruling. When there is no conflict in the evidence, the trial court's findings can be inferred from its decision." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (internal citations omitted).

"N.C. [Gen. Stat.] § 15A-244 requires that an application for a search warrant must contain (1) a probable cause statement that the items will be found in the place described, and (2) factual allegations supporting the probable cause statement." *State v. Taylor*, 191 N.C. App. 587, 589, 664 S.E.2d 421, 423 (2008) (citation omitted). Furthermore, "the statements must be supported by one or more affidavits particularly setting forth the circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched." *Id.* (citation, quotation marks, and brackets omitted).

In determining whether to issue a warrant, the magistrate must "make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (citation omitted); *see also State v. McCoy*, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) ("The standard for a court reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant." (citation and quotation marks omitted)).

> Probable cause . . . means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause, nor does it import absolute certainty. . . . If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent man

> would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant.

State v. Campbell, 282 N.C. 125, 128-29, 191 S.E.2d 752, 755 (1972) (internal citation and quotation marks omitted). N.C. Gen. Stat. § 15A-245(a) provides that "information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant[.]" N.C. Gen. Stat. § 15A-245(a) (2017).

In assessing the sufficiency of Sergeant Murray's affidavit, we find instructive several decisions from our appellate courts. In *State v. Benters*, 367 N.C. 660, 766 S.E.2d 593 (2014), law enforcement officers with "extensive training and experience with indoor marijuana growing investigations" received an anonymous tip regarding the defendant's involvement in an indoor marijuana growing operation. *Id.* at 661, 766 S.E.2d at 596. After visiting the address referenced in the tip, the officers observed various gardening materials on the property including potting soil, fertilizer, and seed starting trays. However, they did not see any gardens or potted plants. Based upon their observations as set forth in an affidavit, a search warrant was issued for the property located at that address. *Id.* at 662-63, 766 S.E.2d at 596-97.

In ruling that the affidavit in support of the search warrant application was insufficient to provide probable cause, our Supreme Court stated that it was "not convinced that these officers' training and experience are sufficient to balance the quantitative and qualitative deficit left by an anonymous tip . . . , observations of innocuous gardening supplies, and a compilation of conclusory allegations." *Id.* at 673, 766 S.E.2d at 603 (citation omitted). With regard to the gardening items observed by law enforcement, the Court specifically noted that

> [n]othing [in the affidavit] indicates a fair probability that contraband or evidence of a crime will be found in a particular place beyond [the officer's] wholly conclusory allegations. The affidavit does not state whether or when the gardening supplies were, or appeared to have been, used, or whether the supplies appeared to be new, or old and in disrepair. Thus, amid a field of speculative possibilities, the affidavit impermissibly require[d] the magistrate to make what otherwise might be reasonable inferences

> based on conclusory allegations rather than sufficient underlying circumstances. This we cannot abide.

Id. at 672, 766 S.E.2d at 602 (internal citations and quotation marks omitted).

State v. Beaver, 37 N.C. App. 513, 246 S.E.2d 535 (1978), involved the warrantless seizure of a shot glass from the defendant's vehicle by a law enforcement officer during a routine traffic stop. *Id.* at 514-15, 246 S.E.2d at 537. The shot glass contained a "film of a white substance appearing to be some type of white powder." *Id.* at 517, 246 S.E.2d at 539. This Court held that the seizure was unsupported by probable cause, concluding as follows:

> [W]e cannot say that a white powder residue in a glass gives rise to facts of general knowledge or facts of a particular science so notoriously true as to support a reasonable belief on the part of the seizing officer that he was seizing contraband or evidence of a crime. We think that, absent specific testimony indicating particular knowledge on the part of the officer . . . , a white powder residue in a glass must be taken as equally indicative of lawful substances and conduct as of contraband or unlawful conduct. Such would give rise to a mere suspicion, which will not support a finding of probable cause.

Id. at 519, 246 S.E.2d at 539-40 (citation omitted).

In the present case, Sergeant Murray's affidavit simply stated that he saw "a smoke pipe used for methamphetamine" in a bedroom in Defendant's house. It made no mention at all of Sergeant Murray's training and experience; nor did it present any information explaining the basis for his belief that the pipe was being used to smoke methamphetamine as opposed to tobacco. In addition, the affidavit did not explain how Sergeant Murray was qualified to distinguish between a pipe being used for lawful — as opposed to unlawful — purposes. Indeed, the affidavit did not even purport to describe in any detail the appearance of the pipe or contain any indication as to whether it appeared to have recently been used. It further lacked any indication that information had been received by law enforcement officers connecting Defendant or his home to drugs.

As with the gardening supplies in *Benters* and the white residue in *Beaver*, a pipe — standing alone — is neither contraband nor evidence of a crime. Rather, the pipe referenced in Sergeant Murray's affidavit

"must be taken as equally indicative of lawful substances and conduct as of contraband or unlawful conduct." *Beaver*, 37 N.C. App. at 519, 246 S.E.2d at 540.

While the State cites *State v. Lowe*, 369 N.C. 360, 794 S.E.2d 282 (2016), in support of its contention that the warrant obtained by Sergeant Murray was properly issued, that case is inapposite. In *Lowe*, our Supreme Court held that probable cause supported the issuance of a search warrant where (1) the investigating officer received an anonymous tip that the defendant was selling and storing narcotics at his house; (2) the affidavit in support of the warrant listed the officer's training and experience; and (3) the officer discovered marijuana residue in a garbage bag outside the defendant's residence. *Id.* at 361-62, 246 S.E.2d at 284.

Noting that the affidavit "presented the magistrate with direct evidence of the crime for which the officers sought to collect evidence[,]" the Court ruled that "under the totality of the circumstances there was a substantial basis for the issuing magistrate to conclude that probable cause existed." *Id.* at 365-66, 794 S.E.2d at 286 (citation and quotation marks omitted). The Supreme Court distinguished its ruling in *Lowe* from its prior decision in *Benters* by noting that "[a]lthough there were many reasons the gardening equipment may have been outside the defendant's house in *Benters*, the presence of marijuana residue in defendant's trash offers far fewer innocent explanations." *Id.* at 365, 794 S.E.2d at 286 (citation and quotation marks omitted).

Here, given the absence of additional information in Sergeant Murray's affidavit to support his bare assertion that the pipe was "used for methamphetamine," we hold that the affidavit was insufficient to establish probable cause for the issuance of the search warrant. Accordingly, the trial court erred in denying Defendant's motion to suppress.

Having determined that the trial court erred, we now turn to the issue of whether the error rose to the level of plain error. Defendant was convicted of possession of a firearm by a felon. His conviction was based solely upon the discovery of a shotgun in his home. There is no indication in the record that Sergeant Murray saw the gun — which was hidden from view — prior to seeking the search warrant. Rather, the gun was found only once the search warrant had been obtained and was being executed by the officers.[2]

2. Indeed, the State makes no argument that the shotgun would have been discovered by law enforcement officers even in the absence of the search warrant obtained by Sergeant Murray.

Thus, the trial court's denial of Defendant's motion to suppress necessarily had a probable impact on his conviction because the jury could not have convicted Defendant of possession of a firearm by a felon but for the admission of evidence concerning the shotgun seized during the execution of the search warrant. *See State v. Canty*, 224 N.C. App. 514, 521, 736 S.E.2d 532, 537 (2012) ("Without the search, no weapons would have been found. Without the weapons, Defendant could not have been convicted of . . . possession of a firearm by a convicted felon."), *disc. review denied*, 366 N.C. 578, 739 S.E.2d 850 (2013). Therefore, we hold that the trial court's denial of Defendant's motion to suppress amounted to plain error.[3]

Conclusion

For the reasons stated above, we reverse the trial court's denial of Defendant's motion to suppress and vacate his conviction for possession of a firearm by a felon.

REVERSED AND VACATED.

Judges STROUD and ARROWOOD concur.

3. Based on our holding, we need not reach Defendant's additional argument that he received ineffective assistance of counsel based on his trial counsel's failure to object at trial to the evidence obtained as a result of the search warrant.

STATE OF NORTH CAROLINA
v.
KEVIN JONATHAN MITCHELL, DEFENDANT

No. COA17-212

Filed 5 June 2018

1. Stalking—felonious stalking—violation—no-contact provision

Defendant's stalking charge was properly elevated to a felony where he violated a no-contact provision of multiple court orders then in effect, in part by writing letters while he was in jail. Although the orders were each titled as "Conditions of Release and Release Order," compliance with the conditions is required during the entire prosecution, whether a defendant is being held in a detention facility or released.

2. Obstruction of Justice—common law obstruction of justice—felony—with deceit and intent to defraud

The trial court did not err in refusing to dismiss defendant's charges of felony obstruction of justice and felony attempted obstruction of justice where defendant was charged under the common law. Although common law obstruction of justice was ordinarily treated as a misdemeanor, pursuant to N.C.G.S. § 14-3(b), a misdemeanor may be elevated to a felony if it is done with deceit and intent to defraud. Here, defendant's indictments properly alleged all necessary elements of felonious obstruction of justice.

Appeal by defendant from judgments entered on or about 13 January 2016 and 15 January 2016 by Judge G. Wayne Abernathy in Superior Court, Wake County. Heard in the Court of Appeals 27 September 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for defendant.

STROUD, Judge.

Defendant Kevin Jonathan Mitchell ("defendant") appeals from his convictions of felonious stalking, felonious obstruction of justice, and felonious attempted obstruction of justice. On appeal, defendant argues that the trial court erred by finding that the "Conditions of Release and

Release Order" were in effect while defendant was in custody of the Wake County Detention Center and denying his motion to dismiss the felony stalking charge. He further argues that the court erred by denying his motion to dismiss the felony obstruction of justice charges. For reasons stated below, we find no error with the trial court's judgment.

Background

The State's evidence at trial showed these facts. On 26 December 2014, defendant was in a romantic relationship and living with Nancy[1] and her four children. Defendant is the father of Nancy's youngest son. That evening, Nancy's daughters used her cell phone to text their father. The girls gave the phone back to their mother, and Nancy walked to the bedroom to read the texts. Defendant then entered the room, snatched the phone from Nancy's hand, read the text, and jumped on her. He choked Nancy and pushed her down on the bed. Nancy took the phone back from defendant, and then he asked her for keys to the house. While Nancy was looking for her set of keys, defendant sucker punched her in the face. Defendant left and Nancy called the police, who took photographs of Nancy's injuries and eventually spotted defendant walking down the road nearby. Defendant was arrested for assault on a female[2] and taken to the Wake County Detention Center.

On 26 December 2014, after defendant was arrested, a magistrate judge entered an order entitled "Conditions of Release and Release Order" (AOC-CR-200, Rev. 12/12) ("Order 1"), which denied bond and placed defendant on a 48-hour domestic violence hold.[3] In the top portion of the form, the preprinted language states:

> To The Defendant Named Above, you are ORDERED to appear before the Court as provided above and at all

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

2. The parties stipulated in the record on appeal that defendant was charged with assault on a female on 26 December 2014 in Wake County File No. 14-CR-229975 and then "[s]ubsequently, on January 7, 2015, [defendant] was charged with habitual misdemeanor assault in Wake County File No. 15-CR-200503, the basis of this charge being the December 26, 2014 assault on a female charge in Wake County File No. 14-CR-229975." The parties also stipulated that "[n]one of the documents in Wake County File No. 14-CR-229975 have been included in this Record on Appeal."

3. *See* N.C. Gen. Stat. § 15A-534.1(b) (2017), "Crimes of domestic violence; bail and pretrial release" ("A defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made under this section by a judge. If a judge has not acted pursuant to this section within 48 hours of arrest, the magistrate shall act under the provisions of this section.").

> subsequent continued dates. If you fail to appear, you will be arrested and you may be charged with the crime of willful failure to appear. You also may be arrested without a warrant if you violate any condition of release in this Order or in any document incorporated by reference."

Just below this statement, the following statement was typed into a blank area of the form: "NOT TO HAVE ANY CONTACT WITH [NANCY]." Below this, the magistrate checked the box with this language: "Your release is not authorized."

The lower section of the form is entitled: "ORDER OF COMMITMENT." This portion of the form directed the Wake County Detention Center to hold defendant "for the following purpose: DV HOLD." It also stated that defendant was to be produced "at the first session of District or Superior Court held in this county after entry of this Order or, if no session is held before" 28 December 2014, then he must be brought before a magistrate "at that time to determine conditions of pretrial release."

The back of the Order has four sections which are filled in by either a Judicial Official or Jailer for each court appearance of the defendant. The four sections, from top to bottom, are:

> CONDITIONS OF RELEASE MODIFICATIONS
> SUPPLEMENTAL ORDERS FOR COMMITMENT
> DEFENDANT RECEIVED BY DETENTION FACILITY
> DEFENDANT RELEASED FOR COURT APPEARANCE

The first handwritten notes by the judge under "CONDITIONS OF RELEASE MODIFICATIONS" state that defendant's conditions of release were modified on 28 December 2014 to an $8,000.00 secured bond and "NCWV," an acronym for "no contact with victim." The next modification was on 29 December 2014, when the secured bond was increased to $10,000.00 and "no contact with victim."[4]

Nancy filed a complaint for a Domestic Violence Protective Order under N.C. General Statutes Chapter 50B against defendant alleging he had committed acts of domestic violence against her, and an ex parte domestic violence protective order ("ex parte DVPO") was issued on 29

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4. On 25 September 2017, the State filed a motion to amend the record on appeal, noted that the original record contains only the front page of the Conditions of Release and Release Orders, and asked this Court to allow the record on appeal to be amended so that the back side of these orders may be included. We grant this motion so that we may fully address this issue on appeal.

December 2014, effective until a hearing scheduled on 5 January 2015. Defendant was served with the ex parte DVPO in jail. Nancy did not appear at the 5 January 2015 hearing, so the complaint was dismissed and the ex parte order expired on that date.

On 7 January 2015, a warrant was issued for defendant's arrest for habitual misdemeanor assault in File No. 15 CRS 200503 and another order entitled "Conditions of Release and Release Order" ("Order 2") was entered on the same AOC form as Order 1. In Order 2, defendant's release was authorized upon execution of a secured bond in the amount of $20,000.00. Order 2 includes the exact same provision of "NOT TO HAVE ANY CONTACT WITH [NANCY]" as Order 1. He was also required to provide fingerprints. In the portion of the form entitled "Additional Information" was "Bond doubled pursuant to statute. Defendant has a $10,000.00 bond for 14CR229975." The Order of Commitment portion of the form directed that if defendant was not presented before a district or superior court judge by 9 January 2015, he must be brought before a magistrate "at that time to determine conditions of pretrial release." On the back of Order 2, in "Conditions of Release Modifications," defendant's conditions of release were modified on 8 January 2015 to a $40,000.00 secured bond and no contact with victim.

On 29 January 2015, the assault on a female charge in File No. 14 CR 229965 was apparently dismissed, so Order 1 was no longer in effect[5]. Nancy received six letters from defendant between 2 January 2015 and 23 February 2015. The first letters were cordial but escalated to threats when she did not respond or reply. Nancy testified at trial that the letters led her to file for a second domestic violence protective order against defendant, although there is no Chapter 50B order other than the one issued on 29 December 2014 in the record on appeal. Nancy also received an envelope marked "Return to Sender. Not Deliverable as Addressed. Unable to Forward" addressed to the Federal Building on Fayetteville Street in Raleigh with her address as the return address. Nancy testified that she did not write this letter or know anything about it before it arrived at her house. The letter contained a bomb threat and demand for one million dollars, purportedly made by Nancy. Defendant was later questioned and eventually admitted to writing the letter and confirmed to investigators there was no bomb in the building. Defendant

5. As noted above, the parties stipulated that the record on appeal contains no further documents from File No. 14 CR 229975. The back side of Order 1 contains the modification entry: "Dismissed" and is dated 29 January 2015, so with no additional information available, we can only presume that this means that file itself must have been dismissed at that time.

was indicted for assault on a female and habitual misdemeanor assault on 23 February 2015 in Wake County File No. 15 CRS 200503.

Another letter purportedly written by Nancy was delivered to the Wake County District Attorney's Office on 25 March 2015. An investigator in the office was told the letter had been sent by way of "jail mail," which means that it was sent by an inmate from the Wake County Detention Center. This letter stated that Nancy had made false allegations of assault against defendant and made demands and threats of committing a crime or terrorist attack if those demands were not met. Investigators spoke with Nancy about the letter, and she denied writing or sending it. Defendant was charged with felony stalking while a court order is in effect based upon the letters to Nancy and two counts of felony obstruction of justice based upon the letters to the Federal Building and the District Attorney's office.

A jury trial was held on these charges on 11 January 2016 in Wake County Superior Court. At the close of all the evidence but before the case went to the jury, the trial court granted defendant's motion to dismiss the original obstruction of justice charge in 15 CRS 5832 regarding the Federal Building bomb threat, since the evidence showed the letter was not addressed properly, so the offense was never completed. Instead, the trial court allowed the lesser included offense of attempted obstruction of justice to be submitted to the jury in its place. The jury found defendant guilty of assault on a female, felonious stalking, felonious obstruction of justice, and felonious attempted obstruction of justice. Defendant admitted to his status as a habitual felon. The trial court entered judgment on or about 13 January 2016 and an amended judgment on or about 15 January 2016. Defendant timely appealed to this Court.

Analysis

I. Motion to Dismiss Felony Stalking While Court Order in Effect Charge

[1] Defendant's first argument on appeal is that the trial court erred in denying defendant's motion to dismiss the felony stalking charge by finding Orders 1 and 2 were in effect while defendant was in custody. The trial court concluded that when defendant sent the letters, he was subject to three orders: (1) Order 1; (2) Nancy's first ex parte DVPO; and (3) Order 2. Defendant argues that conditions of release stated in Orders 1 and 2 do not apply *until* the person has been released from custody, and since defendant was in jail when he wrote the letters, the orders did not apply.

As the issue is whether the trial court reached a proper conclusion of law, we review *de novo*. *See*, *e.g.*, *State v. Barnhill*, 166 N.C. App. 228, 230-31, 601 S.E.2d 215, 217 (2004) ("Although the trial court's findings of fact are generally deemed conclusive when supported by competent evidence, a trial court's conclusions of law . . . [are] reviewable *de novo*. . . . [T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." (Citations and quotation marks omitted)).

Defendant was charged with felonious stalking under subsection (d) of N.C. Gen. Stat. § 14-277.3A (2017): "A defendant who commits the offense of stalking when *there is a court order in effect prohibiting the conduct* described under this section by the defendant against the victim is guilty of a Class H felony." N.C. Gen. Stat. § 14-277.3A(d) (emphasis added). The offense of stalking is defined by N.C. Gen. Stat. § 14-277.3A(c):

> A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following:
>
> (1) Fear for the person's safety or the safety of the person's immediate family or close personal associates.
>
> (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

Defendant does not argue the trial court should have dismissed the charge of stalking under N.C. Gen. Stat. § 14-277.3A(c), which is a Class A1 misdemeanor. Defendant challenges only the elevation of the charge to a Class H felony based upon the existence of a "court order in effect prohibiting the conduct described." N.C. Gen. Stat. § 14-277.3A(d).

Under N.C. Gen. Stat. § 15A-534(a) (2017), a judicial official may place various restrictions on a defendant as "conditions of pretrial release[,]" including "restrictions on the travel, associations, *conduct*, or place of abode of the defendant[.]" (Emphasis added). And under N.C. Gen. Stat. § 15A-534.1, additional conditions may be placed on a defendant charged with various crimes of domestic violence. On appeal, defendant argues that he was not subject to the conditions of pretrial release in Orders 1 and 2 because he never posted his bond and

instead remained in jail during the entire time period when the letters were sent. He argues he was not "released" so a "condition of release" could not apply to him.

Defendant's argument is deceptively simple and focused on the title of the Orders and on the word "release," while ignoring the substance of the detailed provisions of the Orders. Although Orders 1 and 2 are each titled as "Conditions of Release and Release Order," we look to the entirety of an order when interpreting it and focus on the content, rather than the title, of the order. *See*, *e.g.*, *Cleveland Constr., Inc. v. Ellis-Don Constr. Inc.*, 210 N.C. App. 522, 535, 709 S.E.2d 512, 522 (2011)("Court judgments and orders must be interpreted like other written documents, not by focusing on isolated parts, but as a whole." (Citation and quotation marks omitted)); *McNair v. Goodwin*, 262 N.C. 1, 5, 136 S.E.2d 218, 221 (1964) ("The effect of an order or judgment is not determined by its recitals, but by what may or must be done pursuant thereto.").

The trial court's form orders in this case, despite the title, contain much more than just conditions of release. Under the title of the form is a reference to two articles of Chapter 15A of the North Carolina General Statutes: Article 25, which deals with pretrial commitment to a detention facility, and Article 26, which contains provisions related to bail and pretrial release. The top portion of the form includes provisions based upon Article 25, and the bottom portion of the form, entitled "Order of Commitment," includes provisions based upon Article 26.

Under N.C. Gen. Stat. § 15A-521(a) (2017):

> Every person charged with a crime and held in custody who has not been released pursuant to Article 26 of this Chapter, Bail, must be committed by a written order of the judicial official who conducted the initial appearance as provided in Article 24 to an appropriate detention facility as provided in this section.

Section (b) describes what must be in the order of commitment:

> (b) Order of Commitment; Modification. -- The order of commitment must:
>
> (1) State the name of the person charged or identify him if his name cannot be ascertained.
>
> (2) Specify the offense charged.
>
> (3) Designate the place of confinement.
>
> (4) If release is authorized pursuant to Article 26 of this Chapter, Bail, state the conditions of release. If a separate

> order stating the conditions has been entered, the commitment may make reference to that order, a copy of which must be attached to the commitment.
>
> (5) Subject to the provisions of subdivision (4), direct, as appropriate, that the defendant be:
>
> a. Produced before a district court judge pursuant to under Article 29 of this Chapter, First Appearance before District Court Judge,
>
> b. Produced before a district court judge for a probable cause hearing as provided in Article 30 of this Chapter, Probable-Cause Hearing,
>
> c. Produced for trial in the district or superior court, or
>
> d. Held for other specified purposes.
>
> (6) State the name and office of the judicial official making the order and be signed by him.

N.C. Gen. Stat. § 15A-521(b).

"Form AOC-CR-200, Rev. 12/12," the form order the trial court used for Orders 1 and 2, is a comprehensive order which includes both conditions of release and commitment. This order can be modified but remains in effect from the time a defendant is arrested until the charges upon which the order is based are dismissed or the defendant is convicted of the crime. *See generally* N.C. Gen. Stat. §§ 15A-521; 15A-534. Upon conviction, the trial court would enter a judgment or other disposition as appropriate under N.C. General Statutes Chapter 15A, Subchapter XIII. But the order remains *in effect* during the entire prosecution. At each step of the process, this order memorializes the trial court's determinations governing the defendant, whether the defendant is held in a detention facility or released.

Some of the terms of the order would apply whether the defendant is committed or released, while others would apply only in one circumstance or the other. For example, if a defendant posts the bond set for his release, he is released. If he does not post the bond, he is not released, but the order remains *in effect*. Some preprinted options of the order are procedural facts that could apply in a particular case and are not pretrial release conditions, although they are relevant to the types of conditions which may be placed upon a defendant. Here, the trial court's typed addition "NOT TO HAVE ANY CONTACT WITH [NANCY]" contains no additional language to indicate this provision would only apply after defendant had met conditions of release and was released. But the order remains *in effect* until the charges are disposed of, whether the defendant is committed or released.

Order 1 was "in effect" as of 26 December 2014 until 29 January 2015, when the assault on a female charges in File No. 14 CR 229975 were apparently dismissed. On 26 December 2014, the magistrate added a provision to Order 1 stating "NOT TO HAVE ANY CONTACT WITH [NANCY]." This provision had no conditions or limitations; none of the preprinted provisions on the form above this addition were checked and they did not apply to defendant. Below the added provisions, the magistrate checked the box indicating "[y]our release is not authorized" and ordered the Wake County Detention Center to hold defendant for a "DV hold," or domestic violence hold under N.C. Gen. Stat. § 15A-534.1(b).

Order 1 was modified several times by the trial court, as indicated by the handwritten notations on the back. On 28 December 2014, defendant's bond was set at $8,000.00 secured and on 29 December 2014, it was increased to $10,000.00, but both modifications included "NCWV." Thus, the "CONDITION OF RELEASE MODIFICATIONS" were the setting of the bond and increase of the bond; there was no modification to the no-contact provision originally stated on the front of the form, since the trial court noted "NCWV" on the reverse side of the order to show that this original provision remained in effect. As explained above, the charges for which this Order was entered were apparently dismissed on 29 January 2015, so Order 1 ceased to be "in effect" on that date.

Order 2 was based upon charges of habitual misdemeanor assault in File No. 15 CR 200503. It was entered by the magistrate judge on 7 January 2015. Order 2 includes the exact same provision of "NOT TO HAVE ANY CONTACT WITH [NANCY]" as Order 1 , in the same place on the form and not subject to any other conditions. On Order 2, defendant was also required to provide fingerprints. In the portion of the form entitled "Additional Information" the court entered: "Bond doubled pursuant to statute. Defendant has a $10,000.00 bond for 14CR229975." The Order of Commitment portion of the form directed that if defendant was not presented before a district or superior court judge by 9 January 2015, he must be brought before a magistrate "at that time to determine conditions of pretrial release." Order 2 remained in effect until 13 January 2016, when the charge of habitual misdemeanor assault was "consolidated with 15 CRS 4737," the habitual felon charges.

Therefore, either Order 1, Order 2, or both were "in effect" from 26 December 2014 until 13 January 2016.[6] Defendant sent the first letter

6. Defendant does not dispute that the ex parte DVPO which was in effect from 26 December 2014 to 5 January 2015 would be a "court order in effect prohibiting the conduct described under" N.C. Gen. Stat. § 14-277.3A. In addition, this time period was also covered by Order 1, so the additional prohibition of the ex parte DVPO is superfluous.

to Nancy on 2 January 2015 and the last letters were sent on 23 February 2015, so all the letters to Nancy were sent when an order was "in effect." N.C. Gen. Stat. § 14-277.3A(d). We must now determine whether the orders also "prohibit[ed] the conduct described under this section by the defendant against the victim[.]" *Id.*

The "conduct described under this section" in N.C. Gen. Stat. § 14-277.3A(d) includes "harassment" and the definition of harassment includes contacting a person in any manner "including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions…." N.C. Gen. Stat. § 14-277.3A(b)(2). Defendant was ordered not to contact Nancy, and "contact," including written contact by a letter, is "conduct described under this section." N.C. Gen. Stat. § 14-277.3A(d).

In addition, defendant's argument focusing on just the word "release" in Orders 1 and 2 is not consistent with the specific terms or legislative intent of the stalking offense punishable under N.C. Gen. Stat. § 14-277.3A. We interpret the prohibition on "contact" with Nancy in Orders 1 and 2 in a manner in keeping with the intent of N.C. Gen. Stat. § 14-277.3A, which is set forth within the statute:

> a) Legislative Intent.–The General Assembly finds that stalking is a serious problem in this State and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim's quality of life and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time.
>
> The General Assembly recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. *Therefore, the General Assembly enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences. The General Assembly intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts,*

> *communications, and conduct.* The General Assembly recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

N.C. Gen. Stat. § 14-277.3A(a) (emphasis added).

Both orders stated "NOT TO HAVE ANY CONTACT WITH [NANCY]." Defendant does not argue that the threatening letters to Nancy do not fall under the type of communication prohibited by N.C. Gen. Stat. § 14-277.3A; he argues only that the requirement that he was "NOT TO HAVE ANY CONTACT WITH [NANCY]" did not apply to him while he was in detention. As discussed above, the requirement as stated on Order 1 and Order 2 was an independent provision prohibiting certain conduct: contacting Nancy. By its terms, the prohibition was not conditioned on defendant's release or commitment but was required as long as the Order was in effect. We hold that the trial court did not err in denying defendant's motion to dismiss the felony stalking charge.

II. Motion to Dismiss Felony Obstruction of Justice Charges

[2] Defendant's second and final argument on appeal is that the trial court erred by denying his motion to dismiss the felony obstruction of justice charges because the crimes can be committed without deceit and intent to defraud. Defendant claims that the trial court concluded that deceit and intent to defraud are not necessary and inherent elements of obstruction of justice.

The indictment in 15 CRS 4737 alleged that defendant

> unlawfully, willfully and feloniously obstructed justice with deceit and intent to defraud by intentionally giving false information to the District Attorney's Office by writing a letter purporting to be from the victim in Wake County case 15 CRS 200503 recanting her earlier statements, implicating the charging officer in highly unethical and illegal behavior, and threatening to place explosives in the Wake County Courthouse. This act was done in violation of the common law of North Carolina and against the peace and dignity of the State.

Similarly, the indictment in 15 CRS 5832 alleged defendant

> unlawfully, willfully and feloniously obstructed justice with deceit and intent to defraud by intentionally sending

> a letter purporting to be from the victim in his pending court cases and containing a bomb threat to the personnel of the United States Federal Courthouse located on New Bern Avenue, Raleigh, NC 27601. This act was done in violation of the common law of North Carolina and against the peace and dignity of the State.

At trial, defendant argued that the obstruction of justice charges should be misdemeanors, not felonies, based on *State v. Glidden*, 317 N.C. 557, 346 S.E.2d 470 (1986). The trial court granted defendant's motion to dismiss the obstruction of justice charge in 15 CRS 5832, since the evidence showed that the offense was never completed -- the letter never reached the Federal Building -- and instead instructed on the lesser included offense of attempted obstruction of justice, a class I felony. But the court refused to dismiss the remaining obstruction of justice felony charges based upon defendant's argument that to be a felony, the offense must always involve deceit and fraud. Defendant now argues this was error and that the North Carolina Supreme Court mandated a definitional test to elevate misdemeanor offenses to felonies under N.C. Gen. Stat. § 14-3(b) (2017).[7], and the obstruction of justice offenses at issue here -- which involved sending threatening letters -- should not have been elevated to a felony because such offense "does not by its definition include the elements of secrecy and malice[.]"

Glidden, which defendant relies on, is inapposite to the present case. In *Glidden*, "[t]he issue before this Court [was] whether the misdemeanor of transmitting an unsigned threatening letter in violation of N.C.G.S. § 14-394 is an offense which is made a felony by N.C.G.S. § 14-3(b)." *Glidden*, 317 N.C. at 558, 346 S.E.2d at 470. The defendant in *Glidden* was charged under N.C. Gen. Stat. § 14-394 (2017), which makes transmission of an anonymous threatening letter a Class 1 misdemeanor; the State then sought to elevate the charge to a felony based upon N.C. Gen. Stat. § 14-3(b). The North Carolina Supreme Court held that the offense of transmitting an unsigned letter did not fall within the class of misdemeanors under N.C. Gen. Stat. § 14-3(b) punishable as felonies because "the offense of transmitting unsigned threatening letters does not by definition include the elements of secrecy *and* malice." *Glidden*, 317 N.C. at 561, 346 S.E.2d at 473.

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7. N.C. Gen. Stat. Ann. § 14-3(b): "If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony."

Here, defendant was charged with common law obstruction of justice; he was not charged under N.C. Gen. Stat. § 14-394 (2017). While it is true that at common law, obstruction of justice was ordinarily treated as a misdemeanor offense, this Court has repeatedly recognized felony obstruction of justice as a crime under N.C. Gen. Stat. § 14-3(b). *See*, *e.g.*, *State v. Cousin*, 233 N.C. App. 523, 537, 757 S.E.2d 332, 342-43 (2014) ("The elements of common law felonious obstruction of justice are: (1) the defendant unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud."); *State v. Blount*, 209 N.C. App. 340, 343, 703 S.E.2d 921, 924 (2011) ("Common law obstruction of justice, the offense with which defendant was charged, is ordinarily a misdemeanor. N.C. Gen. Stat. § 14-3(b) provides that a misdemeanor may be elevated to a felony if the indictment alleges that the offense is infamous, done in secrecy and malice, or done with deceit and intent to defraud." (Citations, quotation marks, brackets, and ellipses omitted)). We are bound by prior decisions of this Court. *See*, *e.g.*, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

The indictments here properly alleged all necessary elements of felonious obstruction of justice. We hold that the trial court properly denied defendant's motion to dismiss the charges of felony obstruction of justice and felony attempted obstruction of justice.

Conclusion

We find no error with the trial court's judgment.

NO ERROR.

Judges HUNTER and DAVIS concur.

STATE v. PARISI

[259 N.C. App. 879 (2018)]

STATE OF NORTH CAROLINA
v.
JEFFREY ROBERT PARISI

No. COA17-1221

Filed 5 June 2018

Motor Vehicles—driving while impaired—probable cause—odor of alcohol, open box, admission to drinking, clues of impairment

The State presented sufficient evidence that a law enforcement officer had probable cause to stop and cite defendant for driving while impaired where the officer heard the occupants of defendant's car arguing as the car approached the checkpoint, there was an open box of alcoholic beverages in the car, defendant had glassy and watery eyes, defendant emitted an odor of alcohol, defendant admitted he had consumed three beers, and defendant exhibited clues of impairment during field sobriety tests.

Judge HUNTER, Robert N., dissenting.

Appeal by the State from orders entered 13 January 2016 by Judge Michael D. Duncan in Wilkes County Superior Court and 11 March 2016 by Judge Robert J. Crumpton in Wilkes County District Court. Heard in the Court of Appeals 1 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General John W. Congleton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellee.

CALABRIA, Judge.

Where the State presented sufficient evidence that a law enforcement officer had probable cause to stop defendant, the trial court erred in granting defendant's motion to suppress the stop. We reverse and remand.

I. Factual and Procedural Background

On 1 April 2014, Jeffrey Parisi ("defendant") was cited for driving while impaired by Officer Gregory Anderson ("Officer Anderson") of the Wilkesboro Police Department. At a 17 June 2015 hearing in Wilkes

County District Court, defendant made an oral pretrial motion to suppress the stop that resulted in the citation, alleging a lack of probable cause, and a motion to dismiss. The district court granted defendant's motions, and the State provided oral and written notice of appeal. The court subsequently entered its written "Preliminary Order of Dismissal" ("the Preliminary Order"), which, despite its caption, only granted defendant's motion to suppress. Again, the State provided written notice of appeal.

The appeal was heard in Wilkes County Superior Court on 13 November 2015. Following the hearing, the court entered an order on 11 January 2016 affirming the decision of the district court to grant defendant's motions ("the Superior Court Order"). The matter was remanded, and on 11 March 2016, the district court entered a "Final Order Granting Motion to Suppress and Motion to Dismiss" ("the Final Order"), granting defendant's motions. The State once more appealed to superior court. On 6 April 2016, the superior court affirmed the Final Order.

The State appealed the matter to this Court. On 7 February 2017, this Court entered its opinion, dismissing in part, vacating in part, and remanding the matter. *State v. Parisi*, ___ N.C. App. ___, ___ S.E.2d ___, COA16-635 (2017). In this decision, we held that "the superior court erred in its review of the district court's preliminary determination to suppress, when it remanded the case to the district court with instructions to dismiss the case." We further held, however, that the State had no right to appeal the district court's final order granting defendant's motion to suppress, which remained undisturbed. We noted that the suppression of the stop did not mandate the dismissal of the case, vacated the orders of dismissal, and remanded for further proceedings.

On 28 July 2017, the State filed a petition for writ of certiorari, seeking this Court's review of the Superior Court Order and the Final Order. We granted this petition on 16 August 2017.

II. Motion to Suppress

In its sole argument on appeal, the State contends that the trial court erred in concluding that Officer Anderson lacked probable cause to stop defendant, and in granting defendant's motion to suppress. We agree.

A. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn

support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

B. Analysis

At trial, Officer Anderson testified that, on 1 April 2014, he was operating a check point on a public street. Defendant was driving the vehicle and, as it approached, Officer Anderson "kind of heard a disturbance between the occupants of the vehicle." He said that he could not hear what they were saying, but it sounded like they were arguing. After the vehicle stopped at the check point, Officer Anderson approached the driver's door and saw "an open box of alcoholic beverage[]" on the passenger floorboard. He did not see any open individual containers. Officer Anderson testified that defendant had "glassy, watery eyes[,]" and emitted "an odor of alcohol[.]" When asked whether he had consumed alcohol, defendant told Officer Anderson that he had consumed three beers earlier in the evening.

Officer Anderson administered the horizontal gaze nystagmus test ("HGN"), a test of impairment, and found that defendant demonstrated six "clues" indicating impairment. Officer Anderson also administered a "walk and turn" test, and defendant missed multiple steps, also an indicator of impairment. Lastly, Officer Anderson administered a "one leg stand" test, and defendant used his arms and swayed, also indicators of impairment. As a result, Officer Anderson concluded that defendant was impaired.

In the Preliminary Order, the district court found that defendant arrived at the check point, that Officer Anderson noticed defendant's glassy eyes and an open container of alcohol, and that Officer Anderson administered multiple field sobriety tests. However, the court went on to find that Officer Anderson "did not observe any other indicators of impairment during his encounter with Defendant, including any evidence from Defendant's speech[,]" and concluded that "[t]he fact[s] and circumstances known to Anderson as a result of his observations and testing of Defendant are insufficient, under the totality of the circumstances, to form an opinion in the mind of a reasonable and prudent man/officer that there was probable cause to believe Defendant had committed the offense of driving while impaired." Likewise, the Superior Court Order noted Anderson's observations, but concluded that they were insufficient. The Final Order incorporated the findings and conclusions of the Superior Court Order by reference.

The State offers ample case law to suggest that the findings of the lower courts did not support an ultimate conclusion that Officer Anderson lacked probable cause. Particularly relevant is the case of *State v. Townsend*, 236 N.C. App. 456, 762 S.E.2d 898 (2014). In *Townsend*, the officer stopped the defendant at a check point, and immediately noticed the defendant's bloodshot eyes and odor of alcohol. Two alco-sensor tests yielded positive results, and the defendant exhibited clues indicating impairment on three field sobriety tests. We held that this was sufficient to establish probable cause. *Id.* at 465, 762 S.E.2d at 905. In the instant case, as in *Townsend*, Officer Anderson noticed defendant's glassy eyes and odor of alcohol, and defendant exhibited clues indicating impairment on three field sobriety tests. And while no alco-sensor test was administered in the instant case, defendant himself volunteered the statement that he had been drinking earlier in the evening.

Our Supreme Court has held that while the odor of alcohol, standing alone, is not evidence of impairment, the "[f]act that a motorist has been drinking, when considered in connection with . . . other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of G.S. 20-138." *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 794 (1970) (quoting *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965)). Once again, in the instant cast, Officer Anderson was presented with the odor of alcohol, defendant's own admission of drinking, and multiple indicators on field sobriety tests demonstrating impairment.

The superior court, in the Superior Court Order, cited the unpublished case of *State v. Sewell*, 239 N.C. App. 132, 768 S.E.2d 650 (2015) (unpublished), as part of its reasoning in finding a lack of probable cause. We note first that, as an unpublished decision, *Sewell* is not binding upon the courts of this State. Additionally, while many such cases are extremely fact-specific, it is crucial to note that *Sewell* is easily distinguished from the instant case. The officer in *Sewell* did not identify the defendant as the source of the odor of alcohol. The defendant in *Sewell* exhibited no clues of impairment during the "one leg stand" and "walk and turn" tests. In the instant case, by contrast, Officer Anderson clearly identified defendant as the source of the odor of alcohol, and defendant exhibited clues of impairment during all three field sobriety tests. Further, in each of their orders, the lower courts found as much.

Upon our review, it seems clear that the facts, as supported by the evidence and as found by the district and superior courts, supported a conclusion that Officer Anderson had probable cause to stop and cite defendant for driving while impaired. Accordingly, we hold that the trial

court erred in granting defendant's motion to suppress the stop. We reverse the lower courts' orders and remand for further proceedings.

REVERSED AND REMANDED.

Judge BRYANT concurs.

Judge HUNTER dissents in a separate opinion.

HUNTER, JR., Robert N., Judge, Dissenting.

I respectfully dissent from the majority reversing the trial courts' grants of Defendant's motion to suppress. Instead, I would affirm the trial courts' orders.

"The standard of review in evaluating a trial court's ruling on '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. Hammonds*, 370 N.C. 158, ___, 804 S.E.2d 438, 441 (2017) (quoting *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015)). "If no exceptions are taken to findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984) (internal quotation marks and citation omitted). "Where the findings of fact support the conclusions of law, such findings and conclusions are binding upon us on appeal." *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991) (citation omitted). "[T]he trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence." *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998) (citation omitted).

Both Defendant and the State cite to numerous cases addressing probable cause to arrest for driving while impaired. The State, and the majority, primarily rely on *State v. Townsend*, 236 N.C. App. 456, 762 S.E.2d 898 (2014). While the findings of fact *sub judice* are analogous to *some* of the findings of fact in *Townsend*, differences between the orders are critical.

In *Townsend*, an officer stopped defendant at a checkpoint. *Id.* at 458, 762 S.E.2d at 901. The officer noticed defendant's "bloodshot eyes" and smelled a "moderate odor of alcohol about his breath." *Id.* at 458, 465, 762 S.E.2d at 901, 905. Defendant told the officer he drank "a couple of beers earlier" and stopped drinking an hour before the stop. *Id.* at 465, 762 S.E.2d at 905. The officer administered two alco-sensor tests, both

which tested position for alcohol. *Id.* at 458, 465, 762 S.E.2d at 901, 905. Additionally, defendant "exhibited clues" of impairment during three different field sobriety tests. Id. at 458, 465, 762 S.E.2d at 901, 905.

The trial court denied defendant's motion to suppress for lack of probable cause, and defendant appealed. *Id.* at 459, 762 S.E.2d at 901-02. Our Court cited the facts stated *supra* and the trial court's acknowledgement of the officer's twenty-two years' of experience. *Id.* at 465, 762 S.E.2d at 905. Accordingly, our Court concluded the officer had probable cause to arrest defendant. *Id.* at 465, 762 S.E.2d at 905.

Here, unlike in *Townsend*, the trial courts entered several findings weighing against a conclusion of probable cause.[1] First, Officer Anderson did not administer an alco-sensor test. Regarding Defendant's admission of drinking the night of the checkpoint, the order contains no findings of *exactly when* Defendant drank in the night. *Cf. id.* at 465, 762 S.E.2d at 905 (the trial court found defendant admitted to drinking "a couple of beers" and stopped drinking an hour before officers stopped him). Moreover, the trial courts found no facts about Officer Anderson's experience, distinguishing this case from *Townsend*. *See id.* at 465, 762 S.E.2d at 905. Of significant importance, while Officer Anderson testified as to the number of "clues" indicating impairment during the horizontal gaze nystagmus test, the trial courts entered no findings on the number of clues. Indeed, the finding regarding the horizontal gaze nystagmus test states Officer Anderson "found clues of impairment[,]" without stating the number. In addition to the findings of fact included in the majority, the trial courts found Defendant did not slur his speech, did not drive unlawfully or "bad[ly,]" answered Officer Anderson's questions, and was not "unsteady" on his feet.

The uncontested findings of fact support the trial courts' conclusions Officer Anderson lacked probable cause to arrest Defendant. Additionally, *Townsend*, as distinguished from the case *sub judice*, does not mandate reversal. Affording the trial courts "great deference" on the ruling on a motion to suppress, I would affirm the trial courts' orders. *McClendon*, 130 N.C. App. at 377, 502 S.E.2d at 908. Accordingly, I respectfully dissent.

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1. The State does not challenge any of the findings of fact. Thus, the findings are binding on appeal. *Baker*, 312 N.C. at 37, 320 S.E.2d at 673 (citation omitted). In his appellee brief, Defendant challenges two findings of fact. However, Defendant did not cross-appeal.

STATE v. RANDALL

[259 N.C. App. 885 (2018)]

STATE OF NORTH CAROLINA
v.
JEREMY MICHAEL RANDALL, DEFENDANT

No. COA17-924

Filed 5 June 2018

1. Criminal Law—post-conviction relief—DNA testing—materiality

Where defendant pleaded guilty to numerous counts of rape and statutory rape and the evidence included defendant's confession and the victim's report that defendant sexually abused her, the trial court properly denied defendant's motion for post-conviction DNA testing. Defendant failed to meet his burden of showing that there was biological evidence related to his case which would be material, and not merely relevant, to his defense.

2. Criminal Law—post-conviction DNA testing—inventory of biological evidence—preservation of issues

Defendant's argument that the trial court erred by failing to order an inventory of biological evidence pursuant to N.C.G.S. § 15A-268 was not properly preserved for appeal. While defendant's motion for post-conviction DNA testing triggered a requirement for an inventory, the law enforcement agency involved indicated the only evidence it had which was relevant to defendant's case was a computer. Defendant stated he also requested an inventory from a hospital and a social services agency, but he failed to include in the record on appeal any written requests pursuant to subsection 15A-268(a7) or that the trial court considered such a request.

Appeal by Defendant from order entered 3 March 2017 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 20 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for the Defendant-Appellant.

DILLON, Judge.

Jeremy Michael Randall ("Defendant") appeals from an order entered by the trial court denying his motion for post-conviction DNA testing.

I. Background

In 2008, Defendant pleaded guilty to twelve counts of first-degree rape and six counts of statutory rape. He was sentenced pursuant to his plea agreement to a minimum of 240 and a maximum of 297 months.

In May 2016, Defendant filed a motion with the trial court, *pro se*, seeking DNA testing of evidence he alleged was collected by law enforcement during their investigation, including vials of blood and saliva, a bag of clothes, and a rape kit. Defendant contended that the evidence he sought to have tested "would prove that [] Defendant was NOT the perpetrator of the crimes allegedly committed on or between the years 2006, and 2007, and the requested D.N.A. testing is material to [] [D]efendant's exoneration." Defendant also filed a motion for appropriate relief ("MAR"), filed several addendums, and requested an inventory of biological evidence related to the investigation.

The trial court denied Defendant's motions. Defendant has filed a petition for writ of *certiorari* with our Court in the event that he has failed to properly preserve his right of appeal. We hereby grant Defendant's petition as to any potential defect in order to reach the merits of Defendant's appeal.

II. Analysis

On appeal, Defendant contends that the trial court erred by (1) denying his motion for post-conviction DNA testing, and (2) failing to order an inventory of biological evidence. We address each argument in turn.

A. Motion for Post-Conviction DNA Testing

[1] The standard of review for denial of a motion for post-conviction DNA testing is "analogous [to the] standard of review for a denial of a motion for appropriate relief . . . because the trial court sits as finder of fact in both circumstances." *State v. Lane*, ___ N.C. ___, ___, 809 S.E.2d 568, 574 (2018). Accordingly, the trial court's findings of fact are "binding on [our] Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion." *Id.*

> A trial court's determination of whether defendant's request for postconviction DNA testing is "material" to his defense, as defined in N.C. [Gen. Stat.] § 15A–269(b)(2), is

> a conclusion of law, and thus we review *de novo* the trial court's conclusion that defendant failed to show the materiality of his request.

Id. (emphasis added). Our Supreme Court has recently reiterated that the determination of materiality must be made "*in the context of the entire record*, and hinges upon whether the evidence would have affected the jury's deliberations." *Id.* at ___, 809 S.E.2d at 575 (internal citations omitted) (emphasis added).

Pursuant to N.C. Gen. Stat. § 15A-269, a defendant may make a motion before the trial court for the performance of DNA testing if the biological evidence meets a number of requirements, primarily that the biological evidence "[i]s material to the defendant's defense." N.C. Gen. Stat. § 15A-269(a) (2015). According to the plain language of the statute, the defendant has the burden to make the required showing that the biological evidence is material. *State v. Turner*, 239 N.C. App. 450, 453, 768 S.E.2d 356, 358-59 (2015).

Our Supreme Court has defined materiality in a post-conviction DNA context as follows: "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." *State v. Lane*, ___ N.C. ___, ___, 809 S.E.2d 568, 575 (2018). That is, materiality of evidence in the context of post-conviction DNA testing is different and more narrow than materiality of evidence in the context of a trial. Whereas evidence is deemed material at trial if it merely has a significant relationship to something relevant to the case, evidence is material in a post-conviction DNA setting only if there is a reasonable probability that its existence would have resulted in a different outcome.

In the present matter, Defendant pleaded guilty. We acknowledge the inherent difficulty in establishing the materiality required by N.C. Gen. Stat. § 15A-269 for a defendant who pleaded guilty: a defendant must show that there is a reasonable probability that DNA testing would have produced a different outcome; for example, that Defendant would not have pleaded guilty *and otherwise would not have been found guilty.* However, we do not believe that the statute was intended to completely forestall the filing of a such a motion where a defendant did, in fact, enter a plea of guilty. The trial court is obligated to consider the facts surrounding a defendant's decision to plead guilty in addition to other evidence, in the context of the entire record of the case, in order to determine whether the evidence is "material." *See Lane*, ___ N.C. at ___, 809 S.E.2d at 577 (concluding that "[w]here ample evidence, including

eyewitness testimony and defendant's own admission to law enforcement, supported a finding of defendant's guilt, defendant's motion for post-conviction DNA testing did not allege a 'reasonable probability that the verdict would have been more favorable to the defendant' ").

We note that the trial court's order clearly indicates its consideration of the circumstances surrounding Defendant's guilty plea. The trial court found, in relevant part, as follows:

> 1. The Defendant . . . pled guilty according to a plea arrangement and in doing so he swore under oath that he was in fact guilty, that he was satisfied with his lawyer's legal services, that the plea was freely, understandingly and voluntarily made. The Court having heard the sworn statements of counsel found that the plea was freely, understandingly and voluntarily made;
>
> 2. . . . . Defendant failed to allege specific facts showing materiality as required under N.C. Gen. Stat. § 15A-269 and the Defendant made only conclusory statements that the evidence is material. His statements are insufficient to compel relief sought. . . .
>
> . . . .
>
> 4. There is no credible evidence that the Defendant was denied effective assistance of counsel at the time he entered his plea of guilty or that the documents he claim[s] would assert his innocence would have been beneficial to the Defendant had the case proceeded to trial in that his victim at the time of his conviction was 14 years old and still a minor.

Our Court has held that a defendant's burden to show materiality "requires more than the conclusory statement that the ability to conduct the requested DNA testing is material to the defendant's defense." *State v. Cox*, 245 N.C. App. 307, 312, 781 S.E.2d 865, 868 (2016) (internal marks and citation omitted). Defendant's assertions in his motion that his DNA would not be found "in the rape kit collected by [the hospital]" essentially amounts to a statement that testing would show that he was not the perpetrator of the crime. In *Cox*, we concluded that the defendant's statement that "there is a very reasonable probability that [the DNA testing] would have shown that the Defendant was not the one who had sex with the alleged victim" was insufficient to establish materiality. *Id.*; *see also State v. Foster*, 222 N.C. App. 199, 205, 729 S.E.2d 116, 120

(2012) (holding that the following statement was insufficient to meet the requirements of the statute: "the ability to conduct the requested DNA testing is material to the Defendant's defense").

We conclude that Defendant has failed to show that DNA testing would have been material to his defense. Specifically, here, it appears from the record that Defendant was convicted of multiple counts of statutory rape for encounters he had with a single victim which took place over many months; that Defendant confessed to the crimes; and that the victim reported that Defendant had sexually abused her. In his motion, Defendant requested that that DNA testing be performed on certain items—including clothing, bodily fluids, strands of hair, and a rape kit—recovered from the victim over a month *after* Defendant's last alleged contact with the victim. He argues that testing would have shown that his DNA was not present on any of those items. The lack of DNA on those items, recovered well after the alleged crimes took place, would not conclusively prove that Defendant was *not* involved in a sexual "relationship" with the minor victim over a period of several months. *See State v. Brown*, 170 N.C. App. 601, 609, 613 S.E.2d 284, 288 (2005), *superseded by statute on other grounds*, *State v. Norman*, 202 N.C. App. 329, 332–33, 688 S.E.2d 512, 515 (2010) (noting that the statute does not authorize testing to establish a *lack* of biological material). In addition, the Buncombe County Sheriff's Office indicated that the only relevant evidence it had—or ever had—was a Dell computer, which officers searched for child pornography with Defendant's consent in 2008.

Given this evidence, we agree with the trial court that Defendant failed to show that there was biological evidence related to his case which would be "material to [his] defense." N.C. Gen. Stat. § 15A-269(a)(1); *see also State v. Floyd*, 237 N.C. App. 300, 303, 765 S.E.2d 74, 77 (2014) ("Defendant failed to show how DNA testing would produce 'material' evidence; that is, he failed to show how such testing would produce evidence sufficient to create a reasonable probability of a different result, given the evidence already in the trial record."). In conclusion, "[w]hile the results from DNA testing *might* be considered 'relevant,' had they been offered at trial, they are not 'material' in this postconviction setting." *State v. Floyd*, 237 N.C. App. 300, 302, 765 S.E.2d 74, 76 (2014). Accordingly, we affirm the trial court's denial of Defendant's motion for post-conviction DNA testing.

B. Request for Inventory of DNA Evidence

[2] Defendant also argues that the trial court erred in failing to order an inventory of biological evidence pursuant to N.C. Gen. Stat. § 15A-268.

This section requires the preservation of "any physical evidence, regardless of the date of collection, that is reasonably likely to contain any biological evidence collected in the course of a criminal investigation or prosecution." N.C. Gen. Stat. § 15A-268(a1) (2015).

We note that Defendant's motion for post-conviction DNA testing "triggered a requirement to inventory the biological evidence pertaining to that case and provide the inventory list . . . to the prosecution, the petitioner, and the court." *State v. Doisey*, 240 N.C. App. 441, 445, 770 S.E.2d 177, 180 (2015) (internal marks omitted). In his motion, Defendant requested that the trial court require "custodial *law enforcement* agency/agencies to inventory the biological evidence relating to this case[.]" (Emphasis added). In response, the State contacted the Buncombe County Sheriff's Department, which indicated that the only piece of evidence it had which was relevant to Defendant's case was the Dell computer.

A defendant can also request an inventory of biological evidence relevant to the defendant's case from a "custodial agency" under N.C. Gen. Stat. § 15A-268(a7) by making a *written request*. N.C. Gen. Stat. § 15A-268(a7). Defendant contends that he also requested an inventory from a hospital and from DSS, whom he alleged had the clothing, hair and blood samples, etc.; however, there is no evidence of these requests in the record. Without evidence that Defendant made proper requests pursuant to N.C. Gen. Stat. § 15A-268(a7), and without any indication that the trial court considered the issue below, "there is no ruling under [S]ection 15A-268(a7) for [our] Court to review." *Doisey*, 240 N.C. App. at 448, 770 S.E.2d at 182. Accordingly, we agree with the State that consideration of Defendant's argument under Section 15A-268(a7) is not properly before our Court and should be dismissed. *See id.*

AFFIRMED IN PART, DISMISSED IN PART.

Judges CALABRIA and TYSON concur.

STATE v. SUTTON

[259 N.C. App. 891 (2018)]

STATE OF NORTH CAROLINA
v.
LARIS SUTTON, DEFENDANT

No. COA17-35

Filed 5 June 2018

1. Search and Seizure—traffic stop—crossing double yellow lines—reasonable suspicion

The trial court's unchallenged findings of fact that a law enforcement officer observed defendant committing a traffic violation by driving across the double yellow lines in the center of the road were sufficient to support a conclusion that the officer had reasonable suspicion to conduct a traffic stop.

2. Search and Seizure—traffic stop—timing of events—conflicting evidence

The trial court's findings of fact regarding the amount of time the law enforcement officer waited for a canine unit to arrive during defendant's traffic stop were supported by competent evidence, despite some confusion in the testimony by the officer, since it is within the trial court's purview to weigh the credibility of witnesses and resolve any conflicts in the evidence.

3. Search and Seizure—traffic stop—reasonable suspicion to extend—beyond initial reason

The trial court properly concluded a law enforcement officer had reasonable suspicion to extend defendant's traffic stop beyond the initial reason for the stop upon multiple circumstances, including (1) the officer was on patrol due to complaints about drug activity near a particular road, (2) the officer had been advised to look out for defendant based upon reports defendant would be transporting large quantities of methamphetamine, (3) defendant appeared to be under the influence, and (4) another person known to the officer approached during the stop and gave information that the vehicle may be carrying drugs.

Appeal by defendant from judgment entered on or about 9 August 2016 by Judge Alan Z. Thornburg in Superior Court, Jackson County. Heard in the Court of Appeals 8 August 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kacy L. Hunt, for the State.

Julie C. Boyer, for defendant-appellant.

STROUD, Judge.

Defendant appeals from the trial court's order denying his motion to suppress all evidence recovered as a result of a traffic stop and subsequent dog sniff. Although the law enforcement officer had seen defendant's truck cross only once about one inch over the double yellow lines on a curvy road, crossing the center line is a traffic violation which is sufficient to justify the stop. After the stop, the officer's observations of defendant and additional information that defendant had drugs in the truck gave the officer reasonable suspicion to request a canine sniff of the car, and the canine officer arrived without unreasonable delay. We affirm the trial court's order.

Background

Defendant was indicted on trafficking in methamphetamine by transportation, trafficking in methamphetamine by possession, felonious maintaining a vehicle for keeping and/or selling a controlled substance, possession of methamphetamine, possession with intent to sell and/or deliver methamphetamine, possession of drug paraphernalia, and driving left of center on 29 February 2016. On 5 August 2016, defendant moved to suppress the traffic stop which led to his arrest based on both a lack of reasonable suspicion to justify the initial stop and on the search of defendant's vehicle after the "passage of an amount of time far in excess of any justification for said stop and seizure." The trial court held a hearing on the motion to suppress on 8 August 2016 and denied the motion both on the initial stop and to the extension of time and dog sniff. The trial court later entered a written order in accord with its rendition of the ruling on the motion to suppress in open court on 8 August 2016. Defendant reserved his right to appeal the ruling on the motion to suppress and pled guilty to all of the charges against him on or about 9 August 2016. Defendant timely filed written notice of appeal from the order denying motion to suppress and the judgment entered upon his guilty plea.

Analysis

On appeal, defendant challenges the trial court's conclusion of law that there was reasonable suspicion to stop defendant's vehicle. He also challenges some of the trial court's findings of fact and conclusions of law regarding the officer's questioning of defendant after the stop and contends the traffic stop was unreasonably extended beyond the time necessary for the traffic violation.

I. Traffic stop

[1] What a difference a few inches can make in cases dealing with traffic stops. This Court and many other appellate courts have struggled with making fine distinctions between weaving within a travel lane and "weaving plus," such as weaving repeatedly within a lane, weaving and barely crossing a fog line, weaving in the wee hours of the morning, weaving near a bar, weaving while driving under the speed limit, and many other factors. The rules regarding weaving are hazy at best.

But there is a "bright line" rule in some traffic stop cases. Here, the bright line is a double yellow line down the center of the road. Where a vehicle actually crosses over the double yellow lines in the center of a road, even once, and even without endangering any other drivers, the driver has committed a traffic violation of N.C. Gen. Stat. § 20-146 (2017). This is a "readily observable" traffic violation and the officer may stop the driver without violating his constitutional rights. *See, e.g.*, *State v. Johnson*, __ N.C. __, __, 803 S.E.2d 137, 141 (2017) ("To be sure, when a defendant does in fact commit a traffic violation, it is constitutional for the police to pull the defendant over." (Citation omitted)).

Defendant challenges none of the findings of fact regarding the initial traffic stop, so they are binding 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. However, when, as here, the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

The trial court found these facts which are relevant to the traffic stop:

> 6. Daniel Wellmon is an officer with the Jackson County Sheriff's office. Officer Wellmon received his Basic Law Enforcement Training in 2009 and has maintained that certification each year through in-service training. In addition,

> Officer Wellmon is certified to operate an Intoxilyzer and has maintained that certification as required by law.
>
> 7. Officer Wellmon has worked as a Patrol officer with the Jackson County Sheriff's office since 2009 handling, among other things, serving papers, traffic stops, regular patrol duties and community patrols. During his Tenure as a Deputy Sheriff, Officer Wellmon has made in excess of 500 Chapter 20 related investigations.
>
> 8. On the 13th day of January, 2015 Officer Wellmon was working a regular day shift beginning at 6 am through 6 pm. He was operating a marked Dodge Charger equipped with Blue lights, sirens, radio and a computer. His assignment for that day was to conduct a community patrol of Cabe Road because the Sheriff's office had received multiple complaints about drug activity in that area.
>
> 9. That same morning Officer Wellmon was advised by a State Bureau of Investigation Agent, who was involved in drug related investigations, to be on the lookout for a black vehicle driven by [defendant]. According to the Agent, this vehicle was bringing large quantities of methamphetamine to a supplier off of Cabe Road.
>
> 10. At approximately 3:09 pm on January 13, 2016, Officer Wellmon was traveling on Cabe Road behind a white Ford Ranger Pick-up truck. Cabe Road is a dead end, curvy, paved road located in Jackson County and is of sufficient width for two lanes of travel. The officer observed the Ford Ranger travel left of center with the driver's side tires crossing over the double yellow lines approximately one inch.
>
> 11. Officer Wellmon activated his blue lights and the vehicle pulled into Comfort Road, a one lane gravel driveway off of Cabe Road.

Defendant argues that the trial court erred in concluding that "Officer Wellmon had reasonable suspicion to stop the Defendant's vehicle for failing to operate his vehicle on the right half of the roadway that was of sufficient width for more than one lane of traffic in violation of N.C.G.S. 20-146(A)." Defendant relies heavily on *State v. Derbyshire*, 228 N.C. App. 670, 677, 745 S.E.2d 886, 891 (2013) and contends that the facts of this case are "substantially similar, and, in fact, even less suspicious than the facts presented in *Derbyshire*."

But the facts of *Derbyshire* differ greatly from this case. *Derbyshire* was a "weaving plus" case in which this Court held that the officer did not have a sufficient basis for a reasonable suspicion to stop the defendant. *Id.* ("On a number of occasions, this Court has determined that an officer has the reasonable suspicion necessary to justify an investigatory stop after observing an individual's car weaving in the presence of certain other factors. This has been referred to by legal scholars as the 'weaving plus' doctrine." (Citation omitted)). But the *Derbyshire* Court emphasized in a footnote that the defendant's car did *not* cross the center line of the road:

> The right side of Defendant's tires did not cross the line separating his lane of traffic from oncoming traffic. Rather, the tires crossed the line separating those two lanes of traffic headed in the same direction. At no point did Defendant cross the center line or the solid white line on the outer edge of the road.

Id. at 675, n.1, 745 S.E.2d at 890, n.1. *Derbyshire* and the other cases cited by defendant's brief are weaving or "weaving plus" cases; none address readily observable traffic violations.

Here, the uncontested findings of fact show that the officer saw defendant's vehicle cross the double yellow lines in the center of the road, in violation of N.C. Gen. Stat. § 20-146(a). Cases from this Court and the Supreme Court have consistently held that when an officer observes a traffic violation, the officer has reasonable suspicion to stop the vehicle. In *State v. Jones*, the officer saw the defendant's truck cross the double yellow lines in the center of the road, " 'slightly left of center in a curve.' " *State v. Jones*, __ N.C. App. __, __ S.E.2d __, 2018 WL 1597450, at *1 (Apr. 3, 2018) (No. COA17-796). This Court rejected the defendant's argument in *Jones* that the officer needed some additional basis for reasonable suspicion for a traffic stop where he had seen the traffic violation:

> Defendant's argument . . . ignores the fact that Trooper Myers' direct observations provided reasonable suspicion for the vehicle stop. Under North Carolina law, Defendant's act of crossing the double yellow centerline clearly constituted a traffic violation. N.C. Gen. Stat. § 20-150(d) (2017) ("The driver of a vehicle shall not drive to the left side of the centerline of a highway upon the crest of a grade or upon a curve in the highway where such centerline has been placed upon such highway by the Department of Transportation, and is visible.").

> This Court has made clear that an officer's observation of such a traffic violation is sufficient to constitute reasonable suspicion for a traffic stop.

Jones, __ N.C. App. at __, __ S.E.2d at __, 2018 WL 1597450, at *4 (citations omitted).

Officer Wellmon saw defendant's truck cross the double yellow lines in the center of the road, which is a traffic violation, so the trial court correctly concluded that he had reasonable suspicion to stop defendant's vehicle based upon the uncontested findings of fact. This argument is without merit.

II. Extension of Traffic Stop

A. Findings of Fact

[2] Defendant next argues that the "trial court erred in finding and concluding that the length and scope of the stop was reasonable under the totality of the circumstances as it is not supported by competent evidence." Defendant challenges four findings of fact as not supported by the evidence. "The applicable standard in reviewing a trial court's determination on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (citations and quotation marks omitted).

The trial court first made these uncontested findings of fact regarding the stop itself and extension of the stop:

> 12. Officer Wellmon approached the vehicle and identified the defendant to be the driver. Officer Wellmon noticed that [defendant] appeared confused. His speech was so fast that the officer had a difficult time understanding him. The defendant began to stutter and mumble his words.
>
> 13. As the Defendant handed his license and registration to the Officer his hands were quivering.
>
> 14. As Officer Wellmon asked the defendant questions, the defendant's eyes veered away from the officer and he would not make eye contact.
>
> 15. In Officer Wellmon's opinion, the nervousness exhibited by the Defendant was much more extreme than that of any motorists he had previously stopped for a Chapter 20 violation.

16. Officer Wellmon observed the Defendant's eyes to be bloodshot and glassy, like a mirror, and the skin underneath his eyes were ashy in appearance. The defendant, in answer to the officer's inquiry, denied consuming any impairing substance.

17. Based on Officer Wellmon's training and experience, the behaviors and physical appearance of the Defendant were consistent with someone having used methamphetamine.

18. When asked where he was going, the defendant told the Officer he was going to "Rabbit's" house because he had sold "Rabbit" his car and needed to collect the money.

19. The Officer knew "Rabbit" to be the nickname of Archie Stanberry. Furthermore, the officer had prior knowledge that Archie Stanberry was involved with methamphetamine and had previous drug charges involving methamphetamine. Officer Wellmon also knew that Archie Stanberry's house was located at Shadrack Lane, which is in close proximity to Cabe Road.

20. That the defendant had a small dog in his vehicle that was barking and growling at the officer. When the Officer asked if the dog would bite, the defendant, of his own volition, got out of his vehicle. Officer Wellmon testified that it is unusual for someone to exit their vehicle without being requested to do so by the Officer.

21. Because of concerns for officer safety, Officer Wellmon asked the defendant if he could pat him down for weapons. The defendant said he did not mind. During the process of checking for weapons, the defendant talked the entire time, stuttered and the officer was unable to understand anything he said.

22. The officer asked the defendant to walk to the back of his truck and as he did so, the defendant placed his hand on the vehicle for stability. When he reached the back of his vehicle, the defendant leaned on the tailgate.

23. Officer Wellmon did not perform field sobriety tests or seek a breath or blood sample from [defendant].

24. Officer Wellmon then asked the defendant for consent to search and the defendant denied that request.

25. Officer Wellmon, requested Sgt. Kenneth Woodring, who had just arrived on the scene, to make contact with a Canine Unit. Jackson County Sheriff's Office did not have a canine at that time. Macon County was closest to the location, but their canine was unavailable. At 3:17, Officer Wellmon was told that a canine from Cherokee was on the way.

26. Officer Wellmon went to his patrol vehicle to check on the validity of the defendant's license, registration and for any outstanding warrants. Before getting into his vehicle and while his driver's side door was open, Mallory Gayosso, approached Officer Wellmon and told him "that was Archie's dope in the vehicle".

27. Officer Wellmon knew that Ms. Gayosso lived near where the officer and the defendant were parked on Comfort Road. He also knew that Ms. Gayosso has given drug information to law enforcement in the past.

28. Approximately 6 minutes later, while Officer Wellmon was conducting his license and record checks, Ms. Gayosso approached him once again. She told him she had just walked down to Cabe Road from Comfort Road to get milk from her mother. Ms. Gayosso told Officer Wellmon that she had "just got off the phone Rabbit" Archie Stanberry, and that "there was dope in the vehicle and it was in a black tackle box and not to let us find it." Ms. Gayosso continued to walk back to her home.

29. During this time, the defendant remained standing at the back of his vehicle speaking with Sgt. Woodring.

Defendant challenges the next four findings as not supported by the evidence.

30. Officer Wellmon ran an inquiry on the defendant's license from Jackson County Dispatch, ran a driver's history on C.J. Leads, checked for any outstanding warrants on N.C. AWARE and NCIC. He determined the defendant's license and registration were valid and there were no outstanding warrants for his arrest. The defendant's license and registration were not returned to him. This process takes officer Wellmon 15 minutes.

> 31. Within six to seven minutes after making that determination, Sgt. Rick Queen from Cherokee Police Department's NRE Division arrived with his canine Bogart. Officer Wellmon testified the Sergeant and his canine arrived at approximately 3:47 pm.
>
> 32. That based on his training and experience and the totality of the circumstances, Officer Wellmon had reasonable suspicion to justify extending the stop until a canine unit arrived.
>
> 33. That six to seven minutes is a reasonable amount of time, following the completion of the officer's Chapter 20 investigation, to detain the Defendant based on the Officer's reasonable suspicion to believe criminal activity is afoot.

Defendant does not challenge the events described in these findings but only the trial court's findings regarding the exact timing of the events. The trial court found that defendant was detained only "six to seven" minutes after Officer Wellmon completed the Chapter 20 investigation. The court also found that "six to seven minutes" after completion of the Chapter 20 investigation was a reasonable amount of time to detain defendant while waiting for the canine officer, based upon Officer Wellmon's reasonable suspicion to believe that defendant was engaging in criminal activity. Defendant argues that "[i]n the thirty minutes from the arrival of the Sergeant to the arrival of the canine unit, Officer Wellmon could have issued a citation" and defendant should have been released. By defendant's calculations, "[i]t was a full fifteen minutes after" 3:32 pm, or 3:47 pm, "when Officer Queen even arrived on the scene with the dog[,]" not "six or seven" minutes. The State notes that although there was some confusion in the testimony regarding exact timing of the events, ultimately Officer Wellmon clarified his testimony about how long he took to check the information on the computer and when he completed the Chapter 20 investigation. Officer Wellmon testified:

> Q. Did you have an occasion at that juncture [after receiving information about defendant's license, registration, or outstanding warrants] to estimate how long it was before the K-9 arrived?
>
> A. Yes.
>
> Q. About how long was it before the K-9 arrived?

A. I would say 15.

Q. After you had completed running all theinformation, correct?

A. Yeah. Once I completed the information, it was probably six -- six, seven minutes.

Q. Okay. I guess I'm somewhat confused. I asked a second ago: How long after you finished running all the information was it before the K-9 arrived?

A. Oh, excuse me. Six to seven minutes.

Q. You had said 15 minutes.

A. I'm sorry. I got confused.

If there was any conflict in the testimony about the timing of events, the trial court resolved that conflict in the findings of fact. "It is well established that the trial court resolves conflicts in the evidence and weighs the credibility of evidence and witnesses." *Jones*, __ N.C. App. at __, __ S.E.2d at __, 2018 WL 1597450, at *2 (citation and quotation marks omitted). The evidence supports the trial court's findings as to the timing of the traffic stop and extension.

B. Conclusions of law

[3] Defendant argues next that even if the extension of time was only six or seven minutes, the trial court erred in concluding that "Officer Wellmon had reasonable suspicion to further question the defendant in that under the totality of the circumstances there existed reasonable articulable suspicion to indicate that criminal activity was afoot" and that "Officer Wellmon had reasonable suspicion to detain the defendant until the arrival of the canine officer and the delay was not unreasonable under the totality of the circumstances in this case." Defendant contends that the extension of the stop during and after the Chapter 20 investigation was "unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution and case law interpreting same." Defendant's argument is based primarily on *Rodriguez v. United States*, __ U.S. __, 191 L. Ed. 2d 492, 135 S. Ct. 1609 (2015).

In *Rodriguez*, the United States Supreme Court addressed "the question [of] whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop." *Id.* at __, 191 L. Ed. 2d at 496, 135 S. Ct. at 1612. The Court held that if a "police stop exceed[s] the time needed to handle the matter for which the stop was made,"

the stop "violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation." *Id.* at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1612 (citation, quotation marks, and brackets omitted).

Defendant contends that the "factual scenario in *Rodriguez* is very similar" to his case. In *Rodriguez*, a police officer saw a vehicle "veer slowly onto the shoulder" of a highway "for one or two seconds and then jerk back onto the road." *Id.* at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1612. Because state law prohibited driving on the shoulder of a highway, the officer stopped Rodriguez for this traffic violation at about 12:06 a.m. *Id.* at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1612. The officer was a canine officer and his dog was with him in his patrol car. *Id*. at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1612. The officer approached Rodriguez's vehicle and got his license, registration and proof of insurance. *Id.* at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1613. He then ran a record check and returned to the vehicle to get the passenger's license and question him about where they were coming from and where they were going. *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. The officer returned to his patrol car to run a record check on the passenger and called for a second officer. *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. He returned to Rodriguez's vehicle a third time to issue a written warning ticket at about 12:27 or 12:28 am. *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. At that point, the officer acknowledged that he had taken care of " 'all the reason[s] for the stop[.]' " *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. But then he asked for permission to walk his dog around defendant's car, and Rodriguez said no. *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. He had Rodriguez get out of the car and wait for the second officer to arrive. *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. At 12:33 a.m., the second officer arrived and the first officer had his canine sniff the car; the canine alerted, leading to the discovery of a "large bag of methamphetamine." *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. The entire stop took about twenty-seven minutes prior to the dog sniff, and the stop was extended by about seven to eight minutes after completion of the investigation of the traffic violation for the dog sniff. *Id.* at __, 191 L. Ed. 2d at 498, 35 S. Ct. at 1614.

Defendant argues that here, the entire stop was about forty-one minutes, and it was extended six to seven minutes for the dog sniff, so under *Rodriguez*, it was unreasonable because its duration was too long. Defendant argues that "based upon the totality of the circumstances,

performing these functions by checking a driver's information and issuing a traffic citation for driving left of center should reasonably have been completed in less than forty-one minutes." Defendant does not explain how he contends that Officer Wellmon could have completed the Chapter 20 portion of the stop more quickly or why the length of the Chapter 20 portion of the stop was unreasonable under the totality of the circumstances. But even if the stop could have been completed more quickly, defendant ignores a crucial part of the *Rodriguez* analysis. The Court held that the officer may not conduct the traffic stop "in a way that prolongs the stop, *absent the reasonable suspicion ordinarily demanded to justify detaining an individual*." *Id.* at __, 191 L. Ed. 2d at 499, 35 S. Ct. at 1615.

In *Rodriguez*, based upon the findings made by the district court, there were no other circumstances which could have given the officer a basis for reasonable suspicion of any crime other than the initial traffic stop; Rodriguez had merely driven on the shoulder of the road for one or two seconds, which was a traffic violation, but there were no other facts which might arouse suspicion of wrongdoing. *Id.* at __, 191 L. Ed. 2d at 496, 35 S. Ct. at 1612. The district court found that " 'Officer Struble had [no]thing other than a rather large hunch' " and determined that "no reasonable suspicion supported the detention once Struble issued the written warning." *Id.* at __, 191 L. Ed. 2d at 497, 35 S. Ct. at 1613. But the Supreme Court specifically noted that if a law enforcement officer has a basis for reasonable suspicion which develops during the stop, the stop can be extended accordingly. *Id.* at __, 191 L. Ed. 2d at 499, 35 S. Ct. at 1615.

As in *Rodriguez*, the dog sniff here extended the stop. But the Supreme Court noted that the next inquiry was "whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation," and since the Eighth Circuit Court of Appeals had not reviewed the district court's conclusion on this issue, the Supreme Court remanded the case for review of this issue. *Id.* at __, 191 L. Ed. 2d at 501, 35 S. Ct. at 1616-17.

Unlike in *Rodriguez*, here the trial court addressed the basis for reasonable suspicion to extend the stop. Defendant's argument ignores the many uncontested findings of fact which support the trial court's conclusion that Officer Wellmon had reasonable suspicion to extend the stop for the dog sniff. Officer Wellmon was patrolling Cabe Road based upon complaints about drug activity and he had been advised by the State Bureau of Investigation to be on the lookout for defendant based upon reports he was "bringing large quantities of methamphetamine to a

supplier off of Cabe Road." After he stopped the truck, Officer Wellmon identified defendant as the person he was on the lookout for and noticed defendant was confused, spoke so quickly he was hard to understand, and began to "stutter and mumble his words."[1] Defendant did not make eye contact when talking to Officer Wellmon and his nervousness was "much more extreme" than that of most drivers stopped by the officer. His eyes were bloodshot and glassy and the skin underneath his eyes was ashy. Based upon his training and experience, Officer Wellmon believed defendant's "behaviors and physical appearance" were consistent with methamphetamine use. Defendant told Officer Wellmon he was going to "Rabbit's" house, and Officer Wellmon knew that "Rabbit" was involved with methamphetamine and that he lived nearby. When defendant got out of the car -- without having been asked -- he put his hand on the car for stability. And although these facts alone would have given Officer Wellmon reasonable suspicion, at this point a woman Officer Wellmon knew had given "drug information to law enforcement in the past" approached and told him she had talked to Rabbit and defendant had "dope in the vehicle and it was in a black tackle box" and not to let the police find it. These facts were more than sufficient to give Officer Wellmon a reasonable suspicion that defendant may have drugs in his vehicle and to justify a dog sniff, and the trial court's conclusions of law were supported by the findings of fact. This argument is also without merit.

Conclusion

We affirm the trial court's order denying defendant's motion to suppress.

AFFIRMED.

Judges BRYANT and CALABRIA concur.

1. The SBI had told Officer Wellmon to be on the lookout for defendant in a black vehicle, but defendant was the registered owner of the white truck he was driving when he was stopped.

STATE v. TEAGUE

[259 N.C. App. 904 (2018)]

STATE OF NORTH CAROLINA
v.
JOSEPH EDWARDS TEAGUE, III

No. COA17-1134

Filed 5 June 2018

Search and Seizure—search warrant—probable cause—drugs in residence

There was a substantial basis for a warrant to search defendant's residence where a police detective's warrant application stated there were marijuana-related items in defendant's trash dumpster, defendant had a history of drug charges, and database searches linked defendant to the residence to be searched.

Appeal by defendant from judgment entered 8 December 2016 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 17 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kevin G. Mahoney, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for defendant-appellant.

TYSON, Judge.

Joseph Edward Teague, III ("Defendant") appeals from a judgment entered upon a plea agreement from which he pleaded guilty to a count of possession with intent to sell or distribute marijuana and possession of marijuana. We find no error.

I. Background

On 6 March 2014, Raleigh Police Detective N.D. Braswell applied for a search warrant for the premises located at 621 Manchester Drive in Raleigh, North Carolina. In his probable cause affidavit (the "Affidavit"), submitted to a magistrate, Detective Braswell stated that "he received information from a concerned citizen in the neighborhood who wants to remain anonymous . . . that he/she believes narcotics are being sold from 621 Manchester Drive." The Affidavit does not state when Detective Braswell received this information from the anonymous tipster, nor what led the tipster to "believe[] narcotics [were] being sold from

621 Manchester Drive." Based upon the anonymous tip, Detective Braswell began an investigation and surveillance of activities occurring at 621 Manchester Drive (the "Residence").

According to the Affidavit, Detective Braswell drove by the Residence and checked the license plate number on a 1989 Buick automobile parked in the driveway through CJLEADs, a law enforcement database. This database search showed the automobile was registered to Laura Teague. In the Affidavit, Detective Braswell stated, "I am familiar with this address and the son of Ms. Teague from my previous assignments as a patrol beat officer with Raleigh Police Department. Joseph Edwards Teague III is the son of Ms. Teague."

Detective Braswell "then checked city of Raleigh databases" and found Defendant had an established waste and water utilities account for the Residence. Detective Braswell "utilized another database and confirmed that [Defendant] lives at 621 Manchester Dr."

After noting the "regular refuse day for [the Residence] is Thursday," Detective Braswell averred in the Affidavit that he had "conducted a refuse investigation in the early morning hours of Thursday." Detective Braswell did not designate what was the date of the Thursday he had conducted the refuse investigation, nor to which "Thursday" he referred. The trash can Detective Braswell searched was located to the left of the driveway of the Residence, "only inches from the curb line." There was not a house or structure located to the left of the Residence. The nearest structure to the left of the Residence was a church at an unspecified distance.

Inside the trash can, Detective Braswell found three white trash bags. Detective Braswell found a red Solo cup containing a green leafy substance; five cut-open food saver bags; and a Ziplock bag containing trace residue "of what appear[ed] to be marijuana" inside the trash bags. Inside one of the trash bags, Detective Braswell also found a Vector butane gas container, which he noted in the Affidavit can be "used to make butane hash oil by extracting the THC from marijuana through the use of butane." According to the Affidavit, Detective Braswell "utilized a narcotics analysis reagent kit to test the substance for marijuana. The green leafy substance field tested positive for marijuana."

In the Affidavit, Detective Braswell also included information about prior criminal charges and case dispositions involving Defendant, including:

> [Defendant] was charged with possession [of] marijuana [of] less than one half ounce and possession of drug paraphernalia . . . . He accepted a plea to possession of drug paraphernalia. [Defendant] was charged with

> simple possession of marijuana and possession of drug paraphernalia . . . and dismissed by [the] DA. [Defendant] was charged with PWISD marijuana, maintaining a dwelling for controlled substance, and possession of drug paraphernalia. . . . He accepted a plea to possession of drug paraphernalia.

On 6 March 2014, Detective Braswell submitted an application along with the Affidavit to obtain a warrant to search Defendant's Residence. The magistrate found probable cause and issued the search warrant. Pursuant to that warrant, law enforcement officers searched Defendant's Residence on 7 March 2014, and the following items were seized:

1. 358 grams of marijuana
2. 40.39 grams of marijuana
3. 39 grams butane hash oil
4. $1,015 in United States currency
5. 55 grams of butane hash oil in multi-colored containers
6. 2 empty red plastic containers
7. Time Warner mail addressed to Defendant.
8. 1 gram of butane hash oil on a Silpat.
9. a black pelican case containing a glass marijuana pipe
10. a Mastercool pump
11. a metal bowl, glass bowl, temp, gauge, hot plate, razor blades, and a skinny glass cylinder
12. plastic air tight containers with marijuana residue
13. an assortment of marijuana pipes

On 21 July 2014, a grand jury indicted Defendant for two counts of possession with intent to sell or deliver ("PWISD") marijuana and one count of maintaining a dwelling for controlled substances. The grand jury subsequently returned three superseding indictments. The final superseding indictment charged Defendant with PWISD marijuana, PWISD of a schedule VI controlled substance, maintaining a dwelling for a controlled substance, and felony possession of marijuana.

Prior to trial, Defendant filed a motion to suppress the search of the Residence, and argued the information in Detective Braswell's Affidavit

was insufficient to establish probable cause for the magistrate to issue the search warrant. In his motion to suppress, Defendant asserted the lack of information regarding: (1) when the anonymous tip was made to Detective Braswell; (2) the basis or source of the anonymous informant's information; (3) the date on which Detective Braswell conducted the refuse investigation; (4) the contents of the trash bag being linked to the Residence or Defendant; and, (5) any indication on the trash can connecting it to the Residence.

On 30 October 2015, the trial court conducted a hearing upon Defendant's motion to suppress. The trial court denied Defendant's motion and entered a written order containing the following findings of fact:

> 1. That a search warrant was granted by a Wake County Magistrate that was dated March 6, 2014 for the search of the dwelling of 621 Manchester Drive, Raleigh, North Carolina 27612.
>
> 2. Within the Search Warrant application, there was a probable cause affidavit attached in support of the warrant application.
>
> 3. This affidavit given by Detective N. Braswell with the Raleigh Police Department, listed his experience of 12 years as a law enforcement officer and description of the types of previous drug investigations he had been involved in.
>
> 4. The affidavit additionally gives information that Detective Braswell received information from an anonymous concerned citizen in the neighborhood of Manchester Drive that they believed narcotics were being sold from 621 Manchester Drive.
>
> 5. The affidavit further states as a result of receiving that information, Detective Braswell began his investigation by driving by the residence and inquiring as to who the registered owner was of [the] car in the driveway under the carport of the home.
>
> 6. The affidavit lists that the registered owner of the vehicle seen in the driveway as Laura Teague with an address of 6104 Ivy Ridge Road, Raleigh, North Carolina 27612.
>
> 7. The affidavit states that Detective Braswell was familiar with this address and the son of Ms. Teague known as

Joseph Teague, III, from previous assignments with the Raleigh Police Department.

8. The affidavit states that Detective Braswell checked City of Raleigh databases and Joseph Teague, III had a solid waste and water account for the address of 621 Manchester Drive. Detective Braswell also utilized other databases and confirmed that Joseph Teague, III resided at 621 Manchester Drive, Raleigh, North Carolina.

9. The affidavit includes information that Detective Braswell conducted a refuse investigation in the early morning hours of Thursday and that Thursdays are the regular trash collection days for 621 Manchester Drive.

10. Within the affidavit, it does not list a date or any reference to a specific Thursday that the refuse investigation was collected.

11. The affidavit includes that the refuse can was to the left of the concrete driveway only inches from the curb line and there are no other residences to the left of 621 Manchester Drive.

12. The affidavit indicates that the results of the refuse investigation yielded three white trash bags that were tied shut. Within the bags the following was located: marijuana residue that was located within a red solo cup that field tested positive [for] marijuana, five open food saver bags and one Ziploc bag that also contained marijuana residue that also field tested positive for marijuana, and [a] Vector butane gas container.

13. Detective Braswell further lists in the affidavit that Butane gas containers can be used to make butane hash oil by extracting THC from marijuana using the Butane, and that hash oil can be smoked or taken orally.

14. Lastly, Detective Braswell listed the criminal history of Joseph Teague, III, indicating prior drug convictions from 2009 and 2010.

15. The trash pull was done for the purpose of corroborating the information received by Detective Braswell from the concerned citizen and furthering the investigation.

> 16. While there is no specific date listed for what Thursday the refuse investigation was done, this Court has found that a reasonable magistrate using common sense would indicate that this refuse investigation was done within a relatively short time after receiving the information from the concerned citizen and the beginning of this investigation.

Based upon these findings, the trial court concluded that, under "the totality of the circumstances . . . there was sufficient evidence for probable cause for the basis of the Search Warrant for [the Residence,]" and denied Defendant's motion to suppress.

At trial, Defendant's counsel renewed his objection to the search resulting from the search warrant prior to the evidence being introduced at trial. At the close of the State's evidence, Defendant and the State entered into a plea agreement wherein Defendant agreed to plead guilty to PWISD marijuana and felony possession of marijuana, and the State agreed to voluntarily dismiss the remaining charges. Defendant reserved the right to appeal the denial of his motion to suppress.

The trial court fined Defendant $300, sentenced Defendant to a term of six to seventeen months of imprisonment, and suspended the sentence to twenty-four months of supervised probation. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

"An order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2017). Defendant reserved the right to appeal the trial court's denial of his motion to suppress pursuant to his plea of guilty to the charged offenses. The State does not contest Defendant's right to appeal. This appeal is properly before us.

III. Standard of Review

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). "We review *de novo* a trial court's conclusion

that a magistrate had probable cause to issue a search warrant." *State v. Worley*, __ N.C. App. __, __. 803 S.E.2d 412, 416 (2017).

IV. Analysis

A. Probable Cause

The Fourth Amendment to the Constitution of the United States requires probable cause must be shown before a search warrant may be issued. U.S. Const. amend. IV. Defendant argues the search warrant to search his Residence was not supported by sufficient probable cause.

To determine whether probable cause existed to issue a search warrant, a reviewing court looks to the "totality of the circumstances." *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984); *see Illinois v. Gates*, 462 U.S. 213, 238, 76 L.Ed.2d 527, 548 (1983). Under the "totality of the circumstances" test, an affidavit submitted to obtain a search warrant provides sufficient probable cause if it provides

> reasonable cause to believe that the proposed search . . . probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender. Probable cause does not mean actual and positive cause nor import absolute certainty.

Arrington, 311 N.C. at 636, 319 S.E.2d at 256 (citations omitted). "When reviewing a magistrate's determination of probable cause, this Court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that articles searched for were probably present." *State v. Hunt*, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002) (citations omitted).

> A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than commonsense, manner. [T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Riggs, 328 N.C. 213, 222, 400 S.E.2d 429, 434-35 (1991) (alterations in original) (citations and quotation marks omitted).

B. Staleness

To support his argument that probable cause did not exist to support issuance of the search warrant, Defendant asserts that the information obtained from the anonymous tipster and Detective Braswell's investigation of the trash can outside the Residence were potentially stale.

> The test for staleness of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. Common sense must be used in determining the degree of evaporation of probable cause. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock.

State v. Lindsey, 58 N.C. App. 564, 565-66, 293 S.E.2d 833, 834 (1982) (citations, internal quotation marks, and ellipsis omitted). "[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. The continuity of the offense may be the most important factor in determining whether the probable cause is valid or stale." *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 358 (1990) (internal citations omitted).

"[C]ommon sense is the ultimate criterion in determining the degree of evaporation of probable cause." *State v. Pickard*, 178 N.C. App. 330, 335, 631 S.E.2d 203, 207 (2006) (citing *State v. Jones*, 299 N.C. 298, 305, 261 S.E.2d 860, 865 (1980)). "Other variables to consider when determining staleness are the items to be seized and the character of the crime." *Id.* at 335-36, 631 S.E.2d at 207. A defendant's past criminal conduct and reputation for criminal conduct is relevant to whether probable cause exists. *See State v. Sinapi*, 359 N.C. 394, 399-400, 610 S.E.2d 362, 365-66 (2005) (recognizing a defendant's drug-related criminal history recited in an officer's affidavit as relevant to finding probable cause to issue a warrant to search the defendant's residence for evidence of drug crimes).

Here, Detective Braswell's Affidavit states, in relevant part:

> I have received information from a concerned citizen in the neighborhood who wants to remain anonymous for fear of retaliation that he/she believes narcotics are being sold from [the Residence]. When I received this information I started an investigation.

. . .

> The regular refuse day for [the Residence] is Thursday. I conducted a refuse investigation in the early morning hours of Thursday and there was a green refuse can to the left of the concrete driveway only inches from the curb line.

Although the Affidavit does not state when or over what period of time the anonymous tipster observed criminal activity at Defendant's Residence, when the tipster relayed this information to police, or the exact date Detective Braswell conducted the refuse search, the Affidavit was based on more than just the information supplied by the anonymous tipster and the information regarding the refuse search. Detective Braswell's Affidavit included details regarding database searches indicating Defendant had a waste and water utility account at the Residence, that Defendant resided at the Residence, that Detective Braswell was familiar with the Residence and Defendant from his previous assignment as a patrol officer. The Affidavit also recounted Defendant's prior charges for possession of drug paraphernalia, PWISD marijuana, and maintaining a dwelling for a controlled substance.

To the extent the information from the anonymous tip may have been stale, it was later corroborated by Detective Braswell's refuse search, in which Detective Braswell found a Solo cup containing marijuana residue, plastic bags containing marijuana residue, and a butane gas container that Detective Braswell specified is consistent with the potential manufacturing of butane hash oil. These averments are sufficient grounds to provide a magistrate with "a reasonable ground to believe . . . the proposed search [would] reveal the presence upon the premises" of the drug-crime related items sought in the search warrant. *Lindsey*, 58 N.C. App. at 565, 293 S.E.2d at 834.

Detective Braswell averred in his Affidavit that "the regular refuse day for [the Residence] is Thursday. I conducted a refuse investigation in the early morning hours of Thursday[.]" Although the Affidavit is not explicit about which "Thursday" Detective Braswell conducted the refuse search, a "common sense" reading of the Affidavit would indicate the "Thursday" referred to by Detective Braswell was the most recent Thursday to 6 March 2017, the date he swore out the Affidavit and submitted the search warrant application. *See Pickard*, 178 N.C. App. 330, 335, 631 S.E.2d 203, 207.

For purposes of addressing Defendant's argument that Detective Braswell's refuse search was potentially stale, we take judicial notice of

the records of the United States Naval Observatory. *See State v. Garrison*, 294 N.C. 270, 280, 240 S.E.2d 377, 383 (1978) (taking judicial notice of U.S. Naval Observatory report to affirm nighttime element in burglary conviction). "A court may take judicial notice, whether requested or not." N.C. Gen. Stat. § 8C-1, Rule 201(c) (2017). The 2014 edition of the U.S. Naval Observatory's Nautical Almanac indicates 6 March 2014 was a Thursday. Nautical Almanac Office of the United States Naval Observatory, The Nautical Almanac for the Year 2014 (2014).

A magistrate drawing reasonable inferences from the Affidavit would have a substantial, common-sense basis to conclude the "Thursday" referred to in the Affidavit was the day Detective Braswell swore out his Affidavit and applied for the search warrant. The magistrate could reasonably infer Detective Braswell would not delay in applying for a search warrant given the nature with which marijuana-related evidence may quickly dissipate. *See Lindsey*, 58 N.C. App. at 567, 293 S.E.2d at 835 (noting that marijuana "can be easily concealed and moved about and which is likely to be disposed of or used.").

Even if the anonymous tip was potentially stale, the refuse search, Defendant's prior history of drug charges and offenses, and the database searches linking Defendant to the Residence all provided sufficient probable cause to issue the search warrant. Defendant does not contest the legality of the refuse search conducted by Detective Braswell.

The Supreme Court of North Carolina noted in *Sinapi*, a case involving a refuse search for drug-related evidence, that a magistrate may "rely on his personal experience and knowledge related to residential refuse collection to make a practical, threshold determination of probable cause," and he is "entitled to infer that the garbage bag in question came from [the] defendant's residence and that items found inside that bag were probably also associated with that residence." *Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365 (holding that a search warrant was supported by probable cause where the defendant had been previously arrested twice for drug-related offenses and several marijuana plants were discovered in a garbage bag outside the defendant's home).

In addition to our Supreme Court in *Sinapi*, the courts of other jurisdictions have recognized:

> that "the recovery of drugs or drug paraphernalia from the garbage contributes significantly to establishing probable cause." *U.S. v. Briscoe*, 317 F.3d 906, 908 (8th Cir.2003) (holding that marijuana seeds and stems found in the defendant's garbage were sufficient, standing alone, to

> establish probable cause because "simple possession of marijuana seeds is itself a crime under both federal and state law"); *see also U.S. v. Colonna*, 360 F.3d 1169, 1175 (10th Cir.2004) (holding that evidence of drugs in the defendant's trash cover, while potentially indicating only personal use, was sufficient to establish probable cause because "all that is required for a valid search warrant is a fair probability that contraband or evidence of a crime will be found in a particular place") (quoting *Illinois*, 462 U.S. at 238, 76 L.Ed.2d at 543).

State v. Lowe, 242 N.C. App. 335, 341, 774 S.E.2d 893, 898 (2015), *aff'd in part*, *rev'd in part on other grounds*, 369 N.C. 360, 794 S.E.2d 282 (2016).

Presuming, *arguendo*, the anonymous tip was so stale as to be unreliable, the marijuana-related items obtained from Detective Braswell's refuse search and attested to in his Affidavit, Defendant's criminal history, and the database searches specifically linking Defendant to the Residence to be searched, provided a substantial basis upon which the magistrate could determine probable cause existed to issue the search warrant of Defendant's Residence, under the totality of the circumstances. *See Sinapi*, 359 N.C. at 399, 610 S.E.2d at 365 (determining refuse search resulting in evidence of marijuana provided probable cause for search warrant to issue); *see also Arrington*, 311 N.C. at 641, 319 S.E.2d at 259 (specifying that a court reviewing the existence of probable cause to issue a search warrant is to employ the totality of the circumstances test).

V. Conclusion

The Affidavit and application submitted by Detective Braswell to obtain the warrant to search Defendant's Residence gave the magistrate a substantial basis to conclude probable cause existed to issue the warrant. Recognizing the deference we are to give to the magistrate's determination of probable cause and deferring to the reasonable inferences the magistrate could have made based on the information contained in Detective Braswell's Affidavit, this Court concludes the magistrate had a substantial basis for determining probable cause that the evidence to be searched for and seized was located at Defendant's Residence. *See Hunt*, 150 N.C. App. at 105, 562 S.E.2d at 600.

The trial court's order, which denied Defendant's motion to suppress, is affirmed. *It is so ordered.*

AFFIRMED.

Judges DIETZ and BERGER concur.

STATE v. VENEY

[259 N.C. App. 915 (2018)]

STATE OF NORTH CAROLINA
v.
RODNEY VENEY

No. COA17-1323

Filed 5 June 2018

Criminal Law—jury instructions—outside presence of defense counsel

Where the trial court in a criminal trial erroneously rendered instructions to potential jurors during a recess at the voir dire stage of jury selection while defendant's counsel was absent, the error was not structural error because it did not occur during a critical stage of trial. Further, the erroneously rendered instruction to abstain from independent research was harmless error, since the same standard administrative instructions were given to the jury on numerous occasions throughout the trial proceedings without objection.

Judge DIETZ concurring with separate opinion.

Judge BERGER concurring with separate opinion.

Appeal by defendant from judgment entered 21 March 2017 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 17 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

TYSON, Judge.

Rodney Veney ("Defendant") appeals from judgments entered upon his convictions for three counts of assault with a deadly weapon inflicting serious injury. Defendant argues the trial court committed a structural error by instructing prospective jurors outside the presence of defense counsel, which deprived him of his Sixth Amendment right to counsel. The State has proved the conceded error was harmless beyond a reasonable doubt.

I. Background

Defendant was charged with assault with a deadly weapon with the intent to kill inflicting serious injury ("AWDWIKISI") for stabbing Valerie Wright on 12 May 2015. On 6 July 2015, a grand jury returned a true bill of indictment. On 17 August 2015, the grand jury returned a superseding indictment charging Defendant with three counts of AWDWIKISI for stabbing Valerie Wright, Krystal Octetree and Dahmon Scott. The three charges of AWDWIKISI were joined for trial with other charges from a different indictment for first-degree burglary and conspiracy to commit felonious assault.

Defendant was tried before a jury on the 5 December 2016. During the *voir dire* portion of jury selection, the trial court called a recess. While waiting to resume jury selection, and while Defendant's trial counsel was outside of the courtroom, the trial court gave the following instruction to the prospective juror pool, which Defendant contests on appeal:

> COURT: While [defense counsel's] gone, let me give you some instructions, all of you, if you happen to sit on this jury, you're picked for this jury.
>
> As you've been told by the lawyers and by me, you have to try this case based on what you hear in the courtroom uninfluenced by any outside factor whatsoever. This case must be tried based upon the evidence presented and the law as I give it to you.
>
> I was licensed to practice law in 1970. That's 46 years. At that time, the largest office in the law firm was the law library. Now lawyers walk around with a law library on their cell phone. Okay? Which means it gives them access to the law, and it gives you access to the law or access to anything you want to know. If something comes up in the case, I mean, you could Google "burglary" and get some kind of definition.
>
> The reason I say that to you is just to remind you please don't do that. Please don't do that. Okay? Please don't do any research on your own. Don't go to any alleged crime scene. Don't read the law. If something comes up during the testimony with reference to forensic evidence from the City-County Bureau of Investigation, don't Google the term or whatever.

> You're not investigators. You're jurists. Everything you need to know you'll hear in the presentation of the evidence or in the legal principles that I will describe to you. So please don't resort to any matter of investigation on your own. Don't read any law. Don't do any research. Don't do anything of that nature please. You're instructed not to. The Supreme Court has advised me to tell you that that would be improper.

On 9 December 2016, the jury returned verdicts finding Defendant not guilty of first-degree burglary, not guilty of conspiracy to commit felonious assault, but guilty of three counts of assault with a deadly weapon inflicting serious injury ("AWDWISI"). The trial court sentenced Defendant to three consecutive sentences of twenty-six months to forty-four months imprisonment. Defendant's trial counsel gave oral notice of appeal in open court.

II. Jurisdiction

Jurisdiction lies in this Court from an appeal of a final judgment of the superior court in a criminal case based upon the jury's convictions of Defendant following pleas of not guilty. N.C. Gen. Stat. §§ 7A-27(b), 15A-1444(a) (2017).

III. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citing *State v. Tate*, 187 N.C. App. 593, 599, 653 S.E.2d 892, 897 (2007)).

> Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.

State v. Garcia, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (internal citations and quotation marks omitted). Structural "error[ ] is reversible *per se*." *Id.*

The Supreme Court of the United States has made "a distinction between structural errors, which require automatic reversal, and all other errors, which are subject to harmless-error analysis." *Arnold v. Evatt*, 113 F.3d 1352, 1360 (4th Cir. 1997). "The United States Supreme Court emphasizes a strong presumption against structural error."

State v. Polke, 361 N.C. 65, 74, 638 S.E.2d 189, 195 (citing *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)), *cert. denied*, 552 U.S. 836, 169 L. Ed. 2d 55 (2006).

IV. Analysis

A. Preservation

Defendant's sole argument is that the trial court committed structural error by denying him his Sixth Amendment right to counsel by delivering instructions to potential juror pool during *voir dire*, while his counsel was absent from the courtroom. Defendant does not assert any arguments against the specific content of the disputed instructions. Defendant conceded at oral arguments before this Court that if the trial court's recitation of instructions to the potential jurors was not structural error, then it was harmless.

Generally, "structural error, no less than other constitutional error, should be preserved at trial." *Garcia*, 358 N.C. at 410, 597 S.E.2d at 745. "Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Rawlings*, 236 N.C. App. 437, 443-4, 762 S.E.2d 909, 914 (2014) (citing *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004)). Defendant did not object at trial to the trial court's giving of instructions to potential jurors in his counsel's absence. "Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). Defendant does not assert plain error on appeal. The State conceded at oral arguments on this matter that it does not contest whether Defendant preserved his argument.

In *State v. Colbert*, the Supreme Court of North Carolina reviewed a defendant's assertion of structural error, based upon the trial court starting jury selection approximately twenty minutes before the defendant's counsel had arrived in the courtroom. *State v. Colbert*, 311 N.C. 283, 285, 316 S.E.2d 79, 80 (1984). The Court noted "that defendant did not object to the foregoing procedure; however, he does bring the alleged error forward by assignment of error and argument in briefs before the Court of Appeals and this Court." The Court proceeded to address the defendant's arguments on the merits. *Id.*

Following our Supreme Court in *Colbert* and the concession by the State, we address Defendant's structural error argument on the merits. *See id.*

B. Structural Error

The State conceded at oral argument that the trial court erred by giving instructions to prospective jurors in defense counsel's absence, but argues that this error did not amount to structural error and was harmless beyond a reasonable doubt.

The Sixth Amendment to the Constitution of the United States grants defendants the right to assistance of counsel. U.S. Const. amend. VI. An individual is entitled to the assistance of counsel in all criminal prosecutions where his liberty is at stake regardless of whether the offense is "classified as petty, misdemeanor, or felony[.]" *Argersinger v. Hamlin*, 407 U.S. 25, 37, 32 L. Ed. 2d 530, 538 (1972). Denial of counsel during a *critical stage* is "so likely to prejudice the accused at trial that their costs of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984).

Structural errors are rare constitutional errors that prevent a criminal trial from " 'reliably serv[ing] its function as a vehicle for determination of guilt or innocence.' " *Garcia*, 358 N.C. at 409, 597 S.E.2d at 744 (citation omitted); *see Arnold v. Evatt*, 113 F.3d 1352, 1360 (4th Cir. 1997) (stating that "judges should be wary of prescribing new structural errors unless they are certain that the error's presence would render every trial in which it occurred unfair."). Our Supreme Court stated:

> The United States Supreme Court has identified only six instances of structural error to date: (1) complete deprivation of right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 9, L. Ed. 2d 799 (1963); (2) a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927); (3) the unlawful exclusion of grand jurors of the defendant's race, *Vasquez v. Hillery*,474 U.S. 254, 88 L. Ed. 2d 598 (1986); (4) denial of the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122 (1984); (5) denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984); and (6) constitutionally deficient jury instructions on reasonable doubt, *Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182 (1993). *See Johnson v. United States*, 520 U.S. 461, 468-69, 137 L.Ed.2d 718, 728 (identifying the six cases in which the United States Supreme Court has found structural error).

State v. Polke, 361 N.C. 65, 73, 638 S.E.2d 189, 194 (2006).

A critical stage is "a step of a criminal proceeding that . . . [holds] significant consequences for the accused." *Bell v. Cone*, 535 U.S. 685, 696, 152 L. Ed. 2d 914, 927-28 (2002) (citing *Hamilton v. Alabama*, 368 U.S. 52, 54, 7 L. Ed. 2d 114 (1961), and *White v. Maryland*, 373 U.S. 59, 60, 10 L. Ed. 2d 193, 194 (1963)). Denial of counsel during a critical stage of trial has been established where there is "complete denial of counsel . . . if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659, 80 L. Ed. 2d at 668 (1984). The appropriate remedy is automatic reversal, when counsel is "totally absent . . . during a critical stage of the proceeding." *Id.* at 659 n. 25, 80 L. Ed. 2d at 668 n. 25. Jury selection is a critical stage of the trial. *Colbert*, 311 N.C. at 285, 316 S.E.2d at 80. (citing *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976)).

Defendant asserts that he is entitled to "automatic reversal without any showing of prejudice" since the trial court violated his Sixth Amendment right to counsel when the court, in the absence of his counsel, instructed the potential jury members to abstain from doing independent research regarding the case. In support of his argument, Defendant relies upon *State v. Colbert*, in which the Supreme Court of North Carolina held that the defendant's Sixth Amendment right to counsel was violated during a critical stage when the trial court instructed the state to begin jury *voir dire* when defense counsel was absent, and thus could never be treated as harmless error. *Id.* at 286, 316 S.E.2d at 79, 80-81.

In *Colbert*, our Supreme Court found structural error where the trial court allowed the prosecution to question and strike prospective jurors in the defense counsel's absence. *Id.* at 286, 316 S.E.2d at 80-81. Unlike in *Colbert* where the defendant was denied his right to counsel during the critical stage of jury selection, here the challenged instructions were not given during jury selection, but during a recess. *Id.* at 283, 316 S.E.2d at 79.

The Supreme Court of the United States has recognized that a defendant does not have an absolute right to consult with counsel during a brief recess. In *Perry v. Leake*, the Supreme Court held that a state trial court's order directing the defendant not to consult with his counsel during a fifteen-minute recess following direct examination of the defendant was not a deprivation of the defendant's constitutional right to counsel. *Perry v. Leake*, 488 U.S. 272, 283-84, 102 L. Ed. 2d 624, 635-36 (1989).

Defendant also asserts the case of *State v. Luker* supports his structural error argument. In *State v. Luker*, our Supreme Court held that

where the defendant had been denied counsel "for the presentation of his evidence and closing arguments at his trial," the defendant was denied his Sixth Amendment right to counsel. *State v. Luker*, 311 N.C. 301, 301, 316 S.E.2d 309, 309 (1984). This denial of counsel was held to be reversible error. *Id.*

Defendant argues the trial court's giving of instructions to potential jurors during *voir dire* while his counsel was absent, deprived him of his right to counsel at a critical stage of trial, which like in *Luker*, requires automatic reversal. *Id.* At bar, unlike in *Luker*, Defendant's counsel had not withdrawn from the case, but simply failed to timely return from the morning break at the specified time of 11:37 a.m.

During the two minutes Defendant's counsel was out of the courtroom, *voir dire* did not continue. Instead, the trial court made use of this time to generally instruct the potential jury members to abstain from site visits or independent research regarding the case. During these two minutes, neither the court nor the State questioned prospective jurors. Here, the absence of defense counsel is not comparable to the absence of defense counsel in *Luker*. Examination of a criminal defendant and closing arguments are both critical stages of a trial that hold significant consequences for the accused.

During those stages defense counsel has the opportunity to build his client's credibility, present his version of the facts and evidence, and argue critical points and evidence in the case. Here, Defendant's counsel was absent for two minutes after a morning recess and the *voir dire* was resumed when Defendant's counsel returned to the courtroom. This short recess was not a critical stage of the trial and did not result in significant consequences for Defendant. *See id.*

Presuming, *arguendo*, and as the State concedes, the trial court erred in making general comments to the jury pool in a brief recess during a critical stage of jury selection, while Defendant's counsel was absent for two minutes, no activity relating to selecting the jury, such as questioning or striking, occurred during this period of time. We cannot agree that Defendant was completely deprived of his Sixth Amendment right to counsel during the critical stage of jury selection to be *per se* awarded a new trial, because of the trial court's recitation of general instructions regarding administrative matters during the two minutes his counsel was absent. *See State v. Rouse*, 234 N.C. App. 92, 95, 757 S.E.2d 690, 692 (2014) ("The *complete* denial of counsel is one of the six forms of structural error identified by the United States Supreme Court." (citations omitted) (emphasis supplied)). None of the instructions touched

upon jury selection or prejudiced Defendant, and Defendant's counsel was otherwise present for all other portions of jury selection and *voir dire*, except for the two minutes at issue.

We hold that because Defendant's counsel was not absent during a critical stage of the trial proceedings, *per se* structural error did not occur.

C. Harmless Beyond a Reasonable Doubt

While the State concedes, the trial court erred by giving instructions to the jury while defense counsel was absent, the State has also proved such error was harmless beyond a reasonable doubt.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." *State v. Hammonds*, 370 N.C. 158, 167, 804 S.E.2d 438, 444 (2017) (citations omitted).

Harmless-error analysis is appropriate in cases where a defendant has been denied the Sixth Amendment's right to counsel. *State v. Thomas*, 134 N.C. App. 560, 571, 518 S.E.2d 222, 230 (1999).

The State argues that the trial court's instructions to prospective jurors were harmless beyond a reasonable doubt. We note that the trial court gave the jury similar instructions at different times during trial while counsel was present without objection. The instructions were given to the pool of *potential* jury members, some of which may have been struck by counsel or excused by the court, and never had any impact on Defendant's conviction.

In *Satterwhite v. Texas*, the trial court conducted a hearing on the psychological evaluation of defendant. *Satterwhite v. Texas*, 486 U.S. 249, 252, 100 L. Ed. 2d 284, 291 (1988). The defendant was denied counsel while his competency was determined during the examination. *Id.* The defendant claimed that his Sixth Amendment right to counsel had been violated. *Id.* at 253, 100 L. Ed. 2d at 292. The Supreme Court of United States refused to apply *per se* or automatic reversal, and instead conducted a harmless-error analysis to determine whether the defendant's right to counsel was violated. *Id.* at 258, 100 L. Ed. 2d at 295. The Supreme Court determined that the error that occurred in that case was not harmless, since the psychiatrist was the only expert to testify on the issue of the defendant's competency. *Id.* at 260, 100 L. Ed. 2d at 296. The Court noted that it was "impossible to say beyond a reasonable doubt"

that the jury did not rely on the psychiatrist's testimony in rendering a verdict. *Id.*

Unlike in *Satterwhite*, where the jury heavily relied on the psychiatrist's testimony during deliberations, here the same or substantially similar instructions were given to the jury on numerous occasions throughout the trial proceedings without objection, thus making the jury's reliance on the instructions given by the trial court during the *voir dire* recess less impactful. The trial court rendered standard instructions to the potential jurors about not doing outside research, talking about the case while trial is pending, reading the law, and visiting the crime scene. None of the contested instructions were specific to the witnesses and evidence or the facts or law related to the offenses of which Defendant was charged. The trial court's error in giving these instructions without Defendant's counsel present is harmless beyond a reasonable doubt.

V. Conclusion

The trial court's rendering of instructions to potential jurors during a recess at the *voir dire* stage of jury selection while Defendant's counsel was absent was not structural error because this specific time was not a critical stage of trial. The State has met its burden to show that the conceded error in the trial court's giving of the challenged instructions without Defendant's counsel being present was harmless beyond a reasonable doubt. *It is so ordered.*

HARMLESS ERROR.

Judge DIETZ concurs with separate opinion.

Judge BERGER concurs with separate opinion.

DIETZ, Judge, concurring.

The trial court violated Veney's Sixth Amendment rights by speaking to the jury pool about the ground rules for serving as a juror outside the presence of Veney's counsel. The court should not have done so, and no trial court should do this again.

Nevertheless, I am persuaded by the Fourth Circuit's analysis in *United States v. Owen*, 407 F.3d 222, 226 (4th Cir. 2005). As Judge Luttig explained in *Owen*, even if the error occurred at a point of the criminal proceeding that could be called a "critical phase" in the abstract,

structural error analysis turns not on labels but on whether the error affects and contaminates the entire criminal proceeding to such a degree that it casts doubt on the fairness of the trial process. *Id.*

Here, the trial court's brief discussion with the jury pool—a discussion that was essentially about housekeeping rules governing their conduct if selected to serve—did not affect and contaminate the entire subsequent proceeding. The court did not discuss the charges against Veney or the law to be applied to those charges. Moreover, Veney could have asked for the jury to be instructed not to conduct outside research once seated and informed of the subject matter of the case, if this were a concern. And the court did, in fact, instruct the jury on this issue later in the proceeding, while Veney's counsel was present.

Veney conceded at oral argument that, unless we apply the structural error rule, he cannot prevail because this Sixth Amendment violation was harmless beyond a reasonable doubt. Because the trial court's error was not a structural one, I concur in the Court's judgment finding no prejudicial error.

BERGER, Judge, concurring in separate opinion.

I fully concur with the majority's opinion, but write separately to address the apparent conflict between *State v. Colbert*, 311 N.C. 283, 316 S.E.2d 79 (1984) and *State v. Garcia*, 358 N.C. 382, 597 S.E.2d 724 (2004), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

As noted in the majority's opinion, the defendant in *State v. Colbert* did not preserve his argument on appeal. *Colbert*, 311 N.C. at 285, 316 S.E.2d at 80. Even so, our Supreme Court reviewed the merits of that defendant's arguments for harmless error. *Id.* at 286, 316 S.E.2d at 81. However, our Supreme Court more recently declined to review a purported structural error that was not preserved. In *State v. Garcia*, our Supreme Court stated, "It is well settled that constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *Garcia*, 358 N.C. at 410, 597 S.E.2d at 745 (citation and quotation marks omitted). Further, "[s]tructural error, no less than other constitutional error, should be preserved at trial." *Id.*

Here, Defendant waived review of his argument by failing to preserve the issue at trial. But for the State's concession at oral argument concerning preservation, it would appear this Court should follow *Garcia*, and harmless error review should not be utilized. Also, Defendant failed to argue for plain error review on appeal. This case, however, presents

the unusual circumstance in which Defendant's trial counsel was potentially unaware of the error committed by the trial court in her absence. Defendant never had the knowledge to object, or otherwise preserve the argument for review. As such, Rule 2 would be the appropriate vehicle for this Court to reach the merits of Defendant's argument.

WFC LYNNWOOD I LLC AND WFC LYNNWOOD II LLC,
DELAWARE LIMITED LIABILITY COMPANIES, PLAINTIFFS
v.
LEE OF RALEIGH, INC., CHARLES L. PARK
AND SUN OK HELLNER, DEFENDANTS

No. COA17-562

Filed 5 June 2018

1. Contracts—commercial lease—default—liquidated damages—burden of proof

Despite an argument by defendants tenant and guarantors that the liquidated damages provision in a commercial lease was a double damage provision and therefore void, the trial court did not err in awarding liquidated damages where defendants failed to meet their burden of showing that the damages from the breach of the lease were not difficult to ascertain, that the amount stipulated was not a reasonable estimate, or that the amount stipulated was not reasonably proportionate to plaintiffs' actual damages.

2. Attorney Fees—commercial lease—reciprocal attorney fees provision—guarantors

The requirements of N.C.G.S. § 6-21.6 controlled in a situation involving reciprocal attorney fees where the commercial lease at issue was a business contract and not evidence of indebtedness as defendants argued and where the lease was executed after the effective date of the statute. Where a lease provision explicitly subjected the guarantor to liability for attorney fees, the guarantors here were jointly and severally liable with the tenant for attorney fees, despite not satisfying the requirements of section 6-21.6 on their own.

3. Attorney Fees—statutory award—sufficiency of findings—counsel's affidavit

The trial court erred in its award of attorney fees in a suit for breach of a commercial lease by finding as fact that the plaintiffs'

counsel charged a customary fee for like work where the counsel's affidavit did not address comparable rates by other attorneys in the same field of practice.

Judge DAVIS concurring in part and dissenting in part.

Appeal by defendants from orders entered 27 January 2017 and 24 March 2017 by Judge R. Allen Baddour, Jr. in Wake County Superior Court. Heard in the Court of Appeals 13 December 2017.

Smith Moore Leatherwood LLP, by Eric A. Snider and Elizabeth Brooks Scherer, for plaintiff-appellees.

Harris & Hilton, P.A., by Nelson G. Harris, for defendant-appellants.

CALABRIA, Judge.

Where defendants failed to meet their burden when challenging a liquidated damages clause, the trial court did not err in awarding liquidated damages on summary judgment. Where a commercial lease with a reciprocal attorneys' fees provision was executed after the effective date of N.C. Gen. Stat. § 6-21.6, the trial court did not err in awarding attorneys' fees pursuant to that statute. Where guarantors signed a guaranty explicitly noting their liability for outstanding attorneys' fees, the trial court did not err in holding them jointly and severally liable for attorneys' fees. Where there was insufficient evidence to support the trial court's finding that the rates charged by plaintiffs' attorneys were comparable to "the customary fee for like work," we remand for further findings. We affirm in part, vacate in part and remand in part for further findings on the amount of attorneys' fees.

I. Factual and Procedural Background

WFC Lynnwood I LLC and WFC Lynnwood II LLC ("plaintiffs") are Delaware corporations which own the Lynnwood Collection Shopping Center ("Lynnwood Collection") in Wake County. On 26 October 2011, Lee of Raleigh, Inc. ("Lee"), through its president, Sun Ok Hellner ("Hellner"), executed a lease, agreeing to lease space in Lynnwood Collection from plaintiffs. The lease contemplated a 64-month term, to run until 30 September 2017, and as part of the agreement, Lee agreed to conduct business continuously during the term of the lease. The lease also contained a reciprocal attorneys' fees provision for the recovery of fees resulting from litigation. As part of the lease, Hellner and Charles L.

Park ("Park") executed a guaranty to the lease, personally guaranteeing Lee's obligations. On 2 November 2015, Lee informed plaintiffs that it would cease operating business on 6 November 2015, and would surrender possession of the premises on 7 November 2015. Lee did so.

On 29 December 2015, plaintiffs filed a complaint against Lee, Hellner, and Park (collectively, "defendants"), alleging that Lee's abandonment of the premises constituted a default under the lease, and that plaintiffs were entitled to liquidated damages resulting from Lee's failure to remain in operation for the duration of the lease. Plaintiffs' complaint included claims for breach of contract by Lee as tenant, and breach of contract by Hellner and Park as guarantors.

On 16 February 2016, defendants filed an answer and motion to dismiss. Defendants alleged that the liquidated damages contemplated in the lease were void, that plaintiffs failed to mitigate damages, that plaintiffs lacked certificates of authority to transact business in North Carolina, and that plaintiffs' claims were barred by estoppel. Defendants further moved to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, alleging that "Plaintiffs have failed to state claims upon which relief can be granted[.]"

On 7 October 2016, plaintiffs moved for summary judgment. On 27 January 2017, the trial court entered an order granting summary judgment in favor of plaintiffs. This order awarded plaintiffs $43,253.16, plus interest; liquidated damages of $37,685.98, plus interest; and attorneys' fees, to be subsequently determined.

On 3 February 2017, plaintiffs filed a motion for attorneys' fees, noting that the trial court had already held that fees should be awarded, and thus that the issue before the court was "not *whether* attorneys' fees and costs should be awarded to [plaintiffs]; rather, the issue is the *amount* of reasonable attorneys' fees and costs[.]" On 24 March 2017, the trial court entered an order on attorneys' fees. The trial court recognized that the lease agreement included a reciprocal agreement for the payment of attorneys' fees, and that the guaranty agreement signed by Hellner and Park included a provision for the payment of attorneys' fees. The trial court considered the affidavit of plaintiffs' counsel, along with the range of hourly rates of attorneys in Wake County and the amount of work required by the case, and found that "the costs incurred by Plaintiffs were reasonable and necessary to enforce the Lease and Guaranty." The trial court therefore awarded attorneys' fees in the amount of $41,807.50 for costs incurred through 31 January 2017, and an additional $2,929.35 for costs incurred subsequently.

From the order granting summary judgment in favor of plaintiffs, and the order awarding attorneys' fees, defendants appeal.

II. Summary Judgment

In their first argument, defendants contend that the trial court erred in granting summary judgment in favor of plaintiffs, specifically with respect to liquidated damages. We disagree.

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

B. Analysis

[1] In its order granting summary judgment in favor of plaintiffs, the trial court awarded, *inter alia*, liquidated damages in the amount of $37,685.98, plus interest. Defendants contend that this was error, because the provision of the lease establishing liquidated damages was void.

Section 20 of the lease, addressing hours and conduct of business, required defendants to operate continuously during the term of the lease, and provided that:

> In the event of a Default by Tenant of any of the conditions in this Article 20, Landlord shall have, in addition to any and all remedies herein provided, the right at its option to collect not only the Minimum Rent, but Additional Rent at the rate of one three hundred and sixty fifth (1/365th) of the amount of the annual Minimum Rent for each day Tenant is in Default or Breach of the provisions of this Article. Landlord and Tenant specifically acknowledge that the Additional Rent remedy provided for in the immediately preceding sentence is a provision for liquidated damages and is not a penalty, that the damages which Landlord is likely to suffer should Tenant breach any of the conditions in this Article are impossible to calculate at the time this Lease is executed, and because of its indefiniteness or uncertainty, the amount stipulated is a reasonable estimate of the damages which would probably be caused by a Breach or is reasonably proportionate to the [damages]

> which would be caused by such Breach, and the parties have specifically negotiated this provision, without which Landlord would not have entered into this Lease.

Defendants concede that they did not operate continuously for the term of the lease, thus violating Section 20, and that, if the "Additional Rent" described above is not a void provision, defendants would be liable for the amount described. However, defendants contend that this is a "double damage provision," and thus void.

"Liquidated damages are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable . . . if the breach occurs." *Knutton v. Cofield*, 273 N.C. 355, 361, 160 S.E.2d 29, 34 (1968) (citation and quotation marks omitted). "A stipulated sum is for liquidated damages only (1) where the damages which the parties reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach." *E. Carolina Internal Med., P.A. v. Faidas*, 149 N.C. App. 940, 945-46, 564 S.E.2d 53, 56 (citations and quotation marks omitted), *aff'd per curiam*, 356 N.C. 607, 572 S.E.2d 780 (2002). The party seeking to invalidate a liquidated damages clause bears the burden of proving the provision is invalid. *Seven Seventeen HB Charlotte Corp. v. Shrine Bowl of the Carolinas, Inc.*, 182 N.C. App. 128, 131-32, 641 S.E.2d 711, 713-14 (2007).

Defendants, challenging the liquidated damages provision, bear the burden of showing that damages were not difficult to ascertain, that the amount stipulated was not a reasonable estimate, or that the amount stipulated was not reasonably proportionate to plaintiffs' actual damages. Instead, defendants broadly describe the liquidated damages clause as "a penalty." Defendants contend that "if double rent as provided for in Landlords' form lease is a reasonable estimate of damages suffered from (a) lost percentage rent and (b) other damages resulting from failure to continuously operate; it cannot be, in a mathematical sense, a reasonable estimate of simply (b) other damages resulting from failure to continuously operate."

Defendants' argument concerning "lost percentage rent" refers to a secondary argument. Defendants contend that the sentence in Section 20

providing for "Additional Rent" should have been removed from the final draft of the agreement. Defendants cite a deposition which purports that the sentence was only in the agreement as the result of an editing error. Per this deposition, the sentence was only to remain there if percentage rent was paid under the lease. Because the lease contained no percentage rent provision, the provision of Section 20 granting "Additional Rent" should have been similarly stricken.

Even assuming *arguendo* that defendants' argument is true, and that the sentence is the result of an editing error, that fact amounts to parol evidence. "[P]arol evidence is not admissible to contradict the language of the contract." *Thompson v. First Citizens Bank & Tr. Co.*, 151 N.C. App. 704, 709, 567 S.E.2d 184, 189 (2002). The language of Section 20 is plain and clear. Pursuant to that section, in the event of breach by defendants, plaintiffs are entitled to "Additional Rent." Defendants' arguments as to how that section arrived in the final document are parol evidence, and will not be considered to contradict the agreement.

Defendants' argument, then, is that the liquidated damages provision was based on both actual damages and lost percentage rent, which shows that the liquidated damages provision was not a reasonable estimate of actual damages. However, because any arguments concerning percentage rent were parol evidence, the trial court was not to consider them, nor will this Court. As such, defendants are left with no argument as to whether the liquidated damages sought by plaintiffs were not a reasonable estimate of damages, or reasonably proportionate to damages suffered. We hold, therefore, that defendants did not meet their burden with respect to the liquidated damages clause, and that the trial court did not err in enforcing it.

As an aside, defendants suggest that this is a "double damage" provision, and is therefore void as a penalty. Defendants cite to a New York decision in support of their argument. Our analysis above, however, addresses this point. To wit: Defendants bore the burden of challenging the liquidated damages provision, be it "double damage" or otherwise, and have failed to meet that burden. This argument by defendants does not change our analysis, nor does it require additional consideration.

III. Attorneys' Fees

In their second argument, defendants contend that the trial court erred in awarding attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.6.

A. Standard of Review

"The decision whether to award attorney's fees is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion." *Egelhof v. Szulik*, 193 N.C. App. 612, 620, 668 S.E.2d 367, 373 (2008). "An abuse of discretion occurs when a decision is either manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 620-21, 668 S.E.2d at 373 (citations and quotation marks omitted).

B. Recoverable Fees

[2] In its order awarding attorneys' fees, the trial court held:

> The requirements of N.C. Gen. Stat. § 6-21.6 are satisfied to make the reciprocal attorneys' fee provision in the Lease valid and enforceable, because: the Lease is a business contract; the parties executed the contract by hand; and the terms and conditions concerning a possible award of attorneys' fees and legal expenses apply with equal force to Plaintiffs and Lee of Raleigh, Inc.

On appeal, defendants contend that the trial court erred in awarding attorneys' fees pursuant to that section. Defendants note that attorneys' fees are generally not recoverable absent express statutory authority, and that the fees in the instant case should have been enforced under N.C. Gen. Stat. § 6-21.2, not N.C. Gen. Stat. § 6-21.6. We disagree.

The statute upon which the trial court relied provides:

> Reciprocal attorneys' fees provisions in business contracts are valid and enforceable for the recovery of reasonable attorneys' fees and expenses only if all of the parties to the business contract sign by hand the business contract.

N.C. Gen. Stat. § 6-21.6(b) (2015). By contrast, the statute upon which defendants rely provides:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

. . .

> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2(2) (2015). Defendants contend that the lease agreement at issue is not a "business contract," but is rather "evidence of indebtedness," and that the provisions of N.C. Gen. Stat. § 6-21.2 apply, rather than those of N.C. Gen. Stat. § 6-21.6. Defendants therefore contend that the amount of attorneys' fees owed were capped at 15% of the "outstanding balance" on the lease.

Defendants concede that, pursuant to N.C. Gen. Stat. § 6-21.6, "under most commercial leases entered today, a Landlord could choose to seek actual reasonable attorneys' fees under reciprocal attorneys' fee provisions such as Section 31.6 of the Lease, rather than seek a reasonable attorneys' fee, under G.S. § 6-21.2, of 15% of the outstanding balance." Defendants contend, however, that N.C. Gen. Stat. § 6-21.6 was not effective when the lease was signed.

N.C. Gen. Stat. § 6-21.6 became effective on 1 October 2011. In their brief, defendants concede that Lee executed the lease on 3 October 2011, after the effective date of the statute. The trial court likewise found that Hellner, as Lee's president, executed the lease on 3 October 2011, that Park and Hellner executed the guaranty on 3 October 2011, and that Steven Fogel, a manager for plaintiffs, executed the lease on 26 October 2011. It is therefore clear that the lease was executed after the effective date of N.C. Gen. Stat. § 6-21.6, and that Lee, as signatory to the lease, was subject to statutory attorneys' fees as contemplated by N.C. Gen. Stat. § 6-21.6.

Defendants further contend, however, that Hellner and Park, as guarantors, should not be subject to the same attorneys' fees, as the guaranty they signed lacked a reciprocal attorneys' fee provision. It is true that Park was not a party to the lease, and Hellner only signed the lease in her capacity as a representative of Lee. It is also true that the guaranty, on its own, does not satisfy the requirements of N.C. Gen. Stat. § 6-21.6. However, this Court has held that an unconditional guaranty of charges provided for in a lease can subject a guarantor, despite not being a party to the lease itself, to liability for attorneys' fees. *See RC Assocs. v. Regency Ventures, Inc.*, 111 N.C. App. 367, 374, 432

S.E.2d 394, 398 (1993) ("[t]he language in the guaranty contract is sufficient to put a guarantor on notice that he will be liable for attorney's fees if he fails to make the guaranteed payment before the creditor finds it necessary to employ an attorney to collect the debt"); *Devereux Props., Inc. v. BBM & W, Inc.*, 114 N.C. App. 621, 625, 442 S.E.2d 555, 557 (1994) (holding that, where a guaranty agreement covered "each and every obligation of Tenant under this Lease Contract[,]" and the lease required payment of attorneys' fees, the guarantors were likewise responsible for attorneys' fees).

In the instant case, not only did the guaranty cover "each and every obligation" under the lease generally, it specifically included "all damages including, without limitation, all reasonable attorneys' fees and disbursements incurred by Landlord or caused by any such default and/or by the enforcement of the Guaranty." Certainly, if we have held that a general guaranty pertaining to "each and every obligation" under the lease subjects the guarantor to liability for attorneys' fees, one which *explicitly* cites attorneys' fees must likewise subject the guarantor to liability for attorneys' fees.

It is clear, therefore, that the agreement was executed after the effective date of N.C. Gen. Stat. § 6-21.6, that Lee is liable for attorneys' fees as outlined in that statute and the reciprocal attorneys' fees provision of the lease, and that Hellner and Park, as guarantors pursuant to a guaranty that explicitly notes liability for attorneys' fees, are likewise jointly and severally liable with Lee for attorneys' fees. We hold that the trial court did not err in its award of attorneys' fees.

C. Amount of Fees

[3] Defendants also challenge the amount of attorneys' fees awarded. Defendants contend that the trial court's findings of fact are "general and conclusory, and not sufficient to enable the reviewing Court to determine whether or not the award of attorney's fees was reasonable." We agree.

"[I]n order for the appellate court to determine if the statutory award of attorneys' fees is reasonable the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." *Cotton v. Stanley*, 94 N.C. App. 367, 369, 380 S.E.2d 419, 421 (1989). In its order awarding attorneys' fees, the trial court found:

> 12. Counsel's Affidavit outlines the rates and hours billed for each of the timekeepers at Plaintiffs' counsel's law

> firm, Smith Moore Leatherwood LLP, who worked on this lawsuit.
>
> 13. Counsel's Affidavit outlines the legal costs incurred by Plaintiffs through January 31, 2017, in connection with bringing and pursuing this lawsuit to enforce their rights under the Lease and Guaranty.
>
> 14. The Court is aware of the range of hourly rates charged by law firms in Wake County as well as in North Carolina for litigation of business contracts like this. The Court finds that the hourly rates billed to Plaintiffs as set forth in Counsel's affidavit are fair and reasonable and conform to or are less than hourly rates charged in and around North Carolina and specifically in Wake County by firms and attorneys with comparable experience in matters of comparable complexity.
>
> 15. The pursuit of this matter by Plaintiffs reasonably required written discovery, depositions of four fact witnesses, and a Rule 30(b)(6) deposition, preparation for trial, and summary-judgment motions practice. The Court finds that the steps taken by Plaintiffs to enforce their Lease and Guaranty were reasonable and necessary, and that the time and labor expended by Plaintiffs' counsel were reasonable.
>
> 16. The Court finds that the costs incurred by Plaintiffs were reasonable and necessary to enforce the Lease and Guaranty.

In short, the trial court found that (1) counsel's rates were set forth in an affidavit; (2) those rates were comparable and reasonable for the work done, the subject matter of the case, and the experience of the attorneys, (3) the specific work done by counsel was reasonable and necessary, and therefore (4) the costs incurred by plaintiffs were reasonable and necessary.

Defendants contend that these findings were not supported by evidence in the record, arguing that the affidavit itself is "too vague to provide sufficient competent evidence to support the findings of fact in the Attorneys [sic] Fee Order[.]" The affidavit in question was signed by the primary attorney in the case, and included statements (1) that he was a Senior Associate with the firm, and had practiced law since 2007 and in North Carolina since 2011; (2) that he billed at a rate of $260 per hour

in 2015 and 2016, and $285 per hour in 2017, as compared to his normal billing rates of $260, $275, and $315 per hour in each of those respective years; (3) that others worked on the case as well, and he included their billing rates. The attorney also provided detailed tables of the names, hours worked, and dollars billed by different attorneys, and the various expenses incurred throughout the proceedings, to calculate his total amount.

However, the affidavit offers no statement with respect to comparable rates in this field of practice. Nor did counsel offer comparable rates at the hearing on attorneys' fees. It is therefore clear that there was insufficient evidence before the trial court of "the customary fee for like work" for the trial court to make a finding on that point, and to award attorneys' fees accordingly.

We hold that, with respect to the amount of attorneys' fees awarded, the trial court erred by making a finding with respect to "the customary fee for like work," absent evidence to support such a finding. We vacate the order with respect to the amount awarded, and remand that issue to the trial court. "On remand, the trial court shall rely upon the existing record, but may in its sole discretion receive such further evidence and further argument from the parties as it deems necessary and appropriate to comply with the instant opinion." *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999).

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judge TYSON concurs.

Judge DAVIS concurs in part and dissents in part by a separate opinion.

DAVIS, Judge, concurring in part and dissenting in part.

I concur in the result reached by the majority in granting summary judgment in favor of Plaintiffs. I respectfully dissent, however, from the portion of the majority's opinion vacating the trial court's award of attorneys' fees.

The majority holds that the trial court's findings regarding the attorneys' fees award were unsupported by competent evidence because Plaintiffs' affidavit in support of their motion for fees did not expressly contain a statement with respect to "comparable rates in the field of practice." In my view, the trial court's findings show that it exercised its authority to take judicial notice of facts relevant to that issue, which it was permitted to do. Finding of Fact No. 14 stated as follows:

> 14. The Court is aware of the range of hourly rates charged by law firms in Wake County as well as in North Carolina for litigation of business contracts like this. The Court finds that the hourly rates billed to Plaintiffs as set forth in Counsel's affidavit are fair and reasonable and conform to or are less than hourly rates charged in and around North Carolina and specifically in Wake County by firms and attorneys with comparable experience in matters of comparable complexity.

This Court has previously upheld an award of attorneys' fees pursuant to which the trial court took judicial notice of customary hourly rates. In *Simpson v. Simpson*, 209 N.C. App. 320, 703 S.E.2d 890 (2011), we held that "a district court, considering a motion for attorneys' fees . . . , is permitted, although not required, to take judicial notice of the customary hourly rates of local attorneys performing the same services and having the same experience." *Simpson*, 209 N.C. App. at 328, 703 S.E.2d at 895. Although *Simpson* involved the award of fees in connection with a child custody modification issue, I am unable to discern any valid reason why a trial court should not be permitted to similarly invoke the judicial notice doctrine in connection with an award of attorneys' fees under N.C. Gen. Stat. § 6-21.6.

I believe the findings contained in the trial court's order with regard to the award of attorneys' fees were sufficient to satisfy N.C. Gen. Stat. § 6-21.6. Accordingly, I dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 JUNE 2018)

ANDERSON v. N.C. STATE BD. OF ELECTIONS & ETHICS ENFORCEMENT No. 17-1370	Wake (17CVS12072)	Dismissed
BELLAMY v. BRANSON No. 17-666	Wake (16CVD246)	Vacated and Remanded.
CITY OF HICKORY v. GRIMES No. 17-441	Catawba (16CVS1023)	Reversed and Remanded
COFFEY v. COFFEY No. 17-1243	Carteret (16CVD508)	Reversed
GREATER HARVEST GLOBAL MINISTRIES, INC. v. BLACKWELL HEATING & AIR CONDITIONING, INC. No. 17-630	Cumberland (15CVS8010)	Affirmed
IN RE B.A.S. No. 17-1367	Iredell (17JT75)	Vacated and Remanded
IN RE C.D.W. No. 17-352	Buncombe (16SPC1159)	Affirmed
IN RE D.M.O. No. 17-1342	Orange (15JT46)	Affirmed
IN RE E.L.J. No. 17-1138	Wake (15JT303-304)	Affirmed
IN RE M.D. No. 17-1198	Wake (17SPC2225)	Affirmed
IN RE M.T. No. 17-1347	Guilford (15JT203)	Affirmed
IN RE T.T. No. 17-985	Durham (06JB353)	Affirmed, Remanded for Correction of Clerical Error
IN RE Z.R. No. 17-950	Cabarrus (14JT146-148)	Affirmed
KAPLAN v. KAPLAN No. 17-1042	Union (15CVD305)	Affirmed

LI v. ZHOU No. 17-1069	Forsyth (14CVS3654) (16CVS2169)	Dismissed
MIDGETTE v. CONCEPCION No. 17-1230	Pitt (16CVS1967)	Affirmed
NAPOLI v. SCOTTRADE, INC. No. 17-783	Henderson (16CVS1771)	Affirmed
PREFERRED CONCRETE POLISHING, INC. v. PIKE No. 17-1092	Forsyth (15CVS6738)	Affirmed
RAMIREZ v. STUART PIERCE FARMS, INC. No. 17-525	N.C. Industrial Commission (X07653)	Affirmed
ROBESON CTY. ENFORCEMENT UNIT v.HARRISON No. 17-558	Robeson (16CVD215)	Affirmed
ROUND BOYS, LLC v. VILL. OF SUGAR MOUNTAIN No. 17-515	Avery (14CVS297)	Affirmed
SILVER v. CHASE PROPS., INC. No. 17-1204	Orange (16CVD926)	Affirmed
STATE v. ALLEN No. 17-973	Union (14CRS51109)	Dismissed
STATE v. ANTONE No. 16-1203	Columbus (12CRS674)	Affirmed
STATE v. BRAWLEY No. 17-287-2	Rowan (15CRS55547)	Vacated and Remanded
STATE v. CHARLES No. 17-937	Henderson (14CRS52174-75)	No Error
STATE v. COOK No. 17-885	Rutherford (16CRS2070)	Reversed and Remanded
STATE v. COREY No. 17-1031	Burke (14CRS52667) (16CRS1782)	Vacated and remanded in part; Affirmed in part
STATE v. FOSTER No. 17-989	Vance (13CRS50790)	No Plain Error in Part, No Error in Part

STATE v. FREEMAN No. 17-469	Davie (14CRS50399)	Vacated and Remanded for resentencing
STATE v. HICKS No. 17-1109	Mecklenburg (14CRS247592) (15CRS25914) (16CRS32661)	No Error
STATE v. HILL No. 17-993	Wayne (14CRS54833)	NO ERROR, REMANDED FOR NEW SENTENCING HEARING
STATE v. HOPPES No. 17-861	Cleveland (13CRS54582)	No Error
STATE v. LAWING No. 17-231	Wake (14CRS7299)	No Error
STATE v. LEWIS No. 17-1096	Hoke (94CRS357) (94CRS360) (94CRS367-368)	Vacated and Remanded
STATE v. MURRAY No. 17-769	Brunswick (12CRS50974-75) (13CRS2020-21)	No Error
STATE v. PERRY No. 17-1223	Mecklenburg (16CRS10739-40)	No Error
STATE v. RUCKER No. 17-809	Iredell (11CRS57344) (11CRS57346)	No Error
STATE v. SANCHEZ No. 17-1135	Mecklenburg (15CRS11913-15) (15CRS9033-34)	No Error
STATE v. SCOTT No. 17-1181	Mecklenburg (13CRS223624)	No Error
STATE v. SIMMONS No. 17-952	Forsyth (14CRS53555)	Vacated and Remanded

STATE v. SMITH No. 17-1116	Rowan (11CRS52570-76) (11CRS52579-83) (11CRS52589-90) (11CRS52598-604) (11CRS52608)	No Error
STATE v. SURRATT No. 17-1285	Catawba (15CRS4600) (15CRS4601)	No Error
STATE v. TAYLOR No. 17-545	Moore (14CRS1555) (14CRS1559) (14CRS1566-68) (14CRS1573-74) (14CRS1577-78) (14CRS1583) (14CRS1585) (14CRS1587-88) (14CRS1591-92) (14CRS1595) (14CRS1597-600) (14CRS1603) (14CRS1607-10) (14CRS1929) (14CRS1930) (14CRS1931-34) (14CRS1935) (14CRS1936-37) (14CRS1949-52) (15CRS1593-95) (16CRS17) (16CRS4) (16CRS642)	No Prejudicial Error
STATE v. TOMLIN No. 17-351	Guilford (03CRS89524)	Reversed
STATE v. YATER No. 17-390	Wayne (14CRS50339-40)	No Error
STRAZZANTI v. DOLCE No. 17-1217	Mecklenburg (16CVD8615)	Reversed and Remanded
SWAN BEACH COROLLA, L.L.C. v. CTY. OF CURRITUCK No. 17-411	Currituck (12CVS334)	Dismissed
WHITE v. GUEST SERVS., INC. No. 17-1156	N.C. Industrial Commission (15-036879)	Affirmed

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